CHAPTER V

Collection of Assets by a Foreign Personal Representative

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

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

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

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

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2 Duehay v. Acacia Mutual Life Ins. Co., 105 F.(2d) 768, 124 A.L.R. 1268 (D.C. Cir. 1939). “No state need allow property of a decedent to be taken from within its borders until debts due [local] creditors have been satisfied...; Hensley v. Rich, 191 Ind. 294, 132 N.E. 632, 18 A.L.R. 1118 (1921).”

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

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

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

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

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

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5 See discussion supra Chapter II, pp. 30-31.
6 In re Nolan’s Estate, 56 Ariz. 366, 108 P. (2d) 391 (1940); In re Brown’s Estate, 21 Del. Ch. 562, 52 A. (2d) 387 (1944).
states. This concept seems based on two reasons. The first is an idea which is expressed in the older cases, viz., that the ancillary administrations are subordinate to the domiciliary and their only purpose is to administer the assets located in the jurisdiction and then to transmit the remainder to the domicile for distribution. This doctrine has gone out of favor, and the tendency is to treat the ancillary and domiciliary administrations as completely independent of one another and supreme within their respective jurisdictions. The second reason, and a more forceful one, is that the succession to movable property is determined by the law of decedent's domicile at date of death and it is this same law which appoints the domiciliary representative. Since the law of the domicile will treat the representative it appoints as having title to all the personal property of the decedent, subject to the right of local administration in other states, the courts in those states treat the domiciliary representative as having title to personal property in their jurisdictions until a local administrator is appointed. Needless to say, this theory that a domiciliary representative has title to personal property located in other states is in direct conflict with the notion that a personal representative is a creature of the state that

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

I. Duty to Collect Assets

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

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


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


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

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

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

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

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

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

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

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

2. Collection of Chattels

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

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

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

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

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

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

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

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

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


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

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

3. Voluntary Payment of Debts to a Foreign Personal Representative

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

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

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

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

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

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

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

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

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


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

The next hypothetical case represents the strongest situation for treating voluntary payment to a foreign personal representative as a valid discharge of the obligation. $F$ is the domiciliary representative. He enters the state where $D$ resides, and $D$ voluntarily pays the debt to him. There are no local creditors in the state, and at the time, there is no ancillary administrator. The cases have generally held that such voluntary payment when there is no ancillary administration and no domestic creditors are prejudiced will constitute a valid discharge of the debt.\[^{35}\] There is some authority to the effect that if there are local creditors at the time of the payment who are prejudiced by the removal of assets from the jurisdiction, $D$ will be liable in an action brought on the same debt by $A$.\[^{36}\] This test of prejudice to local creditors has been criticized because "The effect of the payment is left to the subsequent determination of fact unknown when the payment is made; namely, the existence of unsatisfied creditors."\[^{37}\]


\[^{36}\] Contra: Crohn v. Clay County Bank, 137 Mo. App. 712, 118 S.W. 498 (1909); Young v. O'Neal, 3 Sneed 55 (Tenn. 1855); Vaughn v. Barrett, 5 Vt. 333 (1833).

\[^{37}\] See also: Richardson v. Neblett, 122 Miss. 723, 84 So. 695, 10 A.L.R. 272 (1920). Voluntary payment to a foreign personal representative was held not to be a discharge because he had failed to comply with the statutory requirement of filing his letters before he received the payment.

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

If at the time of the voluntary payment by $D$ to $F$, there is an ancillary administrator, $A$, appointed in the state where $D$ resides, does the payment discharge $D$'s obligation? The few cases which have considered this question have held that if the payment were made in good faith and with no knowledge of the existence of the ancillary administrator, it would be a bar to a subsequent action brought by $A$.

The leading case on this point is *Maas v. German Savings Bank*. $D$, a New York bank, voluntarily paid a deposit of decedent to $F$, the domiciliary representative appointed in New Jersey. $A$ had previously been appointed administrator in New York, and he brought this action against $D$ to recover the deposit. It was conceded that there were no creditors of decedent in New York and that the payment was made in good faith and without knowledge of the appointment of the plaintiff. The New York Court of Appeals held that the voluntary payment was a valid discharge as long as it was made in good faith. It was contended that the bank had constructive notice of the ancillary administration because $A$'s appointment was made in the prescribed manner with notice and was a matter of court record. However, the court held that

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actual notice of the appointment of a domestic administrator would be necessary before there would be a sufficient lack of good faith to destroy the validity of the payment.

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

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

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

\(^{42}\) *Wilkins v. Ellett*, 9 Wall. 740, 19 L.Ed. 586 (U.S. 1869).
of the United States had held that the payment was a valid discharge. The case was retried and the lower court found that decedent was domiciled in Tennessee, so that $F$ was to be treated as ancillary administrator. The Supreme Court still held that the payment was a good discharge of the obligation. It based the result largely on the decision in the previous case, saying that it was immaterial whether $F$ was an ancillary administrator or not. While it is difficult from the viewpoint of theory to fit this case in with those involving payment to a domestic representative, the cases decided since have followed the holding in *Wilkins v. Ellett.*\(^{43}\) The courts seem more concerned with reaching a result which will protect the debtor from having to pay twice than one which will fit into a neat, logical pattern of explanation.

The discussion thus far has assumed that the payment was of a simple contract debt. Another factor which can complicate the problem and may cause a different result is the existence of a negotiable instrument or promissory note as evidence of the debt. It is generally held that $F$ who has the note representing the debt is entitled to receive the payment if the debtor is willing to make payment.\(^{44}\) This result is the same as in the normal case involving voluntary payment by the debtor to a foreign personal representative. One case has held, however, that if the note is held by $A$, the local administrator, voluntary payment by $D$ to $F$


\(^{44}\) McNamara v. McNamara, 62 Ga. 200 (1879); Thorman v. Broderick, 52 La. Ann. 1298, 27 So. 735 (1900); Goodlett v. Anderson, 75 Tenn. 286 (1881).

*Contra:* Bull v. Fuller, 78 Iowa 20 (1889); McIlvoy v. Alsop, 45 Miss. 365 (1871).
will not protect him in an action brought later on the note by A.\textsuperscript{45} In view of the tendency of modern courts to adopt the "mercantile theory" in regard to commercial paper which holds that the debt is property where the note is,\textsuperscript{46} it is likely that any modern court would hold that the only personal representative entitled to collect the asset would be the one in possession of the note. Therefore, a debtor should not feel safe in paying a foreign personal representative unless he can surrender the note which evidences the debt.

A question may be raised whether there is any legal obligation on the debtor to pay a foreign personal representative when he demands payment. This is not an easy question to have litigated, because generally the foreign administrator who demands payment is not entitled to go to court to collect the debt. However, in states where the foreign personal representative is permitted to bring an action, the question has been decided, and the courts have held that there is no duty on a debtor to pay a foreign personal representative.\textsuperscript{47} He is entitled to wait and pay an ancillary administrator appointed in the jurisdiction, who can unquestionably give a valid discharge of the obligation. One of the cases reached this result in spite of a statute aimed at protecting debtors who make such voluntary payments. It held that such a statute merely removed from the debtor certain restrictions and did not impose on him an obligation to pay.\textsuperscript{48} This result seems strange. It

\textsuperscript{45} Amsden v. Danielson, 19 R.I. 533, 35 A. 70 (1896).

\textsuperscript{46} See supra Chapter II, pp. 41-43.


\textsuperscript{48} Joy v. Swanton Sav. Bank, 111 Vt. 106, 10 A.(2d) 216 (1940):

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

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

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

As might be expected, there has been a great deal of
difficulty in satisfactorily explaining the result in cases
involving voluntary payment. Beale, who is the fore­
most exponent of the traditional theory concerning the
territorial limitation of a personal representative's au­
thority, has developed a very complicated explana­
tion.51 When D has made a voluntary payment to F,
the forum in which D resides can compel him to pay
A, the domestic administrator, a second time. How­
ever, if F is the domiciliary administrator and there
are no local creditors in the forum, A, after he has ad­
ministered the estate in his hands, will transmit the
assets including the second payment by D to F for dis­
tribution. Now the estate in the hands of F will contain
two payments made by D. He will be entitled to re­
cover the amount of his first payment from F on a
theory of unjust enrichment. In order to avoid this cir­
cuity of action, the forum will treat the first payment
as an equitable discharge and will not permit a second
recovery by the domestic administrator. This reason­
ing is a logical and adequate, although involved, ex­
planation of the majority rule that payment to a domi­
ciliary representative when there are no local creditors
will be a valid discharge, but it does not explain the
cases which go further and hold that payment is valid
if made to a foreign ancillary administrator or when
there are local creditors. Also, this explanation has
never actually been used by the courts as an explana­

51 Beale, supra note 31 at 605, 608.
tion for their decisions, nor does it seem accurately to reflect the true motivations for the result.

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

The state of the decisions at common law as related to the varying fact situations makes it impossible to state categorically what the law is. A debtor may be fairly safe in relying on payment to a foreign domiciliary representative when he is sure there are no local creditors and no local administration as a discharge of his debt which will bar a subsequent action by a local
administrator. If he is not sure about the existence of local creditors, or if there is an ancillary administration, or if his obligation is evidenced by a promissory note which the foreign personal representative does not possess, the only completely safe course for the debtor is to refuse to pay any but a local administrator or to wait until the foreign representative has obtained a court order directing him to pay.

4. Statutes Affecting Voluntary Payment to a Foreign Personal Representative

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

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

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

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

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

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

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

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

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

5. Debts Due to Decedent from the United States

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

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

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

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

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

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

6. Summary

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

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