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 communist 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

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8 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).
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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." 4

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.

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 belong­
ing to him, as liable for decedent's debts, and for the
payment of legacies, an easy and relatively simple solu­
tion 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 suc­
cessor 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 loca­
tion of the property. The development across the Eng­
lish Channel brought about a very different theory of
the nature and the authority of a personal representa­
tive 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 evolu­
tion of the personal representative begins on the con­
tinent 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.
Glanville mentions the executor, so that this institution was in use in England before the end of the twelfth century.\textsuperscript{18} 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 \textit{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.\textsuperscript{19}

The heir at this point was not a universal successor, although he was similar in many respects to the Roman \textit{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.\textsuperscript{20} 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.

\textsuperscript{18} Holdsworth, \textit{op. cit.}, \textit{supra} note 6 at 563.
\textsuperscript{19} Atkinson, \textit{supra} note 11 at 111.
\textsuperscript{20} This analysis of the difference between the heir and the universal successor was made in Atkinson, \textit{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. 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. 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. 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. 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. 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

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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.
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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\textsuperscript{31} that really originated the administrator.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{35} However, if he left

\textsuperscript{31} Edward III, st. 1, c. 11.

\textsuperscript{32} Holdsworth, \textit{op cit.}, supra note 21 at 568–569.

\textsuperscript{33} There is a quasi personal representative known as the executor \textit{de son tort} which may be treated as a third type of personal representative. For a brief discussion of this concept, see \textit{infra} pp. 122–124.

\textsuperscript{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 \textit{infra} pp. 125–129.

bona notabilia\(^3\) 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.\(^3\) 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.\(^3\) 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.\(^3\) This became the settled law.\(^3\) 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.\(^3\) 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-

\(^3\) 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. 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."

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.
50 In re Drew's Estate, 183 Minn. 374, 236 N.W. 701 (1931); Lethbridge v. Lauder, 13 Wyo. 9, 76 P. 682 (1904).
51 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).
52 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).
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over his realty. Therefore, it is the personal representa­
tive rather than the estate with whom third persons and
courts must deal.

The function of the personal representative is to ad­
minister the property of the decedent. As will be seen
constantly throughout this work, the distinction be­
tween immovable or real property and personal prop­
erty 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 with­
out any action on the part of the personal representa­
tive. 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

56 Stephens v. Comstock-Dexter Mines, Inc., 54 Ariz. 519, 97 P. (2d)
202 (1939); Aubuchon v. Lory, 23 Mo. 99 (1856).
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).
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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.\textsuperscript{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\textsuperscript{65} and in some cases the duty to sell it, such as when the assets are perishable goods.\textsuperscript{66} In the case of real property, he may have the power to sell it if given by the will or statute.\textsuperscript{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.\textsuperscript{68} He is personally liable for his own conversion of assets of the estate in his control\textsuperscript{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.\textsuperscript{70} The personal liability which accrues

\textsuperscript{64} Mayo v. Arkansas Valley Trust Co., 132 Ark. 64, 200 S.W. 505 (1917); in re Jenning's Estate, 74 Mont. 449, 241 P. 648 (1925).
\textsuperscript{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).
\textsuperscript{66} Atkinson, op. cit., supra note 46 at 667.
\textsuperscript{67} See infra Chapter IV, pp. 125–132.
\textsuperscript{68} In re Macky's Estate, 73 Colo. 1, 213 P. 131 (1923); In re Wilmerding's Estate, 238 N.Y.S. 375 (1929).
\textsuperscript{69} Meyers' Adm'r v. Meyers, 244 Ky. 248, 50 S.W. (2d) 81 (1932); Heap v. Heap, 258 Mich. 250, 242 N.W. 252 (1932).
\textsuperscript{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 con­
serve and manage the assets properly, like all liability
of the personal representative to the heirs or benefi­
ciaries, will be imposed on him at the time of his final
account by a surcharge.\(^7^1\)

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 admin­
istrator 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 pre­
sented to the personal representative within the spec­
ified time are barred.\(^7^2\) A creditor may sue the personal
representative on an obligation of the decedent and
secure a judgment against him.\(^7^3\) However, such a
judgment cannot be satisfied by levying an execution on
any of decedent’s property.\(^7^4\) The judgment must be
presented as a claim.\(^7^5\) 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

\(^7^1\) Shinn’s Estate, 166 Pa. 121, 30 A. 1026, 45 Am. St. Rep. 656 (1895).
\(^7^2\) Pufahl v. Estate of Parks, 299 U.S. 217, 57 S.Ct. 151, 81 L.Ed. 133
\(^7^3\) 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).
\(^7^4\) Brown v. Sweat, 149 Fla. 524, 6 So. (2d) 538 (1942); Grife v. Equi­
table Life Assur. Soc., 233 Iowa 83, 8 N.W. (2d) 584 (1943); In re Mannix
Estate, 146 Ore. 187, 29 P. (2d) 364 (1934).
\(^7^5\) Meredith v. Scallion, 51 Ark. 361, 11 S.W. 516, 3 L.R.A. 812 (1888).
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.\textsuperscript{76} Also, he may be personally liable for failure to collect certain assets.\textsuperscript{77} 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.\textsuperscript{78}

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-

\textsuperscript{76} Shinn's Estate, 166 Pa. 121, 30 A. 1026, 45 Am. St. Rep. 656 (1895).
\textsuperscript{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, \textit{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 corporations have national and international lists of stockholders, 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.