1957

Foreign Personal Representatives

Banks McDowell Jr.

Follow this and additional works at: http://repository.law.umich.edu/michigan_legal_studies

Part of the Common Law Commons, Comparative and Foreign Law Commons, Estates and Trusts Commons, and the Property Law and Real Estate Commons

Recommended Citation


This Book is brought to you for free and open access by the Law School History and Publications at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Legal Studies Series by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
MICHIGAN LEGAL PUBLICATIONS
Hessel E. Yntema, Editor

MICHIGAN LEGAL STUDIES

Discovery Before Trial
George Ragland, Jr.

Torts in the Conflict of Laws
Moffatt Hancock

The Amending of the Federal Constitution
Lester B. Orfield

Review of Administrative Acts
Armin Uhler

The Prevention of Repeated Crime
John Barker Waite

The Conflict of Laws: A Comparative Study—Three Volumes
Ernst Rabel

Unreported Opinions of the Supreme Court of Michigan 1836–1943
William Wirt Blume, Editor

Problems in Probate Law: Including a Model Probate Code
Lewis M. Simes and Paul E. Basye

Soviet Civil Law—Two Volumes
Vladimir Gsovski

Survey of Metropolitan Courts: Detroit Area
Maxine Boord Virtue

Administrative Agencies and the Courts
Frank E. Cooper

Our Legal System and How It Operates
Burke Shartel

Retroactive Legislation Affecting Interests in Land
John Scurlock

Integration of Public Utility Holding Companies
Robert F. Ritchie

Perpetuities and Other Restraints
William F. Fratcher

Nonprofit Corporation Statutes
Ralph E. Boyer

Foreign Personal Representatives
Banks McDowell, Jr.

UNIVERSITY OF MICHIGAN PUBLICATIONS: LAW

Transactions of the Supreme Court of the Territory of Michigan, 1805–1836
Six Volumes
William Wirt Blume, Editor

Ratification of the Twenty-First Amendment to the Constitution of the United States
Everett S. Brown, Compiler

COOLEY LECTURES

The Constitution and Socio-Economic Change
Henry Rottschaefer

Some Problems of Equity
Zechariah Chafee, Jr.

Our Legal System and How It Operates
Burke Shartel
(published in Michigan Legal Studies)

Selected Topics on the Law of Torts
William Prosser

A Common Lawyer Looks at the Civil Law
Frederick H. Lawson

Public Policy and the Dead Hand
Lewis M. Simes

Frontiers of Constitutional Liberty
Paul G. Kauper

LEGISLATIVE RESEARCH CENTER

Current Trends in State Legislation: 1952


SUMMER INSTITUTE LECTURES

The Conflict of Laws and International Contracts: 1949

The Law and Labor-Management Relations: 1950

Taxation of Business Enterprise: 1951

Atomic Energy—Industrial and Legal Problems: 1952

Federal Antitrust Laws: 1953

Communications Media: 1954
FOREIGN PERSONAL REPRESENTATIVES

By
Banks McDowell, Jr.

Foreword
by

Hessel E. Yntema

Ann Arbor
University of Michigan Law School
1957
To
Professors Yntema, Simes, and Dawson, whose example showed me what a legal scholar should be, and to

Alan, Ivor, and Lee, whose friendship made my time at Michigan a rich experience
Foreword

THE distribution and administration of property on death is a subject of perennial interest, whether from a comparative or a practical point of view. Provision must be made to care for the assets in the estate of the decedent pending their liquidation and/or transfer to those respectively entitled—the family heirs, the legatees, the creditors, and the tax authorities. This process of administration may be organized, as in the Civil Law, by operation of law, casting the universal succession on the legitimate heir, or by the appointment of a fiduciary, as in the Common Law, to administer the estate for the benefit of those interested. In the process, complications may arise, not only from differences in the rules applying to different types of assets—of which the distinction made in the Common Law and certain other systems of succession, between interests in land, governed by the law of the situs, and other property, subject to the personal law of the domicil or nationality, is a common illustration—but especially when the assets are found in a number of jurisdictions, with variations in their laws and systems of administration, each in effective control of some part of the estate. With the increased fluidity of property across state borders and widespread interstate or international investments, the frequency of such situations, where it is necessary to provide for the simultaneous administration of decedents’ estates in several states, has correspondingly multiplied, notably in the United States. In this subject matter, the position of the personal representative of the
deceased appointed in one state, as respects administration of property located elsewhere, is of central practical interest, as the present study sufficiently evinces.

In dealing with the legal rules affecting foreign personal representatives, the author of the present monograph is to be commended for the lucid analysis in the following pages of the principal questions that an executor or administrator appointed in one state will encounter in the administration of a single estate on a multi-jurisdictional basis: his right to sue and liability to suit in other states, the effects of his extralegal action outside the state of his appointment, and the possibilities of reforming existing laws so as to make feasible a system of single administration of decedents' estates. This analysis is preceded in the first chapter by a useful historical and comparative survey, summarizing the basic differences between the Civil Law system of universal succession and the Anglo-American system of divided administration and suggesting that the latter, as derived from the practice in the ecclesiastical courts, is in a sense an historical accident. Doubtless, the principle of the latter system that the management of a single mass of property should be divided, for official purposes, among as many jurisdictions as there may be in which property is found, owes its durability to the dispersion of authority in the field of private law within the United States and in the international sphere. But the principle is a source of practical difficulty that has inspired the important exceptions that have had to be introduced to secure a reasonable measure of adjustment in settling estates in a world governed by many territorial sovereigns. It is to the author's credit that he has not limited himself
to careful consideration of these improvisations but has also constructively contemplated the needs of modern life that argue for the development of a unified system to administer estates that pass on death. This is a subject that obviously concerns every lawyer and everyone else.

HESSEL E. YNTEMA
Preface

THE preparation of this work was undertaken as the research project which is the major requirement for the degree of Doctor of the Science of Law at the University of Michigan. The topic was suggested by a discussion in a course on Conflict of Laws under Professor Yntema, which arose out of a consideration of several leading cases, notably Wilkins v. Ellett, Maas v. German Savings Bank, and Vaughan v. Northrup. The rules developed to deal with extraterritorial actions of personal representatives caught my interest as one of the most graphic illustrations of a field where blind adherence to the system of legal logic has obscured what is obviously a socially undesirable result. It is hoped that this discussion, if it does not pose satisfactory solutions, will at least demonstrate the problems which need to be solved.

Some expression of gratitude must be made to those people who have assisted me materially in this project. First I wish to thank the Committee on Graduate Study at the University of Michigan Law School, who awarded me a fellowship from the William W. Cook Research Fund for my year of study there. My great debt is to Professor Hessel E. Yntema, who taught me Conflict of Laws and who, as chairman of my graduate committee, guided this work with tolerance and understanding. I am also deeply indebted to Professor Lewis M. Simes, who read my drafts carefully and made a number of very helpful suggestions. A word of gratitude must be given to Alan Mewett, who graciously helped me with any problems that I had in the English materials. Whatever merit there is in this study is due in large measure to the helpfulness of these people.

BANKS McDOWELL, JR.

xi
## Table of Contents

<table>
<thead>
<tr>
<th>Part</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FOREWORD</strong></td>
<td>vii</td>
</tr>
<tr>
<td><strong>PREFACE</strong></td>
<td>xii</td>
</tr>
<tr>
<td><strong>Chapter I. The Personal Representative</strong></td>
<td></td>
</tr>
<tr>
<td>1. The Universal Successor</td>
<td>1</td>
</tr>
<tr>
<td>2. The Historical Development of the Personal Representative</td>
<td>3</td>
</tr>
<tr>
<td>3. The Modern Personal Representative</td>
<td>7</td>
</tr>
<tr>
<td>4. The Scope and Plan of This Work</td>
<td>17</td>
</tr>
<tr>
<td><strong>Chapter II. Capacity of a Foreign Personal Representative to Sue</strong></td>
<td>24</td>
</tr>
<tr>
<td>1. General Rule at Common Law</td>
<td>30</td>
</tr>
<tr>
<td>(a) Waiver by defendant of the objection to capacity of a foreign personal representative to sue</td>
<td>30</td>
</tr>
<tr>
<td>(b) Suit by the foreign personal representa as an individual</td>
<td>35</td>
</tr>
<tr>
<td>(c) Suit as a matter of comity to prevent injustice</td>
<td>38</td>
</tr>
<tr>
<td>(d) Miscellaneous exceptions</td>
<td>53</td>
</tr>
<tr>
<td>2. Effect of the Absence of Local Creditors</td>
<td>57</td>
</tr>
<tr>
<td>3. Suit for Wrongful Death</td>
<td>58</td>
</tr>
<tr>
<td>4. Suit by Assignee of Foreign Personal Representative</td>
<td>63</td>
</tr>
<tr>
<td>5. Statutory Permission to Sue</td>
<td>67</td>
</tr>
<tr>
<td>6. Federal Jurisdiction over Foreign Personal Representatives</td>
<td>75</td>
</tr>
<tr>
<td>7. Summary</td>
<td>77</td>
</tr>
<tr>
<td><strong>Chapter III. Liability of a Foreign Personal Representative to be Sued</strong></td>
<td>79</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

1. General Rule at Common Law .......................... 79
   (a) Jurisdiction in rem ................................. 87
   (b) Fraudulent removal of assets from the state of administration .......... 93
   (c) Jurisdiction by consent ............................ 95
   (d) Statutory consent .................................. 100
   (e) Effect of revival statutes .......................... 104
   (f) Obligations incurred after decedent’s death ......................... 109
   (g) Executor de son tort ................................ 112

2. Statutory Liability to Suit ............................. 114
3. Summary ................................................ 122

Chapter IV. The Foreign Personal Representative and Immovable Property .. 123
1. Sale of Land by a Foreign Executor Who Has a Power of Sale ............... 125
2. Statutes Affecting Sale of Land by a Foreign Personal Representative .... 130
3. Assets Arising from an Oil and Gas Lease .................................. 132

Chapter V. Collection of Assets by a Foreign Personal Representative ....... 139
1. Duty to Collect Assets .................................... 144
2. Collection of Chattels ..................................... 148
3. Voluntary Payment of Debts to a Foreign Personal Representative ......... 151
4. Statutes Affecting Voluntary Payment to a Foreign Personal Representative 163
5. Debts Due to Decedent from the United States ................................ 166
6. Summary .................................................. 168

Chapter VI. The Unified Administration .......................... 170
1. The Necessity for a Unified Administration ................................. 170
2. Requirements for a Unified Administration ................................. 179
# TABLE OF CONTENTS

3. Means of Achieving the Unified Administration .................................. 187  
APPENDIX A ...................................................................................... 194  
APPENDIX B ...................................................................................... 197  
TABLE OF CASES ........................................................................... 205  
INDEX .................................................................................................. 215
CHAPTER I

The Personal Representative

PROPERTY is probably the most vital relationship in modern legal systems. It may not be the bulwark of civilization that John Adams felt it was when he wrote:

"The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."\(^1\)

Still the experience of even such a society as the communistic state of Soviet Russia, where most property rights have been taken away from individuals and transferred to the government, has been that there is need for a vast number of legal rules to regulate property relations.\(^2\) So long as man lays claim to the material objects in his environment, some rules must be devised to control the way in which those objects are enjoyed and to settle disputes which arise.

An integral part of every system of property law deals with the problems of devolution of property on the death of the owner. As a matter of theory, a legal order could provide that any property which a person acquired during his lifetime would revert to the state on his death, thereby abolishing any rights of succession. However, no legal system has seriously attempted doing that. A man may leave dependents after his death who

---

\(^{2}\) For a detailed discussion, see Gsovski, Soviet Civil Law, Vol. II, 18-148 (1948).
must be cared for and maintained. If his property interests pass to such persons, society will have fewer problems in the support of elderly people, widows, and minor children. Beyond this, it is felt that an individual who has accumulated property through his industry should have the power to dispose of it on his death to those friends whom he wishes to reward. Hence, within limits, a man is usually permitted to leave his property on death to anyone he designates by will, or in the absence of a will, the legal order specifies which relatives will be his heirs.

The transfer of a man's property interests after his death creates some serious practical problems. The primary reason for this is the complex nature of property in modern societies. There are such various types as real property, movable chattels, corporate stocks, negotiable instruments, insurance, bank deposits, etc. The decedent may own an absolute interest in these or he may share them with other persons. His right to use the objects may be immediate or to take effect in futuro. If the estate is very large, the assets will be located in many jurisdictions. As the property interests of a decedent may be of various kinds and frequently will be widely scattered, a period of some time will be required for the legal order to determine what objects and obligations he has claimed as his own and what his interests in them are.

Once the legal order has discovered all the assets of a deceased person, a number of claims to this property must be adjudicated. Creditors will want the obligations of the decedent owing to them satisfied. The state may have a claim in the form of estate taxes. It is possible that potential heirs or beneficiaries under a will might disagree on who will succeed the decedent and what
each one's interest is to be. While these various claims are being presented and adjudicated, the property of the decedent must be conserved and then delivered to the successful claimants and heirs.

In order to solve these problems arising from the death of a property owner, some procedure must be devised whereby the property of decedent is collected and conserved, a period is provided during which claims against the estate may be presented and paid, and then the property is distributed to the persons entitled to take it under the law of succession. The procedure by which this is done in Anglo-American systems is the probate administration, and the person who performs the functions of administration is designated as the personal representative.

I. THE UNIVERSAL SUCCESSOR

American lawyers, because of a certain provincialism in their training, tend to regard Anglo-American solutions to legal problems as the only possible solutions or, at any rate, the best ones. However, it is important to note that there is a scheme of administration which is much older in origin and more widespread in modern usage than the one with which we are familiar. It had its beginning in that highly developed legal system found embodied in the Corpus Iuris.

The Romans developed a rather elaborate law of succession. There were a number of different types of wills by which a testator could devise his property. There was also a complete system of intestate succession, but early there developed a dislike of intestacy for

---

3 The following discussion on the Roman scheme of administration is based on Buckland, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN, 2nd Ed., chapters VII-IX (1921).
FOREIGN PERSONAL REPRESENTATIVES

religious reasons, so that in the great majority of deaths, property was transferred by a testamentary instrument. According to Buckland,

"The Will of Roman Law had for its primary purpose in historical times the appointment of a heres or heredes, a successor or successors in whom the rights and liabilities of the deceased should vest as a whole."  

It is this institution of the heres or heir which is the significant concept for our purposes. His importance in the scheme of succession is attested by the fact that the institutio heredis by which he was appointed had to appear first in the will and any legacy which preceded it was void.

The first important point to note about the heres was that he took title to all the property of the decedent. There might be several heredes, but their shares had to be such that they totalled the entire estate of the decedent. Of course, the testator could leave legacies to other persons which the heres was obligated to pay, but the title to the entire estate went to the heres as soon as he entered on his duties. For a time testators granted such excessive legacies that the heres would refuse to accept the hereditas and so the decedent would die intestate, but by the lex Falcidia of 40 B.C., it was provided that the heres must be left at least a quarter of the estate.

In later theory, the heres was said to be a continuation of the personality of the decedent. This was not true for all purposes, but the results of the concept were that in addition to receiving title to all of the decedent’s property, the heres was liable for all his debts. The explanation for this phenomenon is not clear, but seems to lie

4 Id. at 282.
in the social and religious nature of early Rome. The main function of the early will may have been to transfer the chieftainship from the deceased head of the family to his successor. Then he would receive not only the property of the decedent, but his obligations as well. More probably, the institutio heredis was developed to insure that the religious obligations to the family gods would be carried out. It was thought to be a great disgrace to die without providing a successor who would perform these religious duties on behalf of the family.

Just as the language of the Romans has become a dead language, so the law of the Corpus Iuris has ceased to operate as a legal system. But Latin lives on in the Romance languages, and likewise, Roman Law has survived in the civil law which operates in a large portion of the countries of the world, including most of the European nations. This adoption of Roman Law naturally included its scheme of administration of a decedent's estate. The Roman heres has become the "universal successor" in the civil law. To illustrate the institution of the universal successor, its operation in French law will be considered.

The decedent may make a will, and then the universal successor is the legataire universel. In addition, there is a system of intestate succession. This seems to be so satisfactory that only a small portion of Frenchmen make wills. When a man dies intestate, his universal successor is the heir or heirs specified by the law of succession.

The heir becomes the owner of the estate at the time of death. He is faced with three choices—(1) he may accept pure and simple, (2) he may accept with benefit of inventory, or (3) he may renounce the succession.

5 The discussion of the universal successor in French Law is based on Amos and Walton, INTRODUCTION TO FRENCH LAW, chapter XIII (1935).
The act of acceptance pure and simple must be sufficient to indicate that he assumes the character of heir. This is the heir who continues the person of the decedent. He owns all the estate of the decedent, and there is complete confusion between that estate and his own. He can prosecute all actions which belonged to the decedent. The heir is liable for all of the decedent's debts. This is the type of universal successor most similar to the classical Roman heres.

When an heir accepts with benefit of inventory, he must make a declaration in court and inscribe it on a special register. Within a specified period thereafter, he must make an inventory of the movable estate of the decedent. The effect of this type of acceptance is to prevent the confusion between the property of the heir and that of the decedent. The heir is then liable for decedent's debts only to the extent to which there is property of the decedent to satisfy them.

An heir may renounce the succession and is then considered as if he had never been an heir. His share of the estate will go to his co-heirs who are in the same degree, or if there are no co-heirs, to the next heir in the line of succession. If there is no heir other than the renouncing one, the state will serve as the universal successor.

There may be several heirs. Those who accept will receive their proportionate share of the estate and will likewise be liable for their share of the deceased's obligations, but the aggregate of these interests must always equal the total estate of the decedent.

Thus one method of solving the problems raised in the administration of an estate is to require the person who receives the property of the decedent under the law of succession to perform the necessary duties. If the
heir is treated as receiving title to the whole estate of the decedent, as being able to bring any actions belonging to him, as liable for decedent's debts, and for the payment of legacies, an easy and relatively simple solution is provided. Such a system can be effectively used only in those societies where the heir who is to act as universal successor will receive, in most instances, a substantial portion of the decedent's estate. If he does not receive much of the property to keep as his own, he will refuse to accept the duties of administration. This was the experience which the Romans had when they found it necessary to provide that the heres was entitled to receive at least a fourth of the estate. The important distinction to bear in mind is that the universal successor is treated as the owner of all the property left by the decedent from the date of death. The estate of the decedent is thus treated as a single entity or as a whole passing to the universal successor regardless of the location of the property. The development across the English Channel brought about a very different theory of the nature and the authority of a personal representative and is responsible for the legal problems discussed in this work.

2. The Historical Development of the Personal Representative

The type of administration with which we are familiar developed in England. Actually our study of the evolution of the personal representative begins on the continent of Europe with a concept of Germanic origin. The executor in English law probably originated from the Germanic institution of the salman. This was a per-

son to whom property was transferred in order that he might convey it according to the grantor’s wishes. The only right which a salman acquired over the property was the right to reconvey it according to the grantor’s directions. 

This institution was a flexible instrument which could be used for many purposes, the most important of which was the making of a revocable will. Originally the salman was appointed by a bilateral act in which both he and the testator took part, but by the time the salman was introduced into England, it was customary to appoint him in a clause of the will itself. From this, the modern legal concept developed that the executor is a personal representative appointed by the testator in the will.

The first important event to occur in England was the separation of the lay from the ecclesiastical courts by a royal ordinance in the reign of William the Conqueror. Although the common-law courts and later the chancery court had important roles to play in the administration of estates, it was the ecclesiastical court where the most significant developments took place in the history of the personal representative. The organization of the eccle-

7 Goffin, The Testamentary Executor in England and Elsewhere, 26 (1901).

8 Among other uses, there was a sort of trust by which persons, such as Jews, who were prohibited from owning land, could have the enjoyment of the property. There was also a transaction whereby a sale of land would be made through a powerful noble as salman to give security to the transfer.

9 An example of this type of transaction would be as follows: “... a man going to war or on a journey would make over his property to a salmann with instructions to convey it to some church or other holy foundation in the event of his death, but to deliver it back to himself if he returned safely.” Goffin, op cit., supra note 7 at 25.

10 Id. at 32.

siastical courts was rather irregular. There were usually the courts of the bishop in each diocese, which were presided over by the ordinary. The ordinary was frequently the bishop of the diocese himself, but might be a deputy such as an abbot or an archdeacon. There were also peculiar courts having testamentary jurisdiction. Appeal from these courts went to the courts of the archbishop in the respective provinces, Canterbury and York. Prior to the Reformation, appeals from the archbishops' courts went to the Pope, but later to the High Court of Delegates made up of three common-law judges and four to six doctors of the civil and canon law.

Real property was always outside the jurisdiction of the ecclesiastical courts. If a man died intestate, the title to the land passed automatically to his heirs. If the land was devised by will, the will was treated as a deed. All questions of title to land were determined by the common-law courts and consequently were completely outside the orbit of the ecclesiastical courts.

It was with the disposition of a man's chattels that the personal representative was concerned. At the time of Glanville, a man could leave by will only one third of his chattels if he left a wife and heir and half if he left no wife. At this time, the heir was the true representative of the testator. He probably could sue to recover debts due to the decedent. He paid the debts and if the decedent's effects were not sufficient, he had to make it up out of his own property. He was also obliged to observe any reasonable testaments of his decedent.

12 Id. at 115.
13 Goffin, op cit., supra note 7 at 68.
14 Atkinson, supra note 11 at 121.
16 Id. at 110.
17 Atkinson, supra note 11 at 110.
Glanville mentions the executor, so that this institution was in use in England before the end of the twelfth century. The most probable explanation for its appearance was the fact that clergymen travelled a good bit between England and the English possessions on the continent. They had always been interested in testamentary matters, and it is likely that they brought the institution of the *salman* back with them. The executor of this period had a very limited function, chiefly to see that legacies were paid out of those chattels from which a testator could make a bequest. If the heir refused to pay the legacy or interfered in any way, he could bring suit to enforce payment.

The heir at this point was not a universal successor, although he was similar in many respects to the Roman *heres*. A universal succession requires that the estate pass as a whole to the heir. Yet in England a portion of a testator's chattels had to go to the widow, and the heir did not control these. Further, if a man died intestate, either the church or his lord would take a part of his personal property. The use of the executor to insure payment of legacies was also inconsistent with a theory of universal succession. The clergy whose influence in testamentary matters became so powerful through the ecclesiastical courts were thoroughly familiar with Roman Law and its scheme of administration. However, their powerful influence when the English administration was in its most fluid state led toward the development of the personal representative rather than endeavoring to convert the heir into a universal successor.

---

18 Holdsworth, *op. cit.*, supra note 6 at 563.
19 Atkinson, *supra* note 11 at 111.
20 This analysis of the difference between the heir and the universal successor was made in Atkinson, *supra* note 11 at 111.
For a hundred and fifty years after the time of Glanville, there was a gradual transfer of representative functions from the heir to the salman or executor. It is not important for the purposes of this work to trace the detail of this development, particularly since several very good studies have been made of it.\(^{21}\) By the end of the thirteenth century, the executor could be sued both by the beneficiaries under the will and by the creditors of the decedent.\(^{22}\) The executor could not prove his title until he had gotten probate of the will in the ecclesiastical courts, but after this was done, he could sue to collect the debts of the testator.\(^{23}\) During the early period of his development, the executor was probably treated as having absolute ownership of the decedent's chattels and thus was liable out of his own property for decedent's debts, much in the same position as the English heir and the Roman heres had been.\(^{24}\) However, by the middle of the fourteenth century, it was recognized that a separation existed between the testator's property and that of the executor, and a judgment rendered against the executor in favor of a creditor of the decedent was de bonis testatoris.\(^{25}\) From this time on, the executor is a personal representative in the modern sense of the term.

The development of the executor as a personal representative has been traced many times, but the true explanation for this peculiar phenomenon, instead of the assimilation of the Roman scheme of universal succession, is obscure. It may lie, as does the reason for


\(^{22}\) Holdsworth, op. cit., supra note 21 at 565.

\(^{23}\) Id. at 566.

\(^{24}\) Holmes, supra note 21 at 43.

\(^{25}\) Id. at 45.
many English legal concepts, in the struggle between courts for jurisdiction. The ecclesiastical courts were attempting in this period to obtain jurisdiction over all testamentary matters. As might be expected, the common-law courts were not too friendly toward this ambition. The ecclesiastical courts first obtained the concession from the temporal courts that the executor had to probate the will in their courts. Further, before they were willing to admit the will to probate, they insisted that the executor give an oath that he would account for all his dealings to the ordinary. This duty to account was enforced by the then very potent threat of excommunication for failure to obey the orders of the ecclesiastical courts. Also, the executor could be removed for misconduct by the church courts. The common-law courts retained the power to entertain actions of debt by and against executors and always had exclusive jurisdiction over real property. If a scheme of universal succession were adopted, the only aspects of administration which would require adjudication could be adequately handled in the common-law courts. Since the universal successor is personally liable for all debts and legacies, the creditors and legatees would have a satisfactory remedy in the common-law action of debt. Quite possibly, the clergy, who were always influential with those persons who had reached that time in life when they become aware of the necessity of making a will, suggested the use of the executor, because it was the institution which was most subject to control by the church and the ecclesiastical courts.

Another reason probably lies in the different practices

26 Atkinson, supra note 21 at 112.
27 Ibid.
28 Ibid.
of succession. In Rome, the universal successor was developed largely for family and religious reasons. In France it was adopted because of the influence of Roman Law, but it worked well enough because the general practice was to die intestate, thus leaving the total estate to the heirs. With the property in their hands, they can easily be required to perform the duties of administration. In England, however, there seemed to be a greater fondness for disposing of one's chattels by will. In addition, these legacies seemed frequently to go to persons other than a man's lawful heirs. Thus the institution of salman or executor was first used to insure that an unwilling heir could not interfere with the payment of legacies. It soon became the regular custom for a testator who wished to make legacies to provide an executor to make sure that the legacies were paid. From this, it was an easy step to the use of an executor to administer all of a testator's chattels under the watchful eye of the ecclesiastical courts.

The concept of the executor was responsible for the development of another type of personal representative. If a person died intestate or left a will without having appointed an executor, his estate was administered in the ecclesiastical courts. Originally, the ordinary took possession and administered the decedent's goods, but it early became common for him to appoint a person to carry out the actual duties of administration. It was this appointee who was to become the administrator. In this early period, the ordinary was not a true personal representative of the decedent since he could not sue to recover his assets nor be sued for his debts.

29 Holdsworth, op. cit., supra note 21 at 567-568.
30 Id. at 568.
It was the statute of 1357 31 that really originated the administrator. 32 It compelled the ordinary to appoint an administrator from among the close friends of the decedent. It also gave the administrator power to sue on obligations due to the decedent and made him answerable for decedent’s debts. This statute modeled the administrator on the already well-established concept of the executor.

Thus the two personal representatives with whom we are familiar in Anglo-American law are the testamentary executor and the administrator. 33 The executor is the appointee of the testator in the will, while the administrator is appointed by the probate court. As a practical matter, the distinction between the two causes only a few minor differences as respects the applicable legal rules in the modern administration. 34 The law relating to one is generally applicable to the other.

There is another historical development in the concept of the personal representative which is of primary importance in the problems discussed in this work. As we have seen, the personal representative, in early English law, had to obtain his right to administer the estate from the ecclesiastical courts. The estate would be probated in the diocese where the decedent was domiciled at the date of his death. 35 However, if he left

31 Edward III, st. 1, c. 11.
32 Holdsworth, op cit., supra note 21 at 568-569.
33 There is a quasi personal representative known as the executor de son tort which may be treated as a third type of personal representative. For a brief discussion of this concept, see infra pp. 122-124.
34 The only difference of importance to this study is that an executor may be given a power to sell decedent’s real property in the will and he will be permitted to exercise this power by a conveyance to foreign lands. Needless to say, the administrator has no such privilege. See infra pp. 125-129.
bona notabilia\textsuperscript{36} of more than five pounds in a diocese other than the one in which he was domiciled, there would have to be a prerogative probate in the court of the archbishop of the province.\textsuperscript{37} There were two provinces in England, York and Canterbury. When a man left bona notabilia in one or more dioceses in each province, an early case decided in 1596 that the prerogative probate of Canterbury would govern, on the ground of the necessity for a unified administration.\textsuperscript{38} However, in 1661, it was held to be the rule that when a man died leaving bona notabilia in each province, it would be necessary to have two administrations.\textsuperscript{39} This became the settled law.\textsuperscript{40} This was also held to be the result when a man at death left bona notabilia in a diocese in a province and also in a peculiar carved out of that same province.\textsuperscript{41} From these early cases, the rule has developed that the authority of a personal representative does not extend beyond the territory of the jurisdiction which appointed him.

The disruption which has been caused in probate administration by this theory raises the interesting problem why this rule developed. Probably the archbishops were jealous of any invasion of their authority and wished to maintain supreme control in their respec-

\textsuperscript{36} Bona notabilia are goods and chattels of a decedent which are of sufficient value to be accounted for in an administration. This value became fixed at five pounds.


tive jurisdictions.\textsuperscript{42} Certainly, permitting a personal representative appointed elsewhere to administer goods in his province would deprive the archbishop of all jurisdiction over the decedent's estate. The case authority which first established the rule supports this theory when it said:

"... administration granted in one province, is void as to goods in another, because there are distinct supreme jurisdictions."\textsuperscript{43}

The cases on this point were decided in the temporal rather than the ecclesiastical courts. They involved actions for debt brought in the common-law courts by an administrator appointed in one province against a debtor residing in another province, or an equity action to discover property in a province other than the one in which the administrator was appointed. In these cases, the temporal courts had to determine the source of the administrator's authority and its territorial extent as defined by the ecclesiastical courts. Therefore their reasoning, based on jurisdictional limitations, should accurately reflect the attitudes of the ecclesiastical courts.

Whatever may be the explanation for its development, this concept of the territorial limitation on the authority of the personal representative has become a firmly established rule of Anglo-American law. The theory behind the rule seems to be that the personal representative is an artificial person created by the law of the state in which he is appointed, and since the law of that state cannot extend beyond its territorial limits,


the personal representative cannot exist outside its boundaries. The important consequence of this type of thinking has been the requirement of separate administrations on a single estate comprising assets in several states. If a decedent dies testate, his executor will qualify as the personal representative where the decedent was domiciled at the date of death. However, it is very likely that the decedent will have property in another jurisdiction. Under the traditional theory, the executor cannot by virtue of his original grant of letters collect or administer that property. He must qualify as ancillary administrator in the second state, or some other person may be appointed administrator there. This ancillary administration, even if the same person is the personal representative in both, goes through all the proceedings of administration under the supervision of the local probate court and is completely independent of the domiciliary administration. Thus, the phenomenon frequently appears of two or more administrations proceeding under the control of as many different legal systems, each concerned with administering and determining the succession to the property of a single deceased person. It is from this concept of separate administrations in each jurisdiction that most of the conflict of laws problems in probate administration arise.

3. The Modern Personal Representative

An understanding of the conflicts problems relating to personal representatives requires some general under-

standing of the functions of a personal representative in a purely domestic administration. His functions are completely interwoven with the problems of administering the decedent’s estate. This is because the executor or administrator performs all the activities of the administration. However, it is not the purpose of this study to discuss problems of essentially probate law. It will be assumed that the administration has been granted. Therefore the problems of jurisdiction to grant a probate administration and who may apply to secure an administration will not be considered. Also, this discussion of administration ends with the final accounting by the personal representative, so that it is not within the scope of this work to treat problems of succession.

When a will has been admitted to probate or an administration has been granted on the estate of a person dying intestate, the first duty of the probate court is to appoint the personal representative. If the decedent has left a will and that instrument nominates a specified person as executor, the court must appoint him as the personal representative unless he is completely incompetent to perform the duties of administration. If there is no will or if the will fails to nominate an executor, the court will appoint an administrator. The personal representative may be a corporation as well as a natural person, but about a third of the states prohibit

---

46 A false impression may be created unless it is realized that it is in only about one out of every four deaths that there is an administration. If the estate is small, the heirs may by agreement pay off the debts of decedent and distribute his property among themselves. In addition, there have been statutory enactments dispensing with administration on estates below a specified value. For a discussion of this matter, see Atkinson, HANDBOOK ON THE LAW OF WILLS, 2nd Ed., 565-575 (1937).


48 In re Lawrence’s Estate, 53 Ariz. 1, 85 P. (2d) 45 (1938); Equitable Trust Co. v. Plume, 92 Conn. 649, 103 A. 940 (1918).
nonresidents or foreign corporations from serving as personal representatives. There may be joint representatives in one administration.

The authority of the personal representative is said to be derived from the court which appointed him. Actually, he is often described as an "officer of the court." It was always understood that the authority of the administrator was obtained from the ordinary or court which appointed him. However, the old common-law theory was that the executor derived his authority from the will itself and the appointment by the probate court was merely evidence of his right. The more modern view is that the executor, as well as the administrator, gets his authority solely from the appointment by the probate court in which the administration is being had.

It should be clear at this point that the "estate" is not an entity. The term "estate" refers to decedent's property. The executor or administrator cannot be said to be an agent or representative of the estate. The personal representative is more properly an agent of the court which appointed him, and he has title to decedent's personal property and to some extent control

49 See infra p. 34.
60 In re Drew's Estate, 183 Minn. 374, 236 N.W. 701 (1931); Lethbridge v. Lauder, 13 Wyo. 9, 76 P. 682 (1904).
61 In re Estate of Ferris, 234 Iowa 960, 14 N.W. (2d) 889 (1940); Hargrave v. Turner Lumber Co., 194 La. 287, 193 So. 648 (1940).
62 Estate of Conkey, 35 Cal. App. (2d) 581, 96 P. (2d) 383 (1939); In re Estate of Ferris, 234 Iowa 960, 14 N.W. (2d) 889 (1940); In re Drew's Estate, 183 Minn. 374, 236 N.W. 701 (1931).
65 A. L. Goetzman Co. v. Gazett, 172 Minn. 68, 214 N.W. 895 (1927); Ferrin v. Myrick, 41 N.Y. 315 (1869).
over his realty. Therefore, it is the personal representa­tive rather than the estate with whom third persons and courts must deal.

The function of the personal representative is to ad­minister the property of the decedent. As will be seen constantly throughout this work, the distinction be­tween immovable or real property and personal prop­erty is fundamental in problems of administration. This is evident in the type of control which the personal representative has over these two kinds of property interests. In the case of immovable property, the common-law rule is that title to the real property of the decedent descends directly to the heirs or devisees without any action on the part of the personal representa­tive. However, the modern view is that realty, while still the property of the heir or devisee, may be taken to pay decedent's debts if the personal property is not sufficient to satisfy them. Some states have legislation which gives the personal representative the right to take possession of the decedent's real property, to manage it, and to collect the rents and profits. The control of the personal representative over the decedent's personalty is much greater. At the time of his appointment, he obtains title to all the personal property of the decedent, both tangible and intangible. If there is more than one personal representative appointed on the estate, there may be difficulty in determining which has title to any particular piece of personal property. This difficulty is avoided by the rule that the personal representative who

57 See cases cited supra note 56.
58 See infra Chapter IV, p. 135.
59 Cunningham v. Rodgers, 267 F. 609 (D.C. Cir. 1920).
THE PERSONAL REPRESENTATIVE

collects the asset by reducing it to his possession will have title to it. It should be clear that the title of the personal representative is not absolute. He is a fiduciary whose position is somewhat analogous to that of the trustee. He is administering the property for the benefit of the creditors and beneficiaries or heirs, and when the administration is completed, he must transfer his title to those persons whom the court designates.

The first duty of the personal representative is to collect the assets of the decedent. These assets include tangible personal property, intangible choses in action which survive the death, and real property if the personal representative is given by will or statute the power to sell this realty. In the collection of assets, he may accept voluntary payment of obligations due to the decedent and give a valid discharge for them. If the obligor is unwilling to make payment, he may bring suit to collect the asset. If the cause of action accrued prior to the death, he sues in his official capacity as personal representative. If it arose subsequent to the death, he may sue in his official or personal character.

The personal representative is required to file an inventory listing all of the decedent's assets within a certain period after his appointment, usually from one to three months, at which time he should have completed his collection of the assets.

The next duty of the personal representative is to conserve the assets he has collected and keep them

60 In re Stewart's Estate, 145 Ore. 460, 28 P. (2d) 642, 91 A.L.R. 818 (1934).
61 See cases cited infra Chapter V, note 35.
63 See cases cited supra note 61.
safely during the period of administration. In modern estates of much size, this can be by far the most difficult obligation of the personal representative. There may be business enterprises which must be kept in operation. In the absence of permission in the will, by statute, or by the court, any expenditures made in this operation of a business would be at the personal representative’s risk, and he would be personally liable for all losses accruing during the business venture.\(^64\) It may be necessary for the most efficient management to convert some of the decedent’s property into a more convenient type of assets. In regard to personal property that he has collected, the personal representative has the power\(^65\) and in some cases the duty to sell it, such as when the assets are perishable goods.\(^66\) In the case of real property, he may have the power to sell it if given by the will or statute.\(^67\) He may also have the duty to invest the cash which comes into his hands from sale or otherwise, and his standard of duty will be the exercise of good and conservative business judgment.\(^68\) He is personally liable for his own conversion of assets of the estate in his control\(^69\) and for any waste which occurs to the assets through any action on his part which a reasonably prudent man acting in good faith would not have taken.\(^70\) The personal liability which accrues

\(^{64}\) Mayo v. Arkansas Valley Trust Co., 132 Ark. 64, 200 S.W. 505 (1917).
\(^{65}\) Smith v. Steen, 20 N.M. 536, 150 P. 927 (1915); In re Heinze’s Estate, 224 N.Y. 1, 120 N.E. 63 (1918).
\(^{66}\) Atkinson, op. cit., supra note 46 at 667.
\(^{67}\) See infra Chapter IV, pp. 125–132.
\(^{68}\) In re Macky’s Estate, 73 Colo. 1, 213 P. 131 (1923); In re Wilmerding’s Estate, 238 N.Y.S. 375 (1929).
\(^{70}\) In re Janke’s Estate, 193 Minn. 201, 258 N.W. 311 (1935); In re Belcher’s Estate, 221 N.Y.S. 711 (1927); In re Reilly’s Estate, 77 Pa. Super. 178 (1921).
against the personal representative for failure to con­serve and manage the assets properly, like all liability of the personal representative to the heirs or benefi­ciaries, will be imposed on him at the time of his final account by a surcharge.\footnote{Shinn's Estate, 166 Pa. 121, 30 A. 1026, 45 Am. St. Rep. 656 (1895).}

Another of the duties of the personal representative is to pay off the debts of the decedent and claims which accrue after his death, such as funeral expenses and estate taxes. The common practice is to provide a period after the appointment of the executor or admin­istrator during which claims can be presented for payment. The length of this period varies anywhere from three months to a year, with the average being about six months. Those claims which are not pre­sented to the personal representative within the spec­ified time are barred.\footnote{Pufahl v. Estate of Parks, 299 U.S. 217, 57 S.Ct. 151, 81 L.Ed. 133 (1936); Davis v. Shepard, 135 Wash. 124, 237 P. 21, 41 A.L.R. 163 (1925).} A creditor may sue the personal representative on an obligation of the decedent and secure a judgment against him.\footnote{Pufahl v. Estate of Parks, 299 U.S. 217, 57 S.Ct. 151, 81 L.Ed. 133 (1936); Eddy v. Adams, 145 Mass. 489, 14 N.E. 509 (1888); Roberts v. Roberts, 62 Wyo. 77, 162 P. (2d) 117 (1945).} However, such a judgment cannot be satisfied by levying an execution on any of decedent’s property.\footnote{Brown v. Sweat, 149 Fla. 524, 6 So. (2d) 538 (1942); Grife v. Equitable Life Assur. Soc., 233 Iowa 83, 8 N.W. (2d) 584 (1943); In re Mannix Estate, 146 Ore. 187, 29 P. (2d) 364 (1934).} The judgment must be presented as a claim.\footnote{Meredith v. Scallion, 51 Ark. 361, 11 S.W. 516, 3 L.R.A. 812 (1888).} The purpose of this procedure is to effectuate one of the most basic policies underlying our probate proceeding, which is to secure equality of payment to all the creditors of the decedent. After the period for the presentment of claims has run, the personal representative will pay out of the assets in his hands the claims, first those classes of creditors which
FOREIGN PERSONAL REPRESENTATIVES

are preferred. Then he will pay the general creditors. If there are not sufficient assets to cover their claims, he will pay them in equal shares the remaining assets.

Lastly, the personal representative must file his final account with the court which appointed him. If the court does not regard any given expenditure listed in the account as proper, he will be surcharged with the amount. Also, he may be personally liable for failure to collect certain assets. After the final account has been approved, he will be directed to turn over the remaining assets in his hands to those beneficiaries or heirs who the court has decided are entitled to them, and is then discharged as the personal representative.

4. THE SCOPE AND PLAN OF THIS WORK

The conditions of modern American life have intensified the conflicts problems in administering a decedent's estate. Although we have retained forty-eight separate legal systems with distinctive geographical territories, the barriers which prevent people and property from moving freely across national borders have been eliminated between our states by the Constitution. Certainly, people today do not confine their lives and their possessions to one community as was common in the seventeenth and eighteenth centuries when the rules of ancillary administration were being worked out. Due to improved transportation facilities and the homogeneous quality of the people, our popula-

78 This discussion of the functions of the modern personal representative is very brief and is not intended to be more than a framework on which the conflicts discussion can be hung. For a more complete, but still brief picture of this area, see Atkinson, HANDBOOK ON THE LAW OF WILLS, 2nd Ed., chapters 12 & 13 (1937).
tion has become highly mobile, so that many persons move periodically from state to state, frequently leaving property behind them. At the death of such a person, each state in which he left some of his property will be faced with problems involving conflict of laws.

A second factor is the equalization of wealth which has occurred in the twentieth century. There are more medium-sized estates which will have scattered property interests in various jurisdictions. Therefore in a larger proportion of deaths, there may be a need for ancillary administration.

The commercial nature of modern property interests has contributed to magnifying the problems. Much of the total wealth of the nation is represented by credit transactions. Since these are intangible interests and therefore consist solely of legal relationships between two or more persons, it is difficult to fix a situs for them. Very often the debtor and creditor will reside in different states so that, when one of the parties dies, conflicts problems will be raised in the administration of his estate. Frequently, the credit transaction will be evidenced by a negotiable instrument which passes freely from holder to holder and carries the situs of the debt with it. This increases the possibility that the parties to the transaction will be in different jurisdictions, thereby raising conflicts questions. Another type of commercial interest which forms a substantial part of property today is in the form of corporate stocks. These shares of stock are usually treated as property in the state of incorporation.79 Since it is common to organize a corporation in a state which is far removed

79 Nashville Trust Co. v. Cleage, 246 Ala. 513, 21 So. (2d) 441 (1945); Murphy v. Crouse, 135 Cal. 14, 66 P. 971, 87 Am. St. Rep. 90 (1901); Black Eagle Mining Co. v. Conroy, 94 Okla. 199, 221 P. 425 (1923).
from its place of business, and since our huge corpora-
tions have national and international lists of stock-
holders, it is very likely that the domicile of a deceased
person will not coincide with the state where the
corporation in which he owns stock was organized.

The problems of multiple administrations are not
confined to a large estate, but will frequently occur in
the medium-sized and many times in the small ones.
Even a person from a low income group is likely to own
one or two shares of stock in a foreign corporation or to
have loaned money to a friend who has moved out of
the state without paying him. On his death, the problem
is raised how to collect these assets and whether an
ancillary administration is necessary.

As has been discussed previously, the general theory
is that a personal representative has no authority to act
in a jurisdiction other than the one in which he was
appointed. If there are assets to be administered in
another state, there must be an ancillary administration
in that jurisdiction. Since this result is usually explained
on the theory that the personal representative is an
artificial creature who has no existence outside of the
state which created him, it would seem logical to suppose
that he never performs acts in any other state. As a
matter of fact, the pressure of necessity has forced the
courts and legislatures to make frequent exceptions in
order to permit executors and administrators to act in
other jurisdictions. These exceptions have become so
numerous and are so fundamental that they raise the
questions whether ancillary administrations as a matter
of legal logic are still defensible and whether as a matter
of social policy it is desirable to retain the principle of
a separate administration in each jurisdiction.

The purpose of this work is to determine what acts a
personal representative appointed in one jurisdiction can perform in other states. The next chapter will consider those instances where either by statutory modification or by common-law decision the personal representative is permitted to resort to the courts of other states to secure some relief. The third chapter will discuss the problems raised when the forum seeks to exercise jurisdiction over an executor or administrator from another state. The fourth chapter will treat the problems of a personal representative in transactions regarding immovable property located in foreign states. The fifth chapter will deal with the effects of extra-legal action by a personal representative when he enters another state and there collects some property belonging to the decedent and removes it to the jurisdiction where he is administering the estate. The final chapter will consider whether the conditions of modern life require that we consolidate and expand the numerous exceptions that have been made by developing a system of a single administration on a decedent's estate which will operate in all jurisdictions. If this is found to be desirable, then the best means of achieving it must be determined.

It should be clear by now that this is primarily a study in jurisdiction. The jurisdictional questions will be raised on two levels. The first is the question of the power of a legal order to adjudicate as to a personal representative acting extraterritorially. Can the legal system which appoints a personal representative authorize him to act in another jurisdiction? Does the state in which he attempts to act have the power to permit him to do so? Can the state in which he acts control his actions in regard to the act or in regard to all aspects of the administration? All of these represent
problems as to the power of a legal order to affect rights of a personal representative who acts in a foreign jurisdiction. Assuming that the legal system does exercise jurisdiction, the second level to be discussed is whether other states must recognize that action or whether they have the jurisdiction to refuse to give it effect. However, any study must go beyond the question of mere power to act. It is necessary to consider next what states actually do. This requires an examination of the cases and statutes which permit a personal representative to act in other jurisdictions. Finally these rules must be examined to see whether they are desirable and what changes should be made.

Something should be said about the terminology which will be used. There are technical terms by which various types of personal representatives are distinguished. If the personal representative is nominated in the will and confirmed by the probate court, he is spoken of as an executor. If he is appointed by the probate court, he is an administrator. If there is a will and he is appointed to administer under the will, he will be referred to as an administrator cum testamento annexo or c.t.a. If the administration has been started and he is appointed to complete it, he is designated as an administrator de bonis non or d.b.n. The term, personal representative, refers, of course, to all types of executors and administrators. Since the purpose of this study is to treat the jurisdictional questions raised when a personal representative appointed in one state acts in another, the distinctions represented by this terminology are not important and therefore will not be used. Unless it is made clear during the discussion of a problem that the distinction is important, the terms,
personal representative, executor, and administrator, will be treated as synonymous and will be used interchangeably.

The phrases, "foreign personal representative," "foreign executor," or "foreign administrator," mean one who is appointed in a state other than the forum in which he is a party to a suit or is performing some action. The converse of this terminology, namely, a "personal representative acting in a foreign jurisdiction," means that he is appointed in the forum and performs some action in another state.
CHAPTER II

Capacity of a Foreign Personal Representative to Sue

I. GENERAL RULE AT COMMON LAW

The legal validity of any act performed by a personal representative outside the state of his appointment is dependent on the effect which courts will ascribe to that act. The court which makes such a determination may be the one which appointed the personal representative and thus has complete control over his activities. On the other hand, a court of the state in which the act is performed may decide the question. It may do so when passing on title to property in relation to the foreign administrator or when it is asked to give him some form of relief. This chapter will consider the latter problem. When will the courts of one state take jurisdiction of a case if the party seeking relief is an administrator or executor appointed in another state?

The general rule at common law is stated by Story as follows:

"It has hence become a general doctrine of the common law, recognised both in England and America, that no suit can be brought or maintained by any executor or administrator, ... in his official capacity, in the Courts of any other country, except that from which he derives his authority to act in virtue of the probate and letters testamentary or the letters of administration there granted to him...."¹

A host of cases in the United States have laid down in

accord with Story's statement the general rule that in
the absence of statutory permission a foreign admin­
istrator or executor may not sue in the courts of their
states. This is also the rule in England and probably
the Commonwealth countries as well.

The traditional explanation for the rule has been
given by Professor Beale thus:
"... But as has been seen the claim due to the decedent is at
common law not to be paid to anyone else; and an admin­
istrator can sue only because of a statutory power given him.
But this power, like all created by statute, extends only to
the boundaries of the state; and the administrator appointed
in the state cannot claim the power."

This is based on an accentuated "territoriality" concept
of law. It seems to say that the administrator as a legal
person is a statutory creation, and since the statutes of
a state cannot by their own power operate outside the
boundaries of the state, the administrator cannot func­
tion as such outside its territory. The explanation is
questionable on its face and becomes completely un­
satisfactory when it appears that the administrator
often performs acts outside the territory of the state
which appointed him and that he frequently appears
as a party in the courts of other states.

---

5 Beale, op. cit., supra note 2 at 1533.
6 See infra Chapter V, pp. 151-162.
7 Infra pp. 35-54.
FOREIGN PERSONAL REPRESENTATIVES

It must be clearly understood that the rule is not the result of lack of jurisdiction or power in the court to make a foreign personal representative a valid party plaintiff. The external limitations on any legal system can come from only two sources. The law of any nation may be limited by clearly recognized rules of international law. In addition, the states of the United States are limited in their power to make legal rules and to adjudicate cases by certain constitutional provisions. Neither of these prohibits a legal system from permitting a foreign personal representative to sue in its courts. Certainly, a foreign administrator may be allowed to sue as a matter of comity. Therefore, any restrictions on suits by foreign personal representatives must be imposed by a rule of the positive municipal law of the jurisdiction. Our question is why this law and the courts which apply it generally refuse to allow such an action.

The real explanation lies in a public policy which is probably as old as the rule itself. The forum, having control over property within its jurisdiction, insists that the property be administered under its direction in order to protect local creditors. Such a policy saves local creditors the expense of going to a distant jurisdiction to present and prove their claims. It saves them from litigating their rights in a forum where the rules determining such rights may be different from those of their home state. If the estate is insolvent, it guarantees

9 Chiefly the Fourteenth Amendment (the due process clause) and Article IV, sec. 1 (the full faith and credit clause).
10 Vaughan v. Northrup, 15 Pet. 1, 10 L.Ed. 639 (U.S. 1841); Kirkbride v. Van Note, 275 N.Y. 244, 9 N.E. (2d) 852 (1937). "An exception to the prevailing view that foreign administrators have no standing in our courts is sometimes made as a matter of comity in the interests of justice."
that local creditors will be paid to the extent to which assets in the forum will cover the local debts. By applying the general rule then, the forum is preferring the claims of its citizens over the interest of the foreign administrator in having a unified administration. This explanation for the rule has been used by modern courts. In a recent case, the Supreme Court of Iowa said:

"The underlying reason for this rule is that a state will not allow property within its jurisdiction to be so taken by a foreign administrator as to deprive its own citizens of opportunity to enforce their claims against it. The rule does not arise from any want of legal right in the foreign administrator or lack of inherent authority in the court to accord him recognition."

The discussion in this chapter on the capacity of foreign administrators and executors to sue will presuppose that there has been no ancillary administration. A jurisdiction may refuse to allow a foreign personal representative to sue to recover property of the decedent within its territory. Instead it will require that an ancillary administrator be appointed in its courts who will administer the estate of the decedent under its supervision. If there is an ancillary administration, the proper party to bring such an action would be the ancillary administrator. A foreign personal representative, who wishes to sue in another state, may always

qualify in that state as ancillary administrator\textsuperscript{13} if the laws of the state permit him to do so. One third of the states hold by statute,\textsuperscript{14} decision,\textsuperscript{15} or court order\textsuperscript{16} that only residents are entitled to be appointed administrators in their jurisdictions. Thus a foreign personal representative, who is not a resident, is not eligible to serve as ancillary administrator in those states. If he can qualify as ancillary administrator, he becomes administrator of the estate in that jurisdiction and will always be permitted to sue. If he brings an action as a foreign personal representative and then qualifies as ancillary administrator after the suit has been filed and before there has been an objection to his lack of capacity to sue, he will be permitted to continue the suit.\textsuperscript{17}

There have been three general classes of exceptions which the courts have made to the general rule prohibiting suits by foreign personal representatives. Each of these will be considered separately.

\textsuperscript{13} Beale, \textit{op. cit.}, supra note 2 at 1533; Gross v. Hocker, 243 Iowa 291, 51 N.W. (2d) 466 (1952); Thomas v. Richards, 97 N.Y.S. (2d) 640 (1950); Hicks v. Shively, 137 S.W. (2d) 102 (Tex. 1940).


\textsuperscript{15} Monfils v. Hazlewood, 218 N.C. 215, 10 S.E. (2d) 673 (1940). “A foreign administrator has no authority in this state and cannot sue nor be sued as such; and since a nonresident cannot be appointed administrator, there should be an ancillary administration by a proper person in this State.”


\textsuperscript{17} Leahy v. Haworth, 141 F. 669 (8th Cir. 1905); Gross v. Hocker, 243 Iowa 291, 51 N.W. (2d) 466 (1952).
CAPACITY TO SUE

(a) Waiver by defendant of the objection to capacity of a foreign personal representative to sue

The first general exception deals with the problem whether the objection to the capacity of the foreign administrator to sue may be waived by the other party to the action. It is a curious thing, but those courts that for the most part cling persistently to the theory that a foreign administrator because of his territorial limitation does not have the capacity to sue, will allow the other party to the suit to waive this objection. 18 This is allowed because the courts speak of the administrator’s disability as a lack of capacity to sue. Then based on the analogy to the rule applied to other parties who lack capacity to sue, such as minors and mental incompetents, they say that this objection may be waived if the other party to the suit does not bring timely objection. Naturally this has led, particularly in the older cases, to rather complicated procedural debates on what constitutes a timely and proper objection. 19 Some courts require that the objection be raised by a plea in abatement, 20 others say that it may be done by a plea in bar, 21 and still others by a special demurrer if the incapacity is apparent on the face of the complaint. 22 Pleading to

19 See discussion of this problem in the annotation at 108 A.L.R. 1282.
20 Kane v. Paul, 14 Pet. 33, 10 L.Ed. 341 (U.S. 1840); Fort Fairfield Nash Co. v. Noltemier, 135 Me. 84, 189 A. 415, 108 A.L.R. 1276 (1937); see cases cited in the opinion.
22 Funk v. Funk, 76 Colo. 45, 230 P. 611 (1924); Wilson v. Wilson, 26 Ore. 251, 38 P. 185 (1894).
the merits constitutes such a waiver. All these courts would agree that the objection may not be raised for the first time on appeal. Modern courts operating under code systems of procedure would not be so concerned with the technicalities of raising the objection. Still they would require that a seasonable objection to the plaintiff's capacity to sue be made. Pleading to the merits or filing a counterclaim would be a waiver.

The courts which have refused to follow the rule allowing waiver of the objection have done so on a different theory of the disability. They say that a foreign administrator appears in their courts only as an individual, not in his capacity as representative of the estate. Yet it is only as a representative that he can show any interest in the subject matter of the cause of action belonging to the estate. Since he fails to show any interest in himself as plaintiff, he fails to state a cause of action. The objection that the plaintiff has failed to establish a cause of action in his favor may be raised at any time during the proceedings and even on appeal. Therefore, these courts say that the other party can never waive his right to object to suit by the plaintiff as foreign administrator.

The reasoning of either position does not seem sound. The real reason for the general rule against suits by foreign personal representatives is the policy of protecting local creditors. In any such suit, there are three interests involved. One is the interest of the foreign personal representative as plaintiff, another is that of

23 Brown v. Nourse, 55 Me. 230 (1867); Farmers Trust Co. v. Bradshaw, 242 N.Y.S. 598 (1930).
the defendant, and the third is that of local creditors. It is not consistent with the underlying reason for the general rule to allow the defendant by his consent or carelessness to bar the interest of the local creditors in this action. While the majority of cases allow such a waiver, the preferable result from the common-law point of view would be that such action on the part of the defendant would not constitute a waiver as long as local creditors might be harmed.

There is an interesting side question which arises out of the waiver cases. If the defendant fails to answer the petition, may the foreign administrator as plaintiff take a valid judgment by default? The foregoing cases which require affirmative action by the defendant in making a timely plea to plaintiff's lack of capacity would seem to imply that such a default judgment would be granted. Authority on the question is slight. The problem was discussed in a case decided by a Federal District Court.\(^27\) The plaintiff, who was an administratrix appointed in Indiana, sued two defendants in Kentucky for conversion. One of the defendants failed to answer, but the other defendant made proper objection to plaintiff's capacity to sue. The court refused to grant a judgment by default against the defendant who did not answer, saying:

"The defendant United Distillers has failed to answer the petition, and except for the fact that its co-defendant has raised the foregoing defense in its behalf a judgment by default might be given. However, the defense raised is of such a character as to inure to the benefit of all defendants, even though not specifically pleaded by each defendant."\(^28\)

\(^{28}\) 28 F. Supp. at 635.
Apparently default judgments would be granted in favor of foreign personal representatives. However, it seems that granting a judgment by default would be unsound for the same reason that allowing a waiver of the objection to suit by the other party is unsound. If the court either from the face of the petition or surrounding circumstances has knowledge that the plaintiff is a foreign administrator, it should refuse to grant a judgment by default. By its refusal, it would thereby give effect to the public policy of protecting local creditors by not permitting assets of the estate to be taken out of the jurisdiction.

(b) Suit by the foreign personal representative as an individual

The second exception to the general rule concerns those cases where the foreign administrator is said to be suing not in his representative capacity, but as an individual. Since the cause of action arises out of plaintiff’s representative capacity, and since any recovery will be treated as assets of the estate, the distinction may not be an easy one to draw, nor may it be an intrinsically sound one. Yet it is a line which the courts have drawn and must be considered. Under this exception, the courts have decided several rather different fact situations which will be discussed separately.

The first of these concerns the case where the foreign administrator is suing on a judgment he obtained in the state of his appointment. Almost without exception the cases permit such a suit. The theory is that the old

---

29 Reed v. Hollister, 95 Ore. 656, 188 P. 170 (1920).
30 Moore v. Kraft, 179 F. 685 (7th Cir. 1910); Turner v. Alton Banking & Trust Co., 166 F. (2d) 305 (8th Cir. 1948); Schlorer v. Mangin, 39 F. Supp. 65 (E.D. N.Y. 1941); McCraw v. Simpson, 208 Ark. 471, 187 S.W. (2d) 536 (1945); Reed v. Hollister, 95 Ore. 656, 188 P. 170 (1920).
cause of action which the personal representative had to sue on in his representative capacity is merged in the judgment. The judgment represents a new cause of action which never belonged to the decedent. Therefore, the personal representative need not sue as a representative of the estate of the decedent, but may sue as an individual who owns the claim based on the judgment. Consequently, the general rule concerning suits by foreign administrators is said to be inapplicable.

In all the cases supporting the exception as applied to judgments, the administrator obtained the judgment in the state of his appointment. There are, however, many instances where a personal representative may sue in a state other than the one in which he was appointed and he will be granted a valid judgment. May he then sue on this judgment in a third state? This would seem to follow from the reasoning employed in the above cases. If it is said that the cause of action merges in the judgment and the judgment becomes a new cause of action which the administrator may sue on as an individual, then it should be immaterial where the judgment was obtained as long as it was a valid one.

Suits on judgments raise an interesting constitutional question in the United States. Must a court give effect to the judgment of a sister state in favor of a personal representative appointed in that state under Article IV, Section 1 of the United States Constitution? Since courts, as a matter of fact, always do give such effect under the theory discussed in the two preceding para-

---

31 He may sue on a cause of action in a representative capacity, but the defendant will waive his objection to such suit and a valid judgment will be granted, see supra pp. 35–38, or he may sue under a statute permitting such suit and recover a valid judgment, see infra pp. 67–75.

32 "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. . ."
graphs, the question is largely academic. There is no authoritative decision because there is no United States Supreme Court case deciding the question. However, the Supreme Court of Arkansas, in deciding a case where an administratrix appointed in Oklahoma sued on an Oklahoma judgment, first rested the decision on the theory of merger of the cause of action in the judgment and suit on that judgment in an individual capacity. Then it said:

"We must and do give full faith and credit to this foreign Judgment (art. 4, sec. 1, Const. of United States) where, as here, there is no contention that such judgment was fraudulently obtained or that the court where it was obtained was without jurisdiction." 33

This may be treated as dictum. Certainly it does not represent a binding authority on a federal constitutional question. This is because a state may always accord a judgment from a sister state more credit than it would be entitled to under the "full faith and credit" clause. There really can be no reliable decision on this constitutional question until the state court holds that the judgment is not entitled to full faith and credit and the United States Supreme Court holds that it should have been given effect. Still the above case reaches what seems to be the correct result on the constitutional issue. The sister state has granted a valid judgment as to parties over which it had jurisdiction, and the fact that the successful plaintiff was a personal representative should not alter his constitutional right to sue on that judgment in other states. This argument should apply not only to judgments granted in the state of appointment, but also judgments in favor of personal represent-

CAPACITY TO SUE 41

atives who secure them in states other than the one in which they qualify.

The second situation concerns cases where the foreign personal representative is suing on a negotiable instrument which is part of the assets of the estate in his possession. The Restatement adopts the "mercantile" theory on this question. According to Section 509 of the Restatement, Conflict of Laws:

"An administrator in possession of a negotiable instrument, share certificate, or negotiable warehouse receipt or bill of lading belonging to the decedent, and only such administrator, can sue upon the duty represented by such document wherever jurisdiction can be secured over the debtor or his property."

The "mercantile" theory on which this rule is based adopts the position that the property exists at the place where the negotiable instrument is located rather than at the place where the debtor may be found.

The cases decided under common-law rules do not fully support the Restatement in this position. Some of the older cases adopt a rule completely contrary to Section 509, based on the concept that debts are bona notabilia in the state where the debtor resides and a foreign administrator, even though he may have the "evidence" of the debt, is not entitled to collect the debt. The majority of cases hold that an administrator who has in his possession a negotiable instrument made

34 Restatement, Conflict of Laws. § 509 (1934). Reprinted by permission of the American Law Institute. For the cases which support the Restatement position, see Beale, op. cit., supra note 2 at 1547; Michigan Trust Co. v. Chafee, 73 N.D. 86, 11 N.W. (2d) 108, 149 A.L.R. 1078 (1943). This case is a good discussion of the problem from the "mercantile" point of view which it adopts.

payable to bearer may sue on it in any jurisdiction. The reason given is that the administrator as rightful holder of the note is the "bearer" and may thus sue in his individual capacity. However, if the note is payable to order or is nonnegotiable, the foreign administrator would not be allowed to sue on a note given to his decedent during his lifetime. A foreign administrator would generally not be permitted to sue to recover funds represented by a certificate of deposit in his possession. Contrary to the opinion of the Restatement, there is also authority which holds that a foreign administrator in possession of share certificates of stock would not be able to bring an action on that stock as the basis for suit in the jurisdiction of incorporation. Of course, if a note were given to the foreign administrator after the death of the decedent as payee, the foreign administrator could sue on that note in any jurisdiction in his individual capacity.

While the cases do not clearly support the Restatement in most of the rules of law laid down in section 509, that does not mean that such rules based on the "mercantile" theory are not desirable. The tendency of the commercial world is to treat negotiable paper and stock certificates as property where they are found

36 Knapp v. Lee, 42 Mich. 41, 3 N.W. 244 (1879); Sanford v. McCready, 28 Wisc. 103 (1871).
37 Lefebure v. Baker, 69 Mont. 193, 220 P. 1111 (1923); Thompson v. Wilson, 2 N.H. 291 (1820); Cannon v. Cannon, 228 N.C. 211, 45 S.E. (2d) 34 (1947); Terrel v. Crane, 55 Tex. 81 (1881); Hicks v. Shively, 137 S.W. (2d) 102 (Tex. 1940); Knapp v. Lee, 42 Mich. 41, 3 N.W. 244 (1879) (dictum).
40 Trotter v. White, 10 Smedes & Marshall 607 (Miss. 1848); Robinson v. City Nat. Bank, 56 F. (2d) 225 (N.D. Tex. 1931).
rather than at the domicile of the debtor or the corporation. It is clearly more convenient for business people to deal with such pieces of paper as property because they are so easily transferable. The legal problem involved in this area is to determine the *situs* of the property for the purposes of administration. There is no inherent necessity or virtue in treating such interests evidenced by documents as property at the domicile of the debtor or corporation. Instead, it seems a good policy to have our rules of law and their practical application conform as closely as possible to business practice and the mental attitude of business people. If businessmen and the courts treat these pieces of paper as property for other purposes, they should be so treated for administration purposes. Then the administrator who gets possession of the notes or share certificates will have title to them and may sue on them anywhere in his individual capacity.

A third situation which arises under this general exception concerns a suit to recover insurance proceeds. A foreign personal representative who has an insurance policy payable to the estate of deceased or to his executor or administrator may sue to recover the proceeds in any state where the insurer can be sued. 41 A leading case on this question is *Cramer v. Phoenix Life Insurance Co.* 42 This was an interpleader action filed in Iowa by the insurance company. One claimant was the domiciliary administrator appointed in Iowa and the other was an ancillary administrator appointed in Connecticut. The Connecticut administrator contended that he was immune from process outside the state of

42 91 F. (2d) 141 (8th Cir. 1937), *cert. den.* 302 U.S. 739, 58 S.Ct. 141, 82 L.Ed. 571.
FOREIGN PERSONAL REPRESENTATIVES

his appointment. The court rejected this contention and decided that he was a proper claimant in an interpleader proceeding outside of Connecticut, saying,

"... But the cause of action which Cramer [Connecticut administrator] sought to assert had never vested in the intestate. The contract of life insurance did not become a debt until the death of the insured, and it was not collectible in the right of the insured... The want of power in a personal representative to sue or be sued in any sovereignty other than that under whose laws he was appointed, unless authorized by statute of the appropriate jurisdiction, does not apply to a cause of action involving a right which did not belong to the deceased..." 43

The same reasoning is applied to transactions entered into by the personal representative himself. If the right is acquired after decedent's death, the administrator may sue on it in his individual capacity in a state other than the one of his appointment. 44 This has been applied where a foreign administrator sued on a note given to him as payee, 45 where he sued for an over-payment of estate taxes made by him, 46 where he sued on a contract to which he was an original party, 47 where he sued to compel contribution by a coguarantor after paying the obligation of his decedent who was the other guarantor, 48 and also where a foreign executor sued

43 91 F. (2d) at 147.
44 Beale, op. cit., supra note 2 at 1545.
45 Trotter v. White, 10 Smedes & Marshall 607 (Miss. 1848); Robinson v. City Nat. Bank, 56 F. (2d) 225 (N.D. Tex. 1931).
48 Mowry v. Adams, 14 Mass. 327 (1817). In De Paris v. Wilmington Trust Co., 7 Boyce 178, 104 A. 691, 1 A.L.R. 1352 (Del. 1918), the domiciliary representative of a deceased guarantor paid when the obligor defaulted. An ancillary administrator sued to compel contribution from the co-guarantor. The court dismissed the suit saying, "... the right to enforce contribution to Schemel [the deceased guarantor] in his life, and the pay-
to recover proceeds of a sale of real estate made by his agent.\textsuperscript{49}  

The case where the personal representative is suing on a contract to which he was an original party represents one of the two situations where it can realistically be said that he is suing in an individual capacity. A contract made by a personal representative on behalf of the estate is his own individual contract, and he is personally liable on it.\textsuperscript{50} Certainly, if the contract is the individual one of the personal representative when an action is brought against him, it should be the same when he is suing the other party to the contract. The result reached can also be explained from the point of view of the defendant in the action. Since he dealt with the personal representative rather than the decedent as the original contracting party, he should have the right to expect only that personal representative to enforce the obligation.

If the foreign personal representative has reduced personal property to his possession in the state of his appointment, he thereby acquires legal title to that

\textsuperscript{49} Moore v. Petty, 135 F. 668 (8th Cir. 1905), \textit{cert. den.} 197 U.S. 623, 25 S.Ct. 800, 49 L.Ed. 911. This case involved an executor who qualified in Pennsylvania under a will which gave him a general power of sale of the real property of testatrix. This included land in Iowa. As is pointed out \textit{infra} Chapter IV, the foreign executor under these conditions may make a valid conveyance of the realty. The executor hired $D$ as his agent to sell the Iowa land. This was an action brought in Iowa by the executor to recover proceeds from the sale. The court permitted the action on the theory that this was a right accruing personally to the executor from his own transaction and was not a right of the decedent.

FOREIGN PERSONAL REPRESENTATIVES

property. This title will be good as against any other administrator. If he then takes the property outside the state and it is there converted by a third party, he may sue for its recovery.\(^{51}\) Since he has title to the property for the purposes of administration, he is said to be suing to vindicate that right rather than any right in the property he secured as a representative. This is the other instance where the executor or administrator is actually suing as an individual. While he may be called by the court which appointed him to account as a fiduciary, his title to the property is good as against anyone else until the administration has been completed. Actually, the result in this case is a necessity in modern administrations. The personal representative who is attempting to conserve assets of the estate may well have to transport them into or through other jurisdictions to obtain more advantageous sales or safer storage places. While doing this, he ought to be protected from interference with his property to the same extent that other rightful holders of property are. However, there is one old case in which it was held that the property must have been taken outside the state against the will of the administrator before he will be allowed to sue.\(^{52}\)

The exception that a foreign personal representative can sue on a cause of action in his individual capacity is recognized in English law. The case authority is limited but clear on this point. The cases deal with the problem of suit by a foreign administrator on a judgment

\(^{51}\) Clark v. Holt, 16 Ark. 257 (1855) (Suit to recover slaves who had been removed from Tennessee by the bailee of the Tennessee administrator); Beckham v. Wittkowski & Rintels, 64 N.C. 464 (1870) (Suit by a South Carolina executor to recover cotton which he had taken to North Carolina to market and which had been there taken from him).

\(^{52}\) Kilpatrick v. Bush, 23 Miss. 199 (1851).
obtained in the jurisdiction of appointment. The English courts allow such a suit on the theory that the judgment obtained by the personal representative was a right that did not belong to the deceased. Consequently, the personal representative who recovered the judgment sues in his individual capacity. The English cases have not considered most of the fact situations decided by American courts under this exception, so that it is not possible to say that they would reach the same result in all similar cases. However, one Canadian court has decided that a foreign administrator may sue on a negotiable instrument in his possession without being required to take out ancillary administration. This is based on the theory that the debt was reduced to possession by possession of the negotiable instrument. Thus the foreign administrator had title to the debt and could sue to recover it as an individual.

Some writers have contended that this class of cases does not constitute a real exception to the common-law rule. It is said that the personal representative acquires only the claims of the decedent by the statute which makes him representative of the estate. Any rights acquired thereafter are owned personally by the personal representative because rights must vest in a living man. Therefore, he may sue on rights acquired after the death of the decedent in any jurisdiction as an individual. Since the general rule only applies to actions where the foreign administrator or executor sues in a representa-

53 Vanquelin v. Bouard, 15 C.B. (N.S.) 341 (1863); In re Macnichol, L.R. 19 Eq. 81 (1874).
tive capacity, all these cases are said to be completely outside the rule.

The cases seem to me to be true exceptions. The rule as stated by Story and in the numerous cases which have followed him is broad enough to prevent all suits by foreign personal representatives when they are brought to collect assets of the estate. In all these cases, the recovery will become assets of the estate in the hands of the successful foreign personal representative. If the policy of the rule is to protect local creditors by prohibiting foreign administrators or executors from withdrawing assets of the decedent from the jurisdiction, these cases violate that policy. A legal order certainly has the power to prevent a foreign personal representative from suing in its jurisdiction regardless of the nature of the claim he is suing on. If such as is discussed above is permitted, it must be explained as an exception to the general rule of exclusion.

Actually, this general exception seems to cover two classes of actions. The first concerns suits brought by a foreign personal representative on a contract which he made himself or to recover property which he brought into the state. In each of these, it is unquestionably the individual right of the personal representative on which he is suing. Therefore the traditional explanation is satisfactory in explaining the result. The second type of suit involves actions on a judgment obtained by the personal representative or on a negotiable instrument in his possession. These are really not individual rights of the personal representative, but rather grow out of his representative character and are based on original rights which the decedent had. An explanation of this exception on the basis of suit as an individual obscures
what seems to me to be the true explanation for all the actions coming within this general exception.

Regardless of the explanation given, these exceptions would have to be made on considerations of convenience and practicality. If an ancillary administrator were allowed to recover on a claim established by a judgment obtained by another administrator, by a contract entered into by another administrator, or by a negotiable instrument in the possession of another administrator, some difficult problems would be raised. The court granting the judgment in favor of the ancillary administrator would have to foreclose the interest of a person not within its jurisdiction, the administrator possessing the claim, who would not have the opportunity to appear and be heard. There would be the possibility that the Supreme Court of the United States would adopt the "mercantile" position that the property of the note, contract right, or judgment would be in the administrator who originally held them and not in the ancillary administrator. This would mean that there had been a deprivation of property without due process under the Fourteenth Amendment. Also, the court rendering the judgment would have to consider the possibility of the defendant being sued in another jurisdiction by the administrator having the claim. This would raise the problem of the extent to which such a judgment would be res judicata under the "full faith and credit" clause of the United States Constitution. The serious nature of these problems is even more obvious when the foreign administrator who possesses the claim was appointed in a foreign country. Should the debtor enter that country, he may be sued a second time on the note, contract, or judgment. The foreign court may well
treat the claim as property in the hands of that administrator. Then it would refuse to recognize the recovery against the debtor by the ancillary administrator and would give a second recovery against him. There is no way that the forum can bar such an action. Rather than trying to solve these problems satisfactorily, it is simpler and safer to hold that the administrator possessing the claim is the only person who will be permitted to recover on that claim regardless of the jurisdiction in which the action is brought.

(c) Suit as a matter of comity to prevent injustice

The third general exception to the common-law rule prohibiting suits by a foreign personal representative is made when he is allowed to sue "as a matter of comity in the interests of justice." Naturally, these cases involve rather rare fact situations. In each one, however, the decision is rested on the broad generalization that the suit will be permitted in order to prevent injustice. Therefore, the cases should be considered not as a definitive statement of a legal rule, but rather as examples of the application of a very general principle of equity and justice.

The leading case in this area is Kirkbride v. Van Note. A husband and wife were divorced in New York and the wife was awarded monthly alimony payments. She thereafter remarried. Later, the husband died domiciled in New Jersey and an administrator was appointed in that state. The wife brought suit in New Jersey for back alimony from the date of her remarriage. The administrator sought to be substituted as defendant

57 Ibid.
in the New York divorce action and to apply for a modification of the decree awarding alimony. The New York Court of Appeals held that this application should be granted:

"To deny [the foreign administrator] permission to appear and apply for modification of the judgment of divorce in so far as it directs the payment of alimony after the remarriage of the plaintiff, would work a gross injustice, and the courts, as a matter of comity, should permit him to make such application."58

There is another situation illustrating the application of this principle. One individual was ancillary administrator of two English estates and domiciliary executor of a domestic estate. Each of the estates had claims under the will in a probate proceeding in New York. As domestic executor, this person sought a construction of the will which was prejudicial to the interests of the foreign estates. The English domiciliary executor sought to intervene on behalf of the English estates. The court permitted this intervention on the ground that "the interests of justice will best be preserved by allowing the petitioner to intervene."59

Still another application of the principle occurs when the foreign administrator sues to recover assets of the estate, but the assets are not such as will allow an ancillary administration. There was such a case arising in Missouri in which the foreign executor sued to enforce a contract for the sale of stock. This was not such an asset as would entitle the executor under the law of Missouri to take out an ancillary administration. The Federal Court of Appeals decided that the foreign

58 275 N.Y. at 251.
executor should be permitted to sue to enforce the contract.\textsuperscript{60} However, it must be emphasized that inability to secure ancillary administration is not sufficient in and of itself to permit suit by a foreign administrator. It must be shown in addition that there is no other forum in which the right can be enforced or that great injustice will follow refusal to allow suit.\textsuperscript{61}

These cases represent an encouraging trend displayed by the courts. A rigid application of the common-law rules will often cause great harm and injustice in the administration of a decedent's estate. Since the courts certainly have the power to permit such suits, whenever a foreign administrator can show that refusal to permit suit will cause more harm to the estate than it will produce benefit to local creditors, he should be allowed to sue. One example which may occur is this. The asset in the state may be a debt owed to the decedent by a resident. This debt may be so small that it would not justify the expense of an ancillary administration to recover it. It may well be that the debtor will not voluntarily pay it to the foreign administrator, and if he does not, this asset is virtually uncollectible. The local creditors are not protected by the common-law rule, since no ancillary administrator will collect the

\textsuperscript{60} Buder v. Becker, 185 F. (2d) 311 (8th Cir. 1950). "To deny the domiciliary administrator a forum to enforce his rights in the assets, in Missouri, of the non-resident decedent, and at the same time deny right of ancillary administration on those assets in Missouri, would lead to taking property without due process of law. That conclusion we avoid if possible."

\textsuperscript{61} Moses v. Wood & Selick, 93 N.Y.S. (2d) 829 (1949). "Of course if ancillary letters might be obtained, then plaintiff would be obligated to secure them. Assuming, however, that they may not be obtained in this case, that in and of itself is not sufficient reason for allowing suit by a foreign executrix without them. . . . There is no showing in the present case that a gross injustice will result if plaintiff is not allowed to sue in our courts, or that plaintiff will be able to enforce her rights elsewhere."
asset for them. On the other hand, their interests as well as the interests of the whole estate will be better served if the foreign administrator is permitted to sue to collect the asset because they can participate in those assets by filing a claim in the probate court which appointed the foreign administrator. The court should have little difficulty in an action brought on such a debt in determining as a jurisdictional fact whether the usual expenses of an ancillary administration in costs and fees plus the inconvenience of the long delay will exceed in value the amount of the debt. If it so finds, I feel such a suit should be permitted. A more liberal application of the rule in *Kirkbride v. Van Note* to such cases would alleviate some of the most unsatisfactory results of the common-law rule.

(d) Miscellaneous exceptions

The three general classes of exceptions are not all-inclusive of suits which may be brought by foreign personal representatives. For example, an executor may by the will be given authority to sell the real property of the testator wherever located. Such an executor has the power to make a valid conveyance to land in a state other than the one in which he qualified as executor. 62 This is based on the theory that he is acting under a common-law power created by the testator in the will rather than as a statutory representative. Reasoning from this, it has been held that a foreign executor having such a power of sale may maintain ejectment for the land as against a wrongful possessor. 63 This result seems a practical necessity. The heir or devisee who

62 See *infra* Chapter IV, pp. 125–129.
normally receives title to the land immediately on death has no interest in this land which will enable him to maintain an ejectment action. An ancillary administrator might be appointed in the state where the land lies to maintain the action, but the courts of that forum would generally say that they have no right to deal with the land when the testator gives a power of sale to the executor. Besides, the right to maintain ejectment might not be a sufficient asset to serve as the foundation for an ancillary administration. The best solution is to treat the executor who has been given a power of sale as the devisee of the land for the purpose of sale and consequently as entitled to maintain ejectment against a wrongful possessor.

Another type of miscellaneous exception concerns a stockholder's derivative action. A foreign personal representative holding stock as an asset in the estate may sue on that stock as the basis for a stockholder's derivative action.64 This rule is unquestionably sound. Any recovery in the action will be for the benefit of the corporation, rather than that of the estate. Such a recovery could not be reached by local creditors of the estate. Therefore, there is no reason for not allowing suit by the foreign personal representative.

There is another interesting situation in this area arising out of a New York case.65 A Turkish citizen died domiciled in New York leaving a considerable legacy to his mother, a Turkish national. Thereafter the mother died domiciled in Turkey. Under the law of Turkey, the Sultan of Turkey became universal successor of the estate. He sued in New York to recover from the administrator the legacy due to the mother. The New York

64 North v. Ringling, 63 N.Y.S. (2d) 135 (1946).
CAPACITY TO SUE

Court of Appeals in a four to three decision permitted the suit. It is well established that the forum in determining the succession to movable property will look to the law of the domicile at the date of death. Under the law of the domicile, the Sultan as universal successor received the legal title to the claims of the decedent, rather than occupying the position of personal representative. The forum permitted him to sue on the claim as legal owner in the same manner as it would have permitted a legatee to do so. This is apparently the only case which has considered the problem of suit by a foreign universal successor in an American jurisdiction. The English courts have been faced with the same problem of suit by a foreign universal successor and have reached the same result as did the New York Court of Appeals. Such a case does not theoretically represent an exception to the general proposition stated at the beginning of the chapter, because the party seeking relief was not a personal representative, but was the legal owner.

This represents a very important problem in conflict of laws. In civil-law systems, the administration of estates is done by a universal successor. The important thing to remember is that immediately after the death he is vested with legal title to decedent’s property. With the increasing mobility of population in the world through improved transportation, and with more widespread business investment in foreign countries, there is a growing possibility that a decedent dying domiciled in a civil-law country will leave property in a common-law country and his universal successor will sue for its

---

66 Beale, op. cit., supra note 2 at 1030.
68 See supra Chapter I, pp. 3–7.
FOREIGN PERSONAL REPRESENTATIVES

recovery. This presents an interesting problem for the common-law court. It is committed to the rule that title to movable property will be determined by the law of the domicile, and under that law the universal successor would have legal title and should be in the same position as a legatee suing for his legacy. This was the position taken by the New York Court. On the other hand, the common-law court operating under common-law rules is committed to the policy of local administration of a foreign decedent's property to protect domestic creditors. From the point of view of common-law policy, the decision in the New York case seems incorrect. The universal successor may be regarded as in a position of a legatee or owner of the property or else he may be treated as a foreign administrator. Neither of these would generally be permitted to sue to recover property of the decedent until there has been a local administration and payment of domestic creditors. Even though the universal successor has legal title to the property, the common-law court can require that the property be subject to local administration and the payment of decedent's debts according to the law of the forum before the foreign universal successor will be entitled to recover it. While, however, as a matter of legal logic proceeding from the basic premise of the common-law policy requiring separate administrations, the decision allowing the universal successor to sue seems wrong, there is much to be said for it. As will be discussed later, the trend is away from requiring unnecessary ancillary administrations, and there has been much advocacy of a system of unified administration. The doctrine of universal succession was designed to establish a single administration

69 See infra Chapter VI, pp. 170–179.
by providing that the heir would continue the personality of the decedent by taking legal title to all of his property and by being liable for all his debts. If the civil-law countries have the policy of treating the universal successor as in the same legal position as the decedent, the common-law courts should treat him on the same basis, particularly since creditors residing in common-law countries will probably receive more protection when the decedent is represented by a universal successor personally liable for all his debts than they would if there were a personal representative liable only to the extent of decedent’s property in his possession.

2. Effect of the Absence of Local Creditors

At the beginning of this chapter, it was explained that the real reason for prohibiting suits by foreign personal representatives was the policy of protecting domestic creditors. In accordance with the maxim “when the reason ceases so does the rule itself,” it would seem to follow that when there are no local creditors, the foreign administrator should be permitted to sue as a matter of comity. Of course, the problem raised is how to establish that there are no local creditors. This may be done in more than one way. The foreign administrator may allege and offer evidence that there are no domestic creditors. The cases generally refuse to recognize that such an allegation and offer of proof is sufficient. This is because such a procedure might foreclose a creditor who had dealt privately with the deceased and has no knowledge of his death. Such a possibility is more likely when there is no local administration to notify him. The other

---

70 McCully v. Cooper, 114 Cal. 258, 46 P. 82 (1896); Warren v. Globe Indemnity Co., 216 La. 107, 43 So. (2d) 234 (1949); Petersen v. Chemical Bank, 32 N.Y. 21 at 48 (1865).
possible solution is to give local notice of the death and then provide a period during which the creditors may come forward and file claims. This is, of course, the accepted probate practice of the states in requiring ancillary administration. Until this ancillary administration is completed, the court would have no proof that there are no local creditors. If it is assumed that the state is primarily interested in protecting domestic creditors, an ancillary administration would always be required in order to establish the existence or non-existence of local creditors. Those cases which seem to stand for the proposition that a foreign administrator may sue if there are no local creditors are those where the recovery would not be available to creditors if they did exist, such as wrongful death actions\(^1\) and stockholder’s derivative actions.\(^2\)

3. **Suit for Wrongful Death**

There is a situation somewhat analogous to the cases discussed in the preceding portions of this chapter. This involves a suit by a foreign personal representative to recover damages for the wrongful death of the decedent. In the United States, with its forty-eight state jurisdictions, its highly mobile population, and its alarming record of traffic fatalities, such a problem is a common one.

To make the problem clear, we will consider a hypothetical case. \(A\), a resident of Idaho, is killed in an automobile accident in Oregon by the negligence of \(B\), a resident of California. \(C\) is appointed administrator of the estate of \(A\) in Idaho. Now \(C\) sues \(B\) in California


\(^2\) North v. Ringling, 63 N.Y.S. (2d) 135 (1946).
to recover for the wrongful death of A. Will the California court permit a foreign personal representative to sue to recover for the wrongful death?

The answer to the question posed depends on an additional factor. Under the accepted choice of law rule applicable to an action for wrongful death, the law of the place of the wrong to decedent governs.\textsuperscript{73} Thus the California court will look to the wrongful death statute of Oregon. What that statute provides will determine whether our foreign administrator in the hypothetical case will be permitted to sue or not.

If the statute provides that any recovery will become part of the general assets of the estate, the foreign administrator would not be permitted to sue.\textsuperscript{74} He would be suing in a representative capacity on behalf of the estate. Thus the rule discussed in the first portion of this chapter which prohibits suits brought by foreign personal representatives would apply. This result is consistent with the reason for the common-law rule. Such recovery, if part of the general assets of the estate, would be subject to the payment of decedent’s debts. In order to protect the interests of local creditors in this recovery, an ancillary administration would be required.

Many wrongful death statutes in the United States contain different provisions. They provide that the personal representative is the proper party to bring the action, but that any recovery will go to certain named beneficiaries without being subject to the claims of the decedent’s creditors. A typical statute of this type has been enacted in the State of Oregon.

\textsuperscript{73} Restatement, Conflict of Laws, sec. 391 (1934).

\textsuperscript{74} Baldwin v. Powell, 294 N.Y. 130, 61 N.E. (2d) 412 (1945).
"Action by personal representative for wrongful death. When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents and in case there is no surviving spouse or dependents then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission."  

This statute has been construed to mean that while the named beneficiaries are in existence, the recovery of damages in an action by the personal representative goes personally to them rather than to the general estate. Thus creditors have no claim to the recovery. Under this statute or a similar one, the majority of modern cases would permit the foreign personal representative to recover in our hypothetical case.

If the beneficiaries named in the statute do not exist so that the recovery goes to the general estate, the foreign administrator would not be permitted to sue. Also, if the foreign personal representative sues to recover on two causes of action, one for wrongful death under such a statute and the other for injuries to decedent during his lifetime, he will be permitted to sue on the first, but not on the second because such recovery would go to the general estate.

76 Ross v. Robbins, 169 Ore. 293, 128 P. (2d) 956 (1942).
The distinction must be made clear between the action for wrongful death and the cases of suit by a foreign personal representative discussed in the preceding parts of this chapter. Here the fund recovered in the action will not become part of the assets of the estate, but is the property of the named beneficiaries who are the actual parties in interest. The foreign administrator is really a different legal personality here. The statute which confers the right of action also provides that the same person who is personal representative of the decedent will be the proper party to bring the action. He is for the purposes of this action not a personal representative, but rather a statutory trustee for the specified beneficiaries. Consequently, this is not a case involving a foreign personal representative in the strict sense of the term.

There is an interesting question which occurs when the defendant in a suit by a foreign personal representative in a wrongful death action counterclaims for damages done to him by the decedent. He will not be permitted to recover on the counterclaim. This is based on the reasoning explained above. The personal representative is merely a trustee, and the real party in interest would be the named beneficiary or beneficiaries. Since these named beneficiaries are in no way liable for the damages caused by decedent, a counterclaim should not be permitted in an action brought for their benefit.

There is a problem what personal representative can

80 Wiener v. Specific Pharmaceuticals, Inc., 298 N.Y. 346, 83 N.E. (2d) 673 (1949). “Suing under such a statute, plaintiff acts, not as an officer of the foreign court appointed by it as alter ego for the estate, but as a trustee for the designated beneficiaries, the actual and real parties in interest.”

81 Natwick v. Moyer, 177 Ore. 486, 163 P. (2d) 936 (1942).
sue to recover for wrongful death. This will depend on the wording and construction of the applicable wrongful death statute. If the statute permits a foreign personal representative to recover as the statutory trustee, then in our hypothetical case, the administrator appointed in Idaho could sue in California to recover for the wrongful death occurring in Oregon. If, on the other hand, the statutory trustee is limited to a local representative, then there must be an ancillary administrator appointed in Oregon who could sue in California to recover for wrongful death to the decedent. An ancillary administrator may be appointed for a nonresident decedent's estate in the state where the wrongful death occurred even though the right of action is the only asset on which the ancillary administration can be based. Then such ancillary administrator could sue in any other state as a statutory trustee.

In several cases where a foreign personal representative was suing for wrongful death, the court refused to permit the suit based on the general proposition that foreign personal representatives will not be allowed to sue. The language is broad enough to indicate that the courts do not agree with the theory of permitting a foreign personal representative to sue as a statutory trustee. Examined closely, however, the cases do not stand for so broad a generalization. In each case, suit was brought by the foreign administrator in the state where the wrong was committed. The court sitting in that state held that their wrongful death

statute required that the proper plaintiff must be a local administrator. Thus the result turned on the fact that the plaintiff was not the person designated by the wrongful death statute as statutory trustee. It must be understood that the right of action is created by the applicable statute, and the party to whom it gives the right to sue is the only one who may do so. If the statute and its construing cases hold that a local administrator is the only proper party, then a foreign administrator cannot sue.

4. **Suit by Assignee of Foreign Personal Representative**

The common-law rule which prohibits an administrator appointed in one state from suing in another state may not prevent him from effectively collecting assets through the courts of a second state. If the administrator has in his possession an assignable chose in action such as a promissory note, a mortgage, or a policy of insurance, he may assign it to some third party. The consideration for the assignment will be included in the assets of the estate. The assignee will then try to sue the debtor in the second state to collect the chose in action. By this procedure, assets which might otherwise be available for local creditors would be drained off into another state. Our question is whether the courts will permit the assignee of a foreign administrator to sue on a claim on which the foreign administrator himself could not sue.

The older cases definitely hold that such an assignee could not sue. The theory of these cases is that the

---

debts sued on are *bona notabilia* at the residence of the debtor. The foreign administrator who held the evidence of the chose in action had no title to convey to the assignee. The title would have to be assigned by a personal representative appointed in the state where the debtor resides. It is easy to see that such reasoning was the product of a time when people remained relatively stationary and the court felt that it could be fairly certain of where the debtor resided in order to treat the *situs* of the property as located there.

The first break in the line of authority on this question occurred in a case decided by the Supreme Court of the United States in 1829. ⑤ This involved a suit in Mississippi by the assignee of a Kentucky executor on a promissory note. The defendant was unrepresented in the Supreme Court. Chief Justice Marshall delivered a rather summary judgment in favor of the plaintiff which failed to consider the real issue involved.

The leading decision in favor of permitting suit by the assignee of a foreign personal representative is *Petersen v. Chemical Bank*. ⑥ This was a suit by the assignee of a Connecticut administrator in a New York court to recover the bank account of decedent. The New York Court of Appeals rested its decision in favor of the plaintiff on two propositions. First, it decided that the rule preventing a foreign personal representative from suing "does not attach to the subject of the action, but is confined to the person of the plaintiff." ⑦ Secondly, the title to the personal property of decedent was to be determined by the law of the domicile of the decedent at the date of death, which was Connecticut. Under the

⑥ 32 N.Y. 21 (1865).
⑦ 32 N.Y. at 46.
law of Connecticut, this assignment was sufficient to pass a valid legal title in the bank account to the assignee. Therefore, the assignee was entitled to sue in New York as owner of the debt.

The majority of modern cases have followed the holding of Petersen v. Chemical Bank and permit an assignee of a foreign personal representative to sue.\textsuperscript{88} However, the courts will not permit an assignee for collection only to bring an action.\textsuperscript{89} In such cases, the recovery would be transmitted to the foreign personal representative. Since this procedure is obviously designed to circumvent the prohibition against suit by the foreign administrator, the courts say that the assignee is merely the agent of the foreign administrator and will be subject to the same disability as his principal.

When the problem is first considered, it seems very illogical and unjust to permit an assignee to sue when his assignor cannot. It certainly seems an easy way to circumvent the common-law rule. It must be remembered that the disability on the assignor or foreign administrator and, therefore, on the assignee is the policy which attempts to retain assets in the jurisdiction in order to protect domestic creditors. The operation of the majority rule on this question does not seem designed to protect them.

\textsuperscript{88} Vogel v. New York Life Insurance Co., 55 F. (2d) 205 (5th Cir. 1932) (policy of insurance); McCully v. Cooper, 114 Cal. 258, 46 P. 82, 35 L.R.A. 492 (1896) (dictum); Campbell v. Brown, 64 Iowa 425, 20 N.W. 745 (1884) (note); Owen v. Moody, 29 Miss. 79 (1855) (non-negotiable note); Petersen v. Chemical Bank, 32 N.Y. 21 (1865) (bank deposit); Grigon v. Shope, 100 Ore. 611, 197 P. 317 (1921) (promissory note); Solinsky v. Fourth Nat'l Bank, 82 Tex. 444, 17 S.W. 1050 (1891) (promissory note).

\textit{Contra:} McCarty v. Hall, 19 Mo. 480 (1850); Hayward v. Williams, 57 S.C. 235, 35 S.E. 503 (1899).

\textsuperscript{89} Riddle v. Slack, 96 N.J.L. 412, 115 A. 741 (1921); Thacker v. Lindahl, 48 S.W. (2d) 588 (Tex. 1932).
On the other hand, there are strong reasons for sustaining the majority rule. The compelling reason is the pressure of the business world for the attributes of negotiability of commercial paper. Such pressure has created a strong policy in our system toward extending the qualities of negotiability. One of the vital aspects of this concept is the reliability of the chain of title. Persons who obtain a piece of commercial paper from a bona fide assignor who was in rightful possession should be confident that they possess title to the property. Another reason is the difficulty of founding an ancillary administration on a single chose in action. If it is relatively small in value, the expense and delay of an ancillary administration would not be justified and the asset would be virtually uncollectible unless the debtor entered the state in which the personal representative was appointed. The adoption of the "mercantile" theory for choses in action evidenced by an instrument enables the personal representative to assign the chose in action, and the assignee can locate the debtor and collect the amount due wherever he may be found. It seems that the policy of protecting local creditors does not outweigh the desirable features of the majority rule.

The argument against the majority position to the effect that the foreign administrator does not have any title to pass is not persuasive. The forum can always permit the assignee who has possession of the note to sue as a matter of comity. The judgment in favor of the assignee on the note would be res judicata under the "full faith and credit" clause and would thus bar any further action against the debtor by a local administrator.
5. Statutory Permission to Sue

The common-law rules regarding suits by foreign personal representatives leave much to be desired from the point of view of efficient administration of estates. Often there will be several administrations, each completely independent of the others, attempting to deal with the assets of one man. The results will be duplication of effort by the several administrators, inevitable delay in integrating the results of the separate administrations, and increased expense in the form of court costs, attorney's fees, and administrator's fees. It would be possible that the assets in one jurisdiction will be too small to justify the expense and difficulty of an ancillary administration. Since the common-law rules make it difficult, if not impossible, for the domiciliary personal representative to collect such assets unless they are voluntarily handed over, they might not be included in the estate. The unsatisfactory results of multiple administrations early prompted many states to adopt legislation to remedy the situation.

There is no question of the power of the state to pass legislation which will permit a foreign personal representative to sue in the state. It has been pointed out previously that no external limitations prevent a legal system from permitting personal representatives appointed in one state from suing in another. Any rules excluding personal representatives from the courts are merely matters of municipal law. Since each state may permit foreign executors and administrators to sue as a matter of comity, the legislature of the state may

---

90 See supra p. 32.
91 See supra p. 32.
extend this comity to all situations in which a foreign personal representative might want to sue. By so doing, the statute merely puts the foreign personal representative on the same footing as the domestic personal representative.

The states began passing such statutes in the early part of the nineteenth century, and enactments have continued down to the most recent New York statute on this subject passed in 1951. About half the states have adopted these statutes. They vary considerably in their provisions and effects, but the main purpose of each one is to permit foreign personal representatives to sue in the state. A good example of such a statute is that of Ohio:

"An executor or administrator appointed in any other state or country may commence and prosecute an action or proceeding in any court in this state, in his capacity as executor or administrator, in like manner and under like restrictions as a nonresident is permitted to sue."  

This statute is as broad in its provisions and contains as few restrictions as any of those which have been adopted.

In those states which have not enacted such legislation, the common-law rules discussed in the preceding portions of this chapter are still in force. As a matter of

---


93 Page's Ohio Rev. Code, sec. 2113.75.
fact, at least two states have by statute expressly adopted the general common-law rule as stated by Story.\(^94\)

The right to sue given to foreign personal representatives by these statutes may be conditioned on fulfilling certain requirements. About half of the statutes expressly require that the authority of the foreign personal representative, an authenticated or certified copy of the letters testamentary or letters of administration, be filed in the probate court of the county in which the action is filed.\(^95\) Under some statutes, the letters must be filed prior to the commencement of the action.\(^96\) In other states, they may be filed at any time before the hearing;\(^97\) while in still other jurisdictions, filing the letters at any time before judgment is sufficient.\(^98\) Even in those states where the statute is silent about filing letters, the foreign personal representative would have to present an authenticated copy during trial as proof of his right to the claim.

A half dozen of the statutes also require that the foreign personal representative post bond before he will be allowed to sue. If the statute requires that a


\(^{95}\) A typical provision is found in Minn. Stat. Ann., sec. 573.05. "... Before commencing such action, he shall file an authenticated copy of his appointment as executor or administrator with the probate court of the county in which such action is to be commenced."

\(^{96}\) Ibid.


\(^{98}\) E.g., 62 Ala. 151 (1940). "Any executor or administrator... may maintain suits and recover or receive property in this state:

"By recording at any time before judgment, or the receipt of property, a copy of his letters, duly authenticated according to the laws of the United States, in the office of the judge of probate of the country in which such suit is brought or property received. ..."

Campbell v. Hughes, 155 Ala. 591, 47 So. 45 (1908).
bond be posted, this must be done as a condition precedent to suit.\textsuperscript{99} The amount of the bond may be only enough to cover costs\textsuperscript{100} or it may be an amount equal to the value of the assets recovered by the foreign administrator.\textsuperscript{101} The statute may make the posting of the bond mandatory,\textsuperscript{102} or it may rest in the discretion of the court.\textsuperscript{103} The bond, if it is in the amount of the assets which the foreign administrator recovers, will be available to local creditors who are prejudiced by the removal of assets from the jurisdiction. Presumably, as long as these creditors are permitted to participate equally with all other creditors in the payment of claims in the jurisdiction where the personal representative was appointed, they are not sufficiently harmed so that they could recover on the bond.

One problem raised by such statutes is which foreign personal representative will be permitted to sue. Under a statute like the Ohio statute quoted \textit{supra}, apparently any foreign personal representative can sue. However, about half of the statutes limit the right to sue to personal representatives appointed in some state or territory of the United States.\textsuperscript{104} Where such a statute is in effect, a personal representative who was appointed in a foreign country would be subject to the common-

\textsuperscript{100} Burns Ind. Stat., sec. 7-753 (1953); Smith Hurd Ill. Stat., Ch. 3, sec. 419.
\textsuperscript{101} 62 Ala. 151 (1940).
\textsuperscript{103} Smith Hurd Ill. Stat., Ch. 3, sec. 419.
CAPACITY TO SUE

law rules concerning suits. Several statutes permit foreign personal representatives to sue only when the decedent was a nonresident of the state. Some of the states either by statute or by construing decisions limit the personal representatives who may sue to domiciliary representatives.

The function of such statutes must obviously be to eliminate as far as possible unnecessary multiplicity of administrations and to secure a unified administration. Therefore, a statute which permits suits by foreign personal representatives may well designate one personal representative who will be entitled to collect assets of the estate which are in the jurisdiction. If there is more than one personal representative, a provision which permits only the domiciliary or principal personal representative to sue would seem to accomplish the purpose of unifying the administration.

On the other hand, there is less reason for limiting personal representatives who may sue to those appointed in the United States or its territories. The only conceivable reason for making such a distinction is to prevent local creditors from having to go to distant lands with diverse legal systems in order to present their claims. That such a policy argument is not too persuasive is shown by the fact that a number of statutes permit suit by an executor or administrator from a foreign country. Whether the policy of pro-

\[\text{References:}\]

tecting local creditors by separate administrations should outweigh the policy of a unified administration will be considered later.109

A second problem is raised by these statutes in connection with the existence of locally appointed administrators. Should the foreign personal representative be allowed to sue if a local administrator has already been appointed? A few statutes provide expressly that no such suit will be permitted if a local administrator is already in existence.110 Colorado requires a foreign personal representative who wants to sue to give notice to the local administrator. If the local administrator then does not sue, the foreign personal representative may.111 The rest of the statutes are silent on this problem.

Another question arises when an ancillary administrator is appointed after a suit has been begun by a foreign personal representative. A few statutes provide a solution for this problem. They say either that the local administrator will automatically be substituted as plaintiff in the action112 or else that the local administrator may intervene if creditors will be harmed by the removal of assets from the state.113

The purpose of these statutes is to eliminate the necessity for an ancillary administration in the state. If there is an ancillary administration, there will be all the expense, delay, and duplication which the statute sought to avoid. Therefore, since the purpose of

109 See infra Chapter VI, pp. 170-179.
113 62 Ala. 152 (1940).
the act cannot be accomplished, there is no reason not to provide that, in the event of a local administration, the assets should be collected and administered by the administrator appointed in the jurisdiction.

There is a question as to the value of the statutes which have been passed in the United States. They are designed to achieve a unified administration. However, since only about half the states have enacted such legislation, any estate of much size and consisting of widely scattered property interests cannot have a single administration. There will still have to be ancillary proceedings in order to collect assets in those states which retain the common law. Therefore, the piecemeal legislation in this country has not accomplished its purpose. Nonetheless, the statutes serve a valuable function of saving expense by providing a relatively quick, easy, and inexpensive way to collect assets in a foreign jurisdiction when the assistance of the courts is needed.

The English have handled this problem of a legislative remedy for the common-law rules in regard to foreign personal representatives in a somewhat different manner. In the Colonial Probates Act of 1892, 114 a mechanism allowing foreign personal representatives to sue was set up. The act is a reciprocal one and only applies to those British colonies which give the same effect to English administrators acting in their jurisdictions. 115 Any personal representative from one of the complying colonies may apply to a probate court in the United Kingdom to have his letters resealed by

114 55 & 56 Vict. c. 6.
115 The Colonies which have complied with the act may be found listed in the 1954 Cumulative Supplement to Halsbury’s LAWS OF ENGLAND, paragraph 371.
that court and thereafter the letters "shall be of like force and effect, and have the same operation in the United Kingdom, as if granted by that court." The court may require that adequate security be given to insure the payment of debts due to creditors of decedent residing in the United Kingdom.

The English statute is in some respects preferable to the statutes passed in the United States which were designed to have the same effect. After complying with the English Act, the foreign representative is in exactly the same position as a local administrator. This means that not only may he sue to recover assets in the English courts, but that debtors of the decedent residing in England may safely turn over assets to him without fear of possible consequences. The interests of local creditors can be as effectively protected under this statute as they can by a rigid application of the common-law rule. However, this legislation is subject to certain criticisms. First, it applies only to personal representatives from British colonies and not to those from foreign countries. Thus in the case of a decedent whose principal administration is in a foreign country and who also has property in England, no unified administration is possible for his estate under this act. Secondly, the act does not make it clear that the principal or domiciliary administrator is to be the only personal representative who can take advantage of this provision. It seems to me that the achievement of a unified administration requires that the legislation specify a certain foreign personal representative who will be entitled to act in the jurisdiction. The English

116 55 & 56 Vict. c. 6, sec. 2.
117 For discussion of this problem, see infra Chapter V.
scheme still seems better adapted to achieving a unified administration than the statutes which merely give the foreign personal representative the power to sue.

6. **Federal Jurisdiction over Foreign Personal Representatives**

Nearly any analysis of conflict of laws problems in the United States must take into account not only the separate legal orders of the various states, but the dualism that results from imposition of a federal judiciary on top of the state court systems. Since one of the main sources of jurisdiction in the federal courts is the case involving diversity of citizenship where the amount involved exceeds $3,000, many of the actions which are brought by foreign personal representatives will be tried in the federal courts. A typical case would be that in which an administrator appointed in New York sues a debtor of the decedent residing in Michigan on a negotiable instrument in his possession. If the amount of the note is in excess of $3,000, the action will probably be filed in one of the Federal District Courts for Michigan. In such cases, what rules of law will the federal court apply in regard to actions brought by foreign personal representatives?

The early federal cases decided on this point refuse to permit suit on the general statement that in the absence of statute the common law does not allow a personal representative to sue outside the state of his appointment. It is not clear what statutory or common law is to govern or what should be the effect of a statute passed in the state where the federal court was sitting

---

which permitted such suits. However, in the case of *Hayes v. Pratt*,\(^{120}\) an executor who had qualified in Pennsylvania brought suit in a federal court in New Jersey to compel a local administrator to account. The Supreme Court of the United States permitted the suit and rested its decision on the New Jersey statute which gave foreign personal representatives the right to sue. Apparently this decision meant that the capacity of a foreign personal representative to sue would be determined by the law of the state in which the federal court sits.

Any uncertainty which may have existed as regards the law applicable in the federal courts on this question has been cleared up by Rule 17(b) of the Federal Rules of Civil Procedure.\(^ {121}\)

"(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued, shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . ."

This rule means that the capacity of the foreign personal representative to sue will be determined by reference to the law of the state where the federal court is located.\(^ {122}\) If that law retains the common-law rule, he will be permitted to sue in a federal court only when he comes within one of the recognized exceptions. If, on the other hand, that law has a statute which

\(^{120}\) 147 U.S. 557, 13 S.Ct. 503, 37 L.Ed. 279 (1893).

\(^{121}\) 28 U.S.C.A., Rule 17 (b).

permits foreign personal representatives to sue, he may do so in the federal as well as in the state courts by complying with the conditions of the statute.

7. Summary

The law in regard to capacity of foreign personal representatives to sue is in an unsatisfactory state. This arises both from uncertainty in many instances as to possible results and from lack of uniformity which makes the rules very complex. Not quite half of the states have adopted legislative remedies for the situation and now permit foreign personal representatives to sue. This simplifies the situation a good deal. If a decedent leaves assets in such a jurisdiction, his personal representative should have no difficulty in collecting the assets there, and to that extent an ancillary administration can be avoided. In the remaining states, the common-law rules are still in force. This is where the uncertainty arises because so many exceptions have been engrafted upon the rule. The foreign personal representative will be permitted to sue in those cases (1) where the defendant fails to object to his lack of capacity, (2) where he sues on a cause of action as an individual, such as on a judgment, a negotiable instrument, a contract made by him, or to recover property which he has reduced to possession, and (3) in the limited cases where he can show that failure to permit him to sue will cause gross injustice. Certainly these exceptions completely discredit the explanation for the common-law rule that a personal representative is an artificial creature who can have no existence outside the legal system under which he was appointed. The other explanation which has been given to support the common-law rule is the policy of protecting local
FOREIGN PERSONAL REPRESENTATIVES

creditors. However, in view of the exceptions which have been made and the legislation which had been adopted, it is doubtful whether in even a majority of the instances, creditors in the United States are protected against removal of decedent's assets from the jurisdiction. If a rule is based on a policy which is effectuated less than half the time, the question is raised whether the policy is strong enough to support the rule.
CHAPTER III

Liability of a Foreign Personal Representative to be Sued

I. GENERAL RULE AT COMMON LAW

IT IS unquestionably the general common-law rule that a personal representative cannot be sued outside the state of his appointment. This is recognized in the United States, England, and the majority of the Commonwealth countries.

The cases in the United States abound with statements that "a foreign executor or administrator can neither sue nor be sued outside the state of his appointment." This connection between the capacity of a foreign personal representative to sue and his liability to be sued indicates the feeling of many courts that the

1 Beale, A TREATISE ON THE CONFLICT OF LAWS, 1552 (1916). See cases cited in note 3.

Contra: Armstrong v. Newey, 17 Vict. L. R. 734 (1891). "In my opinion, where a foreign administrator is within the jurisdiction of this Court, he is liable to be sued by one the next-of-kin for an account and administration, and the rule is not confined to the case where part of the estate is also in the colony ...."
rules are corollaries based on the same reasoning. This reasoning represents the traditional explanation that a personal representative is the creature of the legal order of a state and thus cannot have the power to act outside its boundaries. That this was not a satisfactory explanation of the capacity of a foreign administrator to sue was seen in the preceding chapter. Is it any more satisfactory in regard to the rule respecting liability to suit?

In order to appreciate the difference between suits by foreign administrators and suits against them, it must be remembered that in regard to suits by a foreign administrator, he is the party seeking relief. The party whom the court must compel to furnish the relief is an ordinary defendant within the jurisdiction of the court. The court thus has the power to give a valid judgment, and the only question to be decided is whether the foreign administrator is the proper party to seek the relief. Generally, the courts have decided that he is not in order to effectuate the policy of protecting local creditors. This is a very different problem from the one with which this chapter is concerned, i.e., where the relief must come from the foreign administrator.

The problem of analysis in regard to suits brought against foreign administrators and executors is a difficult and complex one. One of the factors which is largely responsible for this is the fact that the individual who is the personal representative may be treated as

5 Typical of such thinking is the statement in Mellus v. Thompson, Fed. Cas. No. 9,405 (C.C. Mass. 1858): "He cannot sue for the personal estate of the testator out of the jurisdiction of the power by which the letters of administration were granted, and upon the same principle and for the same reason he cannot be sued or compelled to defend a suit in any jurisdiction to which his authority as executor does not extend."

6 See supra Chapter II, pp. 31-32.
two legal persons. First, he is the ordinary legal personality which always attaches to a human being. In this personality, if he is present in any jurisdiction, he may be personally served, and the court will then have jurisdiction to render a valid personal judgment against him. Secondly, when he qualifies as personal representative of a decedent’s estate, he may be said to be the legal person whom we designate as the personal representative. Thus, we have the apparent phenomenon of two legal persons attached to one biological person. The problem here considered arises when the biological person enters a foreign state and is personally served in an action based on his representative character. May the court in that jurisdiction render a valid judgment against him as a personal representative? The courts have uniformly held that they may not and have explained the result by the foregoing legal schizophrenia. They say that the representative personality cannot exist outside the jurisdiction in which he was appointed. Since the person as representative was not within the jurisdiction, the court did not obtain jurisdiction by personal service.

Actually, the division of legal personality made in these cases is neither necessary nor valuable in analyzing

---

7 Beale, op. cit., supra note 1 at 339.
8 Hargrave v. Turner Lumber Co., 194 La. 287, 193 So. 648 (1940). “While Alcus, one of the executors of the estate of Charles B. Box [who qualified in Mississippi], is present in the State of Louisiana, he is present here as an individual, but is not present in his official capacity as executor. It is well settled that an executor as an individual and as an official is, in the eyes of the law, two separate and distinct persons...”; McMaster v. Gould, 240 N.Y. 379, 148 N.E. 556, 40 A.L.R. 792 (1925).
9 McMaster v. Gould, 240 N.Y. 379, 148 N.E. 556, 40 A.L.R. 792 (1925). “The foreign administrator as the official of another sovereignty exists only by virtue of the statute of another state and has no legal existence in this State.”
the problems in this area. The individual has certain legal qualities as an ordinary human being. With these we are familiar. When he is appointed as personal representative, certain other legal properties are added. Our concern is to determine what these latter legal qualities are by an examination of how the courts actually treat the foreign personal representative in various fact situations. When we have obtained a general picture of these legal properties peculiar to the personal representative, there is no need to personify them. These qualities will be determined by the decision of two courts, the first being the foreign forum which does or does not entertain jurisdiction over the personal representative, and the second being the home forum or court of appointment which may be asked to give effect to action in the foreign forum.

Theoretically, a legal order can authorize its courts to try actions and render judgments against any person it chooses without complying with any of the notions of jurisdiction with which we are familiar. Such a judgment would be a valid one in the forum in which it was rendered. Thus, a state could provide that foreign personal representatives are subject to the jurisdiction of its courts and that valid judgments can be rendered against them. The exceptional cases permitting such suits indicate that such a power exists. However, the states have not generally authorized the courts to exercise this power, and our question is why they have not done so.

In order to understand the problems involved, it must

10 In the United States, the "due process" clauses of the United States Constitution would require certain minimum standards of jurisdictional procedures such as notice reasonably calculated to apprise the defendant of the action and an opportunity to appear and be heard.
be understood that the administration of an estate is essentially an in rem proceeding. Its purpose is to collect the property of the decedent, pay his debts, and then distribute the remaining property among his successors. The property of the decedent is the subject matter of the administration, and the personal representative is merely the conservator of that property. Since the personal representative in Anglo-American law, unlike the Roman heres and the universal successor in the civil law, is not personally liable for the debts of the decedent, any liability must be satisfied out of decedent's property. Thus even actions brought against the foreign personal representative on personal obligations owed to the plaintiff by the decedent partake of the nature of an in rem proceeding because they


The statements that a probate proceeding is a proceeding in rem are usually made in connection with certain constitutional problems such as the requirement of notice in a probate proceeding and the question of the extent to which parties are bound by determinations in such a proceeding. For this purpose, the probate proceeding may be both in rem and in personam. It is in rem to the extent that all interested parties will be foreclosed from relitigating certain issues such as the validity of the will and its admission to probate when notice is given by publication. It is in personam to the extent that all parties who are within the personal jurisdiction of the probate court will be bound by the decision made by that court on any issues raised in the proceeding. Torrey v. Bruner, supra.

The discussion in the text concerning the in rem nature of an administration is not concerned with these problems, but is merely used to point up certain problems of enforcement of judgments against a personal representative when he is sued in his representative character and when the object of the suit is to reach property of the estate.

12 See supra Chapter I, p. 4.
13 See supra Chapter I, p. 6.
must be satisfied, if at all, out of some property of the decedent.

The problems in this chapter can best be made clear by asking what makes a judgment a valuable thing. From a practical point of view, the creditor of a decedent who sues a personal representative in a foreign jurisdiction is not interested in securing a judgment in and of itself, but he is vitally concerned in getting his debt paid. In other words, he wants to know whether the judgment can be satisfied. Therefore, our first question in attempting to understand the rules developed in this area is whether the forum can enforce a judgment which it renders against a foreign personal representative.

There is no problem as to the effect of a judgment in rem as against a foreign personal representative. The court has the property of decedent in its jurisdiction, and any judgment it renders as to that property will bind interested parties, including the foreign personal representative.

The real problem arises in cases of what would have been an action for a personal judgment for money if brought against the decedent in his lifetime. This is the common action brought against an administrator by creditors of the decedent or persons who have tort claims against the decedent. One of the reasons for not granting a judgment in such a case against a foreign personal representative is the difficulty of enforcement. If the decedent has property in the jurisdiction, that property might be executed on to satisfy the judgment. However, the decedent usually has little or no property in the jurisdiction where a suit is brought.

against a foreign personal representative. Instead, most of the assets of the estate will be in the state where he was appointed and where he will have collected them. Thus, though the forum may render a judgment against a foreign administrator on a personal obligation of the decedent, that judgment would be worthless unless given effect in the state of principal administration. Such effect will not be given. The second forum is not required to give effect to such a judgment under the "full faith and credit" clause, because it is said that the first court was without jurisdiction over the foreign personal representative. Since there is this practical difficulty of enforcing the judgment, the courts, being reluctant to grant worthless judgments, have refused to entertain actions against foreign executors and administrators.

This points up the fact that the analysis of cases in this area has a dual aspect. The first is the question of the positive law of the forum. Will it permit a suit against a foreign personal representative? The second aspect is that if the forum renders a judgment for money against a foreign personal representative, will that judgment be given effect in other states? If no

16 In re Thompson's Estate, 339 Mo. 410, 97 S.W.(2d) 93 (1936).
17 See cases cited supra note 2.
18 In the interesting New Zealand case, In re Voet, [1949] New Zealand L.R. 742, the court based its refusal to permit an action against a foreign personal representative on the following statement, which it said was based on Cheshire: "In any event, it does not seem to me that a judgment of this Court, in such circumstances would have the essential quality of effectiveness, and effectiveness is a paramount element of jurisdiction . . . ." The statement does not seem entirely correct, because the forum may authorize its courts to render a judgment even though it will not be effective outside its territory. The lack of effectiveness will not defeat the jurisdiction, but it is a strong reason why the legal system will not authorize its courts to take jurisdiction.
such effect is given, then the judgment is, as a practical matter, generally worthless.

There is a second reason for refusing to allow suits against foreign personal representatives. This is a policy consideration. A personal representative is an official of the probate court which appointed him. His function is to collect and conserve the assets of the decedent. He works under the close supervision of that probate court, and he must account to it for all assets collected. If the forum renders a judgment against a foreign administrator, it will affect assets for which he must account to the court which appointed him. The courts refrain from granting such judgments because they would be an interference with the activities of another tribunal. Such a judgment might start a dangerous precedent whereby several courts would be assuming jurisdiction over a personal representative and telling him how to dispose of the assets in his possession. The representative would be placed in an impossible position of trying to decide which court to obey. This would cause havoc in efficient estate administration. Rather than face the likelihood of such consequences, the courts refuse to entertain actions against foreign personal representatives and thus leave the plaintiff to his remedy in the court which appointed the personal representative.

The reasoning behind this policy is clearly brought out in the leading case on the subject, *Vaughan v. Northrup*.

19 In that case, a debt due to the decedent from the United States was paid in the District of Columbia to his administrator appointed in Kentucky. Heirs of the decedent secured personal service on the administrator in the District of Columbia and sued him for their distributive shares of the estate. This suit was not

19 15 Pet. 1, 10 L.Ed. 639 (U.S. 1841).
permitted, and Mr. Justice Story speaking for the court said:

"... the administrator is exclusively bound to account for all the assets which he receives under and in virtue of his administration to the proper tribunals of the government from which he derives his authority; and the tribunals of other states have no right to interfere with or to control the application of those assets. . . ."\(^{20}\)

An administrator or executor can always be sued in the state which appoints him.\(^{21}\) Therefore, if a personal representative appointed in one state qualifies in another state as ancillary administrator, he will always be liable to suit in the second state.\(^{22}\) The extent of his liability as ancillary administrator in the second state will be limited to the assets being administered in the ancillary administration. The common-law rules apply only when the personal representative appointed in one state is sued in another in which he has not qualified as ancillary administrator.

While the general common-law proposition has been laid down quite broadly and applied rather rigidly, there are exceptional cases which hold that a foreign administrator or executor can be sued. While these exceptions are not so important as the ones which have been made to the rule regarding capacity to sue, they are still of sufficient importance to merit detailed consideration.

(a) *Jurisdiction in rem*

One of the recognized bases of jurisdiction is property within the jurisdiction of the court. The court which has

\(^{20}\) 15 Pet. at 5.
\(^{21}\) Beale, *op. cit., supra* note 1 at 1529.
control over the property may determine the interests of claimants in this property. If the decedent owned property in the jurisdiction and his personal representative was appointed in another jurisdiction, may the court determine the interests of the estate as represented by the foreign personal representative in that property?

Clearly there is no problem if the property of the decedent had its situs in the jurisdiction at the time of his death. The court has jurisdiction to determine title to that property.\(^2\) Thus, in a true proceeding in rem such as a libel in admiralty or a confiscation of contraband, the interest of the estate could be foreclosed even though its only representative were a foreign appointed executor or administrator. Likewise, a mortgage given on land owned by the decedent could be foreclosed by the courts where the land lies and the interests of the estate as represented by the foreign executor or administrator cut off.\(^3\) Also, it has been held that the forum will assume jurisdiction in an action brought against a foreign personal representative to rescind a sale of stock in a domestic corporation.\(^4\)

The result in this situation is based on the theory that the stock had its situs as property in the state of incorporation, and the court may base its jurisdiction on its control over this property. Such cases do not represent situations where jurisdiction is being sought directly or personally over the foreign personal repre-

---


LIABILITY TO BE SUED

sentative. The only basis needed for jurisdiction is control over the property, and any control exercised over the interests of the foreign personal representative is only incidental. The only requirement related to foreign personal representatives would be that the requirements of procedural due process are complied with.26

One interesting problem concerning the jurisdiction of the court to entertain an action in rem in regard to movable property arises where the property is brought into the state by a foreign personal representative after the date of the decedent's death. Most cases permit the court to take jurisdiction based on this property.27 This result seems incorrect. The court unquestionably has the power to make the adjudication, but it should refrain from doing so. The foreign personal representative got title to the property when he took possession of it in the state of his appointment, and he will be required to account for it in the probate court of that place of residence.

26 The foreign administrator should have an opportunity to appear and be heard so that the estate can be represented at the trial. Also, there should be a means of notice reasonably designed to inform him of the action. The ordinary service by publication should be sufficient. It has uniformly been held that such notice is adequate in the normal proceeding in rem, and it has been held a number of times that such notice is sufficient in a probate proceeding. See supra note 11. Some doubt as to the adequacy of this notice is raised by the case of Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 70 S.Ct. 652 (1949). This involved an accounting of a common trust fund composed of a number of small trusts. The Supreme Court held that notice by publication was not sufficient as to the beneficiaries of the trust to constitute due process. Such notice was adequate to beneficiaries with unknown addresses, but those whose place of residence was known would have to be notified by mail. This requirement might possibly be extended to actions involving a decedent's property when there is an attempt to cut off the interests of heirs and beneficiaries under a will.

27 In re Paine's Estate, 128 Fla. 151, 174 So. 430 (1937); Baker v. Smith, 3 Metcalf 264 (Ky. 1860); Fugate v. Moore, 86 Va. 1045 (1890).

Contra: Brownlee v. Lockwood, 20 N.J.Eq. 239 (1869).
state. If the forum does adjudicate as to this property, it will interfere with the activities of the tribunal to which the foreign personal representative must account. The policy of not interfering with the probate court that appointed the foreign personal representative, which is responsible in part for the rule prohibiting suits brought against foreign executors and administrators, should apply here. Once a personal representative has reduced property of the decedent to his possession and has become obligated to account for it, that property should have the same immunity from suit outside the state as is enjoyed by the foreign executor or administrator.

Another interesting problem is raised in connection with actions quasi-in-rem. May a person who has a personal cause of action against a decedent attach property of the decedent in a state where there has been no administration and recover a valid judgment to be satisfied out of that property? It would seem that the state has that power under the doctrine developed in *Pennoyer v. Neff.* 28 There is some American authority which seems to permit such a suit. 29 However, in the case of *Courtney v. Pradt,* 30 which was a garnishment action to satisfy a judgment for money against the decedent where the defendant in the garnishment action was a foreign executor, the court refused to permit the action. It said that since defendant, who was a foreign executor, could not be sued in the jurisdiction, debtors of the estate could not be garnished. This

---

28 95 U.S. 714, 24 L.Ed. 565 (1877).
30 160 F. 561 (6th Cir. 1908).
LIABILITY TO BE SUED

seems to me to be the correct result in all attachment and garnishment proceedings brought against a foreign personal representative. The purpose of such claims is in reality to collect personal obligations. They are not, despite the language of the courts to that effect,\(^{31}\) to determine interests in property. The property is actually to satisfy a personal judgment whether it is attached at the commencement of the action or executed on after judgment. If the estate as represented by the foreign administrator is not subject to suit in the jurisdiction even if he is personally present, it seems to me improper to subject any property or debts of the estate to the payment of such obligations without an ancillary administration in the state and the appointment of a local administrator to administer the assets.

There is another argument against the quasi-in-rem procedure against a foreign personal representative. Most states will not permit an attachment or levy of execution to be made against a decedent’s property when the estate is a domestic one,\(^{32}\) but instead will require that the claimant present his claim to the probate court and receive equal payment with other creditors. It is very probable that the forum will construe its attachment statute as not permitting the attachment of a decedent’s property, even when the only administration on the estate is in a foreign jurisdiction. The purpose of the accepted probate practice in each state of requiring local administrators to collect all the assets of decedent and then pay all the claims against the estate is to carry out the policy of paying all decedent’s creditors equally. To permit an action

\(^{31}\) E.g., see Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877).

\(^{32}\) See cases cited Chapter I, note 74.
quasi-in-rem by attachment or garnishment gives the creditor or tort claimant a preference over other creditors. It would seem preferable to require that the plaintiff file his claim in the court which appointed the personal representative and thus share equally with decedent's other creditors, or if the state insists on retaining decedent's property in the state to protect local creditors, the claimant should be required to have an ancillary administration taken out and present his claim to the ancillary administrator along with any other local creditors.

One argument may be raised in favor of the quasi-in-rem procedure, and, for that matter, it might justify any action against a foreign personal representative. A plaintiff who has a tort claim which must be tried or a contract claim which has to be proved may find it inconvenient to establish his claim in the state of administration. It may be impossible for him to transport his witnesses or other evidence to the place of domiciliary administration, but he can establish his claim conveniently in the forum if he can get jurisdiction by attaching property or garnisheeing a resident debtor of decedent. This sort of forum non conveniens contention is not too convincing, since some inconvenience in establishing claims against an estate must accrue to all parties who have dealt with a person who dies. Henceforward, the problem is to find property of the decedent to satisfy claims and on which to base jurisdiction. If there is no property in the convenient state, jurisdiction cannot be obtained by attachment or garnishment. If there is property there, an ancillary administration can be obtained by the claimant, and he can then present his claim to the ancillary administrator.
From the foregoing discussion, it should be apparent that the state has the power to subject any of the decedent’s property within its territory to the payment of any claims against the decedent. However, this power should not be exercised. The only jurisdiction in rem which the forum should assume in the absence of an administration in the state would be when it is necessary to determine the title to some *res* in the jurisdiction. This will always have to occur in the case of real property in the state, because no other forum can determine that question. It will also occasionally be necessary in regard to personal property in replevin actions. In such cases the foreign personal representative is only a party to the extent that the estate has some claim in the property which may be foreclosed.

*(b) Fraudulent removal of assets from the state of administration*

In certain situations, foreign personal representatives have been held subject to the jurisdiction of the forum in proceedings which partake both of the nature of the proceeding in rem and the action in personam. When a personal representative is appointed in a foreign jurisdiction, he may collect the assets there, and if they are movables, such as cash, securities, or jewelry, he may take them into another state. This possibility seems to occur more often when the personal representative is not a resident of the state which appointed him, which is probably one of the major reasons why so many states have passed statutes which require the personal representative to be a resident.33 As long as the foreign personal representative remains in another state, the probate court which appointed him as personal repre-

33 See *supra* Chapter II, p. 34.
representative will not have any effective control over him as regards the assets of the estate. Under the doctrine of *Michigan Trust Co. v. Ferry*, the court which appointed him may retain personal jurisdiction over the personal representative and thus could render a personal judgment against him which would have to be given effect in the state where the personal representative now resides. However, the court of appointment would have difficulty in determining the personal liability of a nonresident executor or administrator without having an accounting and a finding as to the extent to which the assets have been dissipated. In many situations, the heirs, beneficiaries, or creditors will require quicker relief in order that the assets are not wasted, and the only court which can furnish that relief would be those of the state into which the personal representative had removed the assets. In such cases, a court of equity may require the foreign personal representative to account. It certainly has the power to do this. There are the assets within the jurisdiction on which the court can impress a trust. More particularly, the court will have personal jurisdiction over the individual who is personal representative. It will treat him as a trustee who has mismanaged trust funds, and he will be required to account as a trustee. This individual can be forced to perform the required acts by the contempt power of the equity court.

There are limitations on the exercise of this jurisdiction. The foreign personal representative must have removed the assets of the estate from the state of

---

34 228 U.S. 346, 33 S.Ct. 550, 57 L.Ed. 867 (1913).
35 Falke v. Terry, 32 Colo. 85, 75 P. 425 (1903); In re Paine’s Estate, 128 Fla. 151, 174 So. 430 (1937); In re Appleton’s Estate, 81 D. & C. 85 (Pa. 1951); Tunstall v. Pollard’s Adm’r, 2 Leigh 1 (Va. 1840).
administration into the forum. If the assets are still in the control of the original probate court, it can remove the recalcitrant personal representative and appoint a new administrator. This is an adequate remedy, and the equitable remedy which is extraordinary will be refused.\(^{36}\) Also, there must be evidence of some fraudulent conduct on the part of the personal representative. Even though he has removed the assets from the state of administration, there is no danger to heirs and creditors as long as he is willing to obey the instructions of the court which appointed him. Conversion of the assets to his own use or waste of the assets would certainly be sufficient grounds to secure this equitable remedy. In such events the court of equity in the forum will treat the personal representative as the holder of trust funds who has violated the trust and will require him to account for those funds.

\((c)\) Jurisdiction by consent

There is no question that an ordinary individual by making a general appearance in an action brought against him confers jurisdiction on the court by consent. May a foreign personal representative by a general appearance confer jurisdiction on the forum to render a judgment against him? The majority of cases say that he cannot,\(^{37}\) although there is respectable authority which will permit the foreign executor or administrator

\(^{36}\) Falke v. Terry, 32 Colo. 85, 75 P. 425 (1903).

to appear and thereby waive his objection to the juris-
diction.38

The reasoning which supports the rule as regards
jurisdiction based on appearance by an individual is
this. The defendant had the opportunity to stay outside
the state or to object to the jurisdiction of the court by a
special appearance at the beginning of the action. If he
elects to try the action on its merits, has a fair trial, and
judgment goes against him, he should be estopped from
denying the jurisdiction of the court. To hold otherwise
would allow him to speculate on the outcome of the
trial, and this would be unfair to the plaintiff. Does this
reasoning apply with equal force to an appearance made
by a foreign personal representative?

It must be remembered that the foreign personal
representative as a representative personality is far
different from an individual as such. He represents the
estate which is under the control of the foreign tribunal
which appointed him. The consent of the representative
when he appears in court is not to bind himself in-
dividually, but is an attempt to bind the estate so that
the judgment may be satisfied out of property in the
control of the appointing court. Thus, the important
consent to obtain is that of the court which controls the
assets of the estate. This must be obtained when the
judgment entered against a consenting foreign ad-
ministrator is presented in the state of administration
as a claim against the estate. It is extremely significant
that every case which has treated appearance by a
foreign administrator or executor as conferring juris-
diction has been in the forum where the action was

originally brought,\textsuperscript{39} whereas in every case where the judgment rendered against a consenting foreign representative has been presented in the state of administration, that court has refused to give effect to it.\textsuperscript{40}

The majority rule is the preferable one. This is for the same reasons for which judgments against foreign personal representatives generally are not granted, i.e., the ineffectiveness of the judgment outside the forum and the potential interference with the activities of the tribunal which is administering the estate. The forum should refuse to entertain such a suit and instead leave the plaintiff to his remedies in the courts of the state where the administration is being had.

This type of case frequently arises when a personal action has been begun against a nonresident defendant, and the defendant dies before the court can render judgment in the case. A personal representative is appointed in the state where the decedent was domiciled when he died, and it is sought to substitute him as defendant in the action. The personal jurisdiction which the forum had over the decedent ceases at his death, and it is necessary to substitute the personal representative before a valid judgment can be rendered which will be satisfied out of the decedent's property. Therefore, the court must secure jurisdiction over the personal representative who was appointed in another jurisdiction. An effort to do so by service by publication is not adequate,\textsuperscript{41} nor would personal service in the state confer jurisdiction.\textsuperscript{42} One alternative would be for the personal

\textsuperscript{39} See cases cited supra note 38.

\textsuperscript{40} Jefferson v. Beall, 117 Ala. 436, 23 So. 44 (1897); Judy v. Kelley, 11 Ill. 211 (1849); In re Thompson's Estate, 339 Mo. 410, 97 S.W.(2d) 93 (1936).

\textsuperscript{41} Giampalo v. Taylor, 335 Pa. 121, 6 A.(2d) 499 (1939).

\textsuperscript{42} See cases cited supra note 8.
representative to appear and defend the action, but it has generally been held that an appearance in the action is not sufficient to bind the foreign administrator in a suit begun against his decedent. 43

Thus far, we have been considering the case where judgment has been rendered against the defendant foreign representative when he appears in the forum, and the effects of such a judgment. Will the result be the same when the plaintiff sues a foreign personal representative who makes a general appearance, and then judgment is rendered for the defendant representative? Will this judgment serve as a bar in the state of administration on the same cause of action? In the case of *Jasper v. Batt*, 44 the Supreme Court of Arizona held that the plaintiff was bound by a judgment in favor of the defendant who was a foreign executrix. At first blush, this result seems highly illogical. The defendant would not generally be bound by the judgment, but the plaintiff is. It must be remembered that the foreign representative is appearing as the representative of the foreign tribunal administering the estate, while the plaintiff appears as an individual. Although the defendant cannot bind the estate, that is no reason why the plaintiff cannot bind himself. The plaintiff knew that the defendant was a foreign administrator and thus was not subject to the jurisdiction of the court even if the action were defended. If he insisted on trying the action in the forum, had a fair trial, and the verdict was against him, he should be estopped from denying that the court he chose was without jurisdiction. This is the principle on which

43 Greer v. Ferguson, 56 Ark. 324, 19 S.W. 966 (1892); Judy v. Kelley, 11 Ill. 211 (1849).
44 76 Ariz. 328, 264 P.(2d) 409 (1953).
LIABILITY TO BE SUED

res judicata is founded. A party who has had a fair adjudication of his rights should not be entitled to have the matter relitigated if he is dissatisfied with the result.

There is another type of consent problem involved in actions against a foreign personal representative. If the personal representative brings an action in a foreign jurisdiction under one of the common-law exceptions discussed in the previous chapter or under a statute which permits such a suit, is he subject to a counterclaim filed by the defendant? It has been held that both when he sues for a partnership accounting and when he sues on a judgment, the foreign personal representative is subject to counterclaims filed against him. This is because by filing suit he has consented to all the procedure of the forum in connection with that proceeding, which may include counterclaims. If the forum is going to force the defendant to give relief to a foreign administrator suing on behalf of the estate, the defendant ought to be entitled to have his rights as against the estate determined in the same action, if consistent with the procedure of the forum. There is no

45 See supra Chapter II, pp. 35-54.
46 See statutes listed supra Chapter II, note 92.
47 Lacker v. McKechni, 252 F. 403 (7th Cir. 1918).
48 Turner v. Alton Banking & Trust Co., 166 F. (2d) 305 (8th Cir. 1948).
49 The permitting of recovery on a counterclaim in an action brought by a foreign personal representative in this situation must be distinguished from the result when the defendant counterclaimed in the action brought for wrongful death discussed supra p. 61. In the cases discussed in this chapter, the action is brought by the foreign administrator in his representative capacity and it is proper to permit any claims by the defendant against the estate to be the basis of a counterclaim. In the action for wrongful death, the real party in interest is not the estate represented by the foreign administrator, but rather the specified beneficiaries, and they are not responsible for the damages done by decedent so as to be liable on a counterclaim.
authority which has considered the case where a counter-claim was so large that it could not be offset against the judgment in favor of the plaintiff administrator and then that counterclaim was sued on in the state of administration as a judgment against the personal representative. It seems that effect should be given to such a judgment based on a counterclaim. The personal representative works under the close supervision of the court which appointed him, and if that court authorizes him to collect assets by bringing actions in the courts of other jurisdictions, it ought to be prepared to recognize any judgment rendered in that proceeding against the personal representative.

(d) **Statutory Consent**

There is another type of consent problem which is quite interesting. This arises under the nonresident motorist acts. These acts, which have been passed in all the states of the United States,\(^\text{51}\) provide that any nonresident motorist who uses the highways of a state will be deemed to have appointed a specified state official to be his process agent in any action brought against him arising out of an accident which occurred while using the highways of the state.\(^\text{52}\) Service on the

\(^{51}\) See annotation at 18 A.L.R.(2d) 544.

\(^{52}\) An example of such a statute appears in the Annotated Laws of Massachusetts, Ch. 90, sec. 3B:

"The operation by any person, by himself or his agent, of any motor vehicle, whether registered or unregistered, and with or without a license to operate, on any way, or private way if entrance thereto was made from a way, or in any place to which the public has a right of access, in this commonwealth, shall be deemed equivalent to an appointment by such person of the registrar, or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, or his executor or administrator, growing out of any accident or collision in which he or his agent may be involved while operating a motor vehicle on any way, or private way if entrance thereto
designated agent plus actual notice by registered mail to the nonresident defendant is sufficient to give personal jurisdiction in a tort action arising from an automobile accident. This type of statute was held constitutional by the Supreme Court of the United States as it relates to individuals. 53

In the United States, with its highly mobile population and high rate of traffic fatalities, there will be many automobile accidents in which a nonresident driver, who dies as a result of the accident, is at fault. His personal representative will be appointed in the state of his domicile. Some of the nonresident motorist acts provide that the appointment of a service agent arising out of the use of the highways of the state binds not only the nonresident motorist, but his personal representative as well. 54 Can a state, on the basis of service under such a statute, entertain an action against the foreign personal representative of the deceased motorist? The cases are split rather evenly on this question. 55

The leading case which has held that a foreign

was made from a way, or in any place to which the public has a right of access, in this commonwealth, and such operation shall be a signification of an agreement by such person that any such process against him, or his executor or administrator, which is served upon the registrar or his successor in office shall be of the same force and validity as if served upon him personally . . . ."

54 See language in Mass. statute, quoted supra note 52.
55 Those cases which hold that a foreign personal representative is not subject to jurisdiction under such a statute are: Knoop v. Anderson, 71 F. Supp. 832 (N.D. Iowa 1947); Rigutto v. Italian Terrazzo Mosaic Co., 93 F. Supp. 124 (W.D. Pa. 1950); Buttson v. Arnold, 4 F.R.D. 492 (E.D. Pa. 1945); Harris v. Owens, 142 Ohio St. 379, 52 N.E.(2d) 522 (1943).
Those cases which hold that a foreign personal representative is subject to jurisdiction under such a statute are: Oviatt v. Garretson, 205 Ark. 792, 171 S.W.(2d) 287 (1943); Plopa v. Du Pre, 327 Mich. 660, 42 N.W.(2d) 777 (1950); Leighton v. Roper, 300 N.Y. 434, 91 N.E.(2d) 876, 18 A.L.R. (2d) 537 (1950).
personal representative was subject to jurisdiction under a nonresident motorist act was a decision by the New York Court of Appeals in *Leighton v. Roper*.

This case involved an automobile accident occurring in New York in which plaintiff was seriously injured. The driver at fault was an Indiana resident. Plaintiff filed an action for damages and served the Indiana administrator of the deceased driver in compliance with the Nonresident Motorist Act of New York, part of which provided:

"A nonresident operator or owner of a motor vehicle or motor cycle which is involved in an accident or collision in this state shall be deemed to have consented that the appointment of the secretary of state as his true and lawful attorney for the receipt of service of process shall be irrevocable and binding upon his executor or administrator. Where the nonresident motorist has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident motorist in the same manner and on the same notice as is provided in the case of a nonresident motorist. . . ."  

The personal representative appointed in Indiana appeared specially and moved to vacate the service. The court held that the service was valid and that the foreign personal representative was subject to the jurisdiction of the New York courts. It based its decision first on the proposition that a foreign administrator can consent to be sued, which is not a generally accepted principle. Then it argued that the agency created by the decedent did not die with him,

---

57 McKinley's Laws of N.Y., Vehicle and Traffic Law, sec. 52.  
58 See supra pp. 95–98.
because it was for the benefit of third persons and because the legislature had made the agency irrevocable under the state police power. Therefore the agency, even after the death of the principal, continued to bind the personal representative. Whatever the quality of this argument may be, it must be conceded that New York has the power to entertain such a proceeding against a foreign administrator.

In the opinion, the New York Court of Appeals recognized the limitations on this jurisdiction when it said:

“What effects the Indiana courts will be required to give any judgment rendered in this action under the 'full faith and credit' clause of the Federal Constitution, we need not now consider.’”

However, this question which they “need not now consider” represents the crux of the matter. If there were property of the decedent in the state, this type of proceeding would probably be unnecessary. It is only when a state seeks to impose on a nonresident personal liability which must be enforced elsewhere that the service on an agent based on statutory consent is important. Therefore, the vital question is what effect such a judgment would have in the state of administration where it can be enforced. Since all the cases which have considered the question of the effect to be given to a foreign judgment based on consent by a personal representative appointed in the forum have refused to give any such effect, a fortiori, no effect would be given to a judgment based on statutory consent. There is no decision on this question under the “full faith
and credit” clause, so that the Supreme Court of the United States might say that the state of administration is required to give effect to such a judgment. The real question to be decided there would be whether the forum obtained jurisdiction to render a personal judgment against the foreign personal representative by such service in order to bind the estate. It would seem that the decision should be that no such jurisdiction was obtained and consequently that the judgment is not entitled to full faith and credit. If personal service on the representative in the jurisdiction or actual consent by the representative is not sufficient to give personal jurisdiction, it is difficult to see how this type of service is adequate to do so.

(e) Effect of revival statutes

In connection with a previous section in this chapter which discussed actions brought against a foreign personal representative with his consent, the problem was raised as to cases where a personal action was commenced against the decedent, he died during the trial, and it was sought to substitute his foreign personal representative as a defendant. It was seen that the foreign administrator could not consent to such a substitution. The same problem is raised in connection with revival statutes. A typical one is the following:

“No cause or right of action shall be lost or destroyed by the death of any person, but it shall survive in favor of or against the executor or administrator of any such deceased person. No civil action or proceeding shall abate by reason of the death of any party thereto, but it may be continued by or against the executor or administrator of such decedent . . . in case of the death of any party defendant, the plaintiff, within

61 See supra pp. 97–98.
LIABILITY TO BE SUED

one year thereafter, may have a writ of scire facias against such decedent’s executor or administrator to show cause why judgment should not be rendered against him. . . . 62

To make the problem clear, a hypothetical case will be posed. A, a resident of Connecticut, is injured in an automobile accident occurring in New York by the negligence of B, a resident of Rhode Island. A secures personal service on B in Connecticut and commences a personal action for damages against him. Before the case can come to trial and judgment, B dies and C is appointed his administrator in Rhode Island. Under the law of New York, such a cause of action does not survive the death of the defendant, but the Connecticut survival statute provides that in such suits, the cause of action survives the death of the defendant and may be continued against his personal representative. May the Connecticut court substitute C, the Rhode Island administrator, as defendant in this action and render a valid judgment against him?

There are two issues raised by this fact situation. The first is a choice of law problem. Which law should govern the survival of this cause of action, New York or Connecticut? There is no decision which squarely decides the question, but the dictum in Orr v. Ahern63 is helpful. That case involved a fact situation like the hypothetical case posed, except that the death of the wrongdoer occurred before the action was commenced; also it is not clear where the personal representative was appointed, so presumably it was in Connecticut. The actual decision in the case held, first, that the cause of action was created by the law of the place of the wrong

63 107 Conn. 174, 139 A. 691 (1928).
to the plaintiff, which is a well-established proposition. Then it said that this law, the law of New York, provided that in the event of the death of the wrongdoer, the cause of action ceased to exist. Thus when the action was filed in Connecticut, there was no cause of action to sue upon.

In the opinion, however, the court indulged in some dicta which touch on our problem. It said that if the action had been commenced against the wrongdoer prior to his death, the Connecticut revival statute would control instead of the New York law, and the personal representative could be substituted as defendant. This was based on two arguments. First, the revival of an action once it is commenced is a question of remedies rather than a question of substantive rights, and consequently it is determined by the law of the forum. Secondly, it was said that once the action was commenced in the Connecticut courts, a right was created in the forum which could not be destroyed by the law of another state. Thus, it would appear that the Connecticut court would construe its revival statute to apply to the hypothetical case posed and would permit substitution of the personal representative as party defendant. Although the court was prob-

64 Restatement, Conflict of Laws, sec. 384 (1934).
65 107 Conn. at 176. "The locus delicti determined the existence of the cause of action. The locus fori determined the remedy. The place of the injury could not, by legislative or judicial action taken subsequent to our acquiring jurisdiction, take away our jurisdiction over the cause of action which was good when we assumed it . . . ."
66 107 Conn. at 178. "A statute of revivial . . . does not revive a right of action which has ceased in its place of origin; it revives an action for a right which arose in a foreign jurisdiction, but while the right still existed in that jurisdiction the action to secure the right was begun in another forum. The right which the action thus sought to secure became a right in the jurisdiction of the forum as soon as its courts had assumed jurisdiction of it. . . . It then existed by force of the law of the forum."
ably treating the problem of a domestic personal representative, nothing in its language would indicate that it would not apply the same rules in the case of a foreign personal representative.

It seems to me that the dicta in *Orr v. Ahern* are incorrect as to the choice of law problem. In regard to the actual issue in the case, the survival of the cause of action prior to the commencement of the action, the court decided that survival is a question not of remedy but of the substantive right, and applied the foreign law. The Connecticut court seems to feel that the mere commencing of the action changes the situation. Still the question of revival of a suit as well as survival of a cause of actions as necessary a part of the cause of action as any element necessary to establish it. The plaintiff must have a cause of action at the time of judgment as well as when the action is commenced. This cause of action depends for its existence on New York law, since the Connecticut court never contended that Connecticut law would create a cause of action on an automobile accident occurring in New York. If the New York law creates the cause of action, that law should determine when the cause of action ceases to exist. It seems to me that the question of revival of a cause of action should be determined by the same law that determines whether there is originally a cause of action.

The dicta in the case of *Orr v. Ahern* may be treated as applying their revival statute only to domestic representatives. There is no question of their power to do this. The more serious problem is whether the court should construe such a revival statute to apply to foreign personal representatives. There is a fairly strong argument which can be made in favor of such a
construction. After the commencing of the action, the plaintiff may have spent a great deal of time and money in prosecuting his claim. It seems highly unfair that due to the death of the defendant domiciled in another state, he should lose the money and effort already expended and have to relitigate the matter completely in a foreign forum. Also, it may be inconvenient or even impossible for him to transport his witnesses and other evidence to that forum for the trial against the personal representative. However, the uniformity of the cases applying the general common-law prohibition against suing foreign administrators plus the decisions holding that a foreign personal representative cannot consent to jurisdiction in an action begun against the decedent would indicate that the probabilities are very great that a court would construe its revival statute so as not to permit reviving an action against a foreign personal representative.

Assuming that the court does construe its revival statute so as to permit the substitution of a foreign personal representative and the rendering of a judgment against him, this raises the second problem of what effect this judgment will have in the state of administration, Rhode Island. That court would not have to treat it as a judgment against its personal representative because it would consider the Connecticut court as being without jurisdiction over him. Therefore, it would not be required to give full faith and credit to this adjudication. Should it, however, permit the judgment to be presented as a claim in the probate proceeding? There seems to be no serious objection to

---

67 See supra pp. 95–97.
allowing it as a claim. If the Connecticut court has properly notified the personal representative, given him an opportunity to appear and defend the action, and the trial has been a fair one, there is no reason for requiring the plaintiff to relitigate these same issues in a Rhode Island court before his tort claim can be presented as a claim against the estate. It would seem that the Rhode Island court cannot be required to give any effect to this adjudication, but as a matter of convenience such effect should be given once the matter has been adjudicated.

(f) Obligations incurred after decedent’s death

In the preceding chapter, it was seen that a foreign personal representative who acquired a right after the death of decedent could sue on that right in any jurisdiction, based on the theory that he was suing as an individual rather than as a representative. Now the question is whether the reverse of this proposition is true. Is a personal representative, who by contract acquires obligations after the death of decedent, liable to be sued in any jurisdiction on such obligations? The case authority, which is scanty, holds that he is liable in any jurisdiction.

The only case which has squarely decided the question is the old New York case of Johnson v. Wallis. A judgment had been rendered in New York. That judgment was assigned to decedent, who was domiciled in New Jersey at the date of his death. His executors

69 See supra Chapter II, pp. 44-45.
qualified in New Jersey and then contracted to sell the judgment to plaintiffs. This was an equity action in New York to compel the New Jersey executors specifically to perform the contract to sell the judgment. The New York Court of Appeals granted this remedy saying:

“In this case, therefore, the defendants [New Jersey executors] were owners of the judgment and could lawfully contract for its sale. Having done so they were liable on that contract which could be enforced against them because they made it, and it did not derive its existence from any act or dealing of their testator.”

The suit was brought in equity to compel the foreign executor to do a physical act, namely the assigning of the judgment. Since the forum had personal jurisdiction over the executor, it had the power to compel him to do the act by its contempt powers. In addition, the action really concerned title to a res in the jurisdiction of the forum, the New York judgment, and the forum could determine the parties to the judgment without interfering with assets in the control of a foreign tribunal.

The more important problem occurs in the action brought for a money judgment. If the foreign executor or administrator creates a contract obligation after the death of his decedent, may he be sued on that obligation to recover a money judgment? The answer to this question should depend in large measure on whether the judgment in such an action will be satisfied out of property of the estate or out of the representative’s own property? It is uniformly held that a personal representative who contracts on behalf of the estate after

72 112 N.Y. at 233.
the death of decedent is individually liable on that contract.\textsuperscript{73} Since the liability is against the personal representative as an individual and it will be satisfied out of his own individual property,\textsuperscript{74} then there is no objection whatever to permitting an action against him in any court which has personal jurisdiction over him. This does not really represent an action against a foreign personal representative as such, but is an action against the individual who happens also to be the personal representative. It is only in those actions for a money judgment where some liability must be enforced out of property of the estate under control of the probate court administering the estate that it can be said to be improper to allow an action against a foreign administrator.

Thus it will be seen that actions by a foreign administrator on a right acquired after decedent's death and an action against a foreign administrator on an obligation created after the death present analytically different problems. The first is merely an action to

\textsuperscript{73} Christian v. Morris, 50 Ala. 584 (1874) (Suit against executor on a promissory note he gave plaintiff); Taunton v. Taylor, 37 Ga. App. 695, 141 S.E. 511 (1928) (Action to recover money loaned to administrator); Phelps v. Exchange Bank of Commerce, 181 Okla. 145, 73 P. (2d) 137 (1937) (Action on lease made to administrator); Allen v. Armfield, 190 N.C. 870, 129 S.E. 801 (1925) (Action on lease made by administrator); Dahlberg v. Brown, 16 S.E.(2d) 284, 198 S.C. 1 (1941) (Action by certified public accountant against administratrix for services performed in connection with estate taxes.

\textsuperscript{74} If the claim is a legitimate one because the contract was necessary in the administration of the estate, the personal representative will be reimbursed when he makes his final account from estate funds. Permitting the personal representative to be sued on such a contract in a forum other than the one in which he was appointed does not interfere with the control of the appointing tribunal over him. That court still has complete control over all estate funds in the hands of the personal representative and has the opportunity to pass on the legitimacy of the claim when it decides whether to reimburse the personal representative or not.
collect an asset of the estate, and the problem is whether the asset should be collected by a foreign or a local administrator. In the second situation, the solution is determined by the nature of the liability. Since the action is to impose individual liability on the foreign personal representative, he can be sued in any state which has personal jurisdiction over him. It is only in the latter situation that it can accurately be said that a foreign personal representative appears as a party to an action in the forum in an individual rather than in a representative capacity.

(g) Executor de son tort

The concept of executor de son tort as developed in the ecclesiastical and common-law courts of England was defined as follows:

"If one, who is neither executor nor administrator, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law, an executor of his own wrong, or more usually an executor de son tort." 75

The executor de son tort will be required to account for all the assets of decedent which come into his possession, and he will be personally liable for all damages which result to the heirs from his intermeddling. 76 This concept was developed to deal with the situation of a relative or friend of the decedent who had possession of his property and who would attempt to administer that property without securing authority from a probate court.

76 Roggenkamp v. Roggenkamp, 68 F. 605 (C.C. Neb. 1895).
A couple of cases, however, have applied the doctrine to suits brought against foreign personal representatives. The fact situation involved in these cases was that in which the foreign personal representative was being sued in a jurisdiction other than the one in which he was appointed, and he appeared and defended the action. The judgment against him was not based on consent, but rather on the theory that since he was acting outside his authority by defending the action and thereby intermeddling in the local affairs of decedent, he would be treated as an executor de son tort. Assuming that the liability this judgment creates is an individual one to be satisfied out of the representative’s own property, the result is not an improper one from the conflicts point of view. However, one of the cases held that a judgment granted in a foreign court against an executor qualified in the forum based on the theory of an executor de son tort could be satisfied out of the assets of the estate in the hands of the executor. This holding seems incorrect. The assets of the estate should not be subject to satisfying a judgment based on the personal representative’s individual wrongdoing.

The doctrine of executor de son tort has largely gone out of favor in American jurisdictions. This is because the doctrine is a harsh one which punishes close relatives and friends who have possession of decedent’s property and who attempt to care for it and to handle decedent’s affairs in the period between his death and the time that probate can be obtained. Some states have abolished it by statute or decision. It has also

77 Jasper v. Batt, 76 Ariz. 328, 264 P. (2d) 409 (1953); Davis v. Connelly’s Ex’rs, 4 B. Mon. 136 (Ky. 1843).
78 Davis v. Connelly’s Ex’rs, 4 B. Mon. 136 (Ky. 1834).
79 An example of such a statute is 61 Ala. Code 113: “Executor de son
been somewhat limited by the proposition that a later grant of letters of administration to the person will ratify any actions done by him as executor *de son tort* which would be proper if they had been done by a properly appointed personal representative.\(^8^1\) It is very unlikely that the doctrine will play an important role in future decisions in this area.

2. **Statutory Liability to Suit**

The rule prohibiting suits brought by foreign personal representatives and the rule refusing to permit suits against foreign personal representatives are entirely different analytical problems. However, many legal thinkers and judges have treated them as corollaries or reverse statements of the same proposition. With this attitude therefore, it is not surprising that in those states which adopted statutes permitting foreign personal representatives to sue,\(^8^2\) there would be some attempts to pass statutes which made foreign personal representatives liable to suit. A very interesting and instructive example of this occurred in New York.

New York first adopted this statute as an amendment

---

\(^{80}\) Barasion *v.* Odum, 17 Ark. 122 (1856); Bowden *v.* Pierce, 73 Cal. 459, 14 P. 302 (1887); Ansley *v.* Baker, 14 Tex. 607 (1855).

\(^{81}\) Roggenkamp *v.* Roggenkamp, 68 F. 605 (C.C. Neb. 1895); Nance *v.* Gray, 143 Ala. 234, 38 So. 916 (1904); Shawnee Nat. Bank *v.* Van Zant, 84 Okla. 107, 202 P. 285, 26 A.L.R. 1349 (1921).

\(^{82}\) See *supra* Chapter II, note 92.
LIABILITY TO BE SUED

115
to the Code of Civil Procedure in 1911.\textsuperscript{83} It was twice amended in 1925.\textsuperscript{84} In its final form, in the well-known Decedent Estate Law, sec. 160, it was as follows:

"Foreign executor or administrator may sue or be sued. An executor or administrator duly appointed in any other state, territory or district of the United States or in any foreign country may sue or be sued in any court in this state in his capacity of executor or administrator in like manner and under like restrictions as a nonresident may sue or be sued, if within twenty days after any such executor or administrator shall commence, or appear in, any action or proceeding in any court in this state or within twenty days after he shall be required or directed by summons or otherwise to appear therein, there shall be filed in the office of the clerk of the court, in which such action or proceeding shall be brought or pending, a copy of the letters testamentary or letters of administration issued to such executor or administrator duly authenticated as prescribed by section forty-five of this chapter; in default whereof all proceedings in such action or proceedings may be stayed until such duly authenticated copy of such letters shall be so filed. . . ."

This section first came before the New York Court of Appeals in Helme v. Buckelew.\textsuperscript{85} Judge Cardozo wrote the opinion, which is a good discussion of the general rules concerning suits by and against foreign personal representatives and of the problems which such a statute raises. It was his conclusion that the statute "removes disabilities, but does not terminate immunities."\textsuperscript{86} This construction meant that the statute as regards suits against foreign executors and administrators merely adopted the legal and equitable

\textsuperscript{83} Laws of New York, 134th Session (1911), Chapter 631.
\textsuperscript{84} Laws of New York, 148th Session (1925), chapters 253 and 603.
\textsuperscript{85} 229 N.Y. 363, 128 N.E. 216 (1920).
\textsuperscript{86} 229 N.Y. at 372.
rules then in force with some minor changes in modes and effects of proof. Therefore, no suit would be permitted under this construction against a foreign personal representative, with the exception that equity might take jurisdiction to dispose of some res within the jurisdiction. 87 If one feels that the legislature intended what its words clearly indicate, then the opinion appears as an interesting and important example of judicial legislation.

This statute had been construed earlier in a case decided in a Federal District Court by Judge Learned Hand. 88 He had come to the conclusion that the statute should be "read only as opening the courts of New York to suits against executors in those cases where the law of the domiciliary state allows it." 89 He also intimated that a sweeping construction which permitted any suit against a foreign personal representative would be unconstitutional under the fourteenth amendment. Thus two of the ablest judges ever to sit on an American bench refused to give any but the narrowest construction to what appears to be very clear language. This indicates that they both felt the statute would be unconstitutional unless construed narrowly as Judge Hand indicated, or that there were strong policy reasons which prevented them from widening the scope of the forum's control over foreign personal representatives.

The constitutionality of the statute finally came up for review before the New York Court of Appeals in McMaster v. Gould. 90 The case involved an attempt to

---

87 229 N.Y. at 371-372.
89 225 F. at 617.
LIABILITY TO BE SUED

substitute a foreign executor as defendant in a personal action brought against the decedent. The court held that the statute in its wording would apply to such a case where the foreign executor or administrator was sued in personam and there was no res in New York. This application was held to be unconstitutional under the fourteenth amendment. The court argued that a foreign personal representative is not present within the state so that jurisdiction can be obtained over him unless he is acting within the state in his fiduciary capacity in connection with some res. If the foreign personal representative were not present in the state, then a judgment in personam rendered against him would be without jurisdiction, and the rendition of a judgment against a defendant without jurisdiction over him deprives him of property without due process of law. This decision was responsible for the action of the New York legislature which, shortly after it was handed down, repealed Decedent Estate Law, sec. 160. This not only excluded suits against foreign personal representatives, but also actions brought by them. Thus New York returned to the common-law rules regarding actions which involved foreign personal representatives until 1951, when it re-enacted that portion of the statute which permitted them to sue.

The history of the experience of New York with this statute raises two problems. The first is whether such a statute is unconstitutional. The second is whether such a statute is desirable, assuming that it is constitutional. The constitutional issue is a complex one. The problem raised in the McMaster case was whether the forum can render a judgment in personam against a foreign

---

91 Laws of New York, 149th Session (1926), chapter 660.
personal representative without violating the due process clause of the fourteenth amendment. The decision on this question turns on whether the forum has secured jurisdiction over the foreign personal representative. If a judgment is rendered without jurisdiction over the defendant, it will presumably violate the due process clause. Assuming that the forum does render such a judgment and that such judgment does not violate the fourteenth amendment, then there is the problem whether the state which appointed the personal representative is required to give full faith and credit to such a judgment. This question will also turn on the decision as to whether the forum rendering the judgment had jurisdiction over the foreign personal representative. Therefore, the pivotal question on both issues would seem to be whether the forum had jurisdiction. The determination that the court rendering the judgment was without jurisdiction so that the judgment was without due process to the defendant would solve the problem, because no court could be required to give that judgment full faith and credit. If, however, the court is treated as having jurisdiction so that the judgment does not violate the due process clause, this does not necessarily mean that the court which appointed the administrator or executor must give that judgment full faith and credit.

98 The Supreme Court of the United States decided in York v. Texas, 137 U.S. 15, 11 S.Ct. 9, 34 L.Ed. 604 (1890), that the rendition of a judgment without having jurisdiction did not violate the due process clause until an attempt was made to levy an execution on defendant's property. In a later case, Riverside & Dan River Mills v. Menefee, 237 U.S. 189, 35 S.Ct. 579, 59 L.Ed. 910 (1915), the Supreme Court decided that the mere rendition of a money judgment without jurisdiction violated the due process clause. In this decision, the holding in York v. Texas was not mentioned.
because the jurisdiction required under each clause need not be the same. 94

The first problem is whether a judgment against a foreign personal representative under such a statute as that of New York violates the due process clause. The answer to this question turns on whether the rule prohibiting suits against foreign personal representatives is regarded as the result of a lack of jurisdiction or whether it is considered a rule based on policy and convenience. 95 The fact that the equity court will compel a foreign personal representative to account, 96 that some states permit service on foreign representatives under nonresident motorist acts, 97 and that some courts, including the Supreme Court of the United States, 98 will permit foreign personal representatives to consent to suit would argue that this rule is not based on lack of jurisdiction. It is difficult to say that a court can never obtain personal jurisdiction over a foreign executor or administrator and still permit these exceptions. Thus it would seem to follow that the New York Court of Appeals was wrong because courts do have jurisdictional power to render a judgment against a foreign personal representative, and this means that


96 This approach was taken by the lower court in Helme v. Buckelew, 181 N.Y.S. 104 at 110 (1920). Also in Craig v. Toledo, A. A. & N. M. R. Co., 2 Ohio N. P. 64 (1895), and by Carey, supra note 94 at 88.

97 See supra pp. 93-95.

98 See supra pp. 100-104.

such judgment would not violate the due process clause. There will be no definite answer to this problem until the Supreme Court of the United States has an opportunity to pass on it. But the writer feels that the only limitations the fourteenth amendment places on this type of action would be the requirements of procedural due process.

The other constitutional question seems to be the more important one. That is whether a judgment in personam rendered against a foreign personal representative under a statute like that passed in New York is entitled to full faith and credit in the state of appointment. Once again, we cannot be positive about the decision in such a fact situation until the Supreme Court of the United States passes on the question. As has been seen, the courts with few exceptions refuse to entertain an action against a foreign personal representative. While they may be said as a matter of abstract theory to have the jurisdictional power to entertain these actions, they have uniformly refused to do so. As will be discussed below, there are strong reasons why this jurisdiction should not be exercised. Therefore, the full faith and credit clause should not be extended to force courts who themselves refuse to exercise jurisdiction over foreign personal representatives to give effect to judgments rendered in another state against an executor or administrator appointed in the forum. This may be explained on the ground that the foreign tribunal was without jurisdiction to render such a judgment, since as a matter of fact all courts refuse to take jurisdiction in the case of an action for a money judgment against a foreign personal representative. The fact that the forum is not required to give full faith and credit to such a judgment does not mean that it
may not do so. Presumably, the claim of the plaintiff is a legitimate one. If the trial resulting in the judgment had been a fair one and the foreign representative had an opportunity to present any defense on behalf of the estate, permitting that judgment to be a claim in the administration of the estate would eliminate the necessity of relitigating the question.

Assuming that such legislation is constitutional, there is another and actually more basic problem raised by the New York legislation. That is whether such legislation is wise from a policy point of view. There seem to me to be two reasons opposed to the adoption of such a statute.

The purpose of the adoption of statutes permitting suits brought by foreign administrators, which provision appeared in the same section as the New York legislation under discussion, was to achieve a more unified administration. Yet the statute passed in New York permitting suits against foreign administrators has quite the opposite effect. A unified administration requires not only the elimination of multiple administrations, but the supervision of a single court. When other courts enter judgments which must be satisfied out of the assets of the decedent, they interfere to that extent with the administration of the estate by the one court; this tends to make the administrator subject to the direction and supervision of more than one court. Such a situation is not at all satisfactory when the purpose of the suit could be achieved by sending the creditor to the court of administration to present his claim and have it satisfied.

The other argument against such a statute is that it tends to give the plaintiff a preference over other creditors of the decedent. If he is awarded a judgment, he may be able to satisfy that judgment out of property
in the state\textsuperscript{100} even though this conflicts with the established probate practice of permitting all creditors to participate equally in decedent’s property. This problem seemed to disturb Judge Cardozo in \textit{Helme v. Buckelew} and was in part responsible for the result in that case.\textsuperscript{101} In order to insure this equality of payment, the forum should tell the plaintiff that he must present his claim in the court which is administering the assets and has appointed the personal representative or, if the state insists on a local administration, that he must cause an ancillary administration to be had in the forum and then present his claim to the ancillary administrator.

\section*{3. Summary}

In short, on the general problem discussed in this chapter, it seems that the general rule which prohibits suits against foreign personal representatives is quite satisfactory in achieving the most efficient administration. Any necessary relief can be given to a person having a claim against the estate by sending him to the state of administration to present his claim or by requiring an ancillary administration in the forum. The only exceptions which should be made are (1) when the forum is determining title to a \textit{res} in the jurisdiction, (2) when it is causing a fraudulent personal representative to account for assets removed into the forum, or (3) when it is enforcing the individual liability of the representative. There is no worthwhile purpose to be achieved by changing these rules by statute, but, on the contrary, such statutory changes tend to decentralize and hamper efficient administration.

\textsuperscript{100} When a decedent’s estate is being administered locally, the cases do not permit a claimant to attach or levy an execution on decedent’s property, \textit{supra} Chapter I, note 74.  
\textsuperscript{101} 229 N.Y. at 371.
Chapter IV

The Foreign Personal Representative and Immovable Property

In Anglo-American law, decedents' estates are subject to the "split system of succession." This means that the rules determining the succession to immovable or real property are different from those relating to personal property. This distinction between movable and immovable property is also vital in problems of administration. The rules governing control of real property by a foreign personal representative are quite different from those dealing with the personal property of the decedent. This is the result of two general legal propositions. The first relates to succession. The succession to real property is determined by the law of the place where the land lies.\(^1\) The second is that title to land cannot be transferred except in accordance with the law of its situs.\(^2\) Since these questions can best be determined by a court sitting in the same jurisdiction as the land, and since courts are more jealous of their control over real property within the jurisdiction than over movable property, the general rule is that real property can be administered and sold only by a personal representative appointed in the state where it is situated. Any exception to this proposition must be made by the law where the land lies.\(^3\) If that legal system refuses to recognize the validity of the acts of a foreign personal representative in attempting to ad-

---

1 Restatement, Conflict of Laws, sec. 245 (1934).
2 Restatement, Conflict of Laws, sec. 220 (1934).
minister the land, neither heir nor purchaser can rely with confidence on any transactions with him.

It must be remembered that at common law title to real property passes immediately on death to the heirs or devisees, and the only time that the administrator or executor deals with the realty of decedent is when it is necessary to sell it in order to pay claims against the estate. Thus, the only problem with which we are concerned is whether the foreign personal representative can make a conveyance of immovable property lying in the forum. If he can make such a conveyance, the consideration will be included in the estate and he will have effectively collected the asset. Naturally, the determination of the validity of such a transfer will arise after the transaction has taken place. Usually, there will be an ejectment action brought by or against a person claiming under the foreign personal representative. Then the problem is how the forum will treat the conveyance. If it is held to be void, the purchaser does not receive any title, since the law of the forum is the only one which can determine title to immovables within its jurisdiction. This result causes the innocent purchaser to suffer. However, that suffering is not such as should cause the legal order to change its rules in this situation. Today purchasers of real property, or at least the business institutions which finance such purchases, insist almost uniformly that legal advice be obtained as to the validity of the title held by the vendor. Such advice should make it abundantly clear what limitations there are on the power of a foreign personal representative to make a conveyance of immovables in the jurisdiction.

4 See supra Chapter I, p. 20.
I. Sale of Land by a Foreign Executor Who Has a Power of Sale

Only one exception has been made at common law to the requirement of a local administration in respect to land. It is generally held that an executor appointed in a will which gives him the power to sell decedent's real property and who qualifies as an executor in another state may make a valid conveyance to land lying in the forum. It is said that the power an executor has to convey foreign lands was not given by the court which appointed him, but was created by the testator in the will. This is treated as a common-law power given to the executor. The only function of the qualification as executor is to determine the person who has the power, and the exercise of that power is completely independent of the administration in the foreign state. This is one of the few remaining situations where it is important to distinguish between the executor and the administrator as regards applicable legal rules. The only personal representative who can exercise this power to convey foreign lands is the executor, and then only when he has been given in the will itself the power to sell the real property owned by decedent.

Before the foreign executor can exercise the power of sale given to him in the will, that instrument must be established as the valid will of the testator in the state where the land lies. This may mean that the will must...

---

be probated in that jurisdiction. However, it is very common now for a state to have a statute providing that a will which has been probated in a foreign state may be filed in the county in which the land lies and that after this has been done, it can affect title to the realty. While one case held that a deed from a foreign executor conveys a good title to local land which will be protected by a subsequent recording, the majority of cases construe such statutes to mean that a deed from a foreign executor is not a valid conveyance unless, prior to its execution, the foreign will is recorded pursuant to such a statute.

These decisions point up one of the most important inroads on the traditional attitude of the requirement of ancillary administrations. Land, by virtue of its fixed location in the jurisdiction, should represent the article of property which is most likely to require a local administration. The common-law approach is that land descends to the heir or devisee without being subject to an administration unless it is necessary to subject the realty to payment of decedent's debt. The procedure by which this would be done normally is a local administration at the situs of the land. Yet these decisions make it possible for a testator, by appointing an executor and giving him a general power of sale, to provide an oppor-

6 Such a statute is found in Gen. Stat. of Kansas (1949), sec. 59–801: "Authenticated copies of wills, proved outside of this state according to the laws in force in the place where proved, relative to any property in this state, may be admitted to probate and record in the probate court of any county in this state where any part of such property may be situated; and such authenticated copies so admitted and recorded shall have the same validity as wills proved in this state in conformity with the laws thereof...."

7 Crusoe v. Butler, 36 Miss. 150 (1858).

8 Plenderleith v. Edwards, 328 Ill. 431, 159 N.E. 780 (1928); Niquette v. Green, 81 Kan. 569, 106 P. 270 (1910).
tunity for the domiciliary executor to collect all the assets of real property owned by him wherever they may be located. The modern view is that the executor derives his authority from the appointment by the probate court, just as does the administrator.\(^9\) Therefore, his power over any property located in other jurisdictions should generally be as limited as is that of the administrator. The authority which the executor exercises over the foreign land may come from the will. It is possible to say, as the courts have done, that the executor with a power of sale is in the same position as the devisee for the purposes of sale, and he will be able to sell the real property without having a local administration. However, it must be remembered that the forum can subject this realty to a local administration to insure that decedent’s local creditors are paid before any heir or devisee is entitled to the enjoyment and control of the land. Since the forum permits a foreign executor having a power of sale to sell the realty without an administration at the *situs*, it must be regarded as an exception and indeed an important one to the general requirement of a local administration on all of decedent’s property left within the jurisdiction.

An executor having the power of sale may make a contract to sell real property located in another state. That contract will be specifically enforced in the court in which the executor qualified. He will be compelled to execute a deed, just as equity has always compelled a defendant over whom it has jurisdiction in personam to perform specifically a contract for sale of foreign

The efficacy of such a conveyance in passing title will have to be determined by the law of the state where the land lies. Generally, the state will treat the deed by a foreign executor as valid.  

There is a question as to who can exercise the power of sale conferred in the will. If the executor appointed in the will does not qualify, or qualifies and later dies before making a conveyance, can the administrator appointed as his successor exercise the power and make a valid conveyance to foreign land? An interesting Pennsylvania case is the only one which has considered the precise problem. That case held that a successor appointed in New York to an executor with power of sale could make a valid conveyance to Pennsylvania land.  

It based the decision on the argument that the New York appointment was merely to fix the person who had the power of sale conferred in the will, and that the New York decree itself did not affect title to Pennsylvania realty. In deciding this question from a conflicts point of view, those cases which have determined whether the successor to an executor having a power of sale could make a valid conveyance to land located in the state wherein he was appointed should be helpful. These cases generally hold in the situation where a power of sale is coupled with an interest, such as managing the property, or if the power of sale amounts to a direction to sell, then the successor to an executor may exercise the power. However, if the power of sale is a mere naked power, or if the power is one of personal

11 See cases cited supra note 5.
13 Taylor v. Benham, 5 How. 233, 12 L.Ed. 130 (U.S. 1847); Ex parte White, 118 Miss. 15, 78 So. 949, L.R.A. 1918E 1065 (1918).
confidence and trust, the general common-law rule is that the successor cannot exercise the power.\textsuperscript{14} Many states have adopted legislation which permits the administrator appointed as successor to an executor having a power of sale to exercise the power.\textsuperscript{15} It is very likely that the decision in a case where an administrator appointed in a foreign jurisdiction attempts to exercise a power of sale given by the testator to an executor named in the will by conveying lands located in the forum will turn on the same factors. Since this is a question relating to the transfer of title to land, the law which determines the right of the successor to make a conveyance will be that of the forum in which the land lies, rather than of the place of his appointment. If that law so provides, the foreign administrator will be permitted to give a valid deed if the power is coupled with an interest, is a direction to sell, or there is a statute which permits his exercise of the power. Otherwise, the land will have to be conveyed by an ancillary administrator appointed locally. It has also been held that the power of sale given to a foreign executor may be of such a personal nature that it can be exercised by that foreign executor to the exclusion of a locally appointed ancillary administrator.\textsuperscript{16}


\textsuperscript{15} A typical one is the following: 47 Ala. 90 (1940). "Where lands are devised to one or more executors, or a naked power given by the will to sell, the survivor or survivors, where there are more than one named in the will, and the acting executor or executors, when any one or more of them dies, resigns, or refuses to act, or is removed by a court of competent authority, and also an administrator with the will annexed, has the same interest in, and power over such lands for the purpose of making sale thereof, as the executors named in such will might have had. Unless the contrary clearly appear by the terms of the will it shall be presumed that the power or trust imposed is not a personal trust or confidence."

\textsuperscript{16} McMillen v. Bliley, 115 Colo. 575, 177 P.(2d) 547 (1947).
FOREIGN PERSONAL REPRESENTATIVES

2. Statutes Affecting Sale of Land by a Foreign Personal Representative

Nearly a third of the states have passed statutes which deal directly with the problem of sale of real property in the forum by a personal representative appointed in another jurisdiction. These statutes take one of two general forms. The first is merely an adoption of the common-law rule by the legislature. Typical of this type of legislation is the following:

"When by any foreign will, filed and recorded in this State, as authorized by the four preceding articles, power is given an executor or trustee to sell any real or personal property situated in this State, no order of court shall be necessary to authorize such executor or trustee to make such sale and execute proper conveyance, and whenever any particular directions are given by a testator in any such will respecting the sale of any such property situated in this State, belonging to his estate, the same shall be followed unless such directions have been annulled or suspended by order of a court of competent jurisdiction." ¹⁷

Such a statute would require that the personal representative making the conveyance must be an executor or trustee named in the will and must have been given a power of sale in the instrument itself. This is nothing more than a restatement of the rule at common law and adds little to our picture.

Some states have adopted statutes which represent a rather radical departure from the common-law rules relating to a sale of real property by a foreign personal representative. The changes made by such legislation

can best be made clear by giving an illustrative statute. The enactment in Ohio is a good example:

“When an executor or administrator is appointed in any other state, territory, or foreign country for the estate of a person dying out of this state, and no executor or administrator thereon is appointed in this state, the foreign executor or administrator may file an authenticated copy of his appointment in the probate court of any county in which there is real estate of the deceased, together with an authenticated copy of the will. After filing such copies, he may be authorized, under an order of the court, to sell real estate for the payment of debts or legacies and charges of administration, in the manner prescribed in sections 2127.01 to 2127.43, inclusive of the Revised Code.”

It will be noticed that this authority is given not only to foreign executors, but to foreign administrators as well. Also, it does not require a power of sale to be conferred in the will. Nevertheless, such statutes contain rather important restrictions on the power of sale of local lands by a foreign personal representative. It is generally required that the domiciliary administration be elsewhere, since the normal provision is that the decedent not be domiciled in the jurisdiction when he died. In order to sell the land, a court order or license must be obtained. Usually, such authority can be given only when it is necessary to sell the land to pay debts of the decedent or the expenses of administration.

Such statutes as these mark an extremely important trend away from the rather rigid common-law theory. Actually, this type of statute is fairly well drafted to provide a unified administration of decedent’s real

property. The limitation on sale for debts and administration expenses only is not at all harmful, because the only reason an administration needs control of the property is to satisfy claims against the decedent. It is not nearly so necessary actually to collect real property as it is movable property, since land will always be available if it is needed for the payment of claims. Title to the land passes automatically to the heirs or devisees without having to pass through a personal representative, so that an administrator has no need to deal with realty in a foreign jurisdiction unless there are debts and expenses to be paid. Although most statutes are not clear on this, they should permit only the domiciliary personal representative to administer the local realty in order to specify a single administrator for all the property. If this type of statute were adopted in each of the forty-eight states, the problem of multiple administrations of real property would be solved.

3. Assets Arising from an Oil and Gas Lease

The large-scale development of the oil and gas industry in the last hundred years has created a host of legal problems. The property interest in oil and gas is an anomaly. Because of this, much confusion has developed in regard to applicable legal rules. A brief discussion of the problems a foreign personal representative will have in collecting the assets arising from oil and gas interests will indicate this difficulty.

Oil and gas are minerals found below the surface of the earth. Because of the propensity of these minerals to move while underground and the difficulty involved in locating their *situs* as property until they have been reduced to possession by removal from the ground, there has been a serious theoretical dispute whether the
interest in oil and gas should be classified as realty or personalty. 19 It is, however, generally treated as an interest in land. 20 This mineral interest can be separated from the surface ownership and may itself be divided into a number of fractional interests. 21 The almost universal method of utilizing this mineral interest, because of the expense involved in drilling wells and setting up transportation systems, is for the owner to lease his mineral interest to an oil company which does the actual developing. 22

The oil and gas industry in its early days experimented with a number of different types of leases, but in recent years the lease has become fairly well standardized, with a few variations in form. 23 The lease will have a definite primary term, normally of five years, during which the lessee or oil company may extend the lease from year to year by paying delay rentals. The clause may be of the “drill or pay” variety, under which the lessee must drill during the primary term or pay rentals during that term until production starts. If the lessee fails to pay the delay rentals or to drill, the lessor or owner of the mineral interest may forfeit the lease. With this type of clause, a “surrender” clause is included which gives the lessee power to surrender the lease during the primary term. On the other hand, the clause may be of the “unless” type. Under this clause,

21 AMERICAN LAW OF PROPERTY, Vol. 2, sec. 10.6 at 516.
22 An excellent discussion of the problems of obtaining and continuing oil and gas leases in relation to personal representatives, both domestic and foreign, written from the point of view of an oil company attorney will be found in Morris, supra note 20.
23 Summer, op. cit., supra note 19, sec. 292. A good general discussion of the modern oil and gas lease.
the lessee must pay a specified delay rental each year to have the lease continue for the next year throughout the primary term. If the delay rental is not paid, the lease terminates automatically. If, however, during the primary term, there is a well drilled and oil or gas is produced, the lease will thereafter continue as long as there is production in paying quantities. From the time production begins, the delay rentals cease and the lessor is compensated with royalty payments which will be the value of a fraction, usually one-eighth, of the oil produced. Thus under an oil and gas lease, the lessor will be entitled to receive from the lessee either delay rentals or royalties. On the death of the lessor, will his personal representative appointed in one state be permitted to collect royalties and delay rentals paid on an oil and gas lease in another state?

The oil and gas lease is generally regarded as an interest in land, and consequently the delay rentals and royalties are usually treated as analogous to rents and profits from land. Therefore, the rules which determine who is entitled to receive rents and profits from land should determine who is entitled to receive delay rentals and royalties on oil and gas property owned by the decedent.

The rule at common law was that land went directly to the heirs and devisees and they were entitled to receive the rents and profits from the land. In those states where the common law is still applicable, it would seem that the personal representative has no right to collect rents and royalties arising from an oil and gas lease.

However, many states have passed statutes which

---

24 Morris, supra note 20 at 891.
give the personal representative control over decedent's real property and the right to collect the rents and profits.26 Under such statutes, the royalties and rentals should be paid to the personal representative. Frequently, however, the personal representative will be appointed at the decedent's domicile, but the oil and gas lease will cover property in another state. As a general rule, the oil companies do not pay the rentals and royalties to a foreign domiciliary representative, but instead insist on the appointment of an ancillary administrator in the state where the lease is located whom they will pay.27 The problem is very analogous to the case of voluntary payment of a debt to a foreign personal representative. As we shall see in connection with that problem, most courts would treat the payment as a valid discharge,28 but there is enough doubt as to the result that the only completely safe course for a debtor in the absence of statutory protection is to pay only a local administrator. This same doubt exists as to the validity of payments of royalties and rentals to a foreign personal representative, and the oil companies will not take the risk. Therefore, it is very un-

26 A typical statute of this type is found in Kansas:
"The executor or administrator shall have a right to the possession of all the property of the decedent, except the homestead and allowances to the surviving spouse and minor children. He shall pay the taxes and collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the heirs, devisees, and legatees. He shall keep in tenantable repair the buildings and fixtures under his control and may protect the same by insurance. He may by himself, or with the heirs or devisees, maintain an action for the possession of the real estate or to quiet title to the same." Gen. Stat. of Kan., sec. 15-401 (1949).

Among the states which are large oil and gas producers and have adopted similar statutes are the following: Deering's Cal. Code, Probate, sec. 581; N.D. Rev. Code, sec. 30-1304 (1943); 58 Okla. Stat. Ann. 290; S.D. Code, sec. 35.1101 (1939); Wyo. Comp. Stat., sec. 6-1309.

27 Morris, supra note 20 at 894, 898.

28 See infra Chapter V, pp. 151-163.
likely that a foreign personal representative will ever have the opportunity to collect the assets of decedent which arise out of oil and gas leases in the absence of legislation expressly providing for this situation.

One problem may be briefly considered in connection with oil and gas leases, which shows graphically the unfortunate consequences of traditional legal thought as to the authority of personal representatives. One type of oil and gas lease which is in common current use is that which contains the "unless" clause. The lease is extended from year to year during the primary term by the payment of a specified delay rental, usually on a per acre basis. This rental must be paid before the year expires or the lease will terminate automatically. If the lessor dies during the term, there is a serious problem as to who should be paid the delay rental in order to keep the lease alive.

If the lessor under an "unless" lease dies domiciled in a state other than the one in which he owned the lease, there are three possible recipients of the delay rental. The lessor may pay the heirs or devisees of decedent, he may pay the domiciliary personal representative, or he may pay an ancillary administrator appointed in the state where the oil and gas lease is located. The problem which is raised should be distinguished from the collection of assets discussed in the next chapter. The delay rentals are not assets to which the estate is entitled. It is entirely in the discretion of the lessee whether they are to be paid or not. Therefore, this is not a fund to which local creditors are entitled, and the rules designed to protect them by limiting the authority of a foreign personal representative to act in the forum should not

29 Summers, op. cit., supra note 19, sec. 288.
be used in determining the result. The real problem is the question of extending the oil and gas lease. What acts are sufficient to constitute an effective extension? Since an oil and gas lease is treated as an interest in land, this question will be determined by the law of the state in which the oil and gas lease lies. The problem is to determine what sort of payment that state will treat as adequate to extend the lease.

It is frequently true that the lease will be a very valuable piece of property to an oil company and they will want to take every possible precaution to protect themselves. I have been told that in order to insure that the lease on oil property which is likely to be highly productive will be extended, an oil company may make double or even triple rental payments. This seems unnecessary. However, the seriousness of the problem is obvious when the lessor dies shortly before the end of the period during which payment may be made. The lessor must act rapidly and be sure that the right party is being paid. It would seem that the forum, in deciding whether the payment was satisfactory to extend the lease, should only be concerned with the question of whether the payment was made in good faith and to a person entitled to represent the decedent. The forum

This would seem to follow from the cases which have held that a payment in good faith by the lessee which through inadvertence does not reach the lessor in time will not cause the “unless” lease to terminate. Gloyd v. Midwest Refining Co., 62 F.(2d) 483 (10th Cir. 1933); Brazel v. Soucek, 130 Okla. 204, 266 P. 442 (1928). However, probably the majority rule and one adopted in recent cases is that time is of the essence in an “unless” lease and failure to pay the rental on time or payment to the wrong bank will cause the lease to terminate. Keeler v. Dunbar, 37 F.(2d) 868 (5th Cir. 1930); Ellison v. Skelly Oil Co., 206 Okla. 496, 244 P.(2d) 832 (1952) (where fault was attributable to lessee although done in good faith). The problem discussed in the text does not deal with time of payment, but the proper party to receive payment and the courts should be more likely to adopt the minority rule.
should not decide the payment was invalid on the basis that the rule designed to protect local creditors prevents a foreign personal representative from acting in the jurisdiction. The oil company should be protected either if it pays the money into the court which is handling the principal administration to be distributed by it to the proper party, or if it seeks an ancillary administration in the forum and pays the delay rentals into the local court on behalf of that administration.
Chapter V

Collection of Assets by a Foreign Personal Representative

Many of the activities that an executor or administrator performs outside the state of his appointment are done without resorting to the courts. As we have seen previously, the duties of the personal representative are to collect the assets, to conserve and keep them safely, to account for them to the court of administration, to pay or bar all claims against the property of the decedent, and to distribute the assets left to persons entitled to the succession according to the decree of the probate court.1 All of these functions with one exception can be performed in the state of appointment and consequently raise no problems within the scope of this work. However, many of the assets which a personal representative must collect will be found located in states other than that of administration. In order to collect these assets, he may have to bring suit. The questions arising out of such actions were discussed in Chapter II. On the other hand, he may be able to collect these assets without bringing an action. This may be accomplished by transferring the title of decedent’s property in another state to a third person and accounting for the purchase price of the property to the court which appointed him. He may be able to enter another state, take possession of decedent’s movable property, and remove it to his jurisdiction. He may also persuade a debtor or bailee of the decedent

1 See supra Chapter I, pp. 21–24.
to deliver the assets to him voluntarily. This chapter will consider the problems raised by efforts of a personal representative to collect property belonging to the decedent in states other than the one in which he was appointed when there is no need to apply to the courts for assistance.

It must be conceded that the state has the right not to permit any property within its borders belonging to decedent to be removed by the foreign personal representative. This has resulted in the general common-law rule which prohibits foreign personal representatives from suing to collect assets. Such a rule, as we have seen, is merely a matter of the positive law of the particular state and may be relaxed in any situation which that legal order feels proper. Thus, the foreign personal representative may be permitted to sue as a matter of comity. He may also be allowed to remove property of the decedent from the jurisdiction by comity.

Actually, it is not realistic to speak of a state's not permitting a foreign administrator to remove decedent's property. If he sells property within the jurisdiction to a third party for which he receives a consideration, the purchase money can be included in his account as an asset. Similarly, if he persuades a bailee willingly to deliver him personal property, or if a debtor voluntarily pays a debt owed to decedent, such assets will then be included in the inventory of the personal representative.

---

2 Duehay v. Acacia Mutual Life Ins. Co., 105 F.(2d) 768, 124 A.L.R. 1268 (D.C. Cir. 1939). "No state need allow property of a decedent to be taken from within its borders until debts due [local] creditors have been satisfied...; Hensley v. Rich, 191 Ind. 294, 112 N.E. 632, 18 A.L.R. 1118 (1912)."

3 See supra Chapter II, pp. 50-53.

and will be administered by him. The real problem is how the state in which the assets were collected will treat the transaction. If the transfer of property is treated as invalid, then the purchaser from the foreign personal representative will not receive title and the property if still within the jurisdiction may be administered by a locally appointed administrator. If the delivery of a chattel or the payment of a debt is treated as being improper, a local administrator may recover the value of the chattel or the debt from the person who surrendered it to the foreign administrator. This will give the local administrator a fund to administer in the state similar to the assets which were taken out of the state. Such a result places an innocent party who dealt with the foreign personal representative in the unfortunate position of paying twice. This procedure does not prevent the state which appointed the foreign representative from administering the assets obtained in what the forum regards as a void transaction, but it does insure that the same assets will be locally administered for the benefit of local creditors.

Since the activity of the foreign personal representative does not directly involve litigation, the determination of questions involving collection of assets must be decided "after the fact." If the transaction concerns the validity of a conveyance of property by a foreign executor, there may be a replevin action brought by or against the person claiming through the foreign administrator, and the effect of the transfer will be determined in that proceeding. If the situation involves the delivery of movable property or the payment of a debt to a foreign personal representative, the problem will be whether such delivery or payment will be a bar to a subsequent action brought by a local administrator. The fact that
the question is being litigated after the parties have attempted to change their legal relations and that an innocent party will suffer if the attempt is treated as void has undoubtedly influenced the decisions on these questions.

In this area, the courts have naturally had some difficulty in rationalizing the results of the cases. They are committed to the theory that the personal representative is a creature of the state which appointed him and that he can have no existence outside its territory. This theory was developed in the cases dealing with suits by or against foreign executors or administrators. If this theory is applied logically to the situations discussed in this chapter, the transaction with the foreign personal representative respecting property of the decedent having a situs within the forum will be treated as void. As one might expect, the courts have been unwilling to reach this result. It is in this area that the concept of the artificial personality of the foreign representative limited to the state in which he was appointed is most unsatisfactory in explaining the results in the cases.

Another important point to notice is whether the foreign personal representative who collected the asset was a domiciliary representative or an ancillary administrator. One of the explanations usually given in the cases is that the domiciliary representative takes title to all the personal property of decedent wherever located, and the fact that he cannot sue to recover property does not mean that he cannot give a valid acquittance when he collects the property in those

5 See discussion supra Chapter II, pp. 30-31.
6 In re Nolan's Estate, 56 Ariz. 366, 108 P. (2d) 391 (1940); In re Brown's Estate, 21 Del. Ch. 562, 52 A.(2d) 387 (1944).
COLLECTION OF ASSETS

states. This concept seems based on two reasons. The first is an idea which is expressed in the older cases, viz., that the ancillary administrations are subordinate to the domiciliary and their only purpose is to administer the assets located in the jurisdiction and then to transmit the remainder to the domicile for distribution. This doctrine has gone out of favor, and the tendency is to treat the ancillary and domiciliary administrations as completely independent of one another and supreme within their respective jurisdictions. The second reason, and a more forceful one, is that the succession to movable property is determined by the law of decedent’s domicile at date of death and it is this same law which appoints the domiciliary representative. Since the law of the domicile will treat the representative it appoints as having title to all the personal property of the decedent, subject to the right of local administration in other states, the courts in those states treat the domiciliary representative as having title to personal property in their jurisdictions until a local administrator is appointed. Needless to say, this theory that a domiciliary representative has title to personal property located in other states is in direct conflict with the notion that a personal representative is a creature of the state that

10 RESTATEMENT, CONFLICT OF LAWS, sec. 303 (1934).
11 A third reason is given in the case of In re Brown’s Estate, 21 Del. Ch. 562, 52 A.(2d) 387 (1944). "This is because the domiciliary administrator is generally looked upon as being more closely connected with the persons interested in the estate of the decedent than a foreign representative would be. . . ." I personally fail to understand how the connection of a domiciliary representative is any closer to decedent’s heirs or creditors than that of an ancillary administrator.
does not exist outside its territory. Although modern
cases tend not to differentiate between a domiciliary
representative and an ancillary one as respects legal
power, some cases still distinguish between the legal
effect of a collection of assets by the one or by the
other, and therefore this is an important distinction to
bear in mind.

I. Duty to Collect Assets

A preliminary problem concerns the duty to collect
assets outside the state of appointment. It would be ex­
pected that courts which generally hold to the theory
that the personal representative is an artificial per­
sonality that does not exist outside the state of appoint­
ment would conclude that there is no obligation on him
to perform acts in other states. However, the majority
of cases which have decided the question have held that
a personal representative does have a duty to collect
assets located in other jurisdictions.¹² This duty is dif­
ficult to describe precisely and will depend largely on
the facts of the particular case.

Generally, the personal representative must make an
effort to collect a debt due the decedent even though he
may not be able to sue to recover the debt.¹³ This is
based on the theory that the law presumes that men
will pay their just debts.¹⁴ This duty also applies to the

¹² In re Brown's Estate, 21 Del. Ch. 562, 52 A.(2d) 387 (1944); Shultz
v. Pulver, 11 Wend. 363 (N.Y. 1833); Williams v. Williams, 79 N.C. 417,
28 Am. Rep. 330 (1878); Shinn's Estate, 166 Pa. 121, 30 A. 1026, 45 Am.
St. Rep. 656 (1895); Welsh v. Welsh, 136 W.Va. 914, 69 S.E.(2d) 34
(1951).

Contra: Bowman v. Carr, 5 Lea 574 (Tenn. 1880); Farmer's Bk. of
Woodland Mills v. Vinson and Williams, 9 Tenn. App. 51 (1928).


¹⁴ Shultz v. Pulver, 11 Wend. 363 (N.Y. 1833). "... [the debtor] was
abundantly able, and with the means in his hands and in the case of an
collection of the personal property of decedent in other states.\textsuperscript{15} If a suit is needed to collect the asset and the law of that jurisdiction prohibits him from bringing an action as a foreign personal representative, he may be required to secure ancillary administration himself or through an agent.\textsuperscript{16}

The standard of duty which will be applied is that of the reasonably prudent businessman. Thus, it was held in the case of \textit{Shinn's Estate}\textsuperscript{17} that the investment of estate funds by a personal representative in mining property owned by the decedent in a foreign jurisdiction, which was a highly speculative venture and which greatly depreciated in value, was a violation of his duty and that he was personally liable for the funds invested. In the same case, however, it was held proper for him to pay off a debt owing to a foreign creditor when the decedent had pledged with the creditor collateral greatly exceeding in value the debt and thereby securing for the estate the asset consisting of the collateral which had been pledged. It seems proper to make necessary expenditures out of estate funds to collect foreign assets providing the expenditures are such as a reasonably prudent businessman would make.\textsuperscript{18}

honest debt, we are not to presume that a suit would have been necessary. The law will not presume that mankind in general refuse to pay their honest debts when they have abundant means till compelled by its process; nor is the fact so.”

\textsuperscript{15} Shinn's Estate, 166 Pa. 121, 30 A. 1026, 45 Am. St. Rep. 656 (1895).
\textsuperscript{16} In re Brown's Estate, 21 Del. Ch. 562, 52 A.(2d) 387 (1944). Williams v. Williams, 79 N.C. 417, 28 Am. Rep. 330 (1878): “Whether administrators in this State should take out ancillary administration, or try to do so, in the State of a nonresident debtor, must depend upon the circumstances of each case... in determining this latter point, the magnitude of the debt, the solvency of the debtor, the distance and probable expense, were to be considered.”
\textsuperscript{17} 166 Pa. 121, 30 A. 1026, 45 Am. St. Rep. 656 (1895).
A question might be raised whether a personal representative should be treated as having a duty to collect assets in a jurisdiction where there is an ancillary administration. The only case I have found dealing with the issue holds that there would be no duty to collect in such a situation.\textsuperscript{19} Certainly, one of the factors which is important in determining whether a duty exists is the likelihood of collecting the asset. The personal representative would not be permitted to sue and would not have much of a chance to persuade a debtor or bailee to deliver the asset to him in the face of an ancillary administration. Also, one of the main reasons for imposing this duty is to prevent assets from being lost to the estate through failure to be collected. If there is an ancillary administration, it is more reasonable to place the duty to collect assets within that jurisdiction on the local administrator. Consequently, there should be no duty on a personal representative to collect assets in a jurisdiction where an ancillary administration has been granted.

This question of a duty to collect may arise in two ways. The court which appointed the personal representative may compel him on application of an heir or creditor to make an effort to collect the foreign asset.\textsuperscript{20} However, if he is unwilling to do so, the court will probably remove him and appoint a more enthusiastic administrator.\textsuperscript{21} This result is based on the difficulty of supervising the administrator's attempts to collect in a foreign jurisdiction and of determining whether those efforts were sufficient. The more common way to place such a duty on a personal representative is to charge

\textsuperscript{19} Grant v. Reese, 94 N.C. 720 (1886).
\textsuperscript{21} Ibid.
him in his account with the foreign asset he should have collected. This method is subject to the criticism that the administrator or executor would undoubtedly have made satisfactory efforts to collect the asset if he were informed prior to the filing of his final account that he was to be treated as responsible for that asset. Of course, he could escape this uncertainty as to his duty by applying to the court which appointed him for an order clarifying his duty in regard to the collection of specified foreign assets.

In older times when the concept that a personal representative was a legal creature limited to the territory of the state which created him was prevalent and when the population was sufficiently immobile so that most of decedent's property would normally be located in one state, it was easy to say that there was no duty. However, today the property of a decedent's estate will often be widely scattered. In collecting such property, it is recognized that there are many instances where a personal representative may sue in a foreign jurisdiction to collect assets, and that in many other situations the personal representative may receive the asset from a holder who surrenders it voluntarily and this will be a valid discharge of the obligation. Under these circumstances, the personal representative should be placed under a duty to make some effort to collect foreign assets. It is impossible to define this duty with any accuracy. It will depend on the size of the asset and the expense involved in collecting it. If the expense equals or exceeds the value of the asset, there would naturally be no duty to collect. Also, the personal repre-

22 This was done in: Shultz v. Pulver, 11 Wend. 363 (N.Y. 1833); Williams v. Williams, 79 N.C. 417, 28 Am. Rep. 330 (1878); Shinn's Estate, 166 Pa. 121, 30 A. 1026, 45 Am. St. Rep. 656 (1895).
sentative must have some reasonable means of discovering the existence of the asset. He must make a reasonable inquiry, but he need not conduct exhaustive investigations outside the state of administration in the hope of discovering collectible assets. It would seem that a duty to collect should exist only if in the course of the reasonable conduct of the administration he comes across a note or other record showing the existence of this asset or he is informed by some reliable party in interest. If the collection requires an ancillary administration, he should be required to take out the administration himself or see that someone else does to the end that the asset is not lost to the estate.

2. Collection of Chattels

It is possible that an estate of much size where the assets are located in several jurisdictions will consist in large part of movable chattels. If the chattels are easily transported, such as vehicles, jewelry, or securities, the foreign personal representative may take possession and remove them into the state of administration. If the assets are not in the control of any one in the forum, the foreign administrator can accomplish this without any difficulty. Once he has the assets in his possession in the state of his appointment, he will be required to account for them to the probate court there. There is little that the forum in which the assets were located can do about the removal. If the property is in the control of a custodian or bailee, the foreign personal representative must persuade the person having control to deliver the chattels to him. If that person refuses to do so, the foreign personal representative would not be permitted to sue him because of the general common-law prohibition against such suits unless he brings him-
self within one of the recognized exceptions or there is a statute permitting such an action. If he can convince the bailee or custodian to surrender the chattel to him, he has effectively collected it.

An analogous problem based on the same principle concerns the case of stock certificates held by a foreign personal representative in a domestic corporation. He generally will not be permitted to sue to force the corporation to issue new certificates to him. However, if the corporation voluntarily issues new share certificates to the foreign personal representative, it will be protected in an action brought by a subsequently appointed local administrator to compel the corporation to issue the stock to him.

The case authority dealing with this problem is limited because it is difficult to litigate the question of a foreign personal representative's right to collect chattels. If they are not voluntarily delivered to him, he is barred from seeking relief in the courts of that state. About the only way that such a question could arise would be for the foreign personal representative to collect and remove assets of decedent located in the forum. Then a local ancillary administrator would be appointed and sue either the foreign administrator or the bailee who delivered the chattel to him for conversion. The cases which have considered the question

23 See supra Chapter II, p. 42.
25 Morrison v. Hass, 229 Mass. 514, 118 N.E. 893 (1918). In this case, an executor who qualified in New York collected assets of decedent in Massachusetts. An administrator appointed subsequently in Massachusetts sued the executor for conversion. The court gave judgment for the defendant on the ground that he was entitled to collect assets in Massachusetts as long as he did not have to resort to the courts to do so.
26 The decisions which hold that a corporation which issues new share
hold that a foreign personal representative is entitled to collect personal property of decedent located in the forum. 27

Some states have adopted statutes which permit foreign personal representatives to collect the personal property of decedent located in the jurisdiction and which protect the person who delivers the property to him. An illustrative example occurs in the statutes of Alabama:

"Any executor or administrator who has obtained letters testamentary or of administration on the estate of a person who was not, at the time of his death, an inhabitant of this state, in any other of the United States, and who has not obtained letters of administration thereon in this state ... may maintain suits and recover property in this state..." 28

"A delivery of property or the recovery of judgment, under the provisions of section 151 of this title, is a protection to the defendant, or to the person delivering the property, to the extent of such judgment, or the value of such property." 29

These statutes usually require that the foreign personal representative file his letters of appointment and post a bond before he collects the property.

There is a problem whether an ancillary administrator as well as a domiciliary representative is entitled certificates to a foreign personal representative may not be sued by a local administrator, plus the cases which state generally that a foreign administrator or executor has the right to collect personal property, would indicate that a bailee is not liable to a local administrator for assets which he delivered to a foreign personal representative.


28 61 Ala. 151 (1940).
to collect the chattels of the decedent located in other states. Nearly all of the cases which have discussed the issue deal with collections by the domiciliary personal representative. Since the explanation generally given is that, as domiciliary representative, he receives title to all of the decedent's personal property, wherever located, it might be that the courts would not reach the same result if the collection were by a foreign ancillary administrator. Of course, if the property can be removed from the forum by the ancillary administrator, he has effectively collected it. The court which appointed him is probably not likely to order him to return the property to the state from which it was taken. The only remedy the forum has would be against a bailee who surrendered the property to the ancillary administrator.

The case authority on this question is limited and therefore not completely conclusive. It is advisable for a person having control of decedent's property to protect himself by refusing to deliver it to a foreign personal representative unless he is sure that there will be no legal reaction against him. If the law of the particular jurisdiction is not certain by virtue of a clear decision or a statute permitting such collections, it would be wiser to deliver the property only to a local administrator, unless the foreign personal representative can obtain a court ruling showing that he is entitled to the assets.

3. Voluntary Payment of Debts to a Foreign Personal Representative

By far the most litigated, discussed, and important question in this area of the collection of decedent's

29 61 Ala. 155 (1940).
30 See supra p. 142.
assets concerns the effect of voluntary payment by a debtor of decedent to a foreign personal representative.\textsuperscript{31} Most estates which are probated will have some assets consisting of debts due to decedent. Since the orthodox theory is that a simple debt will be treated as property at the place where the debtor is,\textsuperscript{32} and since debtors and the deceased creditor as human beings in a modern society move about freely and frequently, it is very likely that the situs of the debt at the time of the probate proceeding will be in a state other than the jurisdiction in which the administration is being had. Therefore, one of the earliest problems a personal representative will face is this one of collecting debts owed to the decedent by persons residing in other states. Unless the personal representative has a negotiable instrument or note representing the debt, or there is statutory permission, he will generally not be permitted to sue the debtor in that jurisdiction. Thus, the only means of collection would be to persuade the debtor to pay the debt to him voluntarily.

Obtaining voluntary payment from a debtor of the decedent residing in a foreign jurisdiction is not so difficult or infrequent an occurrence as might be imagined. A great majority of debtors are quite willing to

\textsuperscript{31} This problem has been discussed in several articles. The first two listed suffer somewhat in their explanation of the cases because of their emphasis on the completely sovereign aspect of each state as the controlling factor, but they are good discussions of the problems raised by voluntary payment and the case authority.

Beale, "Voluntary Payment to a Foreign Administrator," 42 Harv. L. Rev. at 597 (1929); Mersh, "Voluntary Payment to Foreign Administrator", 18 Geo. L. Journal 130 (1930); Basye, "Dispensing with Administration", 44 Mich. L. Rev. at 410 et seq. (1945).

A good collection of the cases dealing with the major problems will be found in the annotation at 10 A.L.R. 276.

\textsuperscript{32} Harris v. Balk, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 718 (1883).
discharge any obligations they may have and will pay the debt on demand. A substantial number of the cases involve payment of deposits by a bank. The bank is certainly willing to pay, and to a large extent its business reputation is dependent on prompt and voluntary payment. Furthermore, the debtor does not ordinarily want to go through the delay of waiting for an ancillary administrator to be appointed so that payment can be made to him. Certainly if, as frequently must happen, the debtor is without legal advice, he is likely to regard the foreign personal representative as the proper party to discharge the obligation and will pay him without realizing the legal consequences of the representative’s place of appointment. Once the payment has been made, and this will frequently happen, our problem is whether such payment discharges the obligation of the debtor so that he will not be liable to a second recovery against him in an action by a local administrator.

The problem can be a complex one, and the solution in each instance will depend on several varying factors. Such facts as whether the foreign personal representative was a domiciliary or an ancillary one, whether there were any creditors of decedent in the forum, whether there was an ancillary administrator appointed in the forum at the time of payment, and whether the debt was evidenced by a note or negotiable instrument will be important factors in determining whether the voluntary payment to the foreign administrator or executor will operate as a valid discharge to the debtor. In order to make the effect of these factors clear, it will be necessary to consider a number of hypothetical situations which illustrate the various problems. In these hypothetical cases, D will be the debtor of decedent, F, the foreign personal representative to whom the
debt is paid, and \( A \), the ancillary administrator appointed in the state where \( D \) resides.

The first situation to be dealt with is one which does not actually come within the scope of this work, but it should be considered because it has influenced the thinking of the courts in solving the problems treated in this section. \( D \) enters the state where \( F \) was appointed. If \( F \) gets personal jurisdiction over \( D \) and obtains a judgment against him, that judgment will be a bar to any action brought by \( A \) on the same debt in the state where \( D \) resides.\(^{33}\) When the judgment is rendered, the debt merges into the judgment and that judgment is the individual property of \( F \). In a subsequent action brought by \( A \), this judgment will be *res judicata* under the "full faith and credit" clause of the United States Constitution. Similarly, if \( D \) enters the state where \( F \) was appointed and while there voluntarily pays him the debt in good faith, that payment will be a bar to a subsequent action by \( A \).\(^{34}\) This is based on the idea that \( F \) has the right to collect any assets of decedent which can be found in the jurisdiction in which he was appointed, and he has collected the asset to the exclusion of any other personal representative when it is voluntarily paid to him there. Naturally, the courts which have had to treat the problem of the effect of voluntary payment to a foreign administrator see little but a technical distinction between that problem and the situation where payment is made in the state where the administrator was appointed. Thus in the cases discussed in this section, one of the reasons always given for the result is the analogy with the result in the case where the debtor


\(^{34}\) Wilkins v. Ellett, 108 U.S. 256, 2 S.Ct. 641, 27 L.Ed. 718 (1883); Riley v. Moseley, 44 Miss. 37 (1870).
enters the state where an administrator was appointed and there pays him.

The next hypothetical case represents the strongest situation for treating voluntary payment to a foreign personal representative as a valid discharge of the obligation. F is the domiciliary representative. He enters the state where D resides, and D voluntarily pays the debt to him. There are no local creditors in the state, and at the time, there is no ancillary administrator. The cases have generally held that such voluntary payment when there is no ancillary administration and no domestic creditors are prejudiced will constitute a valid discharge of the debt. There is some authority to the effect that if there are local creditors at the time of the payment who are prejudiced by the removal of assets from the jurisdiction, D will be liable in an action brought on the same debt by A. This test of prejudice to local creditors has been criticized because "The effect of the payment is left to the subsequent determination of fact unknown when the payment is made; namely, the existence of unsatisfied creditors." This


Contra: Crohn v. Clay County Bank, 137 Mo. App. 712, 118 S.W. 498 (1909); Young v. O'Neal, 3 Sneed 55 (Tenn. 1855); Vaughn v. Barrett, 5 Vt. 333 (1833).


See also: Richardson v. Neblett, 122 Miss. 723, 84 So. 695, 10 A.L.R. 272 (1920). Voluntary payment to a foreign personal representative was held not to be a discharge because he had failed to comply with the statutory requirement of filing his letters before he received the payment.

37 Mersh, supra note 31 at 146.
criticism points up the undesirable feature of the common-law rule, i.e., the fact that a debtor, when he pays the foreign personal representative, can never be positive that such payment will be a valid discharge. Still, under the state of the common-law decisions in the United States, it is probable that a majority of the courts would turn their decision on this factor of whether the payment operated to the prejudice of local creditors.

If at the time of the voluntary payment by $D$ to $F$, there is an ancillary administrator, $A$, appointed in the state where $D$ resides, does the payment discharge $D$'s obligation? The few cases which have considered this question have held that if the payment were made in good faith and with no knowledge of the existence of the ancillary administrator, it would be a bar to a subsequent action brought by $A$.\textsuperscript{38} The leading case on this point is \textit{Maas v. German Savings Bank}.\textsuperscript{39} $D$, a New York bank, voluntarily paid a deposit of decedent to $F$, the domiciliary representative appointed in New Jersey. $A$ had previously been appointed administrator in New York, and he brought this action against $D$ to recover the deposit. It was conceded that there were no creditors of decedent in New York and that the payment was made in good faith and without knowledge of the appointment of the plaintiff. The New York Court of Appeals held that the voluntary payment was a valid discharge as long as it was made in good faith. It was contended that the bank had constructive notice of the ancillary administration because $A$'s appointment was made in the prescribed manner with notice and was a matter of court record. However, the court held that

\textsuperscript{38} Compton v. Borderland Coal Co., 179 Ky. 695, 201 S.W. 20 (1918); Maas v. German Savings Bank, 176 N.Y. 377, 68 N.E. 658 (1903).

\textsuperscript{39} 176 N.Y. 377, 68 N.E. 658 (1903).
actual notice of the appointment of a domestic administrator would be necessary before there would be a sufficient lack of good faith to destroy the validity of the payment.

The foregoing discussion has presupposed that \( F \), to whom the payment was made, was the domiciliary personal representative. The early cases dealing with the problems of voluntary payment usually rationalized the result on the theory that the domiciliary administrator or executor takes title to all of the decedent's personal property, wherever located, and this includes choses in action such as debts.\(^{40}\) While he might be unable to sue to recover this property, his title is such that he can give a good discharge to the debtor even though the payment occurred outside the state of his appointment. Now the ancillary administrator has not been treated as receiving title to any of the decedent's assets other than those located in the jurisdiction where he was appointed. So our next problem is whether voluntary payment by \( D \) to \( F \) when \( F \) is an ancillary administrator will be a bar in a subsequent action brought by \( A \). The leading case on this question is *Wilkins v. Ellett*.\(^{41}\) \( D \), a resident of Tennessee, paid there to \( F \), an administrator appointed in Alabama, a debt which he owed decedent. Later \( A \) was appointed administrator in Tennessee and brought this action to recover the debt. In a previous case involving the same fact situation,\(^{42}\) where the trial court found that decedent's domicile was in Alabama and consequently that \( F \) was a domiciliary representative, the Supreme Court

\(^{40}\) This theory has been rather vigorously criticized in Beale, *supra* note 31 at 599–604.

\(^{41}\) 108 U.S. 256, 2 S.Ct. 641, 27 L.Ed. 718 (1883).

\(^{42}\) Wilkins v. Ellett, 9 Wall. 740, 19 L.Ed. 586 (U.S. 1869).
FOREIGN PERSONAL REPRESENTATIVES

of the United States had held that the payment was a valid discharge. The case was retried and the lower court found that decedent was domiciled in Tennessee, so that $F$ was to be treated as ancillary administrator. The Supreme Court still held that the payment was a good discharge of the obligation. It based the result largely on the decision in the previous case, saying that it was immaterial whether $F$ was an ancillary administrator or not. While it is difficult from the viewpoint of theory to fit this case in with those involving payment to a domestic representative, the cases decided since have followed the holding in *Wilkins v. Ellett*. The courts seem more concerned with reaching a result which will protect the debtor from having to pay twice than one which will fit into a neat, logical pattern of explanation.

The discussion thus far has assumed that the payment was of a simple contract debt. Another factor which can complicate the problem and may cause a different result is the existence of a negotiable instrument or promissory note as evidence of the debt. It is generally held that $F$ who has the note representing the debt is entitled to receive the payment if the debtor is willing to make payment. This result is the same as in the normal case involving voluntary payment by the debtor to a foreign personal representative. One case has held, however, that if the note is held by $A$, the local administrator, voluntary payment by $D$ to $F$


*Contra:* Bull v. Fuller, 78 Iowa 20 (1889); McIlvoy v. Alsop, 45 Miss. 365 (1871).
COLLECTION OF ASSETS

will not protect him in an action brought later on the note by A. In view of the tendency of modern courts to adopt the "mercantile theory" in regard to commercial paper which holds that the debt is property where the note is, it is likely that any modern court would hold that the only personal representative entitled to collect the asset would be the one in possession of the note. Therefore, a debtor should not feel safe in paying a foreign personal representative unless he can surrender the note which evidences the debt.

A question may be raised whether there is any legal obligation on the debtor to pay a foreign personal representative when he demands payment. This is not an easy question to have litigated, because generally the foreign administrator who demands payment is not entitled to go to court to collect the debt. However, in states where the foreign personal representative is permitted to bring an action, the question has been decided, and the courts have held that there is no duty on a debtor to pay a foreign personal representative. He is entitled to wait and pay an ancillary administrator appointed in the jurisdiction, who can unquestionably give a valid discharge of the obligation. One of the cases reached this result in spite of a statute aimed at protecting debtors who make such voluntary payments. It held that such a statute merely removed from the debtor certain restrictions and did not impose on him an obligation to pay. This result seems strange. It

46 See supra Chapter II, pp. 41–43.
"It is reasonable to assume that the Legislature by the passage of the statute in question intended to remove from a certain class of debtors, to
unquestionably is sound to say that there is no duty to pay an obligation to a foreign personal representative who cannot sue to collect the debt. A legal duty presupposes that the right-holder can resort to the courts to compel the obligor to perform his duty. However, in those situations where states have adopted statutes permitting foreign administrators to sue, this permission must mean that the foreign administrator can sue to collect obligations owing to decedent and the court must give judgment in favor of the plaintiff if such obligation is owing. It would seem that the only proper construction of such a statute would be that the debtor is obligated to pay when sued, and satisfaction of a judgment against him or payment under threat of suit should be a discharge of his obligation.

Many of the obligations owed to decedent which might be voluntarily paid to a foreign personal representative will be secured by some security arrangement such as a mortgage. May a foreign executor or administrator who has the power to discharge a simple debt also discharge mortgages? This will, of course, depend on the law of the forum in which the mortgaged property lies. It would seem to follow as a logical extension of the rule that if a foreign personal representative can discharge a debt voluntarily paid to him, he might also discharge a mortgage securing that debt. There is some case authority to support this position⁴⁹ and legislation which has adopted the principle.⁵⁰ Certainly, any dis-

⁴⁹ Dexter v. Berge, 76 Minn. 216, 78 N.W. 1111 (1899).
⁵⁰ See infra p. 164.
charge of the debt which is recognized by the law governing the release of the mortgage would mean that the remedies on the mortgage would no longer be available, even to a local administrator.

As might be expected, there has been a great deal of difficulty in satisfactorily explaining the result in cases involving voluntary payment. Beale, who is the foremost exponent of the traditional theory concerning the territorial limitation of a personal representative's authority, has developed a very complicated explanation.\(^{61}\) When \(D\) has made a voluntary payment to \(F\), the forum in which \(D\) resides can compel him to pay \(A\), the domestic administrator, a second time. However, if \(F\) is the domiciliary administrator and there are no local creditors in the forum, \(A\), after he has administered the estate in his hands, will transmit the assets including the second payment by \(D\) to \(F\) for distribution. Now the estate in the hands of \(F\) will contain two payments made by \(D\). He will be entitled to recover the amount of his first payment from \(F\) on a theory of unjust enrichment. In order to avoid this circuity of action, the forum will treat the first payment as an equitable discharge and will not permit a second recovery by the domestic administrator. This reasoning is a logical and adequate, although involved, explanation of the majority rule that payment to a domiciliary representative when there are no local creditors will be a valid discharge, but it does not explain the cases which go further and hold that payment is valid if made to a foreign ancillary administrator or when there are local creditors. Also, this explanation has never actually been used by the courts as an explana-

\(^{61}\) Beale, \textit{supra} note 31 at 605, 608.
tion for their decisions, nor does it seem accurately to reflect the true motivations for the result.

The result can be explained much more simply in terms of an almost instinctive reaction as to what is just in this situation. The courts seem to realize that the concept of separate administrations does not reflect the attitude of the layman in dealing with a decedent's estate. The debtor in the creation of the debt dealt with one person, and when he made the payment of that debt to a valid legal representative of the decedent in good faith, he thought he was to be discharged. This payment will create assets of the estate which will be available for the payment of claims and distribution to heirs. The fact that the asset is in the hands of a foreign, rather than a local, personal representative may mean that the interests of local creditors may not be so well protected, but the debtor is also a local citizen who is entitled to some protection from the forum. Usually, the creditors will have been lax in not securing an ancillary administration before payment was made. Certainly, it is obviously unjust enrichment to require the debtor to pay a second time and thus double the assets available for the payment of debts. For these reasons, the forum, which can as a matter of comity recognize the authority of the foreign personal representative, will treat the payment to him as a valid discharge.

The state of the decisions at common law as related to the varying fact situations makes it impossible to state categorically what the law is. A debtor may be fairly safe in relying on payment to a foreign domiciliary representative when he is sure there are no local creditors and no local administration as a discharge of his debt which will bar a subsequent action by a local
COLLECTION OF ASSETS

administrator. If he is not sure about the existence of local creditors, or if there is an ancillary administration, or if his obligation is evidenced by a promissory note which the foreign personal representative does not possess, the only completely safe course for the debtor is to refuse to pay any but a local administrator or to wait until the foreign representative has obtained a court order directing him to pay.

4. Statutes Affecting Voluntary Payment to a Foreign Personal Representative

The uncertainty which the common-law rules raise as to the effect of a voluntary payment to a foreign personal representative was bound to produce legislative activity in an attempt to work out a more satisfactory situation. Certainly the banks and insurance companies who occupy the position of debtors to persons who will frequently die domiciled in a jurisdiction other than the one in which they are located would agitate for legislative remedies. As a result, over half of the states in this country have adopted statutes in one form or another which deal with the effect of a voluntary payment to foreign personal representatives or a delivery of personal property belonging to decedent. The statutes vary considerably in their provisions, but they fall roughly into two classes.

The first group of statutes are those which provide that a foreign personal representative has the power to

62 The influence of banking circles in motivating this type of legislation is very evident in the statute passed in Georgia, 113 Ga. Code Ann. 2406: "Such foreign executor or administrator may transfer the stock of any bank or other corporation in the State standing in the name of the decedent, and check out deposits made by him and dividends declared on his stock, first filing with the bank or corporation a certified copy of his appointment and qualification."
release mortgages and liens. A typical one is the following:

“When an executor or administrator has been appointed in any other state or foreign country of the estate of a person not a resident of this state at the time of his decease, and no executor or administrator thereon be appointed in this state, or when a guardian of a minor has been appointed in any other state or foreign country, such foreign executor, administrator or guardian upon filing and recording in the recorder’s office of the county in which the mortgage held by the estate of such deceased person or minor is recorded an authenticated copy of his appointment, may execute satisfaction or deeds of release of a mortgage upon property situate in this state as and with like effect as executors, administrators and guardians appointed in this state.”

Six states have adopted statutes of this nature. All of these require the foreign personal representative to file his letters for record before he can release the mortgage. While the statutes do not expressly provide that any voluntary payment to a foreign personal representative made in good faith will be a valid discharge, by implication any statute which provides that a foreign personal representative may discharge the security for a debt gives him the power to collect and discharge the debt.

The second, and by far the more numerous variety of statute, provides specifically that the payment of debts and delivery of personal property of decedent to a foreign personal representative will be a valid acquittance. The following is a representative statutory provision of this type:

COLLECTION OF ASSETS

“A payment by a resident or citizen of this state to a fiduciary appointed in another state of, or on account of, a debt due to his decedent, ward or trust, made before letters are granted in this state, shall be as valid and effectual as if made to a fiduciary duly appointed in this state. The foreign fiduciary may, before letters are granted in this state, release and discharge real or personal estate from a mortgage, judgment or other lien or encumbrance held by his decedent, ward or trust, with like effect as if he had received letters in this state.”

Statutes similar to this have been adopted in a large number of states. These statutes usually require that the foreign personal representative must file his letters before he will be entitled to collect decedent’s debts and give a valid discharge for them. Some of the statutes require that the debtor wait a specified period, either three months or six months, after the death of the decedent, and if by that time there is no domestic personal representative appointed, he may safely pay a foreign executor or administrator. A number of the statutes provide that payment will be a valid discharge only if the debtor had no knowledge at the time of the

existence of a domestic representative if he had already been appointed, and a few say that payment is valid only if there is no local representative. The statutes do not generally make the distinction between payment to a domiciliary or ancillary administrator, nor between the existence or absence of local creditors that the common-law rules do. Thus the statutes make important modifications on the common-law rules. They also have the virtue of making the law more certain. In a state where such a statute has been passed, a debtor who is assured that the conditions of the statute have been complied with can make a voluntary payment to a foreign personal representative with confidence that he will not have to pay it a second time.

5. Debts Due to Decedent from the United States

A special problem is raised because of the dual nature of government in this country. Over the forty-eight separate legal systems operating in mutually exclusive geographical areas is imposed one federal legal system which is coextensive in territory with all the states. When a personal representative is appointed in one of the states, he derives his authority from that legal order, and most of his activities are confined within its geographical limits. The United States as a legal entity exists in the territory in which the personal representative was appointed and also in each of the forty-seven other states. When the United States owes a debt to the decedent, there is a problem where the debt is to be collected and by which personal representative. This problem first came before the Supreme Court of the United States in Vaughan v. Northrup 59

59 15 Pet. 1, 10 L.Ed. 639 (U.S. 1841).
The United States owed a debt to decedent for military service in the Revolutionary War. The defendant was appointed his personal representative in Kentucky and came to the District of Columbia and collected the sum from the Treasury of the United States. While there he was sued by heirs of the decedent for their distributive shares. The case was decided in an opinion written by Mr. Justice Story, who always speaks with great authority on matters of conflict of laws. In the course of the opinion, he said:

"The debts due from the government of the United States have no locality at the seat of government. The United States, in their sovereign capacity, have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicile. On the contrary, the administrator of a creditor of the government, duly appointed in the state where he was domiciled at his death, has full authority to receive payment, and give a full discharge of the debt due to his intestate, in any place where the government may choose to pay it; whether it be at the seat of government, or at any other place where the public funds are deposited." 60

Thus it seems that a personal representative has the authority to collect debts due from the United States anywhere he can persuade the Treasury of the United States to pay him.

There is a further problem which arises when there is more than one personal representative. The Supreme Court has held that the United States "may in their discretion, exercised through the appropriate officers,

pay a debt, due to the estate of a deceased person, either to the administrator appointed in the State of his domicile, or to an ancillary administrator duly appointed in the District of Columbia. . . ." 61 This places the decision as to which personal representative should be paid solely in the discretion of the Treasury officials. As a matter of legal reasoning, such a result seems proper. However, the discretion should always be exercised in favor of the domiciliary personal representative. This is the principal administration and is the one toward which all unifying movements should be made. The United States should have no interest in protecting a group of creditors in a specific locality and should lend the weight of its authority to unifying the administration by paying any funds it owes the decedent to the domiciliary representative. To pay them to any other administrator would increase the problems of multiple administrations.

6. Summary

A foreign personal representative can enter the jurisdiction and there take possession of movable chattels to be removed to the state of his administration. Similarly, if the asset is a debt owed by a resident of the forum, he may persuade the debtor to pay it to him voluntarily. These assets will have been effectively collected as far as the foreign personal representative is concerned. The important problem then becomes how the forum will treat the transaction as regards the bailee or debtor who delivered the assets to the foreign administrator. The great majority of cases will reach the conclusion that such delivery was proper so as to

prevent a second recovery by a subsequently appointed local administrator. Over half of the states have statutes which expressly make valid the delivery of chattels or the payment of debts to a foreign administrator. In those states which retain the common law, the most unfortunate feature of the rules is the uncertainty as to legal consequences. A bailee or debtor in such a jurisdiction who surrenders assets to a foreign personal representative can rarely be sure that he has been discharged of his obligation.
The Unified Administration

I. The Necessity for a Unified Administration

The general rule from which all discussion must start is that a personal representative who is appointed in one jurisdiction has no authority *per se* to act in any other. This is the result of two theories.

The most likely explanation for the development of the rule was the extremely influential concept of the sovereign character of each legal order. The rule was developed in the ecclesiastical courts of England, where quite probably each archbishop was jealous of the power of the other and therefore would not permit the other's appointees to act in his jurisdiction. The rule was popularized in the legal world by Story, who founded his system of conflict of laws on a sovereignty-comity theory. We have seen that a modern writer like Beale will still explain the rules as the result of the lack of power of a legal order to make its law by its own force operate in other jurisdictions. This theory, in order to be a satisfactory explanation, presupposes that the other states, because they are not compelled to do so, will refuse to recognize that the laws of that state do have force in their jurisdictions. As a matter of fact, these other jurisdictions frequently recognize the operative force of the law of the first state in their territories, and this forms the basis of those rules generally classified in the field of conflict of laws.

1 See *supra* Chapter I, pp. 15-16.
2 See quotation, *supra* Chapter II, p. 31.
many situations involving foreign personal representatives, effect is given to the law of another state. This should cause us to realize that the important point of view of analysis is not that of the state which appointed the personal representative, but rather the state in which the personal representative attempts to perform some action and which must determine whether that action is proper. Therefore we have to turn from the logical-legal explanations of a Beale and consider the question from the attitude of the forum. Why has the forum adopted the general rule excluding foreign executors and administrators? What exceptions has it made to this general rule? Why were these exceptions made? Should the exceptions be extended further? Should the general rule be abolished altogether?

The real and only justification for the general rule limiting the authority of the foreign personal representative to the territory of the appointing state is the desire to protect local creditors. In the vast majority of cases, the only purpose which a foreign executor or administrator can have in wanting to act in the forum is to collect decedent’s assets. If he is permitted to do so, the local creditors can no longer satisfy their claims out of property located in the jurisdiction. Story pictured the undesirable consequences of permitting the removal of decedent’s assets when he wrote:

Persons, domiciled and dying in one country, are often deeply indebted to foreign creditors, living in other countries, where there are personal assets of the deceased. In such cases it would be a great hardship upon such creditors to allow the original executor or administrator to withdraw those funds from the foreign country, without the payment of such debts, and thus to leave the creditors to seek their remedy in the domicile of the original executor or adminis-
FOREIGN PERSONAL REPRESENTATIVES

trator, and perhaps there to meet with obstructions and inequalities in the enforcement of their own rights from the peculiarities of the local law.”

In order to protect the local creditor's interest, the forum as a general rule has required that decedent's property located in the jurisdiction be administered there, and after all local creditors have been paid the proceeds will be transmitted to the principal administration for distribution. Therefore, in weighing the desirability of a unified administration against the current requirement of separate administrations, on one side of the scales must be placed the interests of local creditors in local assets.

Notwithstanding the necessity of caring for local citizens who have claims against the estate, many exceptions have been made in favor of permitting action in the state by a foreign personal representative. Thus we have seen that there are many situations where a foreign personal representative is permitted by common law or legislation to sue, that he may be allowed to sell land, and is generally permitted to collect movable chattels and debts located in the forum. This indicates a rather extreme dissatisfaction with the operation of the general rule. So the next logical question is, why have the courts and legislatures in general been so willing to make the exceptions?

The result of applying the general rule is to require an ancillary administration in the state where the property is located. Such an administration is quite


4 See supra Chapter II, pp. 35-54.

5 See supra Chapter IV, pp. 125-128.

6 See supra Chapter V.
expensive. There will be the added cost which will always arise from duplication of effort, and more particularly there will be court costs, attorney's fees, and administrator's fees. This added expense must be paid out of the assets of the estate. The expense will diminish the amount of the property available for distribution to the heirs, devisees, or legatees of the decedent. They are as entitled to protection, not only from the domiciliary court, but all courts, as is any group or class of creditors. The heirs and beneficiaries of the decedent should be entitled to demand as inexpensive an administration of the estate as is possible to insure that they will receive more of the decedent's property.

However, if the estate is insolvent, the added expense of various ancillary administrations would mean that there is less of decedent's property available to pay decedent's claims. Treating the estate as a whole and the decedent's creditors as a single group, the application of the rule harms the very class it was designed to protect. Therefore, on the other side of the scales we can place the interest of the heirs and legatees and also the creditors as a general class in having as inexpensive an administration as possible so that there will be more assets for the payment of claims and for distribution.

Another point which argues against the ancillary administration is the time factor. The general practice is that the ancillary administration will follow the established probate proceeding of the state, and after all the claims have been paid and the administrator has made his final accounting, the remaining assets will be transmitted to the principal or domiciliary administration for distribution. This means that the domiciliary administration must be kept open until various ancillary administrations are concluded. This problem of co-
ordinating the various administrations may prolong the principal administration for months and will thus delay the distribution of property. The law should have a definite policy in favor of not tying up property for lengthy periods of time and for seeing that the dependents of decedent get clear title to his property as soon as possible. Thus another factor to be weighed against the general rule is the delay in the conclusion of probate proceedings caused by ancillary administration.

Another important fact which militates against separate administrations is the uncertainty as to the proper personal representative with whom to deal. If a third party resides in the domiciliary state, he may deal with the domiciliary personal representative with confidence that any transactions will be valid. Likewise, if the party resides in a state where an ancillary administration has been taken out, he may carry out any transactions with the ancillary administrator. However, if he lives in a state in which there is no ancillary administration, he can never be sure that a later administration will not be taken out and therefore can never rest assured that in transactions begun with the decedent a completion with the domiciliary representative will be treated as valid in the state where he resides. Since third parties, regardless of where they live, have created contractual obligations with the decedent as a single person, they ought to be entitled in the event of his death to look to a single person to whom they will perform. Therefore, it is important to achieve certainty and unity in the successor or personal representative of the decedent.

Another factor which is becoming of more importance in the conditions of our modern society is a necessity
for a unified policy of conservation and management of an estate. Many estates today, even moderate-sized ones, are made up largely of business enterprises and interests spread over a number of states which the decedent has held and managed as integrated property. The value of such an estate will depend largely on the market values of the property interests, which will be higher when operated in an integrated fashion. Such an estate on decedent's death can only be satisfactorily managed as a whole if advantages are to be taken of fluctuating values and continued business operation. If the estate is managed by several administrators completely independent of one another, the value of the estate may decline sharply. Therefore, another reason against having ancillary administration is the necessity for a unified management of the estate.

Thus we see that in deciding the factors pro and con on this question, on the side of the separate administrations there is the desire to protect local creditors. In favor of some program of unified administration, we have (1) the desire to eliminate expense, (2) the prevention of delay, (3) the necessity to achieve certainty as to decedent's representative, and (4) the avoidance of multiple management of integrated assets. Since these various factors may not be of equal weight in reaching an answer, there should be a brief consideration of how important it is today to protect local creditors by requiring an ancillary administration.

When Story wrote, it was not clear whether a jurisdiction might discriminate against a foreign creditor by refusing to pay his claim until all claims presented by creditors residing in that state were paid. If a local creditor residing in the forum can be made junior to all claimants who are citizens of the state where domiciliary ad-
administration is being had, or if the domiciliary state can refuse to pay any but resident creditors, there is much force in arguing the necessity for an ancillary administration in the forum. In deciding this question, the practice of the states in their treatment of foreign creditors is much more important than their theoretical power to discriminate against the foreign claimants. This problem has been largely resolved in this country by the decision in *Blake v. McClung*. This involved a receivership in Tennessee of an English corporation which was insolvent. There was a Tennessee statute which gave a priority in the distribution of the corporation's assets to Tennessee creditors over those residing in other states. The Supreme Court of the United States held that this statute was unconstitutional under the "privileges and immunities" clause. In the opinion, the court said:

"We adjudge that when the general property and assets of a private corporation, lawfully doing business in a State, are in course of administration by the courts of such State, creditors who are citizens of other States are entitled, under the Constitution of the United States, to stand upon the same plane with citizens of such State, and cannot be denied equality of right simply because they do not reside in that State, but are citizens residing in other States of the Union."  

While the case deals with the administration of insolvent corporations, the case is very analogous to the administration of a decedent's estate, and the result would be the same if a state attempted to give a preference to its creditors.

7 172 U.S. 239, 19 S.Ct. 165, 43 L.Ed. 432 (1898).
8 United States Constitution, Art. IV, sec. 2. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."
9 172 U.S. at 258.
own citizens having claims against a decedent's property over creditors from other states.

While the above decision does not prevent discrimination against foreign corporations having claims, and certainly does not prevent foreign countries from giving priorities to their nationals over claimants from the United States, it is unlikely that a creditor of decedent will be discriminated against among the class of creditors to which he belongs if he files a claim in a foreign estate administration. So the only real difficulty involved is the inconvenience in presenting a claim in a foreign jurisdiction. In the time of Story, this was a real problem. Today, however, with our almost instantaneous communication systems and our very rapid transportation facilities, there is little real inconvenience involved in presenting a claim in the administration being had in a foreign tribunal. Certainly, this slight inconvenience and the expense involved do not outweigh the interest of the heirs and other creditors in having a unified administration.

Even if there were discrimination against a creditor in a foreign jurisdiction in exceptional cases and also some little inconvenience in presenting and collecting his claim, a very forceful argument can be made in favor of unified administration. In modern societies, a party dealing with other persons must take many risks. If the other party is insolvent, he may not be

10 Blake v. McClung, 172 U.S. 239, 19 S.Ct. 165, 43 L.Ed. 432 (1898), held that a foreign private corporation was not a citizen within the meaning of the privileges and immunities clause and therefore could be discriminated against in favor of local creditors. There has been some doubt thrown on this position by cases decided later by the Supreme Court of the United States which hold that a private corporation is a citizen within the privileges and immunities clause. See: Kentucky Finance Corporation v. Paramount Auto Exchange, 262 U.S. 544, 43 S. Ct. 636, 67 L.Ed. 1112 (1923).
able to enforce fulfillment of the obligation. The con-
tract may be unenforceable because of impossibility of
performance. Another risk which the party can be
made to take is that if the other party dies, he will be
left to whatever remedies are provided him by the
domiciliary administration in collecting his debts.
Certainly a nondomiciliary forum is just as interested in
achieving a system of speedy, unified, and inexpensive
administrations as it is in protecting local creditors.
This can only be accomplished if it will refrain from
requiring an ancillary administration and will recognize
the foreign domiciliary personal representative in all
matters, in the hope that the foreign jurisdiction will
reciprocate by treating its domiciliary administrations
in the same manner. If the only way to bring this about
is to send the local creditor to the domiciliary admin­
istration in another jurisdiction, there is no really
serious objection to that. The multitude of legislation
which has this effect indicates that the states have no
real qualms about refusing to protect local creditors if
they will receive fair treatment in the state of principal
administration.

It should be abundantly clear by now that the writer
is completely in favor of a single unified administration
on a decedent's estate. It seems to me that the ad­
vantages to be gained so greatly outweigh the desire
to protect local creditors that there can be little serious
debate. This is the view which has been reached by the
vast majority of the writers who have considered the
problem. The really important question is how to

11 Basye, "Dispensing with Administration," 44 Mich. L. Rev. 329
at 409 (1945); Cheatham, "The Statutory Successor, the Receiver and the
Executor in Conflict of Laws," 44 Col. L. Rev. 549 (1944); Hopkins,
"The Extraterritorial Effect of Probate Decrees," 53 Yale L. J. 221
(1944); Niles, "Model Probate Code and Monographs on Probate Law:
achieve what is generally regarded as the highly desirable result of a unified administration.

2. Requirements for a Unified Administration

In order to achieve a unified administration, there must be some changes made in the present law. This is obvious from the number of ancillary administrations which are still necessary to administer a large estate. Before we decide the best means of bringing about these changes, it is important to determine what is necessary to achieve the unified administration and to what extent these requirements are met by the present law.

The first obvious requirement is that the personal representative must be subject to the control of only one court. If any case involving the property of the estate or raising questions about the management of that property, he should be answerable only to the court which appointed him. As was seen in Chapter III, this is the general result under the existing law. With few and relatively unimportant exceptions, foreign tribunals will not assume jurisdiction over personal representatives in any matter touching their representative character. Consequently, this raises no problems.

A second essential is that there be only one administration on each estate. This may seem a truism, but there is a serious question whether a single administration on a decedent's estate is completely desirable. The single administration presupposes the designation of one jurisdiction as the only one which can administer


decedent’s property. The obvious state to select is the domiciliary one. However, there are instances where the domiciliary state is not the best jurisdiction in which to hold the administration. If a decedent were domiciled in Michigan at the date of his death, but all of his property consisted of a business operated in New York and all of his creditors and debtors resided there, it would be very unsatisfactory to attempt to administer that estate wholly in Michigan. To attempt to lay down a standard which provides that the state where the most property is located or where the majority of the parties are found is to be the place where the single administration is to be held would lead to the unfortunate result of so uncertain a criterion that the states would be fighting over which one was entitled to administer the assets.

One solution to this problem is to retain the principle of separate administrations and try to eliminate only undesirable and unnecessary ancillary administrations. The way to accomplish this seems to be to leave the matter in the discretion of the probate court to whom the parties apply for ancillary administration. If the domiciliary personal representative can show that only a small portion of the decedent’s estate is in the forum and only a few of the heirs and creditors in relation to the total number are present there, the probate court should have the jurisdiction to refuse to grant the administration. Such a provision appears in the Uniform Ancillary Administration of Estates Act.

"The [probate court] may deny the application for ancillary letters if it appears that the estate may be settled conveniently without ancillary administration. Such denial is without prejudice to any subsequent application if it later appears that ancillary administration should be had."\(^\text{12}\)

\(^{12}\) Uniform Ancillary Administration of Estates Act, section 3.
This must be accompanied by legislation which gives the foreign domiciliary representative the power to perform all the functions of administration in the forum. If such discretion were wisely exercised by the courts, the worst features of the separate administrations could be eliminated.

Such a solution does not seem satisfactory to me, however. Two of the reasons previously given for the necessity of the unified administration were the need for management of integrated business interests by a single personal representative and the need to achieve certainty as to the personal representative so that obligors of the decedent could deal with him with confidence. As long as there are ancillary administrations, such policies cannot be completely effectuated. Further, leaving the matter in the discretion of the various probate courts with such a broad standard of decision may well mean that the courts in many localities will require that there be ancillary administrations in nearly as many situations as it is required under the present law.

I feel that it is necessary to provide for one administration on an estate. Since the succession to movable property is determined by the law of the domicile and since the administration there is always regarded as the principal one by Anglo-American courts, the domiciliary administration should be selected as that single administration. It is true that frequently a substantial part of the property and a majority of the decedent’s creditors will be located in other jurisdictions. This does not present an insurmountable barrier to the unified administration. Let us take the extreme hypothetical case posed before. A decedent was domi-

13 Restatement, Conflict of Laws, sec. 303 (1934).
ciled in Michigan, but his property, a going business, and all the parties were in New York. If New York were to permit the personal representative appointed in Michigan to perform the functions of administration in its jurisdiction, the problem could be handled adequately. The Michigan court could authorize the personal representative to manage the business property in New York. It could require him to follow the same procedure for the payment of claims in New York as he does in Michigan. He would give notice in New York of the administration and be available there at specified times over a designated period to receive claims against the estate. The claims, after having been approved by the probate court at the domicile in Michigan, could be paid in New York. Such a procedure, while following closely an ancillary administration, does not mean that the domiciliary representative has to subject himself to the procedure and control of each legal order in which the decedent left property. Such activity in other jurisdictions could be handled by the personal representative himself or by an agent. The personal representative should be required to follow this procedure only in those states where the decedent left a substantial portion of his property and where a number of creditors are who would be inconvenienced by having to come to the domiciliary forum to present their claims. Such a procedure would adequately handle the rare situation where it would be better to have a nondomiciliary forum as the place of unified administration. It will also enable the creditors in those jurisdictions where it is most common and profitable today to require an ancillary administration to be dealt with in a satisfactory manner.

The third necessity for a unified administration is
that the domiciliary representative be treated as having title to all of the decedent's property wherever located for purposes of administration. This will require that the states forego their right to require an ancillary administration which gives title of the property within the jurisdiction to the local administrator. While this will be a substantial difference in the probate law of Anglo-American states, it is not a revolutionary or startling change. There are many analogous situations where a fiduciary in much the same position as a personal representative, such as a universal successor, statutory receiver, or trustee, is treated as having title to property in other jurisdictions.

As was pointed out in the first chapter, the universal successor who performs the functions of administration in civil-law systems takes title to all of the decedent's property. This title will be recognized even by common-law courts as to property in their jurisdictions.\(^{14}\) If the universal successor can be treated thus, it is difficult to see why the domiciliary personal representative cannot be.

Secondly, a statutory receiver is said to have title to the property of a corporation wherever it may be. The receivership is strikingly similar to a probate administration, and the receiver is very much akin to the personal representative.\(^{15}\) When a business is insolvent, he takes over and manages all its property, frequently operates the business, and then pays the assets at the

\(^{14}\) The Sultan of Turkey v. Tiryakian, \(213\) N.Y. 429, 108 N.E. 72 (1915); Vanquelin v. Bouard, \(15\) C.B. (N.S.) 341 (1863).

\(^{15}\) The similarities between the personal representative and the statutory receiver are noted and a strong argument is made for the treatment of the personal representative in a similar fashion to the statutory receiver in Cheatham, "The Statutory Successor, the Receiver and the Executor in the Conflict of Laws," \(44\) Col. L. Rev. 549 (1944).
conclusion of the receivership in equal shares to the creditors. He is a fiduciary conserving the property for the benefit of the corporation's creditors. Originally, the receiver was appointed by a court of equity and was said to be limited to the territory of the appointing court, just as a personal representative is. This result is based on the same theory, i.e., that an appointee cannot have authority to act outside the jurisdiction of the court which appointed him. It was also justified on the same policy, that the state wanted to protect local creditors of the corporation by requiring an ancillary receivership on the corporation's property in the jurisdiction. It became obvious that this was totally unsatisfactory when a large nation-wide corporation went into receivership and had to be operated. So it was held that in the situation where the receiver was appointed in pursuance of a statute of the state of incorporation which made him an assignee of the corporation's property, he had title to that property which will be recognized in other states. According to Beale,

"Other states will recognize this succession (so like the French doctrine of universal succession on death), and will give this statutory receiver all movables of the corporation within the state, and will allow the statutory receiver to sue on a claim due to the corporation."

It is difficult to see how a statute of a state can be more effective in assigning title to the property of a corporation than a decree of a court created by the same legal order, but certainly the result, although not too

16 Standard Bonded Warehouse Co. v. Cooper & Griffen, 30 F.(2d) 842 (W.D. N.C. 1929).
18 Beale, A TREATISE ON THE CONFLICT OF LAWS, 1570.
logical, is a necessary and desirable one. If the statutory receiver can take title to all the property of a corporation organized in the state, it is hard to understand why the personal representative cannot take title to all the property of a decedent domiciled in the jurisdiction at his death. Of course, this depends on the attitude of the nondomiciliary states in which the decedent left property, but if they are going to recognize the title of a foreign statutory receiver, they ought to be prepared to do so with a foreign personal representative.

Also, a trustee is a similar fiduciary who has always been treated as having title to the trust res regardless of its location. 19 This may be because the common law never distinguished between the personalities of a trustee and of an individual as was done with the receiver and the personal representative. 20 In the modern English legislation, principally the Administration of Estates Act of 1925, 21 it has been provided that the personal representative holds the property of the estate as a trustee. This raises the problem whether such a provision will be treated as vesting title to all of the decedent’s property, wherever it may be located, in the English executor or administrator in the same way

19 Shirk v. City of La Fayette, 52 F. 857 (C.C. D. Ind. 1892); Roby v Smith, 131 Ind. 342, 30 N.E. 1093 (1891).
20 Cheatham, supra note 15 at 553–554.
21 "Subject to the powers, rights, duties and liabilities herein-after mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto...." 9 Halsbury's STATUTES OF ENGLAND, 2nd Ed., 716 (Land Transfer Act, 1897. 60 & 61 Vict. 65, sec. 2).

"On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—
(a) as to the real estate upon trust to sell the same; and
(b) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money...."

9 Halsbury's STATUTES OF ENGLAND, 2nd Ed., p. 734 (The Administration of Estates Act, 1925. 15 Geo. 5 c. 23, s. 33).
as was done with the statutory receiver or as an ordinary trustee. This depends not so much on the wording of the English legislation as it does on the effect given it by the courts of other jurisdictions as to property located there. I feel that such a provision will not change the rules discussed in this book. The nondomiciliary courts will be inclined to say that the legislation as to the nature of the personal representative applies only to property within the jurisdiction of the English Parliament and that it cannot enlarge the control of an English personal representative over property outside England.

Two things are required on behalf of the nondomiciliary states in addition to refraining from requiring ancillary administrations in order to place title in the domiciliary representative. The foreign domiciliary personal representative must be permitted to collect all the assets of the decedent located in the jurisdiction and to give a valid discharge to all obligations satisfied to him. Secondly, he must have the power to bring any necessary actions in the courts of the state to compel an obligor of the decedent to perform the obligation to himself and to recover property of the decedent from wrongful possessors. Nearly half of the states have legislation permitting such suits and over half have statutes providing that a foreign personal representative can give a valid discharge to a person who pays a debt or surrenders property of the decedent to him. In those states, little change is necessary. Our problem is to secure changes in the states which retain the common law and to work out a uniform system throughout the nation. By no means should such attempts at uni-

---

22 See supra Chapter II, note 92.
23 See supra Chapter V, pp. 163-166.
formity and unity in the administration of a decedent’s estate be limited to the United States, but it is here that the problems caused by the separate administrations are the most frequent and pressing.

3. Means of Achieving the Unified Administration

This area of the administration of decedents’ estates points up more than any other the unsatisfactory results of the forty-eight separate private law systems we have in this country. The United States is by population, customs, and geography one nation. The state boundaries are unquestionably artificial. Therefore, the population and its movable property are extremely fluid. And yet that population and property are governed by widely differing legal systems depending on their location at any given time. This condition gives rise to a multitude of conflict of law problems which are often bewildering and frequently difficult of solution. It is this situation which has made the United States the cradle for much of modern conflict of laws. There is nothing inherently necessary in maintaining the states as separate legal institutions. The movement for uniform legislation and the expansion of federal activity in many legal areas indicate the desirability of one legal system for the entire country. One such legal order could provide for a unified administration of decedents’ estates in the territory of the United States and thus eliminate all the problems raised by separate administrations. Since this would require drastic constitutional amendment, such a solution is not even remotely possible and the answer must come from other directions.

As long as there are a number of separate legal orders in the territory of the United States, a completely unified administration is a rather forlorn hope. Even if all
the legal orders participated in the achievement of a system of unified administrations, it is very likely that the multiple statutes and decisions would reach a variety of results in the various states. However, the fact that about half of the states retain the common-law rules with little or no statutory modification indicates that the desire to solve this problem is not all-pervading. Therefore, we must treat unified administration as an ideal and work toward the elimination of as much of the unnecessary ancillary administrations as possible.

The states could as a matter of comity through court decision go a long way towards achieving a sufficient unified administration and, as a matter of fact, have done so. If the courts would permit a foreign personal representative always to sue to collect assets, would refuse to permit any actions brought against a foreign personal representative, and would not interfere with his collection of local assets, there would be little need for an ancillary administration. If this were coupled with the power to refuse to grant an ancillary administration in the state unless it were absolutely necessary for efficient administration, most of the problems would be solved. However, the doctrine of *stare decisis* will influence the courts to retain most of the rules which are currently in force, and the evolutionary process which the common law takes is not rapid enough to give an immediate solution. The answer would seem to have to come from legislation.

The legislation must be adopted in all the forty-eight

---

24 The Uniform Negotiable Instruments Law was adopted in all forty-eight states quite early. The experience with that piece of legislation has been that cases decided in pursuance of the same act by different courts in different states do not always produce uniformity. See Britton on *Bills and Notes*, 19–22.
UNIFIED ADMINISTRATION

states. There has been a great deal of piecemeal legisla-
tion dealing with specific problems, but in only about
half of the states. In order to achieve unified admin-
istration of a decedent’s estate, there must be legisla-
tion adopted in each state in which the decedent might
leave property, and that legislation must have in effect
the same provisions. This will, of course, require the
enactment of some uniform legislation.

Naturally, the desirability of such legislation has not
escaped the notice of the National Conference of Com-
missioners on Uniform State Laws, and they have
promulgated and adopted two acts in this area. The
Uniform Powers of Foreign Representatives Act was
adopted by them in 1944. It has not been adopted in
any state. The Act in essence provides that in the
absence of an ancillary administration, the foreign
personal representative “may exercise all powers which
would exist in favor of a local representative.” This
will include the power to maintain actions and to give a
valid discharge to persons who deliver property or pay
debts to him. The Act has the further advantage of per-
mitting such action only by the domiciliary representa-
tive. A unified administration requires action by only
one administrator, and the logical one to select is the
domiciliary representative.

The Uniform Ancillary Administration of Estates
Act was adopted by the National Conference of Com-
missioners on Uniform State Laws in 1949. It has
been adopted in Wisconsin. In addition to providing

25 See infra Appendix A.
26 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS, 1953. Table at 317.
27 See infra Appendix B.
28 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATES LAWS, 1953. Table at 317.
that the probate court may refuse to grant ancillary administration, the purpose of the Act is to permit the foreign personal representative appointed in the domicile to act as ancillary administrator. Not only is he preferred in the appointment of an ancillary administrator, but he may be substituted for a local administrator already appointed. The Act attempts to achieve as unified an administration as possible by providing that in the insolvent estate all creditors, regardless of their residence, are entitled to share equally in the assets of the ancillary administration, taking into account what they have received in other administrations. The important provision in this Act is that which provides that the probate court may refuse to grant an ancillary administration if the estate can be conveniently settled without it. There can be no truly unified administration as long as there is any ancillary administration on the estate. If the jurisdiction will refrain from requiring local administrations except when absolutely necessary, it will be possible to achieve a high degree of unity in probate administrations in this country.

Any legislative remedy which is to be adopted in the various states must have two viewpoints, that of administrations which are domiciliary in the state and that of estates where the decedent is domiciled elsewhere. In the case of the nondomiciliary estate, the provision must be that the domiciliary representative takes title to all of the property of the decedent in the state and that he may maintain actions to collect this property and may discharge obligations due to the estate. The Uniform Powers of Foreign Representatives Act is well drafted to accomplish this and consequently should be adopted in all the states. In addition, the
state must adopt legislation providing that no ancillary administration may be had in the state on a non-domiciliary estate. The Uniform Ancillary Administration of Estates Act, while well drawn to eliminate the unnecessary ancillary administration, still retains the principle of separate administrations and should not be adopted. Under such a legislative program, the domiciliary representative could perform all the functions of administration in the state.

Some changes must be made in the probate practice of the state dealing with a domiciliary estate in order to achieve unified administration. It must be made clear and certain that creditors from other jurisdictions will be treated in exactly the same way as creditors resident in the state in order to alleviate the fear of other states that their residents might be discriminated against. Secondly, the personal representative must be placed under a duty to collect all the assets in those states which participate in this program of a unified administration. Finally, in those frequent situations where a decedent maintained extensive contacts with another jurisdiction or jurisdictions so that he has substantial property interests and creditors there, the personal representative should be required to give notice of the administration, and to receive and pay claims in that locality.

There is doubt whether many states will be interested in adopting such a legislative program. The strongest reason is probably the inertia which is usually responsible for maintaining the status quo. A second reason for the retention of the present system is that the ancillary administration provides fees for the bar which will not be available under a unified administration. Only a minority of the lawyers are motivated by this
consideration, but their active interest in retaining the ancillary administration is usually strong enough to overcome the less enthusiastic efforts of the rest of the bar at reform. The third reason, and the one which is always given to support the rule, is the desire to protect local creditors. As we have seen, the state of the common and statute law in this country at present is such that foreign administrators can remove assets from the jurisdiction in a large number of situations, and thus the local creditors are often unprotected. Further, under a system of unified administration where the domiciliary state treats all creditors equally, the interests of local creditors will be protected just as well as they can be by requiring an ancillary administration. So this reason is not so impelling as it would seem at first.

One plan has been suggested which will exert strong pressure towards a uniform system of unified administrations in the United States. The Federal Government has authority to enact bankruptcy legislation under which the property of any person who is insolvent may be administered. Under this power, it could provide a system of single administration on any decedent's estate which is insolvent. The solvent estates would still be under the control of the separate states, but as the experience of the bankruptcy legislation indicates, the states are strongly influenced to make their law conform to any federal enactment in the field.

It is impossible to see an adequate solution to this problem in the immediate future. The difficulties are likely to become worse rather than better. The rules of ancillary administration were developed in a semi-feudal society where the population was almost com-

pletely immobile. A person today no longer lives his life in as nearly a stationary fashion as a building or tree. In the jet age, a person's community may well become the world. In the world of tomorrow with its ever-increasing commercial types of property, to attempt to chop up a man's property interests into segments based on their location at his death and to administer each segment separately from the rest will lead to the most unsatisfactory results. This is one area where it is imperative to change the rules designed in an older society for those which are more suitable for the present and the future. As Justice Holmes said in another connection:

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." 30

APPENDIX A

Uniform Powers of Foreign Representatives Act

(This text was taken from the Handbook of the National Conference of Commissioners on Uniform State Laws (1944) 325)

Be it enacted . . .

Section 1. (Definitions.) As used in this act:

(1) "Representative" means an executor, administrator, testamentary trustee, guardian or other fiduciary of the estate of a decedent or a ward, duly appointed by a court and qualified. It includes any corporation so appointed, regardless of whether the corporation is eligible to act under the law of this state. This act does not change the powers or duties of a testamentary trustee under the non-statutory law or under the terms of a trust.

(2) "Foreign representative" means any representative who has been appointed by the court of another jurisdiction in which the decedent was domiciled at the time of his death, or in which the ward is domiciled, and who has not also been appointed by a court of this state.

(3) "Local representative" means any representative appointed as ancillary representative by a court of this state who has not been appointed by the domiciliary court.

(4) "Local and foreign representative" means any representative appointed by both the domiciliary court and by a court of this state.

Section 2. (Powers of Foreign Representative in General.) When there is no administration or application therefor pending in this state, a foreign representative may exercise all powers which would exist in favor of a local representative, and may maintain actions and proceedings in this state subject to the conditions imposed upon nonresident suitors generally.

Section 3. (Proof of Authority in Court Proceedings—
Upon commencing any action or proceeding in any court of this state, the foreign representative shall file with the court authenticated copies of his appointment, and of his official bond if he has given a bond. If the court believes that the security furnished by him in the domiciliary administration is insufficient to cover the proceeds of the action or proceeding, it may at any time order the action or proceeding stayed until sufficient security is furnished in the domiciliary administration.

Section 4. (Proceedings to Bar Creditors' Claims.) Upon application by a foreign representative to the [probate] court of the county in which property of the decedent or of the ward is located, the court shall cause notice of the appointment of the foreign representative to be published once in each of [three] consecutive weeks in some newspaper of general circulation in the county. The claims of all creditors of the decedent or of the ward, unless filed with the court within [ ] after date of the first publication, are barred as a lien upon all property of the decedent or of the ward in this state, to the extent that claims are barred by a local administration. If before the expiration of such period any claims have been filed and remain unpaid after reasonable notice thereof to the foreign representative, ancillary administration may be had.

Section 5. (Effect of Local Proceedings.) The Powers granted by this act shall be exercised only when there is no administration or application therefor pending in this state, except to the extent that the court granting local letters may order otherwise, but no person who, before receiving actual notice of local administration or application therefor, has changed his position by relying on the powers granted by this act shall be prejudiced by reason of the application for, or grant of, local administration. The local representative or the local and foreign representative shall be subject to all burdens which have accrued by virtue of the exercise of the powers, or otherwise, under this act and
may be substituted for the foreign representative in any action or proceeding in this state.

Section 6. (Uniformity of Interpretation.) This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Section 7. (Short Title.) This act may be cited as the Uniform Powers of Foreign Representatives Act.

Section 8. (Repeal.) [and] all [other] acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

Section 9. (Time of Taking Effect.) This act shall take effect....
APPENDIX B

Uniform Ancillary Administration of Estates Act

(This text was taken from the Handbook of the National Conference of Commissioners on Uniform State Laws (1949) 330)

Be it enacted...

Section 1 (Definitions) As used in this act:

(1) “Representative” means an executor, administrator [testamentary trustee], guardian or other fiduciary of the estate of a decedent or a ward, duly appointed by a court and qualified. It includes any corporation so appointed, regardless of whether the corporation is eligible to act under the law of this state. [This act does not change the powers or duties of a testamentary trustee under the non-statutory law or under the terms of a trust.]

(2) “Foreign representative” means any representative who has been appointed by the court of another jurisdiction in which the decedent was domiciled at the time of his death, or in which the ward is domiciled, and who has not also been appointed by a court of this state.

(3) “Local representative” means any representative appointed as ancillary representative by a court of this state who has not been appointed by the domiciliary court.

(4) “Local and foreign representative” means any representative appointed by both the domiciliary court and by a court of this state.

Section 2. (Application for Ancillary Letters and Notice Thereof.)

(1) Qualifications of and Preference for Foreign Representative.

(a) Any foreign representative upon the filing of an authenticated copy of the domiciliary letters with the [probate court] may be granted ancillary letters in this state notwithstanding that the representative is a nonresident of this state or is a foreign corporation.
(b) If the foreign representative is a foreign corporation it need not qualify under any other law of this state to authorize it to act as local and foreign representative in the particular estate if it complies with the provisions of sections 4 and 5 of this act.

(c) If application is made for the issuance of ancillary letters to the foreign representative, the court shall give preference in appointment to the foreign representative unless the court finds that it will not be for the best interests of the estate or the decedent shall have otherwise directed.

(2) Intervention upon application. When application is made for issuance of ancillary letters any interested person may intervene and pray for the appointment of any person who is eligible under this act or the law of this state.

(3) Notice to foreign representative. When application is made for issuance of ancillary letters to any person other than the foreign representative, the applicant shall send notice of the application by registered mail to the foreign representative if the latter’s name and address are known and to the court which appointed him if the court is known. These notices shall be mailed upon filing the application if the necessary facts are then known, or as soon thereafter as the facts are known. If notices are not given prior to the appointment of the local representative, he shall give similar notices of his appointment as soon as the necessary facts are known to him. Notice by ordinary mail is sufficient if it is impossible to send the notice by registered mail. Notice under this subsection is not jurisdictional.

Section 3. (Denial of Ancillary Letters.) The [probate court] may deny the application for ancillary letters if it appears that the estate may be settled conveniently without ancillary administration. Such denial is without prejudice to any subsequent application if it later appears that ancillary administration should be had.

Section 4 (Bond.) No nonresident shall be granted ancillary letters unless he gives an administration bond.
Section 5. (Agent to Accept Service of Process.) No non-resident shall be granted ancillary letters and no person shall be granted leave to remove assets under Section 7, until he files in the [probate court] an irrevocable power of attorney constituting the [clerk of the court] as his agent to accept and be subject to service of process or of notice in any action or proceeding relating to the administration of the estate. The [clerk] shall forthwith forward to the representative at his last known address any process or notice so received, by registered mail requesting a return receipt signed by addressee only. Forwarding by ordinary mail is sufficient if when tendered at a United States Post Office an envelope containing such notice addressed to such representative, as aforesaid, is refused registration.

Section 6. (Substitution of Foreign for Local Representative.)

(1) Application and procedure. If any other person has been appointed local representative, the foreign representative, not later than [fourteen] days after the mailing of notice to him under section 2, unless this period is extended by the court because the foreign representative resides outside continental United States or in Alaska, or for other cause which the court deems adequate, may apply for revocation of the appointment and for grant of ancillary letters to himself. [Ten] days' written notice of hearing shall be given to the local representative. If the court finds that it is for the best interests of the estate, it may grant the application and direct the local representative to deliver all the assets, documents, books and papers pertaining to the estate in his possession and make a full report of his administration to the local and foreign representative as soon as the letters are issued and he is qualified. The local representative shall also account to the court. The hearing on the account may be forthwith or upon such notice as the court directs. Upon compliance with the court's directions, the local representative shall be discharged.

(2) Effect of substitution. Upon qualification, the local and foreign representative shall be substituted in all actions and
proceedings brought by or against the local representative in his representative capacity, and shall be entitled to all the rights and be subject to all the burdens arising out of the uncompleted administration in all respects as if it had been continued by the local representative. If the latter has served or been served with any process or notice, no further service shall be necessary nor shall the time within which any steps may or must be taken be changed unless the court in which the action or proceedings are pending so orders.

Section 7. (Removal of Assets to Domiciliary Jurisdiction.)

(1) Application. Prior to the final disposition of the ancillary estate under section 12 and upon giving such notice as the [probate court] directs, the foreign representative or the local and foreign representative may apply for leave to remove all or any part of the assets from this state to the domiciliary jurisdiction for the purpose of administration and distribution.

(2) Prerequisites to granting application. Before granting such application, the court shall require compliance with section 5 and the filing of a bond by the foreign representative or of an additional bond for the protection of the estate and all interested persons unless the court finds that the bond given under section 4 by the local and foreign representative is sufficient.

(3) Granting application—terms and consequences. Upon compliance with this section, the court shall grant the application upon such conditions as it sees fit unless it finds cause for the denial thereof or for postponement until further facts appear. The granting of the application shall not terminate any proceedings for the administration of property in this state unless the court finds that such proceedings are unnecessary. If the court so find, it may order the administration in this state closed, subject to reopening within [one year] for cause.

Section 8. (Effect of Adjudications for or against Representatives.) A prior adjudication rendered in any jurisdiction for or against any representative of the estate shall be as conclusive as to the local or the local and foreign representative as if he were a party to the adjudication unless it resulted
from fraud or collusion of the party representative to the prejudice of the estate. This section shall not apply to adjudications in another jurisdiction admitting or refusing to admit a will to probate.

Section 9. (Payment of Claims.) No claim against the estate shall be paid in the ancillary administration in this state unless it has been proceeded upon in the manner and within the time required for claims in domiciliary administrations in this state.

Section 10. (Liability of Local Assets.) All local assets are subject to the payment of all claims, allowances and charges, whether they are established or incurred in this state or elsewhere. For this purpose local assets may be sold in this state and the proceeds forwarded to the representative in the jurisdiction where the claim was established or the charge incurred.

Section 11. (Payment of Claims in Case of Insolvency.)

1) Equality subject to preferences and security. If the estate either in this state or as a whole is insolvent, it shall be disposed of so that, as far as possible, each creditor whose claim has been allowed, either in this state or elsewhere, shall receive an equal proportion of his claim subject to preferences and priorities and to any security which a creditor has as to particular assets. If a preference or priority is allowed in another jurisdiction but not in this state, the creditor so benefited shall receive dividends from local assets only upon the balance of his claim after deducting the amount of such benefit. The validity and effect of any security held in this state shall be determined by the law of this state but a secured creditor who has not released or surrendered his security shall be entitled only to a proportion computed upon the balance due after the value of all security not exempt from the claims of unsecured creditors is determined and credited upon the claim secured by it.

2) Procedure. In case of insolvency and if local assets permit, each claim allowed in this state shall be paid its proportion, and any balance of assets shall be disposed of in accordance with section 12. If local assets are not sufficient
to pay all claims allowed in this state the full amount to
which they are entitled under this section, local assets shall
be marshalled so that each claim allowed in this state shall
be paid its proportion as far as possible, after taking into
account all dividends on claims allowed in this state from
assets in other jurisdictions.

Section 12. *(Transfer of Residue to Domiciliary Representa-
tive.)* Unless the court shall otherwise order, any moveable
assets remaining on hand after payment of all claims allowed
in this state and of all taxes and charges levied or incurred
in this state shall be ordered transferred to the representative
in the domiciliary jurisdiction. The court may decline to
make the order until such representative furnishes security
or additional security in the domiciliary jurisdiction, for the
proper administration and distribution of the assets to be
transferred.

Section 13. *(General Law to Apply.)* Except where special
provision is made otherwise, the law and procedure in this
state relating generally to administration and representatives
apply to ancillary administration and representatives.

Section 14. *(Uniformity of Interpretation.)* This act shall
be so interpreted and construed as to effectuate its general
purpose to make uniform the law of those states which
enact it.

Section 15. *(Short Title.)* This act may be cited as the
Uniform Ancillary Administration of Estates Act.

Section 16. *(Repeal.)* [. . . and] all [other] acts or parts of
acts which are inconsistent with the provisions of this act are
hereby repealed.

Section 17. *(Time of Taking Effect.)* This act shall take
effect. . . .
Amendment to Uniform Ancillary Administration of Estates Act

(The text of this amendment was taken from the Handbook of the National Conference of Commissioners on Uniform State Laws (1953) 241.)

Section 11 of the Uniform Ancillary Administration of Estates Act as approved in 1949 is amended to read as follows:

Section 11. (Payment of Claims in Case of Insolvency.)

(1) Equality subject to preferences and security. If the estate either in this state or as a whole is insolvent, it shall be disposed of so that, as far as possible, each creditor whose claim has been allowed, either in this state or elsewhere, shall receive an equal proportion of his claim subject to preferences and priorities and to any security which a creditor has as to particular assets. If a preference, priority or security is allowed in another jurisdiction but not in this state, the creditor so benefited shall receive dividends from local assets only upon the balance of his claim after deducting the amount of such benefit. Creditors who have security claims upon property not exempt from the claims of general creditors, and who have not released or surrendered them, shall have the value of the security determined by converting it to money according to the terms of the security agreement, or by such creditor and the personal representative by agreement, arbitration, compromise or litigation, as the court may direct, and the value so determined shall be credited upon the claim, and dividends shall be computed and paid only on the unpaid balance. Such determination shall be under the supervision and control of the court.

(2) Procedure. In case of insolvency and if local assets permit, each claim allowed in this state shall be paid its proportion, and any balance of assets shall be disposed of in accordance with Section 12. If local assets are not sufficient to pay all claims allowed in this state the full amount to which they are entitled under this section, local assets shall be so marshalled so that each claim allowed in this state shall be paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions.
<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. L. Goetzman Co. v. Gazett, 172 Minn. 68, 214 N.W. 895 (1927)</td>
<td>19</td>
</tr>
<tr>
<td>Adam v. Saenger, 303 U.S. 59, 38 S. Ct. 454, 82 L. Ed. 649 (1918)</td>
<td>99</td>
</tr>
<tr>
<td>Allen v. Armfield, 190 N.C. 870, 129 S.E. 801 (1925)</td>
<td>111</td>
</tr>
<tr>
<td>Allen v. Wilhoit, 122 Kan. 387, 252 P. 226 (1927)</td>
<td>90</td>
</tr>
<tr>
<td>Allison and Sharpley v. Dickinson, Hardres 216, 145</td>
<td></td>
</tr>
<tr>
<td>Eng. Rep. 460 (1661)</td>
<td>15, 16</td>
</tr>
<tr>
<td>Amsden v. Danielson, 19 R.I. 533, 35 A. 70 (1896)</td>
<td>159</td>
</tr>
<tr>
<td>Ansley v. Baker, 14 Tex. 607 (1855)</td>
<td>114</td>
</tr>
<tr>
<td>Anthes v. Anthes, 21 Idaho 305, 121 P. 553 (1912)</td>
<td>35</td>
</tr>
<tr>
<td>Appleton's Estate, In re, 81 D. &amp; C. 85 (Pa. 1951)</td>
<td>94</td>
</tr>
<tr>
<td>Aubuchon v. Lory, 23 Mo. 99 (1856)</td>
<td>20</td>
</tr>
<tr>
<td>Bacharach v. Spriggs, 173 Ark. 250, 292 S.W. 150 (1927)</td>
<td>125, 128</td>
</tr>
<tr>
<td>Baker v. Smith, 3 Metcalf 264 (Ky. 1860)</td>
<td>89</td>
</tr>
<tr>
<td>Baldwin v. Powell, 294 N.Y. 130, 61 N.E. (2d) 412 (1945)</td>
<td>31, 59</td>
</tr>
<tr>
<td>Ballard v. United Distillers, 28 F. Supp. 633 (W.D. Ky. 1939)</td>
<td>37, 70</td>
</tr>
<tr>
<td>Barasion v. Odum, 17 Ark. 122 (1856)</td>
<td>114</td>
</tr>
<tr>
<td>Beckham v. Wittkowski &amp; Rintels, 64 N.C. 464 (1870)</td>
<td>46</td>
</tr>
<tr>
<td>Belcher's Estate, In re, 221 N.Y.S. 711 (1927)</td>
<td>22</td>
</tr>
<tr>
<td>Black Eagle Mining Co. v. Conroy, 94 Okla. 199, 221 P. 425 (1923)</td>
<td>25</td>
</tr>
<tr>
<td>Blake v. McClung, 172 U.S. 239, 19 S. Ct. 165, 43 L. Ed. 432 (1898)</td>
<td>176, 177</td>
</tr>
<tr>
<td>Bowden v. Pierce, 73 Cal. 459, 14 P. 302 (1887)</td>
<td>114</td>
</tr>
<tr>
<td>Bowery Sav. Bank v. Meadowdale Co., 64 N.Y.S. (2d) 22 (1942)</td>
<td>88</td>
</tr>
<tr>
<td>Bowman v. Carr, 5 Lea 574 (Tenn. 1880)</td>
<td>144</td>
</tr>
<tr>
<td>Bradley v. Burke, 67 D. &amp; C. 239 (Pa. 1948)</td>
<td>53</td>
</tr>
<tr>
<td>Brazell v. Soucek, 130 Okla. 204, 266 P. 442 (1928)</td>
<td>137</td>
</tr>
<tr>
<td>Brown v. Nourse, 55 Me. 230 (1867)</td>
<td>36</td>
</tr>
<tr>
<td>Brown v. Sweat, 149 Fla. 524, 6 So. (2d) 538 (1942)</td>
<td>23</td>
</tr>
<tr>
<td>Brown's Estate, In re, 21 Del. Ch. 562, 52 A. (2d) 387 (1944)</td>
<td>140, 144, 145</td>
</tr>
<tr>
<td>Brownlee v. Lockwood, 20 N.J. Eq. 239 (1869)</td>
<td>89</td>
</tr>
<tr>
<td>Buder v. Becker, 185 F. (2d) 311 (8th Cir. 1950)</td>
<td>52, 76</td>
</tr>
<tr>
<td>TABLE OF CASES</td>
<td></td>
</tr>
<tr>
<td>----------------</td>
<td></td>
</tr>
<tr>
<td><strong>Bull v. Fuller, 78 Iowa 20 (1889)</strong></td>
<td><strong>PAGE 158</strong></td>
</tr>
<tr>
<td><strong>Burrowes v. Goodman, 50 F. (2d) 92, 77 A.L.R. 249 (2d Cir. 1931), cert. den. 284 u.s. 650, 52 S. Ct. 30, 76 L. Ed. 551</strong></td>
<td><strong>PAGE 127</strong></td>
</tr>
<tr>
<td><strong>Burston v. Ridley, 1 Salkeld 39, 91 Eng. Rep. 40 (1702).</strong></td>
<td><strong>PAGE 51</strong></td>
</tr>
<tr>
<td><strong>Callanan v. Keenan, 142 N.Y.S. 561 (1913).</strong></td>
<td><strong>PAGE 88</strong></td>
</tr>
<tr>
<td><strong>Cameron v. Riggs Nat. Bank of Wash., 53 F. Supp. 56 (D.C. 1943).</strong></td>
<td><strong>PAGE 159</strong></td>
</tr>
<tr>
<td><strong>Campbell v. Brown, 64 Iowa 425, 20 N.W. 745 (1884).</strong></td>
<td><strong>PAGE 65</strong></td>
</tr>
<tr>
<td><strong>Campbell v. Hughes, 155 Ala. 591, 47 So. 45 (1908).</strong></td>
<td><strong>PAGE 69</strong></td>
</tr>
<tr>
<td><strong>Cannon v. Cannon, 228 N.C. 211, 45 S.E. (2d) 34 (1947).</strong></td>
<td><strong>PAGE 42</strong></td>
</tr>
<tr>
<td><strong>Carpenter v. Hazel, 128 Ark. 416, 194 S.W. 225 (1917).</strong></td>
<td><strong>PAGE 45</strong></td>
</tr>
<tr>
<td><strong>Carr v. Prudential Ins. Co., 27 N.Y.S. (2d) 349 (1941).</strong></td>
<td><strong>PAGE 158</strong></td>
</tr>
<tr>
<td><strong>Carter v. Pennsylvania R. Co., 9 F.R.D. 477 (S.D. N.Y. 1949).</strong></td>
<td><strong>PAGE 60</strong></td>
</tr>
<tr>
<td><strong>Chesapeake &amp; Ohio Ry. Co. v. Ryan, 183 Ky. 428, 209 S.W. 538 (1919).</strong></td>
<td><strong>PAGE 62</strong></td>
</tr>
<tr>
<td><strong>Chisholm's Will, In re, 108 N.Y.S. (2d) 182 (1951).</strong></td>
<td><strong>PAGE 51</strong></td>
</tr>
<tr>
<td><strong>Christian v. Morris, 50 Ala. 585 (1874).</strong></td>
<td><strong>PAGE 111</strong></td>
</tr>
<tr>
<td><strong>Citizens' Nat. Bk. v. Sharp, 53 Md. 521 (1879).</strong></td>
<td><strong>PAGE 155</strong></td>
</tr>
<tr>
<td><strong>Clark v. Holt, 16 Ark. 257 (1855).</strong></td>
<td><strong>PAGE 46</strong></td>
</tr>
<tr>
<td><strong>Clark v. Willard, 292 U.S. 112, 54 S. Ct. 615, 78 L. Ed. 1160 (1934).</strong></td>
<td><strong>PAGE 184</strong></td>
</tr>
<tr>
<td><strong>Clarke v. Clarke, 278 U.S. 186, 20 S. Ct. 873, 44 L. Ed. 1028 (1899).</strong></td>
<td><strong>PAGE 123</strong></td>
</tr>
<tr>
<td><strong>Coburn v. Coleman, 75 F. Supp. 107 (W.D. S.C. 1947).</strong></td>
<td><strong>PAGE 62</strong></td>
</tr>
<tr>
<td><strong>Coca-Cola v. New York Trust Co., 22 Del. Ch. 344, 2 A. (2d) 290 (1938).</strong></td>
<td><strong>PAGE 150</strong></td>
</tr>
<tr>
<td><strong>Compton v. Borderland Coal Co., 179 Ky. 695, 201 S.W. 20 (1918).</strong></td>
<td><strong>PAGE 156</strong></td>
</tr>
<tr>
<td><strong>Conkey, Estate of, 35 Cal. App. (2d) 581, 96 P. (2d) 383 (1939).</strong></td>
<td><strong>PAGE 19</strong></td>
</tr>
<tr>
<td><strong>Cooper v. American Airlines, Inc., 149 F. (2d) 355, 162 A. L.R. 318 (2d Cir. 1952).</strong></td>
<td><strong>PAGE 76</strong></td>
</tr>
<tr>
<td><strong>Corner v. Shew, 3 M. &amp; W. 350, 150 Eng. Rep. 1179 (1838).</strong></td>
<td><strong>PAGE 45</strong></td>
</tr>
<tr>
<td><strong>Courtney v. Pradt, 160 F. 561 (6th Cir. 1908).</strong></td>
<td><strong>PAGE 90</strong></td>
</tr>
<tr>
<td><strong>Craig v. Toledo, A.A. &amp; N.M.R. Co., 2 Ohio N.P. 64 (1895).</strong></td>
<td><strong>PAGE 119</strong></td>
</tr>
<tr>
<td><strong>Cramer v. Phoenix Mutual Life Insurance Co., 91 F. (2d) 141 (8th Cir. 1937), cert. den. 302 U.S. 739, 58 S. Ct. 141, 82 L. Ed. 571.</strong></td>
<td><strong>PAGE 109</strong></td>
</tr>
<tr>
<td><strong>Crohr. v. Clay County Bank, 137 Mo. Appl. 712, 118 S.W. 498 (1909).</strong></td>
<td><strong>PAGE 155</strong></td>
</tr>
<tr>
<td><strong>Crusoe v. Butler, 36 Miss. 150 (1858).</strong></td>
<td><strong>PAGE 125, 126</strong></td>
</tr>
<tr>
<td>TABLE OF CASES</td>
<td></td>
</tr>
<tr>
<td>----------------</td>
<td></td>
</tr>
<tr>
<td><strong>Cunningham v. Rodgers</strong>, 267 F. 609 (D.C. Cir. 1920)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>F. 609 (D.C. Cir. 1920)</td>
<td>20</td>
</tr>
<tr>
<td>13 S.C. 409, 36 Am. Rep. 700 (1879)</td>
<td>143</td>
</tr>
<tr>
<td><strong>Currie v. Bircham</strong>, 1 D. &amp; R. 35 (1822)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>1 D. &amp; R. 35 (1822)</td>
<td>79</td>
</tr>
<tr>
<td><strong>Cutter v. Davenport</strong>, 1 Pick. 81 (Mass. 1822)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>1 Pick. 81 (Mass. 1822)</td>
<td>63</td>
</tr>
<tr>
<td><strong>Dahlberg v. Brown</strong>, 16 S.E. (2d) 284, 198 S.C. 1 (1941)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>16 S.E. (2d) 284, 198 S.C. 1 (1941)</td>
<td>111</td>
</tr>
<tr>
<td><strong>Davis v. Connelly's Ex'rs</strong>, 4 B. Mon. 136 (Ky. 1834)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>4 B. Mon. 136 (Ky. 1834)</td>
<td>113</td>
</tr>
<tr>
<td><strong>Davis v. Shepard</strong>, 135 Wash. 124, 237 P. 21, 41 A.L.R. 163 (1925)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>135 Wash. 124, 237 P. 21, 41 A.L.R. 163 (1925)</td>
<td>23</td>
</tr>
<tr>
<td><strong>De Paris v. Wilmington Trust Co.</strong>, 7 Boyce 178, 104 A. 691, 1 A.L.R. 1352 (Del. 1918)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>7 Boyce 178, 104 A. 691, 1 A.L.R. 1352 (Del. 1918)</td>
<td>44</td>
</tr>
<tr>
<td><strong>Doe v. McFarland</strong>, 9 Cranch 151 (U.S. 1815)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>9 Cranch 151 (U.S. 1815)</td>
<td>53</td>
</tr>
<tr>
<td><strong>Dorsay v. Connell</strong>, 22 New Brunswick Rep. 564 (1883)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>22 New Brunswick Rep. 564 (1883)</td>
<td>79</td>
</tr>
<tr>
<td><strong>Drew's Estate, In re</strong>, 183 Minn. 374, 236 N.W. 701 (1931)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>183 Minn. 374, 236 N.W. 701 (1931)</td>
<td>19</td>
</tr>
<tr>
<td><strong>Driscoll v. Loeb</strong>, 59 N.Y.S. (2d) 82 (1945)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>59 N.Y.S. (2d) 82 (1945)</td>
<td>79</td>
</tr>
<tr>
<td><strong>Duehay v. Acacia Mutual Life Ins. Co.</strong>, 105 F. (2d) 768, 124 A.L.R. 1268 (D.C. Cir. 1939)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>105 F. (2d) 768, 124 A.L.R. 1268 (D.C. Cir. 1939)</td>
<td>140</td>
</tr>
<tr>
<td><strong>Eddy v. Adams</strong>, 145 Mass. 489, 14 N.E. 509 (1888)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>145 Mass. 489, 14 N.E. 509 (1888)</td>
<td>23</td>
</tr>
<tr>
<td><strong>Ellison v. Skelly Oil Co.</strong>, 206 Okla. 496, 244 P. (2d) 832 (1952)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>206 Okla. 496, 244 P. (2d) 832 (1952)</td>
<td>137</td>
</tr>
<tr>
<td><strong>Equitable Trust Co. v. Plume</strong>, 92 Conn. 649, 103 A. 940 (1918)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>92 Conn. 649, 103 A. 940 (1918)</td>
<td>18</td>
</tr>
<tr>
<td><strong>Ewing v. Warren</strong>, 144 Miss. 233, 109 So. 601 (1926)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>144 Miss. 233, 109 So. 601 (1926)</td>
<td>42</td>
</tr>
<tr>
<td><strong>Falke v. Terry</strong>, 32 Colo. 85, 75 P. 425 (1903)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>32 Colo. 85, 75 P. 425 (1903)</td>
<td>94, 95</td>
</tr>
<tr>
<td><strong>Farmer's Bk. of Woodland Mills v. Vinson and Williams</strong>, 9 Tenn. App. 51 (1928)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>9 Tenn. App. 51 (1928)</td>
<td>144</td>
</tr>
<tr>
<td><strong>Farmers Trust Co. v. Bradshaw</strong>, 242 N.Y.S. 598 (1930)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>242 N.Y.S. 598 (1930)</td>
<td>36</td>
</tr>
<tr>
<td>106 F. Supp. 308 (N.D. Ohio 1952)</td>
<td>79, 88</td>
</tr>
<tr>
<td><strong>Ferrin v. Myrick</strong>, 41 N.Y. 315 (1869)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>41 N.Y. 315 (1869)</td>
<td>19</td>
</tr>
<tr>
<td><strong>Ferris, In re Estate of</strong>, 234 Iowa 960, 14 N.W. (2d) 889 (1940)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>234 Iowa 960, 14 N.W. (2d) 889 (1940)</td>
<td>19</td>
</tr>
<tr>
<td><strong>Fitch, Matter of</strong>, 160 N.Y. 87, 54 N.E. 701 (1889)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>160 N.Y. 87, 54 N.E. 701 (1889)</td>
<td>42</td>
</tr>
<tr>
<td><strong>Fort Fairfield Nash Co. v. Noltemier</strong>, 135 Me. 54, 158 A. 415, 175 A.L.R. 1276 (1937)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>135 Me. 54, 158 A. 415, 175 A.L.R. 1276 (1937)</td>
<td>35</td>
</tr>
<tr>
<td><strong>Fugate v. Moore</strong>, 86 Va. 1045 (1890)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>86 Va. 1045 (1890)</td>
<td>89</td>
</tr>
<tr>
<td><strong>Funk v. Funk</strong>, 76 Colo. 45, 230 P. 611 (1924)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>76 Colo. 45, 230 P. 611 (1924)</td>
<td>35</td>
</tr>
<tr>
<td><strong>Gardiner v. Thorndike</strong>, 183 Mass. 81, 66 N.E. 633 (1903)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>183 Mass. 81, 66 N.E. 633 (1903)</td>
<td>155</td>
</tr>
<tr>
<td><strong>Gates v. McClanahan</strong>, 124 Iowa 593, 100 N.W. 479 (1904)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>124 Iowa 593, 100 N.W. 479 (1904)</td>
<td>109</td>
</tr>
<tr>
<td><strong>Giampalo v. Taylor</strong>, 335 Pa. 121, 6 A. (2d) 499 (1939)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>335 Pa. 121, 6 A. (2d) 499 (1939)</td>
<td>84, 96, 97</td>
</tr>
<tr>
<td><strong>Gillett v. Hutchinson's Adm'rs</strong>, 24 Wend. 184 (N.Y. 1840)</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>24 Wend. 184 (N.Y. 1840)</td>
<td>83</td>
</tr>
<tr>
<td><strong>Gloyd v. Midwest Refining Co.</strong>,</td>
<td><strong>PAGE</strong></td>
</tr>
<tr>
<td>Case Name</td>
<td>Page</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>62 F. (2d) 483 (10th Cir. 1933)</td>
<td></td>
</tr>
<tr>
<td>Goodlett v. Anderson, 75 Tenn. 286 (1881)</td>
<td>158</td>
</tr>
<tr>
<td>Grant v. Reese, 94 N.C. 720 (1886)</td>
<td>146</td>
</tr>
<tr>
<td>Green v. Alden, 92 Me. 177, 42 A. 358 (1898)</td>
<td></td>
</tr>
<tr>
<td>Greer v. Ferguson, 56 Ark. 324, 19 S.W. 966 (1892)</td>
<td>95, 98</td>
</tr>
<tr>
<td>Gribbel v. Henderson, 151 Fla. 712, 10 So. (2d) 734 (1942), aff'd 153 Fla. 397, 14 So. (2d) 809</td>
<td>90</td>
</tr>
<tr>
<td>Grife v. Equitable Life Assur. Soc., 233 Iowa 83, 8 N.W. (2d) 584 (1943)</td>
<td>23</td>
</tr>
<tr>
<td>Grigon v. Shope, 100 Ore. 611, 197 P. 317 (1921)</td>
<td>65</td>
</tr>
<tr>
<td>Gross v. Hocker, 243 Iowa 294, 51 N.W. (2d) 466 (1952)</td>
<td></td>
</tr>
<tr>
<td>Hanover Fire Ins. Co. v. Street, 234 Ala. 537, 176 So. 350 (1937)</td>
<td>21</td>
</tr>
<tr>
<td>Hargrave v. Turner Lumber Co., 194 La. 287, 193 So. 648 (1940)</td>
<td>19, 79, 81</td>
</tr>
<tr>
<td>Harper v. Butler, 2 Pet. 239 (U.S. 1829)</td>
<td></td>
</tr>
<tr>
<td>Harris v. Balk, 198 U.S. 215, 25 S. Ct. 625, 49 L. Ed. 718 (1883)</td>
<td>152</td>
</tr>
<tr>
<td>Harris v. Owens, 142 Ohio St. 379, 52 N.E. (2d) 522 (1943)</td>
<td>101</td>
</tr>
<tr>
<td>Harrison v. Mahorner, 14 Ala. 829 (1848)</td>
<td></td>
</tr>
<tr>
<td>Hayward v. Williams, 57 S.C. 235, 35 S.E. 503 (1899)</td>
<td>65</td>
</tr>
<tr>
<td>Heinze's Estate, In re, 224 N.Y. 1, 120 N.E. 63 (1918)</td>
<td>22</td>
</tr>
<tr>
<td>Helme v. Buckelew, 181 N.Y.S. 104 (1920)</td>
<td>119, 122</td>
</tr>
<tr>
<td>Hensley v. Rich, 191 Ind. 294, 132 N.E. 632, 18 A.L.R. 1118 (1921)</td>
<td>140</td>
</tr>
<tr>
<td>Hess v. Pawloski, 274 U.S. 352, 47 S. Ct. 632, 71 L.Ed. 1091 (1927)</td>
<td>101</td>
</tr>
<tr>
<td>Hicks v. Shively, 137 S.W. (2d) 102 (Tex. 1940)</td>
<td>34, 42</td>
</tr>
<tr>
<td>Holmes v. Camp, 219 N.Y. 359, 114 N.E. 841 (1916)</td>
<td>88</td>
</tr>
<tr>
<td>Holyoke v. Union Mutual Life Insurance Co., 22 Hun. 75 (N.Y. 1881), aff'd without opinion, 84 N.Y. 648</td>
<td>43</td>
</tr>
<tr>
<td>Hoysradt v. Tionesta Gas Co., 194 Pa. 251, 45 A. 62 (1899)</td>
<td></td>
</tr>
<tr>
<td>Illinois Steel Co. v. Konkel, 146 Wisc. 556, 131 N.W. 842 (1911)</td>
<td>125, 128</td>
</tr>
<tr>
<td>Janke's Estate, In re, 193 Minn. 201, 258 N.W. 311 (1935)</td>
<td>22</td>
</tr>
<tr>
<td>Jauncy v. Sealey, 1 Vern. 397, 23 Eng. Rep. 541 (1686)</td>
<td>79</td>
</tr>
<tr>
<td>Jefferson v. Beall, 117 Ala. 436, 23 So. 44 (1897)</td>
<td>95, 97</td>
</tr>
<tr>
<td>Jenning's Estate, In re, 74 Mont. 449, 241 P. 648 (1925)</td>
<td>22</td>
</tr>
<tr>
<td>Johnson v. Powers, 139 U.S. 156, 11 S. Ct. 525, 35 L. Ed. 161 (1891)</td>
<td>75</td>
</tr>
<tr>
<td>Johnson v. Wallis, 112 N.Y.</td>
<td></td>
</tr>
<tr>
<td>Name and Title</td>
<td>Page</td>
</tr>
<tr>
<td>----------------</td>
<td>------</td>
</tr>
<tr>
<td>230, 19 N.E. 653, 2 L.R.A. 828 (1889)</td>
<td>109</td>
</tr>
<tr>
<td>Joseph v. The National Bank, 124 W. Va. 500, 21 S.E. (2d) 141 (1942)</td>
<td>31</td>
</tr>
<tr>
<td>Joy v. Swanton Sav. Bank, 111 Vt. 106, 10 A. (2d) 216 (1940)</td>
<td>159</td>
</tr>
<tr>
<td>Judy v. Kelley, 11 Ill. 211 (1849)</td>
<td>95, 97, 98</td>
</tr>
<tr>
<td>Kane v. Paul, 14 Pet. 33, 10 L. Ed. 341 (U.S. 1840) 21, 35</td>
<td>129</td>
</tr>
<tr>
<td>Keeler v. Dunbar, 37 F. (2d) 868 (5th Cir. 1930)</td>
<td>137</td>
</tr>
<tr>
<td>Keith v. Proctor, 114 Ala. 676, 21 So. 502 (1896)</td>
<td>34</td>
</tr>
<tr>
<td>Kilpatrick v. Bush, 23 Miss. 199 (1851)</td>
<td>46</td>
</tr>
<tr>
<td>Kirkbride v. Van Note, 275 N.Y. 244, 9 N.E. (2d) 852 (1937)</td>
<td>32, 50</td>
</tr>
<tr>
<td>Klein v. French, 57 Miss. 662 (1880)</td>
<td>155</td>
</tr>
<tr>
<td>Knapp v. Lee, 42 Mich. 41, 3 N.W. 244 (1879)</td>
<td>42</td>
</tr>
<tr>
<td>Kruskal v. U.S., 178 F. (2d) 738 (2d Cir. 1950)</td>
<td>44</td>
</tr>
<tr>
<td>La Salle Nat'l Bank v. Penn. R. Co., 8 F.R.D. 316 (N.D. Ill. 1948)</td>
<td>72</td>
</tr>
<tr>
<td>Lacker v. McKechney, 252 F. 403 (7th Cir. 1918)</td>
<td>99</td>
</tr>
<tr>
<td>Lawrence v. Nelson, 143 U.S. 215, 12 S. Ct. 440, 36 L. Ed. 130 (1892) 96, 119</td>
<td></td>
</tr>
<tr>
<td>Lawrence's Estate, In re, Ariz. 1, 85 P. (2d) 45 (1938)</td>
<td>18</td>
</tr>
<tr>
<td>Leahy v. Haworth, 141 F. 669 (8th Cir. 1905)</td>
<td>34</td>
</tr>
<tr>
<td>Lefebure v. Baker, 69 Mont. 193, 220 P. 1111 (1923) 36, 42</td>
<td></td>
</tr>
<tr>
<td>LeMay v. Maddox, 68 F. Supp. 25 (W.D. Va. 1946)</td>
<td>60</td>
</tr>
<tr>
<td>Lethbridge v. Lauder, 13 Wyo. 9, 76 P. 682 (1904)</td>
<td>19</td>
</tr>
<tr>
<td>Lilienkamp v. Superior Court, 14 Cal. (2d) 293, 93 P. (2d) 1008 (1939)</td>
<td>83</td>
</tr>
<tr>
<td>Louisville and Nashville R. Co. v. Brantley's Adm'r, 96 Ky. 297, 28 S.W. 477 (1894)</td>
<td>36</td>
</tr>
<tr>
<td>Lunn v. Barber, [1949] Ontario Rep. 34</td>
<td>31</td>
</tr>
<tr>
<td>Maas v. German Savings Bank, 176 N.Y. 377, 68 N.E. 658 (1903)</td>
<td>156</td>
</tr>
<tr>
<td>McCarron v. New York Cen-</td>
<td>209</td>
</tr>
<tr>
<td>Case</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>tral Ry. Co., 239 Mass. 64, 131 N.E. 478 (1921)</td>
<td>62</td>
</tr>
<tr>
<td>McCarty v. Hall, 19 Mo. 480 (1850)</td>
<td>41, 65</td>
</tr>
<tr>
<td>McCully v. Cooper, 114 Cal. 258, 46 P. 82 (1896)</td>
<td></td>
</tr>
<tr>
<td>McIvoy v. Alsop, 45 Miss. 365 (1871)</td>
<td>158</td>
</tr>
<tr>
<td>Macky’s Estate, In re, 73 Colo. 1, 213 P. 131 (1923)</td>
<td>22</td>
</tr>
<tr>
<td>McMillen v. Bliley, 115 Colo. 575, 177 P. (2d) 547 (1947)</td>
<td>31</td>
</tr>
<tr>
<td>McNamara v. McNamara, 62 Ga. 200 (1879)</td>
<td>158</td>
</tr>
<tr>
<td>Macnichol, In re, L.R. 19 Eq. 81 (1874)</td>
<td>47</td>
</tr>
<tr>
<td>Mannix Estate, In re, 146 Ore. 187, 29 P. (2d) 364 (1934)</td>
<td>23</td>
</tr>
<tr>
<td>Mason v. Nutt's Ex'rs, 19 La. Ann. 41 (1867)</td>
<td>41</td>
</tr>
<tr>
<td>Mayo v. Arkansas Valley Trust Co., 132 Ark. 64, 200 S.W. 505 (1917)</td>
<td>22</td>
</tr>
<tr>
<td>Mellus v. Thompson, Fed. Cas. No. 9, 405 (C.C. Mass. 1858)</td>
<td>80</td>
</tr>
<tr>
<td>Meredith v. Scallion, 51 Ark. 361, 11 S.W. 516, 3 L.R.A. 812 (1888)</td>
<td>23</td>
</tr>
<tr>
<td>Meyers' Adm'r v. Meyers, 244</td>
<td></td>
</tr>
<tr>
<td>Ky. 248, 50 S.W. (2d) 81 (1932)</td>
<td>22</td>
</tr>
<tr>
<td>Michigan Trust Co. v. Ferry, 228 U.S. 346, 33 S. Ct. 550, 57 L. Ed. 867 (1913)</td>
<td>94</td>
</tr>
<tr>
<td>Middleton’s Case, 5 Co. Rep. 28b, 77 Eng. Rep. 93 (1603)</td>
<td>19</td>
</tr>
<tr>
<td>Miller's Estate, In re, 216 Pa. 247, 65 A. 681 (1907)</td>
<td>19</td>
</tr>
<tr>
<td>Monfils v. Hazelwood, 218 N.C. 215, 10 S.E. (2d) 673 (1940)</td>
<td>34</td>
</tr>
<tr>
<td>Morrison v. Berkshire Loan &amp; Trust Co., 229 Mass. 519, 118 N.E. 895 (1918)</td>
<td>158</td>
</tr>
<tr>
<td>Morrison v. Hass, 229 Mass. 514, 118 N.E. 893 (1918)</td>
<td></td>
</tr>
<tr>
<td>Moses v. Wood &amp; Selick, 93 N.Y.S. (2d) 829 (1949)</td>
<td>52</td>
</tr>
<tr>
<td>Moore v. Kraft, 179 F. 685 (7th Cir. 1910)</td>
<td>38</td>
</tr>
<tr>
<td>Moore v. Petty, 135 F. 668 (8th Cir. 1905), cert. den. 197 U.S. 623, 25 S. Ct. 800, 49 L. Ed. 911</td>
<td>45</td>
</tr>
<tr>
<td>Mowry v. Adams, 14 Mass. 327 (1817)</td>
<td></td>
</tr>
<tr>
<td>Murphy v. Crouse, 135 Cal. 14, 66 P. 971, 87 Am. St. Rep. 90 (1901)</td>
<td>25</td>
</tr>
<tr>
<td>Nance v. Gray, 143 Ala. 234, 38 So. 916 (1904)</td>
<td>114</td>
</tr>
<tr>
<td>Nashville Trust Co. v. Cleage,</td>
<td></td>
</tr>
</tbody>
</table>
## TABLE OF CASES

<table>
<thead>
<tr>
<th>PAGE</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>246 Ala. 513, 21 So. (2d)</td>
<td>Commerce, 181 Okla. 145,</td>
</tr>
<tr>
<td>441 (1945)</td>
<td>73 P. (2d) 137 (1937)</td>
</tr>
<tr>
<td>Natwick v. Moyer, 177 Ore.</td>
<td>Plenderleith v. Edwards, 328</td>
</tr>
<tr>
<td>486, 163 P. (2d) 936 (1942)</td>
<td>Ill. 431, 159 N.E. 780</td>
</tr>
<tr>
<td>New York Trust Co. v. Riley,</td>
<td>(1928)</td>
</tr>
<tr>
<td>722 (1941), aff'd, 315 U.S.</td>
<td>660, 42 N.W. (2d) 777</td>
</tr>
<tr>
<td>343, 62 S. Ct. 508, 86 L. Ed.</td>
<td>(1950)</td>
</tr>
<tr>
<td>855, reh. den. 315 U.S. 829,</td>
<td>Potter v. First Nat. Bank,</td>
</tr>
<tr>
<td>62 S. Ct. 903, 86 L. Ed.</td>
<td>107 N. J. Eq. 72, 151 A.</td>
</tr>
<tr>
<td>1223</td>
<td>546 (1930)</td>
</tr>
<tr>
<td>The Newark Sav. Inst. v.</td>
<td>Prescott v. Crosby, (1923)</td>
</tr>
<tr>
<td>Jones Ex'rs, 35 N.J. Eq. 406</td>
<td>2 D.L.R. 937</td>
</tr>
<tr>
<td>587, 67 Am. Dec. 89</td>
<td>(1599)</td>
</tr>
<tr>
<td>(1856)</td>
<td>Pufahl v. Estate of Parks, 299</td>
</tr>
<tr>
<td>125, 128</td>
<td>U.S. 217, 57 S. Ct. 151, 81</td>
</tr>
<tr>
<td>Niquette v. Green, 81 Kan.</td>
<td>L. Ed. 133 (1936)</td>
</tr>
<tr>
<td>569, 106 P. 270 (1910)</td>
<td>Reed v. Hollister, 95 Ore. 656,</td>
</tr>
<tr>
<td>125, 126</td>
<td>188 P. 170 (1920)</td>
</tr>
<tr>
<td>Ariz. 366, 108 P. (2d) 391</td>
<td>Super. 178 (1921)</td>
</tr>
<tr>
<td>(1940)</td>
<td>Relfe v. Rundle, 103 U.S. 222,</td>
</tr>
<tr>
<td>142, 150</td>
<td>26 L. Ed. 337 (1880)</td>
</tr>
<tr>
<td>35, 75</td>
<td>165 (E.D. Ky. 1945)</td>
</tr>
<tr>
<td>North v. Ringling, 63 N.Y.S.</td>
<td>Richardson v. Neblett, 122</td>
</tr>
<tr>
<td>(2d) 135 (1946)</td>
<td>Miss. 723, 84 So. 695, 10</td>
</tr>
<tr>
<td>33, 54, 58</td>
<td>A.L.R. 272 (1920)</td>
</tr>
<tr>
<td>Orr v. Ahern, 107 Conn. 174,</td>
<td>Riddle v. Slack, 96 N.J.L. 412,</td>
</tr>
<tr>
<td>139 A. 691 (1928)</td>
<td>115 A. 741 (1921)</td>
</tr>
<tr>
<td>105</td>
<td>Rigutto v. Italian Terrazzo</td>
</tr>
<tr>
<td>792, 171 S.W. (2d) 287</td>
<td>(W.D. Pa. 1950)</td>
</tr>
<tr>
<td>(1943)</td>
<td>Riley v. Moseley, 44 Miss.</td>
</tr>
<tr>
<td></td>
<td>37 (1870)</td>
</tr>
<tr>
<td>Owen v. Moody, 29 Miss. 79</td>
<td>Riverside &amp; Dan River Mills</td>
</tr>
<tr>
<td>(1855)</td>
<td>v. Menefee, 237 U.S. 189,</td>
</tr>
<tr>
<td>TABLE OF CASES</td>
<td></td>
</tr>
<tr>
<td>----------------</td>
<td></td>
</tr>
<tr>
<td>PAGE</td>
<td></td>
</tr>
<tr>
<td>35 S. Ct. 579, 59 L. Ed. 910 (1915)</td>
<td>118</td>
</tr>
<tr>
<td>Roberts v. Roberts, 62 Wyo. 77, 162 P. (2d) 117 (1945)</td>
<td>23</td>
</tr>
<tr>
<td>Robinson v. City Nat. Bank, 56 F. (2d) 225 (N.D. Tex. 1931)</td>
<td>42, 44</td>
</tr>
<tr>
<td>Roby v. Smith, 131 Ind. 342, 30 N.E. 1093 (1903)</td>
<td>185</td>
</tr>
<tr>
<td>Roggenkamp v. Roggenkamp, 68 F. 605 (C.C. Neb. 1895)</td>
<td>112, 114</td>
</tr>
<tr>
<td>Ross v. Robbins, 169 Ore. 293, 128 P. (2d) 956 (1942)</td>
<td>60</td>
</tr>
<tr>
<td>Sanford v. McCreedy, 28 Wisc. 103 (1871)</td>
<td>42</td>
</tr>
<tr>
<td>Schluter v. Bowery Sav. Bank, 117 N.Y. 125, 22 N.E. 572, 5 L.R.A. 541 (1889)</td>
<td>155</td>
</tr>
<tr>
<td>Selleck v. Rusco, 46 Conn. 370 (1878)</td>
<td>155</td>
</tr>
<tr>
<td>Shawnee Nat. Bank v. Van Zant, 84 Okla. 107, 202 P. 285, 26 A.L.R. 1349 (1921)</td>
<td>114</td>
</tr>
<tr>
<td>Shinn's Estate, 166 Pa. 121, 30 A. 1026, 45 Am. St. Rep. 656 (1895)</td>
<td>23, 24, 144, 145, 147</td>
</tr>
<tr>
<td>Shirk v. City of La Fayette, 52 F. 857 (C.C. D. Ind. 1892)</td>
<td>185</td>
</tr>
<tr>
<td>Shrader v. Petty, 91 N.Y.S. (2d) 864 (1949)</td>
<td>95</td>
</tr>
<tr>
<td>Shultz v. Pulver, 11 Wend. 363 (N.Y. 1833)</td>
<td>144, 147</td>
</tr>
<tr>
<td>Sloan v. Sloan, 21 Fla. 589 (1885)</td>
<td>95</td>
</tr>
<tr>
<td>Smith v. Steen, 20 N.M. 536, 150 P. 927 (1915)</td>
<td>22</td>
</tr>
<tr>
<td>Solinsky v. Fourth Nat'l Bank, 82 Tex. 244, 17 S.W. 1050 (1891)</td>
<td>65</td>
</tr>
<tr>
<td>Standard Bonded Warehouse Co. v. Cooper &amp; Griffen, 30 F. (2d) 842 (W.D. N.C. 1929)</td>
<td>184</td>
</tr>
<tr>
<td>State ex rel. Finley v. District Court, 99 Mont. 200, 43 P. (2d) 682 (1935)</td>
<td>17, 143</td>
</tr>
<tr>
<td>Stearns v. Burnham, 5 Greenl. 261 (Me. 1828)</td>
<td>63</td>
</tr>
<tr>
<td>Stewart's Estate, In re, 145 Ore. 460, 28 P. (2d) 642, 91 A.L.R. 818 (1934)</td>
<td>21</td>
</tr>
<tr>
<td>The Sultan of Turkey v. Tiryakian, 213 N.Y. 429, 108 N.E. 72 (1915)</td>
<td>54, 183</td>
</tr>
<tr>
<td>Swan v. Bill, 95 N.H. 158, 59 A. (2d) 346 (1948)</td>
<td>140, 150</td>
</tr>
<tr>
<td>Sylvania Industrial Corp. v. Lilienfield, 132 F. (2d) 887, 145 A.L.R. 612 (4th Cir. 1943)</td>
<td>88</td>
</tr>
<tr>
<td>Taunton v. Taylor, 37 Ga. App. 695, 141 S.E. 511 (1928)</td>
<td>111</td>
</tr>
<tr>
<td>Taylor v. Benham, 5 How. 233, 12 L. Ed. 130 (U.S. 1847)</td>
<td>128</td>
</tr>
<tr>
<td>Table of Cases</td>
<td>Page</td>
</tr>
<tr>
<td>----------------</td>
<td>------</td>
</tr>
<tr>
<td>Terrel v. Crane, 55 Tex. 81 (1881)</td>
<td>42</td>
</tr>
<tr>
<td>Thacker v. Lindahl, 48 S.W. (2d) 588 (Tex. 1932)</td>
<td>65</td>
</tr>
<tr>
<td>Thomas v. Richards, 97 N.Y.S. (2d) 640 (1950)</td>
<td>34, 60</td>
</tr>
<tr>
<td>Thompson v. Wilson, 2 N.H. 291 (1820)</td>
<td>42, 63</td>
</tr>
<tr>
<td>Thompson’s Estate, In re, 339 Mo. 410, 97 S.W. (2d) 93 (1936)</td>
<td>85, 96, 97, 108</td>
</tr>
<tr>
<td>Thorman v. Broderick, 52 La. Ann. 1298, 27 So. 735 (1900)</td>
<td>158</td>
</tr>
<tr>
<td>Torrey v. Bruner, 60 Fla. 365, 53 So. 337 (1910)</td>
<td>83</td>
</tr>
<tr>
<td>Tourton v. Flower, 3 P. Will. 368, 24 Eng. Rep. 1105 (1735)</td>
<td>31</td>
</tr>
<tr>
<td>Trotter v. White, 10 Smedes &amp; Marshall 607 (Miss. 1848)</td>
<td>42, 44</td>
</tr>
<tr>
<td>Tunstall v. Pollard’s Adm’r, 2 Leigh 1 (Va. 1840)</td>
<td>94</td>
</tr>
<tr>
<td>Turner v. Alton Banking &amp; Trust Co., 166 F. (2d) 305 (8th Cir. 1948)</td>
<td>38, 76, 99</td>
</tr>
<tr>
<td>United States for the use of Mackey v. Coxe, 18 How. 100, 15 L. Ed. 289 (1855)</td>
<td>167</td>
</tr>
<tr>
<td>Valentine v. Duke, 128 Wash. 128, 222 P. 494 (1924)</td>
<td>150</td>
</tr>
<tr>
<td>Van Vleck’s Estate, In re, 123 Iowa 89, 98 N.W. 557 (1904)</td>
<td>19, 127</td>
</tr>
<tr>
<td>Vanquelin v. Bouard, 15 C. B. (N.S.) 341 (1863)</td>
<td>47, 55, 183</td>
</tr>
<tr>
<td>Vaughn v. Barrett, 5 Vt. 333 (1833)</td>
<td>155</td>
</tr>
<tr>
<td>Vaughan’s Ex’r v. Gardner, 7 B. Mon. 326 (Ky. 1847)</td>
<td>83</td>
</tr>
<tr>
<td>Voet, In re, 1949 New Zealand L. R. 742</td>
<td>79, 85</td>
</tr>
<tr>
<td>Vogel v. New York Life Insurance Co., 55 F. (2d) 205 (5th Cir. 1932)</td>
<td>65</td>
</tr>
<tr>
<td>Von Lingen v. Field, 154 Md. 638, 141 A. 390 (1928)</td>
<td>44</td>
</tr>
<tr>
<td>Voyles v. Robinson, 151 Miss. 585, 18 So. 420 (1928)</td>
<td>17, 143</td>
</tr>
<tr>
<td>Wallan v. Rankin, 173 F. (2d) 488 (9th Cir. 1949)</td>
<td>60</td>
</tr>
<tr>
<td>Warren v. Globe Indemnity Co., 216 La. 107, 43 So. (2d) 234 (1949)</td>
<td>31, 33, 57</td>
</tr>
<tr>
<td>Welsh v. Welsh, 136 W. Va. 914, 69 S.E. (2d) 34 (1951)</td>
<td>144, 146</td>
</tr>
<tr>
<td>Wiener v. Specific Pharmaceuticals, Inc., 298 N.Y. 346, 83 N.E. (2d) 673 (1949)</td>
<td>33, 58, 60, 61</td>
</tr>
<tr>
<td>White, ex parte, 118 Miss. 15, 78 So. 949, L.R.A. 1918 E 1065 (1918)</td>
<td>128</td>
</tr>
<tr>
<td>Wikoff v. Hirschell, 258 N.Y. 28, 179 N.E. 249 (1932)</td>
<td>35, 36</td>
</tr>
<tr>
<td>Wilcox v. District Court, 2 Utah (2d) 227, 272 P. (2d) 147 (1954)</td>
<td>31</td>
</tr>
<tr>
<td>Wilkins v. Ellett, 108 U.S.</td>
<td></td>
</tr>
<tr>
<td>Case</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-------------------------</td>
</tr>
<tr>
<td>256, 2 S. Ct. 641, 27 L. Ed. 718 (1883)</td>
<td>143, 154, 155, 157</td>
</tr>
<tr>
<td>Wilmerding's Estate, In re, 238 N.Y.S. 375 (1929)</td>
<td>22</td>
</tr>
<tr>
<td>Wilton v. Eaton, 127 Mass. 174 (1879)</td>
<td>45</td>
</tr>
<tr>
<td>York v. Texas, 137 U.S. 15, 11 S. Ct. 9, 34 L. Ed. 604 (1890)</td>
<td>118</td>
</tr>
<tr>
<td>Young v. O'Neal, 3 Sneed 55 (Tenn. 1855)</td>
<td>155</td>
</tr>
</tbody>
</table>
Action by assignee of foreign personal representative, 63–66.
Action by foreign personal representative. See Foreign personal representative.
Administration of Estates Act, 1925, 185.
Administrator, 14, 28.
*cum testamento annexo*, 28; *de bonis non*, 28; development of, 13–14.
Ancillary administration
Ancillary administrator
collection of chattels by, 150–151; liability to suit in state of appointment, 87; payment of debt to, 157–158; qualification as, after beginning action as foreign personal representative, 33–34.
Bankruptcy power of federal government, 192.
Beale, 31, 161, 170, 171, 184.
*Bona notabilia*, 15, 41, 64.
Buckland, 4.
Capacity of foreign personal representative to sue
common-law rule, 30–33, 59, 67–69; Federal courts, 75–77; in absence of local creditors, 57–58; waiver of objection to, 35–38.
Cardozo, Judge, 115, 122.
Chattels, collection of
foreign personal representative, by, 148–151; comity, permission by, 140, statutory permission, 150.
Collection of assets
duty of personal representative, 21; duty of foreign personal representative, 144–148: standard of duty, 145, to institute an action, 144–145, to take out ancillary administration, 145, 148.
Colonial Probates Act of 1892, 73–75.
Comity
action as a matter of, 32, 50–53, 67, collection of assets by, 140.
Commonwealth countries
capacity of foreign personal representative to sue, 31, 47; liability of foreign personal representative to suit, 79.
Consent, jurisdiction based on, 95–104.
binding on plaintiff, 98–99; counterclaims, 99–100; statutory consent, 100–104; to revive action brought against decedent, 97–98.
Conservation of assets, 21–23.
Corporate stock
action to rescind sale of, 88; collection of, by foreign personal representative, 149; *situs* of property, 25.
Counterclaims
against foreign personal representative, 99–100; statutory trustee, 61.
Debts
collection of (see Voluntary payment); *situs* as property, 152; United States, due from, 166-168: to which personal representative payable, 167-168, where payable, 167.
Default judgment in favor of foreign personal representative, 37-38.
Discharge to debtor by foreign personal representative. See Voluntary payment of debts.
Domiciliary personal representative delivery of chattels to, 148-151; payment of debts to, 155-157; title to movables of decedent, 142, 157, 183; unified administrator, as, 181-182.
Due process clause, 49, 118-120.
Ecclesiastical courts, 8-9, 12-16.
control over executor, 12; organization, 8-9; real property outside the jurisdiction of, 9.
Ejectment, by foreign executor with power of sale, 53-54.
English law
capacity of foreign personal representative to sue, 31; liability of foreign personal representative to suit, 79; personal representative as trustee, 185-186; suit as individual, 46-47.
Estate as entity, 19-20.
Executor
authority of, 19, 127; *de son tort,* 14 n. 33, 112-114; development of, 7-13; with power of sale in will, 53-54, 125-129.
Federal jurisdiction over foreign personal representative, 75-77.

Federal Rules of Civil Procedure, 17(b), 76.
Foreign personal representative, action by
as individual, 38-50: certificate of deposit, 42, contract made by representative, 44, judgment, 38-41, 46-47, life insurance policy, 43-44, negotiable instrument, 41-43, note to representative as payee, 42, 44, to compel contribution by coguarantor after paying the obligation, 44, to recover over-payment of estate taxes, 44, to recover property which he has reduced to possession, 45-46; as matter of comity, 50-53; common-law rule, 30-33; statutory permission, 67-75; effect of ancillary administration, 72-73, limitations of, 70-71, requirements, 69-70; wrongful death, 58-63.
Fourteenth Amendment. See Due process clause.
Fraudulent removal of assets into forum, action based on, 93-95.
French law of succession, 5-6.
Glanville, 9-11.
Hand, Judge Learned, 116.
Heir, English, as representative of decedent, 9-11.
*Heres,* 4-5.
Holmes, Justice, 193.
Immovable property. See Real property.
In rem proceedings judgment against foreign per-
sonal representative (see Jurisdiction in rem); probate administration as, 83-84.
Insolvent estate, power of federal government over, 192.
Judgment against debtor in state of appointment, 153-163; by default (see Default judgment).
Jurisdiction in personam against foreign personal representative, 84-85; in rem against foreign personal representative, 84, 87-90: foreclosure of mortgage on property of estate, 88, movable property brought into forum after death, 89-90, quasi-in-rem, 90-92, stock in state of incorporation, 88.
Legal personality, 80-82.
Legataire universel, 5.
Lex Falcidia, 4.
Liability of foreign personal representative to suit as individual on obligations incurred after death, 109-112; for fraudulent removal of assets from state of appointment, 93-95; general common-law rule, 79-87; statutory liability, 114-122: constitutionality, under due process clause, 119-120, under full faith and credit clause, 120-121; desirability of, 121-122.
Local creditors protection of, 32-33, 171-172, 175-179; discrimination against in a foreign administration, 175-176.
Management of assets. See Conservation of assets.
Mercantile theory, 41, 49, 159.
Mortgage foreclosure of, 88, release of, 160-161.
Movable property. See Chattels.
Non-interference with foreign tribunal of administration, policy of, 86-87.
Nonresidents, prohibited from serving as personal representative, 34.
Notice, who must be notified, 89 n. 26.
Objection to capacity of foreign personal representative to sue, waiver of, 35-38.
Obligation to pay foreign personal representative, 159-160.
Obligations incurred after decedent's death. See Liability of foreign personal representative to suit.
Oil and gas collection of assets arising from, 132-136; "unless" lease, continuation of, 136-138.
Ordinary, in ecclesiastical court, 9, 13.
Payment of debt to foreign personal representative. See Voluntary payment.
Personal action for money against foreign personal representative, 84-85.
Personal property, title in personal representative, 20-21.
Personal representative, 17-24.
appointment of, 18-19; authority of, 19; development of, 7-17; duties: collection of assets, 21, conservation of property, 21-23, final account, 24, payment of claims, 23-24;
title to personal property, 20-21.
Power of sale, exercise of, 22, 125-129.
by foreign executor, 125-128; by successor to foreign executor, 128-129.
Real property
direct descent to heir or devisee, 9, 20, 124; sale by foreign executor with power of sale, 125-128; sale by foreign personal representative by statute, 130-132; subject to payment of debts, 20, 124, 131; under control of personal representative by statute, 20, 134-135.
Receiver. See Statutory receiver.
Recission of stock sale, 88.
Release of mortgage by foreign personal representative, 160-161.
statutory permission, 163-164.
Representative personality of personal representative, 80-82.
Restatement of the Law of Conflict of Laws, 41, 42.
Revival statute, 104-109.
Rights acquired after death. See Foreign personal representative.
Roman law of succession, 3-5.
Sale of land
by foreign executor with power of sale, 125-128; statutory permission to foreign representative, 130-132.
Salman, 7-8, 11, 13.
Separate administration. See Ancillary administration.
Sovereignty, 170.
Specific performance. See Contract to convey.
Statutory consent, judgment by, 100-104.
Statutory liability to suit. See Liability to suit.
Statutory permission to foreign personal representative to sue. See Foreign personal representative.
Statutory permission to foreign personal representative to collect assets, 163-166.
Statutory receiver, 183-184.
Statutory trustee, personal representative as, 61-63.
Stockholder's derivative action, 54.
Story, Justice, 30, 48, 87, 167, 170, 171, 175, 177.
Succession, split system of, 123.
Territorial limitation on personal representative development of, 14-16, theory of, 16-17.
Title to personal property of personal representative, 20-21.
Trustee, 185-186.
Unified administration desirability of, 170-179: ancillary administration, expense of, 173, ancillary administration, delay of, 173-174, unified policy of conservation of assets, need for, 174-175, certainty in personal representative, requirement of, 174; means of achieving, 187-192: court decision, 188, Federal enactment under bankruptcy
power, 192, uniform legislation, 188–192.
Uniform Ancillary Administration of Estates Act, 180, 189, 191.
text, Appendix B.
Uniform Powers of Foreign Representatives Act, 189, 190.
text, Appendix A.
United States, debts due from. See Debts.
Universal successor, 3–7, 183.
suit in common-law jurisdiction to collect assets, 54–57.
"Unless" lease, continuation of. See Oil and gas.
Voluntary payment of debts to
foreign personal representative, 151–166.
effect of: local administration, 156–157, local creditors, 155–156, note evidencing debt, 158–159; explanation of result, 161–162; in state of appointment, 154–155; obligation to pay, 159–160; statutes affecting, 163–166; to ancillary administrator, 157–158; to domiciliary representative, 155–157.
Wrongful death. See Foreign personal representative.