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...."

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 administrator 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 administrator 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 function as such outside its territory. The explanation is questionable on its face and becomes completely unsatisfactory 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.

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5 Beale, op. cit., supra note 2 at 1533.

6 See infra Chapter V, pp. 151-162.

7 Infra pp. 35-54.
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 if the laws of the state permit him to do so. One third of the states hold by statute, decision, or court order 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.

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.

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.”
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(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. 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. Some courts require that the objection be raised by a plea in abatement, others say that it may be done by a plea in bar, and still others by a special demurrer if the incapacity is apparent on the face of the complaint. 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

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23 Brown v. Nourse, 55 Me. 230 (1867); Farmers Trust Co. v. Bradshaw, 242 N.Y.S. 598 (1930).
26 Louisville and Nashville R. Co. v. Brantley’s Adm’r., 96 Ky. 297, 28 S.W. 477 (1894); Lefebure v. Baker, 69 Mont. 193, 220 P. 1111 (1923).
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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-

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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-

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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).
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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. A leading case on this question is *Cramer v. Phoenix Life Insurance Co.* 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

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42 91 F. (2d) 141 (8th Cir. 1937), *cert. den.* 302 U.S. 739, 58 S.Ct. 141, 82 L.Ed. 571.
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 overpayment 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 \textit{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.

property. This title will be good as against any other administrator. If he then takes the property outside the state and it is then converted by a third party, he may sue for its recovery.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{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.

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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. 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.

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

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."

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

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62 See infra Chapter IV, pp. 125-129.
FOREIGN PERSONAL REPRESENTATIVES

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).
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.
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
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\textsuperscript{71} and stockholder’s derivative actions.\textsuperscript{72}

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


\textsuperscript{72} North v. Ringling, 63 N.Y.S. (2d) 135 (1946).
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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. 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. 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.

\[ ^{73} \text{Restatement, Conflict of Laws, sec. 391 (1934).} \]

\[ ^{74} \text{Baldwin v. Powell, 294 N.Y. 130, 61 N.E. (2d) 412 (1945).} \]
"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."" 75

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. 76 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. 77

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. 78 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. 79

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.\(^8^4\) The theory of these cases is that the

\(^8^4\) Stearns v. Burnham, 5 Greenl. 261 (Me. 1828) (Action on promissory note by assignee); Cutter v. Davenport, 1 Pick. 81 (Mass. 1822) (Action on mortgage by assignee); Thompson v. Wilson, 2 N.H. 291 (1820) (Action on negotiable instrument by assignee).
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. 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*. 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.*" 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

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86 32 N.Y. 21 (1865).
87 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. However, the courts will not permit an assignee for collection only to bring an action. 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.

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. 244, 17 S.W. 1050 (1891) (promissory note).

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

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.\textsuperscript{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.\textsuperscript{95} Under some statutes, the letters must be filed prior to the commencement of the action.\textsuperscript{96} In other states, they may be filed at any time before the hearing;\textsuperscript{97} while in still other jurisdictions, filing the letters at any time before judgment is sufficient.\textsuperscript{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


\textsuperscript{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."

\textsuperscript{96} \textit{Ibid.}


\textsuperscript{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. The amount of the bond may be only enough to cover costs or it may be an amount equal to the value of the assets recovered by the foreign administrator. The statute may make the posting of the bond mandatory, or it may rest in the discretion of the court. 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 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. Where such a statute is in effect, a personal representative who was appointed in a foreign country would be subject to the common-

100 Burns Ind. Stat., sec. 7-753 (1953); Smith Hurd Ill. Stat., Ch. 3, sec. 419.
101 62 Ala. 151 (1940).
103 Smith Hurd Ill. Stat., Ch. 3, sec. 419.
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law rules concerning suits. Several statutes permit foreign personal representatives to sue only when the decedent was a nonresident of the state.\textsuperscript{105} Some of the states either by statute\textsuperscript{106} or by construing decisions\textsuperscript{107} 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.\textsuperscript{108} Whether the policy of pro-

\textsuperscript{106} 113 Ga. Code Ann. 240.
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."\footnote{116} 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.\footnote{117} 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

\footnote{116} 55 & 56 Vict. c. 6, sec. 2.  
\footnote{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 $3,000,118 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.119 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*, 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.

"(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. 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

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