Michigan Law Review

Volume 44 | Issue 3

1945

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Paul E. Basye
Member of the California and Missouri bars, American Bar Association

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DISPENSING WITH ADMINISTRATION*

Paul E. Basye†

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*This article is one of a series of articles on probate law undertaken while the writer was a Research Associate at the University of Michigan Law School in connection with the drafting of the Model Probate Code. The writer is deeply indebted to Professor Lewis M. Simes of the University of Michigan Law School who has contributed many valuable suggestions and criticisms to this study. Appreciation is also due to Professor Thomas E. Atkinson of the New York University Law School, especially for his criticism of that part dealing with dispensing with ancillary administration.

The article will appear in Problems in Probate Law, a book to be published by the University of Michigan Press as a part of the Michigan Legal Series.

The statutes which are discussed herein are complete to January 1, 1945. In addition all legislation passed during 1945 which was available at the time of printing is also included.

†A.B., University of Missouri; J.D., University of Chicago; LL.M., University of Michigan. Member of the California and Missouri bars. Member of Committee on Model Probate Code, Probate Division, Section of Real Property, Probate and Trust Law, American Bar Association.
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WITH an elaborate system existing in every state for the administration of decedents' estates, it should not be assumed that every estate is or need be subjected to official supervision by a probate court. According to studies made in this connection there is approximately one administration for every four deaths. In some cases there is no estate to be administered. In others it is of such small value that administration is neither required nor justified. Even when a decedent died possessed of a moderate or large estate, it does not follow that administration is absolutely essential. It is the experience of every lawyer that an administration in many estates is not needed. On the other hand, the opinion of many heirs and beneficiaries that an administration on the estate in which they are interested is or should be unnecessary is an erroneous one. The purpose of this study is to consider the precise circumstances which will justify dispensing with

a formal administration, in whole or in part, on the estate of a decedent, and the extent to which modern legislation has specifically provided for its being dispensed with or has favored or permitted “informal” or “unofficial” administrations.

The formal process of administration is peculiar to the common law. A personal representative was unknown to the Roman law and to the civil law. Under these systems the estate of the decedent passed directly to the heir in the event of intestacy or to the instituted heir where there was a will, without any intervening administration whatever as known to the common law. Such an heir took the property absolutely but became personally liable for all debts of the decedent even though they exceeded the amount of property received. Only if the heir renounced the succession or claimed the benefit of inventory was he freed from liability for the decedent’s debts. Thus the personality of the decedent was continued in the heir, and the decedent’s estate passed immediately and absolutely to the heir who became liable for the payment of the decedent’s debts and legacies given in the will. These obligations could be enforced as against the heir. In this light they might be regarded as administrative duties although not subjected to supervision by any court. It remained for the common law to develop the practice of appointing a personal representative accountable to the state to continue the personality of the decedent for a period long enough to insure the payment of his debts and any legacies provided for in the will. Thus court control over such a personal representative has led to the elaborate system of probate courts and supervision both in England and America. The origin of this institution has been attributed to the desire to protect creditors and to secure the payment of fees and inheritance taxes—both legitimate interests of the sovereign.

The phenomenon of a complete lack of any official administration upon a decedent’s estate under the civil law is described here in order to suggest a close analogy to those situations in Anglo-American law in which there need be or is no formal administration. In this con-

3 Id. at 432-433.
4 Id. at 435-436.
5 Id. at 438.
6 Id. at 438.
7 Id. at 468-475. This analogy is fully developed by Professor Rheinstein in the article cited. One should read it in full to appreciate the close parallels which prevail under the two systems.
nection it will be observed that under the civil law the property of a decedent is never removed from commerce, whereas under our probate system it is largely taken out of commerce for the period of administration. Any worthy procedure of this kind should not impair too seriously the purposes for which administration is provided. At the same time it should be welcome both to heirs and distributees, and would advance the social interest of keeping property in commerce without substantial interruption upon the occasion of death.

There are two general situations in which administration might be dispensed with, either in the public interest or on behalf of those concerned in the estate. First, administration is scarcely justified in many small estates provided no one is adversely affected by its omission. This may be said of most estates of deceased minors who have but limited capacity to contract debts and whose estates are likely to be small. Second, many estates of substantial amount may not require administration, if all the interested parties can resolve their conflicting interests among themselves. Each of these situations suggests the desirability of a careful and complete statement of the objectives to be achieved by an administration how far each of them is secured only, or more effectively, by an administration, and to what extent administration may be dispensed with without seriously impairing the larger objectives.

I

Functions of Administration

Under the Anglo-American system of administration the title to a decedent's personal property passes to his executor or administrator for the period of administration. During that time his functions are: (1) to collect the assets belonging to the estate, (2) to pay the debts of the deceased and claims against the estate, and (3) to distribute the residue to the heirs or legatees. Each of these functions involves or may involve a resolution of conflicting interests. The collection of assets implies a positive duty on the part of the personal representative. Such is for the benefit of creditors as well as distributees of the estate, since a collection of assets may be necessary in order to pay creditors. At the same time the interests of distributees are opposed to those of creditors, inasmuch as the latter have a prior interest in the distribution of the estate. The payment of the debts of a decedent implies an opportunity for creditors to present and have a judicial determination of their claims and, in case of an insolvent estate, a resolution of the claims of competing creditors. The payment of claims against the
estate (as distinguished from debts of the decedent) involves a determination and payment of funeral expenses, costs and expenses of administration, claims arising in connection with the carrying on of a decedent's business and whatever estate, inheritance or succession taxes and other obligations which may be similarly classed. And finally the distribution of the residue to the heirs or legatees may involve a resolution of many kinds of conflicting interests, as between different classes of distributees and between distributees of the same class. It may also present problems of advancements, ademptions, contributions and the like.

The idea is fundamental in our system that some person occupying an official position under a supervisory court should perform these functions. This is due primarily to the state's solicitude for creditors of the decedent, and perhaps secondarily to the belief that only in this way can the residue of the estate be properly and justly distributed to those ultimately entitled to it. The social and economic desirability of maintaining personal credit by the means of official administration has prevailed over the more direct method of the civil law. Furthermore, the complicated nature of property interests often makes it difficult, if not impossible, for the heirs or distributees to divide the decedent's property among themselves although they may be willing to do so. Our probate courts are maintained to effectuate the prompt settlement of estates and to resolve such conflicts as occur in the process. In a sense, an administration is a liquidation of the decedent's estate, affording creditors a means of realizing upon their claims and at the same time limiting the liability of the heirs who succeed to the property of the decedent.

II

PERSONS INTERESTED IN AND AFFECTED BY ADMINISTRATION IN TERMS OF STATED FUNCTIONS

The three general functions of administration having been stated, it remains to determine which groups of persons are interested in each of these objectives, to what extent the process of administration is essential for their accomplishment, and in what circumstances it could be dispensed with.

8 See Bordwell, "The Conversion of the Use Into a Legal Interest," 21 Iowa L. Rev. 1 at 34 (1935); and dissenting opinion of Campbell, J., in Lafferty v. People's Savings Bank, 76 Mich. 35 at 63, 43 N.W. 34 at 45 (1889).
A. Collection of Assets

Upon the death of a decedent it is ordinarily desirable that someone take charge of his property and proceed to make collection of that which is not already in possession. This may be necessary in the interests of preserving the property and making it available for those ultimately entitled to it. It may involve the bringing of suits for the collection of debts owed to the decedent. In each of these cases the heirs and creditors of the estate will be interested, because each aids in the realization of their respective claims upon the estate. If a debtor of the estate is willing to pay, he is entitled to know with certainty that the payment will operate to discharge his debt. Consequently, each of the three classes of persons interested in the estate, heirs, creditors and debtors, is concerned in this function of administration. Under the system prevailing in many states at the present time, a debtor who pays the heirs directly may remain liable to a personal representative, if one is subsequently appointed.

B. Payment of Debts and Claims

Society's concern for creditors of the decedent has been the prime purpose in maintaining probate courts in which estates could be administered. If an heir proceeds to take possession of the decedent's property without administration, a creditor may petition the probate court for letters of administration and then present his claim for allowance in the administration proceeding. If, however, the heirs pay the creditor, he ceases to be an interested party to require administration or be concerned with the disposition of the property by the heirs. In providing machinery for liquidation of decedents' estates the state is said to be concerned in seeing that the assets shall be applied to the payment of debts and claims which otherwise might remain unpaid.

The heirs also are interested in having the assets of the estate applied to the discharge of claims against it. Otherwise their interest in the residual estate remains subject to the claims of creditors. Only by the machinery of a formal administration can the existence of debts be determined and their payment provided for. And the claims of creditors will not ordinarily be barred by the statute of limitations in the absence of administration, for the running of the statute is ordinarily suspended between the date of the decedent's death and the time when

9 The term "heirs" as used throughout this study is intended to include devisees and legatees as well as next of kin unless the context indicates to the contrary.
10 Woerner, American Law of Administration, 3d ed., § 201 (1923).
a personal representative is appointed. This interest on the part of the heirs is particularly significant where land is involved, because of the necessity for some effective judicial method to release it from the potential claims of creditors and permit it to become freely alienable, unencumbered by claims that are without foundation or are not asserted with reasonable promptness.

C. Distribution of Residue

After the collection of assets and the payment of debts and claims against the estate, the heirs and legatees remain the sole interested parties in the remaining function to be accomplished, viz., the distribution of the residual estate to themselves. In most cases this involves a simple division of property among those entitled to it in accordance with their interests. In other cases it may involve a partition, or some kind of arbitrary allocation of different pieces of property to different distributees. Where interests in property are more complex, the distributees themselves may desire an official distribution according to law or the provisions of the decedent's will.

In addition to securing a proper and satisfactory distribution to themselves the distributees will doubtless have some occasion later to transfer the property so received by them. In that event they will be much interested to know that the distribution has been an effective one and of such a character that it will be readily accepted by a purchaser. This is particularly true where the property is land, and it is true also for personal property which requires some kind of official or public recording for its transfer.

III

Extent to Which Functions of Administration May Be Accomplished Without Administration

A. Ante-mortem Devices to Avoid Administration

Many methods are available by which the use or right of enjoyment of wealth may pass to others at the time of a decedent's death without leaving an estate to be administered. The creation of inter vivos trusts and joint estates are both well recognized methods of accomplishing this end, although either of these devices may subject

11 Id. at § 401. See also comment, "Executors and Administrators—Comparison of Nonclaim Statutes and the General Statutes of Limitations," 36 Mich. L. Rev. 973 (1938).
the property to inheritance taxes. Also savings bank deposits naming other persons as beneficiaries are upheld in most states as another means of transmitting the beneficial enjoyment of property at death, which does not constitute a strict testamentary disposition. Insurance is another method, although the insured alone does not always, during his lifetime, create the fund which becomes payable to beneficiaries at the time of his death. In none of these cases is there any property which would become assets in the hands of a personal representative appointed to administer the decedent's estate.

In the absence of any fraud upon creditors at the time of creating any of these funds or estates, each of them is perfectly valid for the purpose intended. These methods operate to prevent an executor or administrator subsequently appointed from making a successful claim to the fund and also to prevent any claim by creditors of the decedent. There are, however, other devices which are often used to avoid administration but which, if discovered, are not valid to insulate the particular transactions from the claims of a personal representative or of creditors. Thus, fully executed deeds not delivered in the decedent's lifetime, endorsed securities and the like are often resorted to without being questioned. Or interested parties may simply appropriate unregistered property of a kind which may pass by delivery. But these latter devices are always dangerous and not immune from the claims of a personal representative or of creditors, if attacked. Furthermore, unless a limitation exists on the grant of administration, such transactions ordinarily remain open indefinitely to the claims of creditors.

B. Summary Settlement After Appointment of Personal Representative

Administration is often commenced when it is believed that an estate is larger than it turns out to be or when the total amount of assets is unknown. If it subsequently appears that the estate is not large and would be eventually distributable to the decedent’s family in any event, there is a feeling that it should be made available to them at a time when their need for it is likely to be the greatest and that the benefits of a formal administration should be available without requiring its usual procedure, formalities and duration. In such estates there can be no justification in subjecting the estate to the usual ex-

penses of administration or in withholding delivery to the family until the expiration of the ordinary period for full administration. The following discussion is intended to consider existing statutes designed to accomplish this result. Statutes already have been adopted to achieve this purpose, and they are becoming more widely acceptable with time.

I. A method for small estates

a. As dependent on family exemptions and allowances

According to common custom, the rights of homestead and all exemptions enjoyed by the head of a household are transferred to and continued in the widow and minor children after his death. It is also usual to provide for a family allowance of a sum sufficient to provide for their maintenance and support during the period of administration and until distribution of the estate may be made to them. The amount of such allowance will naturally vary with the number of persons in the family, their standard of living and the size of the estate. In a few states there is also an allowance to the widow of a certain amount of money or other property as her absolute property and as such it is not considered a part of the estate. The property of the decedent, to the extent that it comprises the homestead or exempt property or is applied in payment of the family allowance or the widow's absolute property, is ordinarily not subject to the claim of creditors. Upon the setting off of the homestead and exempt property and the payment of a family allowance and widow's absolute property, there is a removal or withdrawal of these items of property from the estate for the purposes of administration. If the estate is thereby exhausted, there is no reason why the personal representative should not then render a final accounting and be discharged, even though the usual period of administration has not expired. Creditors would not be aided and no useful purpose would be served by keeping the estate open longer.

A survey of existing legislation reveals that the statutes of Florida,
Illinois,\textsuperscript{18} Kansas,\textsuperscript{19} Kentucky,\textsuperscript{20} Minnesota,\textsuperscript{21} Missouri,\textsuperscript{22} Oregon,\textsuperscript{23} Wisconsin\textsuperscript{24} and Wyoming\textsuperscript{25} provide for an early termination of administration in this manner. Not infrequently they provide that if it appears upon the return of the inventory that the estate does not exceed a homestead and exemptions, the court may order the same turned over or assigned to the widow and minor children and the personal representative discharged and the estate closed. Such an order operates to vest the persons entitled thereto with the complete title to the personal estate.\textsuperscript{26}

Some of these statutes include the family allowance or widow's absolute property in the list of items which can thus be used to exhaust the estate. Thus the Illinois statute provides for a summary distribution of the property of the estate when it does not exceed the amount of the widow's or child's award or both after the payment of first class claims, and for a discharge of the personal representative. This is also true of the Wisconsin statute. The Minnesota and Missouri statutes authorize such a procedure if the estate does not exceed the exemptions and allowances to the surviving spouse. The Oregon statute applies if the value of the estate does not exceed $150 over and above the exempt property. This $150 allowance is thus available to provide a small fund from which funeral and administration expenses may be paid, since distribution is made subject to their payment.

The recent Florida statute\textsuperscript{27} on this subject is representative of the best in draftsmanship and contains the following clear and concise statement both of function and procedure:

"If at any time during the course of administration it shall be made to appear . . . that the estate does not consist of more than the homestead and exempt personal property of the decedent, the county judge may thereupon direct and order the distribution of said estate among the persons entitled to receive the same and

\textsuperscript{21} Minn. Stat. (1941) § 525.51.
\textsuperscript{24} Wis. Stat. (1943) § 311.04, to be renumbered Wis. Stat. (1945) § 311.05.
\textsuperscript{26} Such is the effect of all of these statutes. See Bell v. Bell, 2 Cal. App. 338, 83 P. 814 (1905).
\textsuperscript{27} Fla. Stat. Ann. (1941) § 734.08.
upon said distribution may thereupon enter his order relieving, releasing and discharging the personal representative."

b. As dependent on size of estate

A similar type of statute designed to accomplish the same purpose is predicated upon the size of the estate rather than upon its exhaustion by setting off the homestead, exemptions and widow’s absolute property, and payment of a family allowance. The total value of property left by the decedent, irrespective of whether real or personal and whether within the technical scope of homestead and exempt property, determines the applicability of the statute. Such statutes are particularly common in the western states which have patterned their probate laws after the California Code.

The California Probate Act of 1851 \(^{28}\) provided for a summary procedure of this kind whenever it appeared upon the return of the inventory that the value of the whole estate of an intestate did not exceed $500. In this event the court was to assign it by decree for the use and support of the decedent’s widow and minor children. Thereafter, the act provided, “there shall be no further proceedings in the administration, unless further estate be discovered.” The amount was raised to $1,500 in 1871, \(^{29}\) and to $2,500 in 1921. \(^{30}\) In connection with the amendment of 1871 which raised the amount to $1,500, a note of the commissioners states that “The distinction is too great between the family of one who has invested in real property and happens to own it when he dies, and one who, not so provident, or it may be more conscientious towards his creditors than careful of his family, has provided no homestead. Again, but few estates which do not amount to more than $1,500, could pay the expenses of administration. In any such cases, it is better that the family enjoy it than to spend it in useless administration.” \(^{31}\) The distinction to which the commissioners referred is between estates which included homesteads, which were exempt up to $5,000, and those which included personal property only.

The net result of this new statute is to carry forward for the benefit of the surviving family of the decedent a new kind of exemption,

\(^{31}\) 2 Cal. Code Civ. Proc., p. 205, note to § 1469 (1872). The distinction to which the commissioners referred is between estates that included homesteads, which were exempt up to $5,000, and those that included personal property only.
made up of a stated maximum amount for the use and support of the family, and which is exempt from the claims of the decedent's creditors. An estate consisting of property not exceeding this value is thus made available to the surviving family even though all of it would not qualify as exempt to the decedent during his life. Under ordinary circumstances one who has acquired a homestead is accorded exemptions different from another who has acquired an equivalent amount of wealth solely in personal property. Statutes of the kind under consideration provide a measure of economic security to the family of a decedent whose wealth exceeds ordinary exemptions but who has not acquired a homestead, comparable to that of the family which has invested its wealth in a homestead.

Legislation similar to the California statute exists in Arizona,\(^\text{32}\) Idaho,\(^\text{33}\) Indiana,\(^\text{34}\) Michigan,\(^\text{35}\) Montana,\(^\text{36}\) North Dakota,\(^\text{37}\) Oklahoma,\(^\text{38}\) Oregon,\(^\text{39}\) Pennsylvania,\(^\text{40}\) Washington\(^\text{41}\) and Utah.\(^\text{42}\) The Arizona statute applies to estates not exceeding $2,000; the Idaho, Montana, North Dakota, Oklahoma and Utah statutes to estates not exceeding $1,500. These latter were doubtless taken from the California statute at various periods between 1871 and 1921 when the amount of $1,500 prevailed in California. The Washington statute, on the other hand, allows property up to $3,000 to be set off to the surviving spouse which shall include the home and household goods.

An Indiana statute authorizes a summary distribution to a surviving widow if an executor or administrator shall discover that the whole estate of the decedent is not worth over $500, exclusive of mortgages, bona fide liens or other encumbrances.

In Michigan letters may be issued without notice where a decedent

\(^{34}\) Ind. Stat. Ann. (Burns, 1933) § 6-1703.
\(^{38}\) Okla. Stat. Ann. (1941) tit. 58, § 317. It has been held that only personal property may be set off under this statute. Minnery v. Thompson, 146 Okla. 72, 293 P. 231 (1930).
\(^{39}\) Ore. Comp. Laws Ann. (1940) § 19-604. This statute includes estates which do not exceed $150 over and above exempt property. Thus it partakes partly of the nature of the statutes previously discussed.
\(^{42}\) Utah Code Ann. (1943) § 102-8-2.
is survived by a widow or widower, or children under the age of sixteen years or by both, and leaves only personalty having a value not exceeding $500. After the payment of the funeral expenses the estate may be distributed to the widow or guardian of the minor children, and the personal representative discharged without further accounting or notice.

The Pennsylvania statute applies to estates not exceeding $500 in value. One aspect of this statute gives it the appearance of being based in fact upon an exemption statute since a widow under Pennsylvania law is entitled to an exemption of this precise amount. However, this statute applies to any decedent and not merely to a deceased husband. Final settlement and distribution in such small estates is authorized after six months.

The first group of statutes making summary distribution dependent upon the exhaustion of the estate in setting off the homestead and exempt property is not radically different from the second group predicated upon the size of the estate measured in terms of a stated monetary value. However, they do contain certain different theoretical bases and have somewhat divergent applications. The idea of the former is merely to carry forward the immunities formerly possessed by the head of the household and nothing more. The latter, on the other hand, is predicated upon the idea that a family allowance of a minimum amount should be devoted to the continued maintenance and support of the family even to the exclusion of creditors. In the language of the Supreme Court of Washington in In re Lavenberg's Estate, "... they sound deeper in the policies upon which homestead and exemption laws are made to rest." They are designed to continue for a period the maintenance of the family as the decedent did during his lifetime. The law is said to step into his shoes and to make the same provision for his family. The North Dakota statute, however, has been construed as a new kind of exemption statute, providing additional property to the head of the surviving family.

As might be expected, this right of summary distribution is superior to the power of testamentary control. The primary function of such

44 104 Wash. 515 at 517, 177 P. 328 (1918). See also Estate of Woodburn, 212 Cal. 683, 300 P. 22 (1931), in which it was pointed out that this statute was derived from that part of the California Code of Civil Procedure expressly relating to the support of the family.
46 In re Walkerly's Estate, 108 Cal. 627, 41 P. 772, 49 Am. St. Rep. 97 (1895); In re Miller's Estate, 158 Cal. 420, 111 P. 255 (1910); McMillan v. Boese, 45 Cal.
statutes is to pass small estates to the surviving spouse and minor children free from the claims of creditors and with the least possible expense and delay, consistent with the rights of any other persons who may be interested in the estate.\footnote{De Ledesma v. Stanley, 57 Cal. App. 470, 207 P. 693 (1922); Estate of Neff, 139 Cal. 71, 72 P. 632 (1903). In general on this point see 2 Woerner, American Law of Administration, 3d ed., 668-669 (1923).}

In the application of the second group of statutes described, some question has arisen as to what property is to be included in ascertaining whether the value of the estate is less than the amount named. It is generally held that a homestead is not to be included.\footnote{Johnson v. Jones, 55 Ariz. 49, 97 P. (2d) 933 (1940); Estate of Neff, 139 Cal. 71, 72 P. 632 (1903); In re Shirey's Estate, 167 Cal. 193, 138 P. 994 (1914); In re Adamson's Estate, (Cal. 1910) 5 Cof. Prob. Dec. 397. According to the preceding decisions distributive rights under these statutes are superior to homestead if the decedent's estate is less than the amount specified and includes the homestead. In Utah, however, homestead property is apparently included in the total estate in computing its value to determine the applicability of this statute, and in any event it is made subject to the payment of expenses of last illness, funeral and administration. In re Thorn's Estate, 24 Utah 209, 67 P. 22 (1901); In re Mower's Estate, 93 Utah 390, 73 P. (2d) 967 (1937).}

All other real and personal property located within the state is included.\footnote{In re Bruhn's Estate, 58 Mont. 526, 193 P. 1114 (1920); In re Jarrett's Estate, 138 Wash. 404, 244 P. 694 (1926).} If property is subject to a lien or encumbrance, only its net value is considered, and it is assigned or distributed subject to such liens or encumbrances.\footnote{This provision is a part of each of the statutes under consideration. But a widow cannot pay funeral expenses and expenses of the decedent's last illness in order to reduce the "net estate" to less than $1,500. Columbia Trust Co. v. Anglum, 63 Utah 353, 225 P. 1089 (1924). Nor can she obtain her widow's allowance in order to reduce the estate to a value less than $1,500. In re Schenk's Estate, 53 Utah 381, 178 P. 344 (1919). The statutes contemplate the entire estate being subject to administration. While general creditors of the decedent may not look to encumbered property so set off, it does not follow that such creditors having a mortgage, lien or other encumbrance upon such property may not subject it to the satisfaction of their claims. Fairbanks v. Robinson, 64 Cal. 250, 30 P. 812 (1883). See also In re Stone's Estate, 14 Utah 205, 46 P. 1101 (1896); In re Farmer's Estate, 17 Utah 80, 53 P. 972 (1898). But a judgment or execution creditor does not have such a specific lien upon property as to entitle him to precedence over the surviving family. Snyder v. Thieme & Wagner Brewing Co., 173 Ind. 659, 90 N. E. 314 (1910); Turner v. Hammerle, 153 Ind. App. 437, 101 N. E. 827 (1913). Nor may a debtor of the decedent purchase an outstanding claim against a decedent after his death and use it as a set-off, for this}
property. In Arizona, however, an amendment to the statute in 1935 expressly excluded the one-half interest to which the surviving spouse is entitled in the community property. The statutes of both types are almost unanimous in providing that funeral charges, expenses of the last illness and expenses of administration shall be satisfied before the residue of the estate may be paid to those entitled. To this extent the rights of the family are subordinated to those of preferred claimants. And it has been held in several cases that this right of the surviving members of the family to the beneficial results contemplated by the statute cannot be given effect unless these prior expenses have first been satisfied. In Kansas and Minnesota expenses during the last sickness and debts having preference under the laws of the United States or the state are included among the preferred charges. In Florida, however, it has been held that the surviving widow of a decedent is entitled to distribution of an estate of some $626 as exempt property even though funeral expenses are left unpaid. A literal interpretation of the Kentucky and Wyoming statutes would indicate a like result.

Some variation is found as to the persons entitled to the benefits of would defeat the widow's right in the minimum of property allotted to her under the statute. Haugh v. Seabold, 15 Ind. 343 (1860).

In re Leslie's Estate, 118 Cal. 72, 50 P. 29 (1897).

Ariz. Code Ann. (1939) § 38-905. For a case under the prior statute see Johnson v. Jones, 55 Ariz. 49, 97 P. (2d) 933 (1940) which held that the amount specified in the statute applied both to community and separate property.

"Certainly the Legislature, in exacting these provisions of law, could not have intended that the expenses of the last sickness, funeral charges, and expenses of administration should not be a proper charge against small estates, merely consisting of a homestead of less than $1,500 in value. Such a rule would pauperize an intestate upon his deathbed, and tend to deprive him of a Christian burial, though the means he may have acquired and accumulated by years of toil were sufficient to pay them." From opinion in In re Thorn's Estate, 24 Utah 209 at 214, 67 P. 22 (1901).

Estate of Parr, 24 Cal. App. (2d) 171, 74 P. (2d) 792 (1937); Ross v. Smith, 47 Ill. App. 197 (1893); In re Thorn's Estate, 24 Utah 209, 67 P. 22 (1901); In re Petersen's Estate, 69 Utah 484, 256 P. 409 (1927); In re Mower's Estate, 93 Utah 390, 73 P. (2d) 967 (1937). According to the case last cited even the homestead property may be subject to these claims if there is not sufficient other property to pay them.


Minn. Stat. (1941) § 525.51.

Seashole v. O'Shields, 139 Fla. 839, 191 S. 74 (1939).


such summary distribution statutes. Most of the early statutes confined their benefits to the surviving widow and minor children. This was true of the California Probate Act of 1851 after which so many of the others have been patterned. But a few states have recently broadened their statutes to include either spouse who survives.60 The California statute was amended only in 1939 to make its provisions applicable to either spouse. 61 Domicile in the state is not a prerequisite.62 And in any event the status of a person at the time of the order for summary distribution is the controlling circumstance. Thus the heirs of a widow who died before a final determination of her rights were held not to be entitled to the benefits of such statutes.63 And a wife who abandoned her husband without cause was held to have barred herself of the right to his support and to the provisions of the statutes authorizing summary distribution to a surviving spouse.64 But an interlocutory decree of divorce will not of itself deprive a surviving wife of these provisions; she must also have lost her right by some fault of her own to receive support and maintenance from her husband and have ceased to be a member of his family.65 Nor will an antenuptial contract bar a widow in claiming the benefits intended by these statutes.66

Similarly in determining the propriety of setting off the estate to the surviving spouse or family of the decedent, the value of the estate at the time of the hearing and order, rather than at the time of the inventory, will control.67 In a world of rapidly changing values this becomes important upon occasions.

60 This is true in the present statutes of Arizona, California, Kansas, Minnesota, Missouri, North Dakota, Pennsylvania, Utah, Washington and Wyoming. Under the former Utah statute the wife could not mortgage the interest of the children in the property so set off to her for the joint use of all. Booth Mercantile Co. v. Murphy, 14 Idaho 212, 93 P. 777 (1908).
62 In re Lavenberg's Estate, 104 Wash. 515, 177 P. 328 (1918); In re Jarrett's Estate, 138 Wash. 515, 177 P. 328 (1918).
63 Estate of Bachelder, 123 Cal. 466, 56 P. 97 (1899).
64 In re Bose's Estate, 158 Cal. 428, 111 P. 258 (1910).
65 In re Boeson's Estate, 201 Cal. 36, 255 P. 800 (1927).
66 Woodburn's Estate, 212 Cal. 683, 300 P. 22 (1931). The widow's rights under these statutes are here declared to be "in no sense either the rights of inheritance or rights depending upon any previous interest in the property of the decedent owned by him during his lifetime, and which she may or may not have surrendered by virtue of the terms of their antenuptial agreement."
67 In re Orosco's Estate, 60 Ariz. 266, 135 P. (2d) 217 (1943). In this case the inventory showed an estate of $2,200. Upon the hearing of a petition by a surviving husband to have it set off to him, the court found that it was less than $2,000 and awarded it to him in its entirety.
Dispensing with Administration

Distribution is usually made to the surviving spouse alone who has the obligation to support any minor children. However, the survival of minor children is not at all necessary to entitle the surviving spouse to the benefits of this summary distribution. However, if there is no surviving spouse, the minor children are entitled to the estate. Some of the early statutes made the property distributable to the surviving widow and children, one half to the widow and the other half to the children equally, but this has now been changed so as to give the widow the exclusive right if she survives. In many cases this eliminates an unnecessary guardianship.

There is one rather unusual feature of the California statute and those of Arizona and Utah patterned after it. They provide that a surviving spouse who has separate estate of a specified amount, shall not be entitled to summary distribution of such property. This would seem to imply that behind the application of the statute is the policy of making it subservient to the continued support of the family. Thus, if the surviving spouse has sufficient independent wealth or separate property, the benefits contemplated by the statute do not exist and the estate of the decedent is administered and distributed in the usual manner. The California statute specifies that summary distribution shall be denied if the surviving spouse or minor child has other estate of $5,000 in value. Similarly in Arizona, if the surviving spouse has separate property, exclusive of his one-half interest in the community property, equal to the portion to be set apart to him, the whole property, other than his half of the homestead, shall go to the minor children. The Utah Code permits the court, in its discretion, to exclude from any such distribution any surviving wife, husband or minor child having either separate property or income.

In setting off an estate to the surviving spouse or minor children

70 Most of the statutes so provide. Where the decedent was the wife, her small estate was set off to the minor children to the exclusion of the surviving husband under the former California statute. In re Leslie's Estate, 118 Cal. 72, 50 P. 29 (1897).
under the provisions of these statutes, no special notice to creditors is required or contemplated. Their interests are not involved. But any person who will be adversely affected by such a proceeding may offer certain objections thereto. Thus such a person will be allowed to show that the estate exceeds in value the amount claimed or that all of the property has not been inventoried.

Once an order is made setting off the estate, it cannot be attacked collaterally except for extrinsic fraud. Thus the marital status of the surviving spouse will not be re-examined or the property reappraised in another proceeding.

2. Accelerated distribution to executor who is residuary legatee

When the executor named in a will is also the residuary legatee, statutes in a few states, in lieu of requiring the executor to give a bond that he will faithfully perform the duties of his office and account for all property which may come into his hands, permit him to give a bond for the payment of all claims against the estate and the legacies provided for in the will. Under some of these statutes he may then be relieved of filing an inventory or rendering any accounting. The bond given by him is regarded as being an adequate protection to creditors and legatees who are deemed to be no longer interested in knowing the extent of assets contained in the estate or in having a formal accounting. In return for being allowed to give this kind of

75 Wills v. Booth, 6 Cal. App. 197, 91 P. 759 (1907); Estate of Palomares, 63 Cal. 427, 59 P. 770 (1900); Browne v. Sweet, 127 Cal. 322, 59 P. 771 (1899).
76 Estate of Roach, 208 Cal. 394, 281 P. 607 (1929).
80 The term “claims” is used here to include debts, funeral expenses, and expenses of administration. Some statutes have added inheritance taxes and family allowance as items to be included in the conditions of the bond.
81 In Massachusetts, Nebraska and Rhode Island. In Vermont an inventory must be returned within three months.
82 In Rhode Island. In New Hampshire an accounting is to be made only “when required.”
bond, which frequently will be much less than the amount of bond ordinarily required, the executor becomes personally liable for all debts of the decedent and all legacies given in the will even though they exceed the amount of property which he receives from the estate.\textsuperscript{84} To the extent indicated there is a slight relaxation of the control over the executor in an effort to minimize his duties.

Between 1819 and 1884 a line of decisions construed such statutes as giving such residuary legatee the right to immediate distribution or as giving him immediate ownership of the property upon the approval of the bond to pay claims and legacies. These decisions were based upon the theory that the administration was thereby terminated and that the executor thereafter carried out the terms of the will independently of judicial supervision. "There is no longer a proceeding in rem," said Judge Cooley, "for the res disappears when the estate passes from the control of the probate court and becomes merged in the individual estate of the executor himself. What before was a jus ad rem in the creditor, to be enforced by the aid of the probate court as a lien upon an estate in its charge, becomes now a personal obligation of the executor and his sureties, attaching itself to no specific property, and concerning no other persons whomsoever. The court has no power, for the purpose of enforcing this obligation, to follow the property which before constituted the assets of the testator; and the heirs, the beneficiaries under the will, or the creditors, are not to be summoned when the demand is to be proved, because they have no interest in the question of its proof, and therefore no right to be heard upon it."\textsuperscript{85} Such a conception of the function of a residuary legatee's bond was a close approximation to the instituted heir under the civil law system, making the residuary legatee and all his property, including that received from the testator, subject to claims of the decedent's creditors.\textsuperscript{86} However, this idea of the function of such statutes was ultimately proved to be erroneous. But while it prevailed such a procedure was the equivalent of a summary administration.

These statutes derive originally from an act of the Massachusetts Bay Colony. In 1685 it was provided that the court might require any executor to give bond with sufficient sureties for paying all debts and

\textsuperscript{84} Hatheway v. Weeks, 34 Mich. 237 (1876); McElroy v. Hatheway, 44 Mich. 399, 6 N.W. 867 (1880).
legacies or to make and exhibit a just and true inventory of the estate. In 1784, one statute was passed making the real estate of a decedent subject to execution on judgments recovered against executors and administrators for debts of a decedent, and another statute provided that a decedent's real estate should be chargeable with his debts and that an executor who is a residuary legatee might give bond to pay the debts and legacies. In the early case of Gore v. Brazier, a residuary legatee had given such a bond, had then sold certain land owned by the decedent and was later sued for breach of the covenant of warranty in the deed. It was held by Chief Justice Parsons that such a bond was not a discharge of the creditors' lien. It was pointed out that before the provincial statute of 1 & 2 Anne, c. 5, all executors were bound to inventory and account for the testator's estate in order to furnish creditors and legatees with evidence and charge them with waste if any assets were embezzled or unaccounted for, that when legacies are specific or could be ascertained without inventory or accounting and the executor was residuary legatee, there is no occasion for an inventory or accounting if legatees and creditors can be secured. "In this case," says the court, "the statute relieves the executor from this duty, on his giving bond with sureties to the Judge of Probate for the payment of debts and legacies. . . . This lien remains in full force, and the benefit to be derived by a creditor or legatee from the bond is merely cumulative."

But in 1819 in Thompson v. Brown, the Massachusetts court held that a license to an executor who was also residuary legatee and had given such a bond was not only improper but void. By giving such a bond it was said that he thereby "acquired a perfect title to the estate," and that no license to sell property of the estate was necessary because he could sell without it. This dictum that the executor thereby acquired a perfect title to the estate became the source of confusion and error later in the same court and accounted for a similar error in some Michigan and Wisconsin decisions later.

Similarly, in 1827 the same court declared: "The legislature has

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87 Ancient Charters and Laws of Massachusetts Bay, published by order of the General Court 206 (1814).
90 3 Mass. 523 (1807).
91 3 Mass. at 542.
92 16 Mass. 172 (1819).
made such bond [to pay the debts and legacies] a substitute for the estate of the deceased, so that there is no longer any lien upon the real or personal estate of the testator by his creditors, after the executor shall have conveyed the same to bona fide purchasers.\(^9\)

In the revision of 1835 a provision was added to the statute\(^9\) in Massachusetts to the effect that the giving of the bond by the residuary legatee conditioned to pay debts and legacies should not discharge the lien upon the real estate of the decedent for the payment of debts. The commissioners who had been appointed to revise the statutes stated in their report to the legislature that it was the purpose of this amendment to make the construction of the statute conform with that indicated in *Gore v. Brazier*. Later cases\(^9\) in Massachusetts returned to the rule of that case.

A series of cases in Michigan and Wisconsin, however, took the position that the giving of such a bond actually terminated the administration and operated to pass title to the property of the estate to the residuary legatee. Thus in *Hatheway v. Weeks*,\(^9\) the Supreme Court of Michigan said that "Having given such a bond, he is not required to make or return any inventory; he is bound to account to no one; he takes the property of the deceased and becomes at once the absolute owner thereof." And in a later case\(^9\) it was said that the approval of the legatee's bond had the effect of closing the administration of the estate from the time of its approval. A corresponding view had been announced in Wisconsin.\(^9\) But in 1889 Michigan re-examined these cases and reached the same result\(^9\) that Massachusetts had reached subsequent to 1835 and without any amendment of its statute relative to the effect on creditors' liens. Wisconsin did likewise.\(^10\) In other states this same result has been reached,\(^10\) although only the Rhode Island statute contains a specific provision corresponding to the addition in the Massachusetts revision of 1836.

The net result is that what appeared for a while to amount to a

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\(^9\) Clarke v. Tufts, 5 Pick. (22 Mass.) 337 at 340 (1827).
\(^9\) Jones v. Richardson, 5 Metc. (46 Mass.) 247 (1842); Collins v. Collins, 140 Mass. 502, 5 N.E. 632 (1886).
\(^9\) 34 Mich. 237 (1876).
\(^9\) Cole's Will, 52 Wis. 591, 9 N.W. 664 (1881).
\(^10\) Pym v. Pym, 118 Wis. 662, 96 N.W. 429 (1903).
true summary administration turned out to be nothing more than a statutory method for providing for an executor's bond which differs from the ordinary bond in its conditions and amount, and which furnishes an additional remedy to legatees and creditors. The legal consequences of giving such a bond are severe, with little or no advantage to the residuary beneficiary in pursuing the course authorized by such a statute. Many persons were financially ruined by giving such a bond. An examination of statutory annotations and digests reveals no case in recent years in which such a bond has been given. What might have been an importation of a civil law method has been refused admission into American law of administration.

3. Withdrawing estates from administration

With the development of the law of administration several methods have been devised for simplifying, for shortening, or for eliminating substantially or entirely the process of administration as it is known in Anglo-American law. One such method is that of authorizing the withdrawal of an estate from administration. A Texas statute provides that after the return of inventory, appraisement and list of claims, any person entitled to a portion of the estate as heir, devisee or legatee may ask that the personal representative be required to render under oath an exhibit of the condition of the estate. Thereafter the persons entitled to the estate may give bond in double the appraised value of the estate conditioned to pay all unpaid debts which have been or may thereafter be allowed against the estate. When such bond is approved, the exhibit passed upon and the amount due to or from the personal representative determined, the latter is required by an order of the court to make distribution to such persons of the portion of the estate to which they are entitled. If an estate is entirely distributed to those entitled, the personal representative is discharged and the administration declared closed. Thereafter the probate court has no jurisdiction over the estate or over the personal representative.

After the withdrawal of the estate from administration in this manner, creditors have a right to rely on the bond or to look to the distributees. The statute specifically preserves a lien on that part of the estate in the hands of each distributee and those claiming under him, with notice of such lien, to secure the payment of the claims of creditors.\textsuperscript{107} If recovery is sought against a distributee, any judgment obtained must not exceed the value of the estate distributed to him.\textsuperscript{108} On the other hand, if recovery is sought on the bond, recovery is limited only by the amount of the bond and the basis of the cause of action is entirely independent of the value of the estate distributed.\textsuperscript{109}

The result achieved by this procedure is in some respects similar to that already achieved by summary administration of small estates which are entirely consumed in the setting off of exempt property or in the satisfying of a minimum of family allowance. In the latter case, however, there is a completion of the functions of administration, while under the Texas statute authorizing the withdrawal of estates from administration there is admittedly no such completion. In lieu of such completion there is the substitution of a bond as a kind of res to insure the accomplishment of the functions of administration.

4. Nonintervention wills

Another method that has been developed for dispensing with administration of estates is that of the independent executor under a nonintervention will. Whether administration in connection with the decedent’s estate is a required proceeding, or whether it may be dispensed with in whole or in part, is a matter involving several considerations of policy. Unless a statute specifically authorizes it, a testator, for example, cannot direct that no administration be had on his estate. Solicitude for creditors has led most states to regard administration as the normal process to be followed. A testamentary provision that administration on the testator’s estate shall be independent of judicial control is entirely ineffective in most states.\textsuperscript{110} Doubtless influenced by the procedure of the civil law, legislation has been adopted in four states authorizing their probate courts to give effect to an expressed wish of this kind. The purpose of such statutes, it is said, is to provide for the settlement of estates with a minimum

\textsuperscript{110} Sevier v. Woodson, 205 Mo. 202, 104 S.W. 1 (1907).
of judicial supervision and expense. The size of the estate has no bearing upon the propriety of resorting to this procedure.

Statutes recognizing the validity of nonintervention wills and independent executors have been passed in Arizona, Idaho, Texas and Washington. These statutes are of two general patterns, one adopted by Texas and the other by Washington. The Arizona statute is modeled after the Texas statute and the Idaho statute after the Washington statute. Neither the Arizona nor Idaho statutes are used extensively. In fact, no reported appellate cases appear to have been decided in either of these states. But numerous cases have arisen both in Texas and in Washington where the power to name an independent executor is exercised frequently. A Texas statute provides that “Any person capable of making a will may so provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement and lists of claims of his estate.” The Washington statute is similar but requires a preliminary finding by the court that the estate is fully solvent, which fact may be established on the filing of the inventory. But in Texas, insolvency of the estate will not prevent an independent administration thereof. Where estates are so administered pursuant to the express wishes of the testator, the personal representative, following the probate of the will, need only file an inventory. Thereafter he may administer and settle the estate without the intervention of the court. No letters testamentary or of administration are granted. Notice to creditors is required under the Washington statute but not under the Texas statute. Both statutes contemplate that the powers and duties of such an independent executor shall be as full and complete as is possessed by the personal representative acting under

120 Wash. Rev. Stat. Ann. (Remington, 1932) § 1462. In Texas, no statute specifically so provides, but the cases imply this.
judicial supervision. The Idaho and Washington statutes\textsuperscript{121} expressly provide that such an independent executor may mortgage, lease, sell and convey the real and personal property of the estate without an order of court in the first instance and without any approval or confirmation thereafter, and in all other respects administer and settle the estate without the intervention of the court. Similar powers are implied under the Texas statute.\textsuperscript{122} In Washington, so long as the executor faithfully performs his duties in the management of the estate, the court is prohibited from taking any control over the executor or the estate.\textsuperscript{128}

Under the Texas system the creditor is not obliged to present his claim to the executor or to the court for allowance or classification, but may demand payment of the executor and may sue thereon.\textsuperscript{124} If a judgment is obtained against the executor, execution may be had against the decedent's estate unless it be insolvent.\textsuperscript{128} In Washington, however, claims must be presented to the executor in the same manner as in estates regularly administered.

Under the Texas statute,\textsuperscript{128} the court may accept the resignation of the executor when tendered. Upon the removal, resignation or death of the executor, the court has power to appoint a successor to the office. A series of statutes in Texas\textsuperscript{127} is designed to confer upon such successor all the powers originally given to the executor named in the will, including the power to act independently of any control by the court.

Certain disagreements between the executor on the one hand and the heir or creditor on the other hand may be the basis for the executor's resorting to the court for a determination thereof. Thus, the executor may ask the court to fix the attorneys' fees.\textsuperscript{128} But the attorney has not been allowed a similar privilege, it being said that he has an adequate remedy by a separate action.\textsuperscript{129}

\textsuperscript{123} State ex rel. Johnson v. Superior Court, 131 Wash. 264, 230 P. 434 (1924).
\textsuperscript{125} Bell's Estate v. Farmers' & Merchants' Nat. Bank, 33 Tex. Civ. App. 408, 76 S.W. 798 (1903).
\textsuperscript{128} Estate of Perry, 168 Wash. 428, 12 P. (2d) 595 (1932).
\textsuperscript{129} Estate of Megrath, 142 Wash 324, 253 P. 455 (1926).
executor for advice and instructions from the court has also been entertained.\textsuperscript{130}

In one sense, this is not a dispensing with administration but is a true administration independent of the probate court. Such an executor is called an independent executor and the management of the estate by him, even though independent of the court, is nevertheless considered an administration.\textsuperscript{131} The power of the court over the administration does not cease absolutely, however. A potential jurisdiction remains in the court in certain emergencies. Under the Washington statute,\textsuperscript{132} if it appears that the executor is about to commit a breach of trust or has committed some breach, the court may order his removal. Under the Texas statutes,\textsuperscript{133} if either creditors or other persons interested in the estate show that the executor is wasting, mismanaging or misapplying property of the estate and that they will be affected thereby, the court may require the executor to give bond for the faithful administration of the estate. Only if the executor fails to give such bond may the court remove him.\textsuperscript{134} Judicial control may thus be invoked instantly in Washington for acts of mismanagement but in Texas it is invoked only by ordering the executor to give bond and then by removing him for failure to comply with such an order. The directness of the Washington procedure has much to commend it. The Texas statute, on the other hand, preserves more nearly the independent administration authorized by the testator. Under both statutes, the testator may dispense with the requirement of a bond by the executor.\textsuperscript{135}

It will be noted that, except for special reasons and for limited purposes, the administration is expected to continue independent of any judicial control. Unless the power of the court over the estate and its administration is invoked in some appropriate manner, the administration is carried out to a conclusion including distribution without the advice or supervision of the court in any degree. Under the Washington statute,\textsuperscript{136} a court, upon application to it, has the authority to enter a decree finding and adjudging that all debts have

\textsuperscript{130} Estate of Meg Rath, 142 Wash. 324, 253 P. 455 (1926).
\textsuperscript{131} Roy v. Whitaker, 92 Tex. 346, 47 S.W. 892, 49 S.W. 367 (1898); Swearingen v. Williams, 28 Tex. Civ. App. 559, 67 S.W. 1061 (1902).
been paid and designating the heirs and persons entitled to distribution of the estate. A Texas statute\textsuperscript{137} provides that an independent executor may ask the court to partition or distribute an estate where the will does not dispose of all of it or fails to provide a means for its partition. In these particular instances also, the power of the court may be invoked; but in other respects the administration by the executor under a nonintervention will is truly independent.

5. Other legislation in aid of summary administration

Ever since the California Probate Act of 1851 was passed, legislation in the western states has exhibited a growing tendency to simplify, to shorten and to minimize expenses of administration proceedings. A provision for summary administration in the California act of 1851\textsuperscript{138} as amended by the code of 1871,\textsuperscript{139} provided that if upon the return of the inventory it appeared that the value of the whole estate does not exceed the sum of $3,000 "it is in the discretion of the Probate Court to dispense with the regular proceedings, or any part thereof, prescribed in this Title, and there must be had a summary administration of the estate, and an order of distribution thereof at the end of six months after the issuing of letters; the notice to creditors must be given to present their claims within four months after the first publication of such notice, and those not so presented are barred as in other cases." The shortened period of administration, the reduction of the nonclaim period and the simplified procedure were courageous departures from established procedures and represented appropriate objectives for the administration of small estates. Since that time the nonclaim period in California has been reduced to six months in all estates, and final distribution is possible at any time thereafter. Nevertheless the basic purposes of that early statute have not been without influence elsewhere.

Statutes in Montana and Oklahoma\textsuperscript{140} similarly provide that the court may in its discretion dispense with regular proceedings, order a summary administration in small estates, require that creditors present their claims within four months and permit distribution after six

\textsuperscript{138} Cal. Laws, 1851, p. 464, § 126.
\textsuperscript{139} 2 Cal. Code Civ. Proc., p. 204, § 1469 (1872).
months. A group of Louisiana statutes also provides for the summary settlement of small successions, or of those so heavily indebted that no one will accept their administration. This they accomplish by authorizing the clerk of the district court to sell the effects of the estate and apply the proceeds to the payment of debts, the whole to be done in as summary a manner as possible. The avowed purpose of these statutes is to provide for the speedy and economical settlements of estates.

Another device for simplifying the problems of the personal representative in small estates is that of dispensing with the usual requirements of notices in connection with the various steps of an administration, or of permitting the posting of notices instead of requiring the relatively expensive method of publication. Usually, of course, when the entire estate is not more than sufficient to satisfy the requirements of homestead, exemptions and family allowance, creditors would have no interest in being advised as to proceedings taken by the personal representative. But the primary purpose of minimizing expenses and providing a speedy settlement for the surviving family of a decedent is evident in most of these pieces of legislation.

In three states provision is made for simplifying the settlement of small or insolvent estates by dispensing with the appointment of a commissioner of accounts or similar officer where such a procedure is ordinarily followed.

The summary administration and settlement of small estates by public administrators or other officials having an equivalent function is also provided for in several codes.

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A Connecticut statute enacted in 1945 provides that when any person who has received old age assistance dies leaving personal estate not exceeding $500 in value and no administration is granted within ninety days after death, the commissioner of welfare may take possession of such estate and dispose of it according to certain statutory provisions.

A statute in South Dakota gives the county court power to combine two or more estates in one probate proceeding when the beneficiaries are the same in each estate, thus avoiding the duplication of procedure that would otherwise result. The consolidation of estates for the purpose of administration is possible when two members of the same family, such as husband and wife or brothers and sisters, die at the same time or approximately the same time leaving identical heirs or beneficiaries under their wills.

C. Judicial Settlement Without Appointment of Personal Representative

I. Another method for small estates

In the preceding discussion treating of the summary settlement of small estates after the return of the inventory it was pointed out that such an administration proceeding, while somewhat shorter than usual, was nevertheless complete. Early distribution to the family was shown to be possible because of the smallness of the estate and its complete consumption in being set off as homestead and exempt property for the use of the decedent's family. The determination of distributive rights was seen to be entirely independent for the most part of the existence of creditors and other distributees. The time ordinarily consumed and the effort involved in the determination of the claims of the latter are eliminated by such a procedure. In short, the task of the personal representative is relatively so simple that the usual period allowed for the administration of an estate is unnecessary. But judicial control over the administration proceeding is full and continuous while it lasts.

If these results are obtainable for small estates in comparatively

10013; N. Y. Decedent Estate Law (McKinney, Supp. 1945) § 103-b; Wyo. Rev. Stat. Ann. (Courtright, 1931) § 88-917. The treatment of these statutes under which public administrators function is not within the scope of this study.


short periods of time, it may well be inquired why they may not even be accomplished in one step or by one order of the probate court. In appropriate cases similar procedure could well be made available by one order or decree of the court, and without interposing a personal representative, without supervising his activities for a limited time, without ordering a distribution of the property, and without passing upon an accounting and finally discharging him. Indeed, legislation authorizing summary settlements of this more abbreviated character has been slowly developing over a period of three quarters of a century. Its merits may be observed in states where it has been in operation and has been subjected to the test of time and experience.

The first legislation of this kind was adopted in Missouri in 1877 at the suggestion and sponsorship of Judge J. G. Woerner, judge of the probate court of the City of St. Louis, and author of the well-known work on *American Law of Administration.* Under this statute, if the estate of the decedent is less than that allowed by law as the absolute property of the widower, widow or minor children, the court may officially determine that administration is unnecessary and order that no letters of administration be issued. Under such an order the property of the estate is set off to the widower, widow or minor children who are entitled to collect, and to sue for and retain all property belonging to the estate in the same manner as a personal representative would if functioning in an official capacity. The existence of debts against the estate is immaterial since the surviving spouse or minor children are entitled to the entire estate absolutely and irrespective of claims against it. In a suit to collect assets no proof as to the non-existence of creditors’ claims is necessary since the order of the court that no letters be issued confers this right upon them independent of the existence of creditors. Such statutes, however, are necessarily confined in their operation to small estates. Nevertheless they offer another inexpensive and expeditious procedure for simplifying the problem of the surviving spouse and minor children in such cases.

In addition to Missouri, where such legislation had its origin, similar statutes are now found in Arizona, California, Colorado, Florida, Idaho, Indiana, Kentucky, Maryland, Michigan, Nebraska,

149 Mo. Laws, 1877, p. 4. This statute has been amended by subsequent legislatures, the last amendment being in 1941. For the present wording of the statute see Mo. Rev. Stat. Ann. (1942) § 2.

Nevada, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Vermont and Virginia. Many of them have been modelled after the Missouri statute. All of them represent attempts to provide a direct and highly desirable method for the collection and distribution of small estates, thus enabling the family of the decedent to have the estate immediately for their support. Distribution is immediate and direct from the decedent to the heirs. The slight amount of judicial contact and judicial control over the estate under all these statutes is to be constrained with that under the summary procedure of the statutes previously discussed wherein a personal representative was appointed.

The Missouri statute was amended somewhat in 1917. It now provides for an immediate setting off or distribution of the estate when the estate is not greater in amount than is allowed as the absolute property of the widow, widower or minor children under eighteen years of age, or at the instance of a creditor when the estate does not exceed $100 and there is no widow, widower or minor children under eighteen years of age, and the creditor gives a bond conditioned upon the creditor paying the debts of the decedent in the order of their preference so far as the assets of the estate will permit. The order of the court not only operates to dispense with an official administration but also authorizes and empowers the widower, widow, minor children or creditor, as the case may be, to collect and sue for all the property belonging to the estate in the same manner and with the same effect as a personal representative. This statute was among the first to provide that in this particular instance the title of the decedent's property could pass directly to the heirs, distributees or other persons entitled thereto without the interposition of a personal representative. At the same time it answered a definite need in small estates by affording adequate protection to debtors of the estate who ordinarily would be entitled to insist on making payment only to a duly appointed personal representative. The procedure is quite informal. Ordinarily

152 Statutes in California, North Dakota, Oklahoma, South Dakota, Texas, Utah and Washington provide that the title to a decedent's property shall pass directly to the heirs, legatees or persons entitled to succeed to the estate by intestacy but that such property shall be subject to the possession of the executor or administrator and to the control of the court for the purposes of administration, sale or other disposition under the law, and shall be chargeable with the expenses of administration, debts and family allowance. However, the totality of rights and powers possessed by a personal representative under such statutes as these is the substantial equivalent of ownership by him.

153 Parsons v. Harvey, 281 Mo. 413 at 427, 221 S.W. 21 (1920). In this case it
the surviving spouse presents a verified petition to the probate court setting forth the necessary facts prescribed in the statute together with an itemized list of the property left by the decedent and the value of each piece. Upon proof the court thereupon makes an order granting the petition, determines that no administration is necessary and orders that no letters be issued and that the widower, widow, minor children or creditor shall have full authority to collect and sue for all property belonging to the estate.

A statute of Arizona provides for the summary settlement and distribution of any estate where the value does not exceed $300. Any person desiring to settle such an estate may make and file an affidavit in the superior court setting forth the death of the decedent and stating that the estate does not exceed $300 in value. Unlike the Missouri provision, the survival of particular members of the decedent's family, or the existence of a creditor, is unnecessary in order to invoke the statute. The superior court is authorized to prescribe rules and regulations for the procedure to be followed in such cases. The statute requires the filing of an accounting of all property received and disbursed. No fee is permitted to be charged or collected on account of the summary settlement of such small estates.

In California a statute was enacted in 1929 providing that if a decedent leaves a surviving spouse or minor child or children and the net value of the whole estate over and above all liens or encumbrances does not exceed $2,500, the person petitioning for probate of the will or for letters or administration may add an allegation to this effect in his or her petition therefor, together with a specific description of all of the decedent's property, the liens and encumbrances thereon and an estimate of its value, and may pray, as an alternative, if the court finds the net value of the estate not to exceed $2,500, for the assignment of the property to the surviving spouse or minor children as the case may be. Such a petition must be verified and the notice thereof must appropriately refer to the prayer for summary distribution. Another was said: "It is manifest that Section 34 of Article 6 of our Constitution confers upon probate courts complete jurisdiction over all matters pertaining to probate business. There is nothing in our Constitution which forbids the General Assembly from passing practical and common sense statutes, like Section 10, supra, which facilitate the transaction and convenience of public business, at a minimum expense, and that, too, without doing an injury to creditors and other persons, whose rights may still be asserted before the court. These statutes are enacted because of their public convenience. They simplify the business before such courts at a minimum cost, and without injury to anyone."

section 156 provides that if the original petition for probate of the will or for letters of administration does not contain such an allegation, a separate or supplementary petition therefor may be filed at any time prior to the hearing on such petition, but at least ten days notice thereon must be given and the hearing on the original petition continued if necessary. If, upon the hearing on the petition, it appears that the value of all property of the estate does not exceed $2,500, the decree or order rendered thereon vests title to all property of the estate, subject, of course, to any mortgages, liens or encumbrances, in the surviving spouse, if any, and otherwise, in the minor child or children of the decedent.157 No further proceedings are to be taken in the estate unless additional estate be discovered. By a provision in this statute passed in 1929 any surviving spouse or minor child having other estate of $5,000 in value is excluded from the benefits of the statute. Another section 158 provides that if, upon the hearing, the court determines that the net value of the estate exceeds $2,500 or that the surviving spouse or minor child has other estate of $5,000 in value or that there is neither a surviving spouse or minor child, it shall act upon the petition for probate or for letters of administration and cause the estate to be administered upon in the usual manner.

A Colorado statute 159 prescribes a similar procedure as to estates of the value of $300 or less. Upon a verified application the court may authorize the payment, transfer or delivery of the estate to the surviving spouse, other heirs or to the creditors of the decedent in the discretion of the court. Like the Arizona statute, the survival of any particular members of the family is not necessary to its application. The statutory fee for such estates is limited to five dollars.

Extensive provisions rendering administration unnecessary in estates less than $2,000 in value are contained in recent amendments to the new Florida Probate Code, 160 which represents a distinct departure from the widely held theory that the heirs can obtain title only through a personal representative. Several situations are said to justify dispensing with administration. The statute 161 provides that

"The county judge may dispense with administration upon

the estate of any testate or intestate who died a resident of this state:

(I) When the entire estate is exempt from the claims of creditors under the constitution and statutes of the State of Florida; or

(2) When the estate is not indebted and does not, in the judgment of the county judge, exceed in the aggregate two thousand dollars in value, exclusive of property exempt under the constitution and statutes of the State of Florida, and there is a sole heir or surviving spouse, or the surviving spouse and all the heirs of such an estate agree upon the distribution of the estate, or the decedent died testate leaving an estate, and the legatees and devisees, and the widow, if any, agree upon the distribution of the estate after the probate of the will of the deceased."

A verified petition is required to be filed in the county judge's court by the surviving spouse and all the heirs, or by the guardians of any heirs who are not sui juris, setting forth their respective relationships to the decedent, a schedule of all of the decedent's property and its value, a statement of the agreed distribution of it among the petitioners, and if it is claimed to be exempt, the names of all creditors. 102 When a decedent has died leaving a will, such a petition may be filed only after the will has been probated. If the entire estate is claimed to be exempt, all known creditors must be notified. If the judge finds the facts contained in the petition to be true, he shall make a finding of the true cash value of the estate and order that administration is unnecessary, and, as a part of the order, make findings as to the heirs or devisees entitled to distribution of the estate, what property shall be distributed to each and, if the entire estate is exempt, of what the estate consists and what debts are known to exist against the estate. 103 It is always within the discretion of the judge to deny the petition if he is in doubt as to the truth of any of the facts alleged in the petition, 104 in which case administration may be had in the usual manner. If the petition is granted, the distributees are then entitled to receive and collect the respective parts assigned to them, to have the same transferred to them and to maintain suits therefor; but they thereby become jointly and severally liable to creditors to the extent of the estate received by them, exclusive of exempt property. 105 This liability to creditors persists for three years, 106 which is the same period

creditors are allowed to enforce their claims in the absence of administration.\textsuperscript{167} However, the distributees may publish a notice to creditors notifying them of the entering of the order and of the distribution of the estate without formal administration and thereby reduce to eight months the time for creditors to present their claims.\textsuperscript{168} Any heir or devisee under a will already admitted to probate, or a devisee under a will subsequently discovered, may likewise enforce his rights, in the same manner as creditors, against those who procured the order dispensing with administration and received the property of the decedent.\textsuperscript{169} The entire cost of a proceeding dispensing with administration is seven dollars and fifty cents and an additional fifty cents for each notice given by registered mail.\textsuperscript{170}

A recent Idaho statute\textsuperscript{171} authorizes the probate court, upon verified petition, to set aside and assign bank accounts of a total not exceeding $300 to the surviving widow of a decedent where no administrator has been appointed. Such deposits up to that amount are declared to be exempt from probate, administration, claims of creditors and heirs, and from inheritance taxes. This statute, however, does not appear to be confined to small estates, although it doubtless is so confined in its practical operation. It would appear to authorize such a procedure in any estate, however large, but to limit payments therefor to $300 or less to the widow.

An Indiana statute\textsuperscript{172} authorizes the circuit court in cases where a decedent has left an estate not worth over $500 and is survived by a widow to vest the entire estate in the widow absolutely. Upon filing a petition therefor the clerk is directed to appoint a disinterested householder to make an inventory and appraisal of the estate, both real and personal, which must be verified by the widow as to its completeness. Upon the return of the inventory the clerk is directed not to issue letters but to continue further proceedings until the next term of the court thereafter when the court shall, if no opposition be made, enter a decree vesting in the widow all the title and interest of the decedent in such estate at his death and directing that no letters issue thereon. Notice thereof must be given by the widow by publishing or posting. Creditors may contest the petition at the time set for its hearing upon the ground that the inventory does not contain all property belonging to the estate or that the estate was improperly

\textsuperscript{172} Ind. Stat. Ann. (Burns, 1933) §§ 6-1701 to 6-1704.
valued, and that in either case the total value of the estate exceeds $500. In this event, the court must appoint two other disinterested householders who will proceed to reappraise the property. The final action of the court is made upon this second inventory and appraisement. The order of the court vesting the title to the estate in the widow is declared to be sufficient authority to enable her to sue for and recover debts and property belonging to the estate. She is exempted from liability for any of the decedent’s debts, except real estate mortgages, but she is made liable for his reasonable funeral expenses and the expenses of his last sickness.

Under the Kentucky statutes the county court has jurisdiction to dispense with administration of small estates if the personal property on hand or in the bank does not exceed the amount to which the widow or surviving minor children are entitled to have set aside to them as exempt. After such an order is made the widow or minor children (through their guardian) may sue for and obtain all property belonging to the estate, and shall thereafter settle accounts in the same manner as a personal representative.

A recent Maryland statute provides that if a decedent dies intestate and leaves a small estate consisting solely of personal property, the person entitled to be appointed administrator may file a petition in the Orphans’ Court requesting that administration be dispensed with. The court may make a preliminary order declaring that no formal administration is necessary and instructing the petitioner to publish notice to creditors to exhibit their claims within thirty days. Upon the expiration of the thirty-day period the court may then render a final order relieving the estate of formal administration and directing distribution of the estate.

The Michigan Probate Code provides that if the estate of a decedent consists solely of a pay check or other personal property less than $200, the probate judge may order such property turned over to the widow or widower, or, if there be no surviving spouse, upon the showing of evidence that funeral expenses have been paid, to the nearest of kin or the person who shall have paid such expenses. This kind of order may be made without the appointment of an administrator or the giving of a bond.

Nebraska provides for the summary settlement of small estates

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by authorizing the filing of a petition showing the usual facts as to the death of a decedent, the names of his heirs and an allegation that his estate is wholly exempt from attachment, execution or other process and is not liable for the payment of decedent's debts. After published notice of the time set for the hearing on such a petition and a finding that the facts alleged in the petition are true, the court is directed to make an order dispensing with regular administration and distributing the estate directly to the heirs or devisees. These statutes are called the "small estates act."

Nevada classifies estates into two groups for the purpose of dispensing with administration. If the decedent leaves a surviving spouse or a minor child or children and his estate does not exceed $1,000 in value, the statute directs that his estate shall not be administered upon but that it shall be assigned and set apart for the support of the spouse or minor children. Even though there be a surviving spouse the court may in its discretion set aside the whole estate for the benefit of the minor children, after directing such payments as may be deemed just. This may be compared with the provisions of the California, Arizona and Utah statutes which exclude from the benefits of participation in small estates a surviving spouse who has separate estate of her own. But if the decedent leaves neither a spouse nor minor children, administration may be dispensed with only when the estate does not exceed $400 in value. But even here the court may direct the payment of funeral expenses, the expenses of the decedent's last illness and other claims. All proceedings taken under this statute are initiated by a verified petition, containing a list of all property belonging to the estate together with its estimated value and a statement of all debts of the decedent so far as known. Notice is given by posting upon the bulletin board of the county courthouse. The costs of publishing notice are limited to $5.00 and court costs to $15.

In New Jersey, when the total value of the real and personal property of an intestate estate does not exceed $100 and there is no surviving spouse, a statute permits one of the next of kin, with the written consent of the remaining next of kin, to petition the surrogate for permission to collect the personal assets for the benefit of all the next of kin. No formal administration is required and no bond need be given. Such petitioning next of kin has the same rights, powers and duties as does an administrator and may be sued and required to

178 See notes 72, 73 and 74, supra.
account. A related statute authorizes the payment or delivery of debts or property not exceeding $100 to the next of kin upon receipt of a copy of the affidavit furnished to the surrogate marked a true copy by the surrogate, and that such person so paying or delivering shall be forever discharged from all claims by any administrator who may be appointed or by any other person, notwithstanding that it may thereafter occur that the intestate had left an estate exceeding $100 or a surviving spouse or next of kin not consenting or that the allegations of the affidavit are erroneous. Because of the limitation of amount and the restriction that there must be no spouse surviving; it would seem that these statutes have but little practical value.

Under the North Carolina statutes debts not exceeding $300 owing to a decedent may be paid into the hands of the clerk of the court whose receipt is declared to be a full and complete release and discharge for such debts. The clerk is then authorized and empowered to pay out such collected sums, first, for the family allowance, second, for funeral expenses, and any other surplus as the law provides. This statute applies only to certain counties and does not include the entire state. The primary purpose is to provide a method by which a debtor of the decedent may discharge his debt by paying the amount to the clerk of the superior court. However, the statute is permissive only and is not mandatory upon the debtor. In small estates where all parties are in agreement such a procedure is valuable for providing a means of settlement without formal administration. Its permissive character would seem to be a serious drawback to a full realization of its possibilities.

A similar statute in South Carolina provides that when a person dies intestate and leaves personal property only, of the value of $500 or less, it shall be the duty of the probate judge to receive such estate, pay funeral expenses and expenses of last illness and to distribute the residue, if any, to the distributaries without the requirement of administration. Any person, firm or corporation having money or other property belonging to the estate of the decedent is required to turn the same upon demand over to the probate judge whose receipt shall be a discharge of such liability. In the Supreme Court of South Carolina expressed an opinion that this section was

182 In re Franks' Estate, 220 N.C. 176, 16 S.E. (2d) 831 (1941).
184 150 S.C. 125, 147 S.E. 646 (1929).
probably intended to apply only to those estates in which creditors were not concerned, but involved "simply the distribution of untrammelled assets." If this be true a small estate which is indebted could not be thus set off to the heirs by summary procedure.

A much broader and more inclusive Virginia statute\textsuperscript{185} authorizes the payment of money up to $500 into the court of the county in which such fund accrued or arose and thereupon the court may authorize its expenditure or use for the benefit of the person entitled to it without the intervention of a personal representative. No reported cases have arisen under this statute. It is not a part of the probate statutes of Virginia and it may be somewhat doubtful how effective it is for the purpose of dispensing with administration.

In one sense these statutes of North Carolina, South Carolina and Virginia provide for a summary administration through a personal representative, the clerk or judge acting as a kind of substitute for the personal representative in this case. In actuality, however, no personal representative is appointed and the distribution is made in as summary and as direct a manner as possible, the purpose being to conserve time, expense and unnecessary procedure in small estates.

An Ohio statute\textsuperscript{186} authorizes the court to order an estate relieved from administration when the value of the assets of the estate is less than $500 and creditors will not be prejudiced thereby. A petition is filed praying for such an order, setting forth the distributees, the character and value of the property comprising the estate and a list of all known creditors. If the court orders the estate relieved from administration, it also orders the property delivered and transferred to the persons entitled thereto. For this purpose the court fixes the amount of property to be delivered or transferred to the surviving spouse or minor children of the decedent, in lieu of property not deemed assets, and of an allowance for a year's support. A commissioner may be appointed to execute instruments of conveyances when necessary. Such an order relieving an estate from administration has the same effect as administration proceedings in freeing land in the hands of an innocent purchaser for value from the possible claims of unsecured creditors. A comment\textsuperscript{187} on this section by the Committee on Probate and Trust Law of the Ohio State Bar Association at the time of the adoption of the new Ohio Probate Code in 1933 indicates that

\textsuperscript{185} Va. Code Ann. (Michie, 1942) § 6143(a).
\textsuperscript{187} See comment in annotations to this section.
the purpose of this summary procedure was to relieve small estates from the expenses of administration.

A Pennsylvania statute authorizes the Orphans' Court to distribute estates not exceeding $200 in value without granting formal letters of administration. Nevertheless, an accounting must be filed and audited. Distribution may be made under such rule of court as may be established by general order or by special order made in each estate.

Another Pennsylvania statute provides that when a decedent shall leave a widow or children surviving him and an estate not exceeding $500 in value, such widow or children may petition the Orphans' Court to set aside such property to them as exempt. The court may act upon the petition and set aside such property without notice or appraisement and irrespective of whether letters have been issued or a will probated. The purpose of this statute, it has been said, is to avoid the cost of administration on small estates where the entire property would be consumed in being set off as exempt property, if administration were to be granted.

The South Dakota Code contains extensive provisions for the summary administration of small estates or estates of such a size and character that creditors are not likely to share in them. It provides that summary administration may be had (1) when the gross estate of the decedent, including both real and personal property, does not exceed $1,500, or (2) when the gross value of the estate, exclusive of homestead not exceeding $5,000, does not exceed $750 and the decedent is survived by a spouse or one or more minor children. A verified petition for such summary administration may be filed by an heir, legatee, devisee or creditor, setting forth the fact of decedent's death and whether he left a will; the names and addresses of all heirs, legatees and devisees, and also, so far as known, of creditors with the amounts owing to each; a statement of the character and value of all property left by the decedent; and the facts in regard to any homestead and the persons entitled thereto. Notice of the hearing on such petition must be published for three weeks and mailed to all heirs, legatees, devisees and creditors at least ten days prior to the date set

190 In re Madeira's Estate, (Pa. Orphans' Court, 1938) 33 D. & C. 717, 52 York 337.
for hearing. If upon the hearing the court determines that the essential facts exist, it may proceed in a summary manner to adjust and determine the respective rights of all persons interested including creditors and their rights in regard to homestead and exempt property. It may also probate a will if there be one. It is authorized to make findings of facts and conclusions of law and to distribute the estate, first, in payment of court costs incurred, second, to those entitled to exempt property and homestead, third, to creditors, and fourth, to heirs, legatees and devisees. Such decree has the same effect as a final judgment and may be recorded. No further action is required for the distribution of the estate. If necessary for such distribution, the court may order the sale of any property other than the homestead. The entire responsibility for collecting and distributing the estate is upon the judge. He may not appoint an agent for these purposes.\(^2\) If such petition is dismissed, regular probate proceedings may be instituted. Even in an appropriate case, summary administration is not an absolute requirement; indeed the court may, in its discretion, require regular administration if it finds that the circumstances are such as to render it for the best interests of those interested in the estate.

A Vermont statute\(^3\) provides that if a husband dies leaving a widow or minor children or both, or if a wife dies and leaves minor children and no surviving husband, and the estate does not exceed $300 or is not sufficient to pay the debts and expenses of settlement and leave a balance of $300, the court, in its discretion, may assign the estate to the value of $300 to the minor children or to the widow or for their joint use and benefit.

As previously mentioned, the prime purpose of this kind of legislation is to make available to a decedent's family a modicum of economic resources without delay and at a time when the cessation of regular earnings are likely to be felt most acutely by them. To the family of small means the value of such procedure is at once apparent. To compel the surviving family to await the termination of a usual administration would be most unjust; and in addition, it would decrease the amount distributable to them by the expenses of administration and would keep the property out of commerce for an interval of time. "Practical and common sense statutes ... which facilitate the transaction and convenience of public business, at a minimum expense, and that, too, without doing an injury to creditors and other

\(^{192}\) Smith v. Terry Peak Miners' Union, 16 S. D. 631, 94 N.W. 694 (1903).

persons’ is the characterization of these statutes by the supreme court of the state of their origin.\textsuperscript{194}

The restrictions on the rights of heirs generally to collect and sue for debts due a decedent, in the absence of administration will be discussed hereafter. Suffice it to say at this point that such actions are ordinarily not permitted, but the heirs are required to have a personal representative appointed in order to make an effective collection of the assets belonging to the estate. Under statutes of the kind now under consideration, however, the heir becomes the “authorized agent of the law to collect debts and give acquittances.”\textsuperscript{195} Without such authority, having its genesis in a denial rather than a grant of administration, the heir is powerless to make collection of property to which he and others will ultimately be entitled. An estate of sufficiently small quantity to come under the statutory amount will not of itself entitle the heir to sue to collect assets. He must first secure a judicial determination that such facts exist and the corresponding authority to proceed in this fashion.\textsuperscript{196}

Upon slight reflection the reasonableness of such a requirement appears. Some sort of showing is necessary to call this exceptional short-cut into play. A court having control over such functions will respond upon proper proof. Creditors are entitled to this amount of protection, at least. Furthermore, more than one person may claim to be the heir or next of kin entitled to the estate. This slight judicial supervision will stave off potential controversies among heirs and creditors in the vast majority of cases. In addition, debtors are afforded explicit assurance of the discharge of their obligations upon making payment to the one thus authorized to make collection. It would, of course, be unsafe to make the heirs the exclusive judges of the applicability of the statute to the facts of a particular case.\textsuperscript{197}

The order of the court denying administration is the equivalent

\textsuperscript{194} Parsons v. Harvey, 281 Mo. 413 at 427, 221 S.W. 21 (1920).
\textsuperscript{195} Bradley v. Raulerson, 66 Fla. 601, 64 S. 237 (1914); Coral Gables First National Bank v. Hart, (Fla. 1945) 20 S. (2d) 647 at 648. And the person to whom it is set off may perfect his or her title as by a suit to quiet title. Bassett v. South, 87 Ind. App. 136, 156 N.E. 410, 158 N.E. 229 (1927).
\textsuperscript{196} Chenoweth v. McDowell, 26 Ariz. 420, 226 P. 535 (1924); Phifer v. Abbot, 68 Fla. 10, 65 S. 869 (1914); Noblett v. Dillinger, 23 Ind. 505 (1864); Griswold v. Mattix, 21 Mo. App. 282 (1886); McMillan v. Wacker, 57 Mo. App. 220 (1894); Adey v. Adey, 58 Mo. App. 408 (1894). But in Mahoney v. Nevins, 190 Mo. 360, 88 S.W. 731 (1905), it was held that a surviving widow was entitled in equity to be recognized as the owner of an estate less than $400 without proceeding to have it set off to her.
\textsuperscript{197} Bradley v. Raulerson, 66 Fla. 601, 64 S. 237 (1914).
of a judgment or decree, it is entitled to corresponding recognition, and it cannot be collaterally attacked. While such an order or decree remains in force a personal representative may not be appointed. Nor may the valuation of the property set aside be assailed in a different proceeding. Nor may an action to collect assets by the next of kin be defeated by showing an indebtedness against the estate. Likewise the setting off of the estate to a person erroneously determined to be an heir cannot be questioned in a different proceeding. If the decree is to be assailed at all it must be done directly, by appeal or by steps appropriate to revoke it. Such a procedure is expressly provided in the statutes of Florida, Kentucky and Missouri and is to be found in the general procedure sections of other probate codes.

It is conceivable that regular administration might be preferable to the summary setting off of a small estate in a given case due to the existence of certain problems or conflicts of interest. The statutes of Kentucky, South Dakota and Vermont expressly make their use discretionary with the judge, while all others appear to be subject to invocation as of right.

Several variations are to be noted among these statutes. Some are predicated primarily upon the existence of a small estate and the survival of particular members of the decedent's family who would be entitled to the entire estate as exempt property, homestead, or as a family allowance if administration were had in the usual manner, while others are predicated solely upon the existence of a small estate

198 Eisenmayer v. Thompson, 186 Cal. 538, 199 P. 798 (1921); McMillan v. Boese, 45 Cal. App. (2d) 764, 115 P. (2d) 37 (1941); Johnson v. Johnson, 53 Cal. App. 805, 128 P. (2d) 617 (1942); Downs v. Downs, 17 Ind. 95 (1861); Boyden v. Ward, 38 Vt. 628 (1866).
199 Although often called inferior courts, probate courts are courts of record in almost every state and within the orbit of their jurisdiction, their decrees are entitled to the same weight as those of courts of general jurisdiction. See Simes and Baszye, "Organization of the Probate Court in America," 42 Mich. L. Rev. 965 at 990-992 (1944).
201 Downs v. Downs, 17 Ind. 95 (1861).
205 The discretionary character of these statutes will not permit a successful appeal from an order denying a petition filed to obtain summary distribution. Frost v. Estate of Harlow Frost, 40 Vt. 625 (1868).
and attempt to provide for its distribution to those entitled, whether
they be the surviving family, next of kin or creditors, or some of
each. 206 The first group of statutes is limited in its application pri-
marily to those estates in which creditors are not entitled to share;
the second group is intended to apply when the estate is of such small
size that it should be administered simply, summarily and with the
least possible expense and delay. In these latter cases, more conflicts
of interest as between distributees are likely to arise, and yet the very
size of the estate is such as to make real conflicts rare. As in the case
of summary distribution by a personal representative the rights of
distributees are usually made subject to expenses of the funeral and
last sickness. 207 But the rights of other creditors are ordinarily sub-
ordained to the paramount social interest of providing for the surviv-
ing family.

It may be objected that such statutes open the door to fraud upon
creditors, either through a process of concealing assets or by with-
drawing assets from judicial inspection such as could ordinarily be
observed from the inventory. Legislation of this kind has also been
challenged on the ground that creditors are deprived of their property
without due process of law.

As to fraud, such is always a possibility even when an administration
runs its full course. An examination of the statutes of the kind under
consideration reveals that most, if not all, of them require a sworn
petition or affidavit to be filed to entitle the applicant or petitioner to
a summary distribution of the estate. There is no more reason why the
concealment of assets could be effected under such circumstances than
when there is a full administration. The limited judicial contact with
the surviving family or the decedent furnishes no more fertile medium
for the practice of fraud of the concealment of assets. In any case, the
statutes contemplate that the court may revoke its order of summary
distribution upon a showing of other or further assets. 208 Creditors

206 In the first category are the statutes of California, Idaho, Indiana, Kentucky
and Missouri. In the second category are those of Arizona, Colorado, Michigan,
Nebraska, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina and Vir-
ginia. The statutes of Florida, Nevada, South Dakota and Vermont must be classified
under both types, i.e., as applying when there is a small estate and certain members of
the decedent’s family survive. See Turner v. Campbell, 124 Mo. App. 133, 101 S.W.
119 (1907), indicating this limitation upon the application of the Missouri statute.
207 Fleming v. Henderson, 123 Ind. 234, 24 N.E. 236 (1890). But see In re
Ulrici’s Estate, 177 Mo. App. 584, 160 S.W. 812 (1913), where it was held that
the widow’s allowance of absolute property is paramount even to funeral expenses and
expenses of administration.
208 The California statute explicitly so provides. A general power of revocation
would seem to have ample protection by this provision alone, not to mention their power to ask that the order or decree be set aside for fraud, if such is found to exist.

As to the constitutionality of such legislation in the face of the objection that such a procedure deprives creditors of their rights without due process of law, two things may be said. If the rights of the decedent's family in his small estate by virtue of homestead, exempt property, family allowance and the like are superior to those of creditors, then the latter have not been affected adversely. On the other hand, if the rights of creditors are superior to those of the decedent's family, then the statute authorizing a summary distribution to the latter does not extinguish the creditor's right. Whatever right he had against the decedent is merely transferred as a chose in action against the heir who has received distribution. On this precise point the language of the Supreme Court of Florida in the case of *Coral Gables First National Bank v. Hart* is quite explicit:

"Under the law of this state (Probate Act) personal and real property descends to the heirs. Since devolution is a matter of legislative discretion, it is entirely competent for the legislature to say that any kind of property shall pass direct to the heirs rather than be suspended until a personal representative be appointed and vest in the heirs through him. Unsecured creditors are at all times subject to the caprice of the legislature in so far as estates are concerned. While it is proper that their claims be paid and they may apply for letters of administration but if they fail to do this and the heir secures an order of 'No Administration Necessary' then they may sue the heir to collect the debt. In other words, the most they have at any time is a chose in action and they may sue the heir who secured the order to collect the debt. They had no property right before the Act was passed and no property right was taken from them by it. *Heirs of Ludlow v. Johnston*, 3 Ohio 553, 17 Am. Dec. 609."

2. A method for distributees who die during administration

It sometimes happens that an heir or distributee who will ultimately be entitled to a portion of an estate being administered dies before final distribution of that estate. The decree of final distribution strictly determines only who are the heirs of the senior decedent and
makes distribution to them. Proper procedure would suggest that the heir's estate should also be administered and his share in the ancestor's estate distributed to his heirs. On the other hand, it is apparent that the second administration may be unnecessary in certain situations. In the early California case of *McClellan v. Downey*, a husband died intestate leaving only community property to be administered. He was survived by his wife and six children, two of the children being by a former marriage. The wife died during the administration of her husband's estate. Administration on her estate was then had and completed before final distribution of her husband's estate. But the decree of final distribution did not include her interest in the community property. Upon the subsequent distribution of the husband's estate the wife's interest in the community property was ordered distributed directly to her heirs, "*no creditor of hers objecting.*" The court admitted that it would have been more orderly to have had her interest in her husband's estate distributed to her heirs by the decree of distribution of her estate, or to have made distribution of any personalty to her administrator for the purposes of administration, but it held that it had the power to make distribution of the wife's interest in her husband's estate directly to her heirs under the dictate of the statute which required it to distribute the residual estate of a decedent "among the persons who by law are entitled thereto." The power of probate courts to make distribution to the secondary next of kin has been declared in a small number of cases, provided there are no creditors of the decedent.

When the heir or distributee who dies prior to the final distribution of the ancestor's estate is an unmarried minor, it may be presumed that he had no capacity to make a will and was incapable of contracting binding obligations. Under these circumstances his estate could safely be distributed to his heirs in connection with the final distribution of

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210 63 Cal. 520 (1883).
211 63 Cal. 520 at 523 (1883). (Italics the court's.)
213 Johnson's Administrator v. Longmire, 39 Ala. 143 (1863); Fretwell v. McLemore, 52 Ala. 124 at 133 (1875); Ward v. Ives, 75 Conn. 598, 54 A. 730 (1903); In re Sprague's Estate, 125 Mich. 357, 84 N.W. 293 (1900); Maxwell v. Craft, 32 Miss. 307 (1856); Watson v. Byrd, 53 Miss. 480 (1876); In re Riley's Estate, 92 N.J. Eq. 567, 113 A. 485 (1921); Matter of Losee, 46 Misc. 363, 94 N.Y.S. 1082 (1905); Young v. Kennedy, 95 N.C. 265 (1886); Roberston v. Gillenwaters, 85 Va. 116, 7 S.E. 371 (1888); Cook v. Nelson, 209 Wis. 224, 244 N.W. 615 (1932). In the New Jersey case of In re Riley's Estate, supra, the court said that only the Court of Chancery, and not the orphans' court, in New Jersey could order distribution to the secondary next of kin and thus dispense with administration. In the Alabama cases
the primary estate, undiminished by debts or expenses of administration. By an amendment in 1866 to one of its statutes on distribution of estates, California provided that if a decedent "shall have left him or her surviving several children, or one child and the issue of one or more other children, and if any one of such surviving children shall before the close of administration have died while under age and not having been married, no administration on such deceased child’s estate shall be necessary, but all the estate which come to the deceased child by inheritance from such deceased parents shall without administration be distributed to the other heirs as prescribed by law." This statute has since been broadened in California to include any heir, devisee or legatee who is issue of a decedent, and also to authorize distribution directly to his heirs at law in the case of his death intestate while under age and not having been married, before final distribution of the ancestor’s estate. The result in most cases will be that distribution of the ancestor’s estate will be made to the other heirs of the ancestor whose shares will thus be augmented, since they are his heirs also. Similar statutes have since been adopted in Arizona, Idaho, Montana, North Dakota, Oklahoma, South Dakota, Utah and Wyoming, all patterned after the early California statute. With the exception of Arizona these statutes are limited in their operation to unmarried minors and cannot be applied to dispense with administration on the estate of a deceased adult heir. In Arizona it is required only that the heir dying before the close of administration be a child of the decedent in order for the statute to apply.

The function of such legislation is to avoid two administrations when the court already has jurisdiction of one estate and in that same proceeding may readily determine the persons who are entitled to the share of the deceased heir and order distribution directly to them.

it was said that it was within the province of equity to thus dispense with administration when it appeared that there were no debts or that administration had not been taken out.

221 S. D. Code Ann. (1939) § 35.1705.
222 Utah Code Ann. (1943) § 102-12-7.
224 In re Skelly’s Estate, 32 S.D. 381, 143 N.W. 274 (1913).
The in rem nature of the proceeding is sufficient to justify the court's exercise of such power. At the same time it may well be realized that secondary administration may be preferable in large estates of minors or if there be indebtedness of the minor, as for necessaries. But if the estate is small this statutory permission to avoid an administration answers a need in a sensible manner. Without exception, however, the operation of these statutes is independent of the size of the estate.

3. A method for persons who die while under guardianship

Another type of statute comparable in function to those just discussed but somewhat different in operation concerns minors or other persons who die while under guardianship. The justification for dispensing with administration upon the estate of a minor or incompetent who dies while his estate is being administered by a guardian should depend primarily upon an ability to determine with reasonable certainty the existence of liabilities against the ward. Since such a ward cannot ordinarily incur debts, it may be said that the guardian, who has incurred and presumably knows of all outstanding obligations against the ward, should be permitted to pay them and distribute the estate remaining in his hands in much the same manner as a personal representative would do. On the contrary it may be argued that the ward may be liable on obligations incurred before the inception of the guardianship, for torts committed by him or for some other obligation which the guardian did not incur or is not aware of. In passing upon the merits of the statutes to be discussed in this connection, the machinery afforded to creditors to obtain payment of their claims during the lifetime of the ward as well as after his death will be an important factor.225

Upon the termination of a guardianship by the death of a ward, a guardian is ordinarily required to make an accounting.226 Distribution of the ward's estate is then made to a personal representative to be appointed. In an attempt to dispense with a formal administration, however, legislation has been adopted in several states to provide for distribution of the ward's estate by the guardian directly without requir-

225 In most states creditors are not notified or afforded an opportunity to present their claims in a guardianship proceeding as they are in a probate proceeding. A few statutes do so provide, however. See Wis. Stat. (1943) § 319.41. To enforce payment on contracts or torts of the ward, in most states an action must be commenced against the ward personally, which action may be defended by the guardian. See George & Ratcliffe v. Dawson's Guardian, 18 Mo. 407 (1853).

226 Such a provision is a part of most guardianship statutes.
ing the appointment of a personal representative. According to such legislation the guardian, after making the required accounting upon the death of the ward, is authorized to make distribution of the residual estate directly to the distributees. It is intended to render unnecessary both the appointment of a personal representative and a complete formal administration on the ward's estate.

In Arkansas 227 and Missouri 228 it is provided that if a minor under guardianship dies, no letters of administration need be granted upon his estate unless he leaves obligations, or unless he leaves a valid will, but that the probate court shall proceed to authorize distribution of the personal estate by the guardian among those interested.

A Pennsylvania statute 229 adopted in 1931 similarly provides for distribution by the guardian of a deceased minor ward to creditors and distributees under the intestate law, unless it appears that the estate is involved or is likely to be involved in litigation, in which case distribution of the estate is made to a personal representative who must be appointed for the ward's estate. This statute depends upon judicial discretion for its application. Notice to creditors is usually given by advertising the final account. 230

A recent Colorado statute 231 applies in the case of the death of any person under guardianship, whether a minor or other incompetent. The guardianship is continued and the estate of the decedent administered in the same proceeding; thereafter the guardian is designated as an administrator, unless the decedent dies testate, in which case the executor or other personal representative appointed shall administer the estate. The court may make any orders necessary to protect creditors and other interested parties.

Statutes in Delaware 232 and Georgia 233 contemplate that no new administration shall be opened in the case of the death of any in-

228 Mo. Rev. Stat. Ann (1942) §§ 427, 428. These statutes formerly purported to apply to all minors under guardianship. However, they were later construed in Norton v. Thompson, 68 Mo. 143 (1878), as inapplicable to married minors. The statutes have since been amended accordingly.
230 Templar's Estate, (Pa. Orphans' Ct. 1940) 38 D. & C. 288. In this case the court indicated that it would be inclined to authorize such a distribution when it was affirmatively shown that the funeral and medical expenses have been paid or provided for and the next of kin joined in the petition for distribution by the guardian.
competent under guardianship, but that the guardian shall distribute the estate in the same manner as if he had been appointed administrator.

Likewise in Illinois\textsuperscript{234} a guardian or conservator of a deceased ward's estate is authorized under the letters of guardianship previously issued to him to administer the estate of the deceased ward without further letters of administration, unless within thirty days after death a petition for letters testamentary or of administration is filed. If letters are so granted, the executor or administrator shall supersede the guardian or conservator in the administration of the estate.

An Indiana statute\textsuperscript{235} provides that upon the death of a ward whose personal estate does not exceed $500, the guardian may proceed to settle the ward's estate without letters of administration. Claims against the estate may be filed, litigated or allowed and paid the same as in cases of executors or administrators, and distribution of the estate made under the same rules and regulations.

In Wisconsin,\textsuperscript{236} a statute provides similarly with respect to the estate of any person other than a minor under guardianship whose total estate does not exceed $300. The guardian is authorized to pay funeral expenses and expenses of the ward's last sickness. In other guardianship matters in which notice to creditors has been given and the ward owned only personal estate of a value not to exceed $1,000, the court, upon notice to all interested parties, may order the guardian to pay funeral expenses together with expenses of the guardianship and all liabilities incurred by the guardian, and distribute the balance to the heirs of the deceased ward.

Statutes in Massachusetts\textsuperscript{237} and Vermont\textsuperscript{238} authorize the guardian of a deceased ward to pay the funeral expenses of the ward. When the estate is sufficiently small that the entire amount is so consumed, the need for a separate administration is thus avoided.

All of these statutory devices represent bona fide attempts to dispense with the necessity for a separate administration proceeding. They apply only when a guardian has been acting under the supervision of the probate court. In most instances he is cognizant of all obligations against the ward's estate. In all probability he has incurred them. If this is true and it can be determined that the guardian has paid and satisfied all outstanding indebtedness from funds in his hands, there

\textsuperscript{235} Ind. Stat. Ann. (Burns, 1933) § 8-135.
\textsuperscript{236} Wis. Stat. (1943) § 319.32.
\textsuperscript{237} Mass. Ann. Laws (Michie, Supp. 1944) c. 201, § 48A.
\textsuperscript{238} Vt. Pub. Laws (1933) § 3282.
is no reason why distribution of the ward's estate should not be made by the guardian directly to the distributees entitled to it. Doubtless this could be done as a practical procedure in the vast majority of instances with reasonable assurance that no creditor was overlooked.

But if there remains some outstanding indebtedness against the ward at the time of his death, it may be inquired at this point what procedure is available for determining it and what devices may be employed by creditors to assert and enforce payment of their claims. In an early Missouri case creditors of a deceased ward presented their claim to the guardian and sought its allowance in the county court which had jurisdiction over the guardian and continued to exercise it pursuant to the statute authorizing distribution of the ward's estate direct to the distributees upon his death. It was held, however, that the county court had no jurisdiction to allow claims against the estate of the deceased ward, and further, that the statute was not intended to apply when there were outstanding debts. No indication was made as to how the existence or non-existence of debts was to be determined. The tacit assumption necessary for the application of the Missouri statute was that no outstanding indebtedness does actually exist. Its practical uselessness in that state may be inferred from the fact that there are no reported cases in which use of the statute has been attempted in nearly three quarters of a century.

The Indiana statute likewise provides for an accounting by the guardian upon the ward's death and for settlement of the ward's estate without letters of administration. The defect of the Missouri statute, however, has been provided against. Express provision is made for the filing and allowance of claims in the settlement of the estate by the guardian in the same manner as when settlement is made by an executor or administrator. In a recent Indiana case a guardian attempted to function under this statute and refused to allow or pay a claim presented after the expiration of some two years subsequent to the death of the ward. The creditors excepted from his final accounting and also from the non-allowance and non-payment of their claim. No notice to creditors had been published. The Supreme Court of Indiana declared that the statute contemplated merely that new letters of administration need not issue to a personal representative, but that the guardian, under the letters already issued to him, should proceed

240 Board of Commissioners of Hamilton County v. Pardue, 214 Ind. 579, 16 N.E. (2d) 884 (1938).
to administer the estate under the same rules and regulations applicable
to an executor or administrator. In other words, he must publish notice
to creditors and of final settlement as he would do in administering on
a decedent's estate. The net result of this conception of the Indiana
statute is that it operates to dispense with the necessity of issuing new
letters of administration. In function, though not in name, the guardian
is transformed into an administrator.

Though statutes of the kind under consideration may have con­
templated some summary distribution of a deceased ward's estate by
his guardian, it seems clear that this is not always practical. Further­
more, the estate of an insolvent decedent is marshalled for creditors
quite differently from the estate of an insolvent ward under guardian­
ship. Creditors are entitled to protection and consideration comparable
to that accorded them in the administration of a decedent's estate. To
permit the guardian to function as an administrator to save expenses,
and to have the settlement and distribution of the estate occur in the
same court and in the same proceeding are sensible and sound ob­
jectives. But to dispense with notice to creditors or other safeguards
employed in an ordinary administration proceeding is neither desirable
nor justifiable.

On the whole, the Indiana and Colorado statutes seem to provide
a sound method for merging the administration proceeding with the
guardianship proceeding. Notice to creditors and other safeguards
applicable to an ordinary administration proceeding are provided for.
While the Illinois statute seems to permit a short-cut, it authorizes a
 guardian or conservator to make distribution of his deceased ward's
estate direct to the persons entitled, only if a petition for letters testa­
mentary or of administration is not filed within thirty days following
the ward's death. Creditors and other persons are thus afforded a
reasonable period of time to apply for administration, failing which
summary distribution to the heirs may be made. While no case has
yet arisen in Illinois, a personal representative subsequently appointed
would probably be entitled to recover from the heirs the property re-

242 In Wingate v. James, 121 Ind. 69, 22 N.E. 735 (1889), the court ordered the
sale of a ward's real estate to pay a judgment. Before the sale was made the ward died.
Nevertheless the guardian sold the land without obtaining a new order. In upholding
the sale, the court said: "When the fact of the ward's death, and the amount and con­
dition of her estate, were reported, the jurisdiction of the court over the settlement of
the ward's estate were continued precisely as if the ward had remained in life. The
proceedings were properly continued in the matter of the guardianship; the guardian
proceeding, as such, to the settlement and distribution of the estate."
ceived by them from the guardian. The thirty-day provision is doubtless a counterpart of another Illinois statute, to be referred to later in another connection, which authorizes any person or corporation indebted to or holding personal property of a decedent to turn it over to certain surviving members of his family, provided that no letters are then outstanding and no petition therefore is then pending, and that thirty days have elapsed since the death of the decedent.

If a guardian proceeds to administer and make distribution of the estate, as is contemplated in the Indiana and Colorado statutes, he is entitled to exercise all the powers of an executor or administrator and he is subject likewise to the same duties. But it should be noted that the effect of such statutes is to alter somewhat the functions of a guardian. Before the death of the ward, he carries out various activities for a living person. After the death of the ward, he administers and accounts for the estate of a deceased person. The statutes add nothing to the estate under his management and control. They do give him additional power to close up the estate. This transformation of function is a small aid, but only a small aid, in the simplification of the problem of administration. They save the necessity of appointing a personal representative, but otherwise administration proceeds in the usual manner. If the ward has left a valid will and appointed an executor, such statutes should not and ordinarily do not apply. It is hard to justify such legislation as exists in Arkansas and Missouri unless an estate is of such small size as to come under the provisions of some other statute justifying summary administration or distribution. Thus the Indiana statute is limited in its operation to estates less than $500 and the Wisconsin statute to estates less than $300 and $1,000, respectively. And the Orphans' Court of Philadelphia has indicated that it will apply the Pennsylvania statute only in estates less than $1,000.


244 This is implied in the Colorado statute. See also Hire v. Hrudicka, 379 Ill. 201, 40 N. E. (2d) 63 (1942); Wingate v. James, 121 Ind. 69, 22 N. E. 735 (1889).


246 Belleville Sav. Bank v. Schrader, 214 Ill. App. 388 (1919); Keener v. Ochsenerdor, 85 Ind. App. 156, 149 N. E. 101 (1925). But if there is no will or if the executor named cannot serve, the guardian has been held entitled to administer the estate as against the next of kin. Lang v. Friesenecker, 213 Ill. 598, 73 N. E. 329 (1905).

Despite the infrequent application of these statutes, it may be possible to increase their utility. If a notice to creditors could be combined with a notice of the guardian's final accounting, opportunity would thus be afforded creditors to present their claims on or before the hearing on the final account. If ample time is thus allowed, such notice may be deemed the equivalent of notice to creditors in an administration proceeding, and the period of time so allowed, as a reasonable nonclaim period. This practice is apparently followed by the Pennsylvania Orphans' Court of Philadelphia County.\(^{248}\) The Wisconsin statute is also applicable to estates of less than $1,000 worth of personal property where notice to creditors has been given in the guardianship proceedings.

4. A method for community property

The administration of community property in those states having the community property system presents certain problems that deserve special consideration in dispensing with administration on such property. Upon the death of either spouse, one-half of the community property is said to go to or belong to the surviving spouse while the other half is subject to the testamentary disposition of the deceased spouse.\(^{249}\) In some of these states if either spouse dies intestate, the entire community property passes to the survivor.\(^{250}\) It has been held in some states that the community property is not liable for the wife's separate debts.\(^{251}\)

As a result of this immunity from the wife's obligations, administration on the wife's interest in the community property is deemed unnecessary if her surviving husband becomes entitled to all of the community property upon her death. Such is the implication of the California Probate Code.\(^{252}\) The community property under the husband's control remains subject to the community debts. An Arizona statute\(^{253}\) specifically provides that if community property passes to a surviving husband, he may obtain a decree determining his ownership which, when recorded, will have the same effect as a decree of distribution. The appointment of a personal representative has been


\(^{249}\) I de Funiak, Principles of Community Property, §§ 198, 202, 203 (1943).

\(^{250}\) This is true in California and Idaho. See I de Funiak, Principles of Community Property, § 199 (1943).

\(^{251}\) I de Funiak, Principles of Community Property, §§ 160-162 (1943).


held futile under these conditions and properly subject to revoca-
tion. Similar statutes apply in Idaho and New Mexico when
the wife dies intestate. There is also a provision in the California Probate Code for the determination of title to property which is affected
by the death of a person, but it does not specifically refer to community
property. A Nevada statute dispenses with administration on com-
munity property when the husband dies and the surviving wife or
surviving wife and children pay or secure all the community debts.
Similarly, a Texas statute provides that when either spouse dies
intestate without children or separate property, the community prop-
erty passes without administration to the survivor but it is charged
with the debts of the community. In each case the community prop-
erty is relieved of administration because of its immunity from the
separate debts of the deceased spouse and its continued liability for
community debts. Only in Nevada is the payment of community debts
or the securing of their payment a condition precedent to the passing
of full ownership and control to the surviving wife or surviving wife
and children.

In connection with the administration of community property an
Idaho statute deserves special mention. It provides that "When a
marital community is dissolved by the death of either member thereof,
thereafter, if the survivor shall die before proceedings shall have been
commenced for the probate of the estate of the person who first died,
and both have died intestate the estates of both of the said decedents
may, by order of the court, be joined for probate in a single proceed-
ing . . . provided the same person is . . . entitled to letters of
administration in both estates. . . ." This statute seems to be unique

254 In re Anderson, 18 Ariz. 266, 158 P. 457 (1916).
255 Idaho Laws Ann. (Anderson, 1943) § 14-113. Under the authority of this
statute, administration has been held unnecessary upon the wife's estate in State ex rel.
Gallet v. Naylor, 50 Idalw 113, 294 P. 333 (1930) and Pierson v. Pierson, 63 Idaho
1, 115 P. (2d) 742 (1941).
258 Nev. Comp. Laws (Hillyer, 1929) § 3365.
259 Wright v. Smith, 19 Nev. 143, 7 P. 365 (1885).
dispensed with under the authority of this statute in the following cases: Wall v. Clark,
19 Tex. 321 (1857); Ross v. Martin, 104 Tex. 558, 140 S. W. 432, 141 S. W. 518
(1911); Graves v. Smith, (Tex. Civ. App. 1911) 140 S. W. 487; Antone v. Stiles,
§ 32.0909(10) cited at note 148, supra.
in permitting the liquidation in one proceeding of the two estates of the members of a marital community.

D. Informal Family Settlements

Despite the existence of an established procedure for the administration of estates, heirs do not always avail themselves of this procedure. If the decedent leaves no debts or only such as the heirs are willing to pay, there may be no one to insist upon administration. And if the heirs can gain possession of or divide the decedent’s property among themselves amicably, there may be no real justification for administration. Most states possess no legislation recognizing or condemning such settlements. In fact, it has often been said that the law looks with favor upon family agreements for the settlement of estates. Justice Cooley expressed this sentiment in an early Michigan case262 when he said: “Formal proceedings for the settlement of an estate are never necessary if all parties concerned can agree to dispense with them. . . . Family arrangements for this purpose, it is said, are favorites of the law, and when fairly made are never allowed to be disturbed by the parties, or by any others for them.” That countless numbers of them have been effected successfully is within the experience of most lawyers. Sometimes, however, difficulties of collection or distribution are encountered; sometimes unexpected creditors’ claims interpose obstacles; or problems of marketable title to land, registered securities or similar property arise long after a decedent’s death and

262 Browne v. Forsche, 43 Mich. 492 at 500, 5 N. W. 1011 (1880). A definite sentiment to the contrary was voiced in an early California case, Estate of Strong, 119 Cal. 663, 51 P. 1078 (1898), wherein it was said at 665-666:

“Whatever the law may be in other jurisdictions, there is nothing in our probate law which would, either expressly or by implication, exempt the property of this estate from the requirement of administration. The whole subject matter of dealing with the estates of deceased persons is one of statutory regulation, and the policy and intent of our statute very clearly contemplates that property of decedents left undisposed of at death . . . shall, for the purposes of ascertaining and protecting the right of creditors and heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court. Indeed, there is no other method provided by the statute whereby the existence of creditors or heirs of decedents may be conclusively established. And such administration may be initiated and had at the instance of any person entitled under the law to administer upon the estate.”

This statement, made at the time it was, should not be taken to reflect a permanent policy in California. Some of the most useful legislation for the purpose of dispensing with administration exists there. It is also true that administration was necessary in order to confer marketable title to the land in the above case, yet neither the vendors nor the vendee were seeking that objective. The public administrator alone desired administration.
the informal settlement of his estate among the heirs. At this point it is proposed to examine the efficacy of these settlements as a substitute for an official administration.

In the first place it may be said that the body of law concerning the informal settlement of decedents' estates has been largely constructed by the judiciary. That a paucity of legislation exists on the subject is not surprising when it is considered that such settlements are confined to small estates for the most part, and that courts have worked out fairly satisfactory solutions to most controversies. Areas of doubt and uncertainty still remain in which debtors and heirs alike often take certain risks when formal administration is omitted. When there is a large estate the heirs prefer to have a formal administration so that property ultimately distributed to them will be free of any possible claims of creditors. Nevertheless informal settlements may also be effected in estates that cannot be classed as small. Only scattered legislation exists which explicitly recognizes the propriety and validity of such settlements. There is a wide feeling that our probate codes are in need of positive legislation dealing with this subject in its varied aspects and giving certainty and assurances instead of leaving doubts and compelling parties to assume risks for their acts.

Only a few statutes deal positively with the necessity for administration and the duty of the court to grant administration upon an estate. An Arkansas statute,263 for example, provides that no administration shall be granted unless, in the opinion of the court, it shall be necessary to preserve the estate from waste or damage or to protect the rights of creditors. Also a Colorado statute264 provides that administration may be dispensed with if there is no property in the state belonging to the deceased of sufficient value to justify administration, or if the testator at the time of his death was living outside the state and left no debts there. A Georgia statute265 provides that if a husband is the sole heir of his deceased wife, he may take possession of her estate without administration upon payment of her individual debts. These statutes are a recognition that the process of administration is more than an empty gesture to fill an office and that it should be required only when a real necessity exists therefor. A Texas statute266 provides that "No administration upon any estate shall be granted unless there exists a necessity therefor, such necessity to be determined

by the court hearing the application." A companion statute\(^{267}\) provides that "such necessity shall be deemed to exist if two or more debts exist against the estate, or if or when it is desired to have the county court partition the estate among the owners."

There are, in addition, several statutes which direct the granting of administration unless the heirs desire to settle the estate without administration. In Arkansas\(^{268}\) the heirs of an intestate decedent, if all are of full age, may collect, manage, control and dispose of an estate if creditors consent or the claims of creditors are satisfied. Or if administration has already been granted, it may be revoked. Authority is conferred upon the heirs to sue for and collect all demands and property belonging to the estate. There is no requirement of administration under a Georgia statute\(^{269}\) when the heirs, distributees or legatees prefer to settle the estate without administration. If there are no debts, official recognition of such settlements has been provided by a new statute\(^{270}\) enacted in 1945. It provides that any heir of a decedent who has died intestate and upon whose estate no administration has been had may file a petition in the court of ordinary stating that there are no debts and that the heirs have agreed upon a division of the estate amicably among themselves and desire to settle the estate without administration, and praying for an order that no administration is necessary. The court may then make a decree declaring that formal administration is unnecessary. In Illinois\(^{271}\) the court need not issue letters testamentary or of administration if it is satisfied that no federal estate or Illinois inheritance tax will be due and if it finds that all claims are paid, that all heirs, legatees or devisees are residents of Illinois, and that they are of legal age and desire to settle the estate without administration. A Kentucky statute\(^{272}\) authorizes the court to dispense with administration on the estate of an intestate decedent upon the written agreement of all persons interested in the personal estate, in cases where there are no creditors or the heirs designate a trustee to collect claims and demands. Such an agreement may be executed on behalf of a minor or other person under disability by his guardian, curator or committee. And if administration has already been granted,

\(^{268}\) Ark. Dig. Stat. (Pope, 1937) §§ 1, 2, 3. Such an agreement may be entered into after administration has been granted, waiving further accounting by the administrator. Herndon v. Adkisson, (Ark. 1945) 184 S. W. (2d) 953.
it shall be revoked. A Florida statute\(^ {273}\) likewise authorizes the court
to dispense with administration when an estate of not more than
$2,000, exclusive of exempt property, is not indebted, and there is a
sole heir or the heirs make division thereof amicably among them­selves.

These are the legislative reliefs from administration. There are,
in addition, some legislative prohibitions against administration after
the expiration of a designated period of time.\(^ {274}\) Most legislation of
the latter kind is designed to bar claims of creditors generally, operat­ing as a kind of special nonclaim statute when there has been no
administration, although some of the legislation merely relieves land
from the lien of creditors' claims. One practical effect of these statutes
is to preclude creditors from attacking these family settlements and
demanding administration after the lapse of a specified time.

There remains to be considered the extent to which informal
administrations may be carried out in the performance of the functions
for which administration is ordinarily granted. Even in the absence of
a specific statute, many cases have upheld the right of heirs to proceed
without administration where assets are applied to the payment of
debts. There is no vested right to the office of personal representative;
and the state possesses no prerogative to demand an administration for
the mere purpose of carrying out a procedure.\(^ {275}\)

The functions of administration have already been stated as being
(1) to collect assets, (2) to pay debts, and (3) to make distribution of
the residual estate to those entitled to it. It is commonly said that
the title to a decedent's personality passes to his personal represent­ative. There is some truth in this statement. Its universal accuracy
may be doubted, however. Suppose that no personal representative
is appointed. Does it follow that the heirs do not under any circum­stances become entitled to the decedent's property in the absence of
administration? Can it be that rights can be thus extinguished? Some
courts have seen fit to say that the personal representative possesses
only a naked legal title or that an exception to the general rule will
be made when no administration is granted. A different point of view
is contained in the codes of some western states which provide that the
title to a decedent's property shall pass directly to his heirs, devisees
or legatees, but "all of his property shall be subject to the possession of
the executor or administrator and to the control of the . . . court for

\(^ {274}\) See part III D 1, post.
\(^ {275}\) Christe v. Chicago, R. I. & P. Ry., 104 Iowa 707, 74 N.W. 697 (1898).
the purposes of administration, ... and shall be chargeable with the
expenses of administering his estate, and the payment of his debts and
the allowance to the family." In those states administration is unneces-
sary to the mere vesting of title, but vesting is made subject to
administration in which liability for payment of debts is determined.
Perhaps in the final analysis there is little practical difference in these
two views. Even under the first view the title of the personal repre-
sentative is very limited, to say the least. Under either mode of
looking at it, interposition by him is but a recognized means of accom-
plishing the three functions of administration.

It will not be denied that the heirs have an interest in the personal
property of a decedent and may enter into contracts for the division
of it, valid as among themselves. Such contracts cannot by their very
nature affect the right of creditors. It has often been stated as a general
principle that the heirs may agree to divide and distribute the property
of an estate when they are all of age and legal capacity and there are
no debts against the estate. This principle itself is looked upon as an
exception to the general rule that the title to personalty passes to the
personal representative.

This exception, that the heirs by a division of the decedent's
property among themselves may obtain full ownership of it, seems
to have taken root from a practice prevailing where courts of equity
have administered estates. As authority for recognizing the legal
rights and ownership of heirs who have taken possession of a decedent's
property without administration, courts have frequently cited deci-
sions of Alabama and Mississippi. An examination of the earlier of
these decisions, however, indicates that merely the "equitable title,"
not the "legal title," was recognized as being in the heirs in the absence
of administration. For example, in *Miller v. Eatman*, one of the
early cases on the subject, the Supreme Court of Alabama said:

"In courts of equity, where it is not necessary that the legal
title should be vested in the plaintiff, an administration may be
dispensed with, where the right is asserted by those who would be
entitled to distribution, and where it is clear that there are no
creditors to be prejudiced."  

276 Cal. Prob. Code Ann. (Deering, 1944) § 300. The following contain sub-
(1943) § 101-4-2; Wash. Rev. Stat. Ann. (Remington, 1932) § 1366. See also N. D.
277 11 Ala. 609 (1847).
278 11 Ala. 609 at 614 (1847).
In each instance the court required proof and made a determination that there were no creditors. Moreover, a court of equity, if asked to do so, would actually make a decree distributing the property of the decedent to the heirs so as to give them the same indicia of ownership as would be obtainable from a personal representative at the close of an administration. As said in the later Alabama case of Fretwell v. McLemore.\textsuperscript{279}

"The rule to be extracted from these decisions is, that a court of equity will dispense with an administration, and decree distribution directly, when it affirmatively appears, that, if there was an administrator, the only duty devolving on him would be distribution. Then administration is regarded as 'a useless ceremony.' An administrator or an executor is a trustee clothed with the legal title. He holds in trust for creditors and distributees or legatees. The creditors are entitled to charge the assets with the payment of their debts, in priority of the equity of distributees or legatees. When there are no debts, the equity of the distributees or legatees is perfect; the legal title, if there was a personal representative, would be a naked trust, which a court of equity ought not and would not permit to be interposed as a bar to the equitable title of the distributee or legatee."

These words have often been cited elsewhere\textsuperscript{280} as authority for dispensing with administration. In applying this principle, courts of other states have not been content to accept it as one to be applied only in courts of equity. They have readily extended it to various actions at law and without any antecedent decree of distribution in equity.\textsuperscript{281} In a wide variety of situations heirs have been deemed to possess all the elements of legal ownership. What was once regarded as purely equitable doctrine to be applied in courts of equity has blossomed into full flower as a well recognized legal principle.

Reverting to the question previously raised, what becomes of the decedent's property if administration is not granted? May the heirs prevent the appointment of a personal representative? Does it follow that the heirs may never sue for and collect the decedent's property? Do they ever become entitled to the possession and ownership of it? And may they gain a marketable title? Perhaps simple, categorical answers are not feasible. The solutions to these inquiries, however,
will circumscribe the areas in which administration may be dispensed with. We turn now to a consideration of each of the inquiries in relation to the stated functions of administration.

I. Right of creditors to require administration and enforce claims

Let us assume that the heirs of a particular decedent have agreed upon a division of the estate among themselves, but that there are one or more outstanding creditors. Under what circumstances may the heirs successfully resist the demands of creditors that formal administration be granted? Will the claims of creditors also become barred in the absence of administration? Several possibilities need to be considered here.

First, the heirs may pay the creditor directly and thus disable him from further demanding administration. A Texas statute provides that they may defeat the application of the creditor "by the payment of the claim of such creditor." It is also sometimes provided that it may be defeated by proof that such claim is fictitious, fraudulent, illegal or barred by limitation.

Second, provision is also made in Texas for the heirs to execute a bond, conditioned to pay the debt. Creditors are thus given a new res as security for their debts in place of the estate which can be transmitted to the heirs without an official administration.

Administration has also been refused when the creditor had ample security for his debt, or where he could bring a direct action against the heirs themselves. Under a Texas statute already mentioned, necessity for administration on an estate is determined by the existence of at least two creditors. Where there is only one creditor, he is said to be adequately protected by permitting him to enforce his claim against the estate in the hands of distributees. This procedure resembles very closely that of the civil law under which the heir takes the decedent's property and at the same time becomes liable for his debts.

283 See, for example, Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3340. Similar provisions are found in many probate codes.
Where several debts exist, the problem begins to suggest complications which justify a formal administration.

Finally there is a substantial body of legislation designed to encourage timely administration proceedings and to bar creditors who do not take appropriate steps to enforce their claims when others do not apply for administration. First, there is the group of statutes already referred to limiting the time for the granting of administration. Such statutes exist in Connecticut, Iowa, Kentucky, Maine, Massachusetts, Pennsylvania, Tennessee and Texas. There is a difference of opinion as to whether these statutes affect the power or jurisdiction of the court, or whether they are intended merely as statutes of limitation on the granting of letters. In Idaho it has been held that an administration proceeding is regarded as an "action" and is subject to the general four year statute of limitations.

Second, there are statutes in Colorado, Florida, Kansas, Nebraska, Oregon and Wyoming which purport to bar claims

290 Iowa Code (Reichmann, 1939) § 11891 (five years, except that if death occurs out of state, period does not begin to run until death is known; if property is discovered after the expiration of five years, administration may be granted only for the purpose of making distribution thereof).
294 Pa. Stat. Ann. (Purdon, 1930) tit. 20, § 342 (twenty one years, except upon order of the Orphans' Court upon due cause shown). But letters granted after the expiration of twenty one years without such an order have been held not to be absolutely void for all purposes. Foster v. Commonwealth, 35 Pa. St. 148 (1860).
295 Tenn. Code Ann. (Michie, 1938) § 8167 (ten years; twenty-two years for infant distributee).
296 Tex. Civ. Stat. Ann. (Vernon, 1939) arts. 3325, 3370 (four years except where administration is necessary to recover funds or other property due the estate).
297 In Maine it has been held that the lapse of time deprives the probate court of any jurisdiction to grant administration. Bean v. Bumpus, 22 Me. 549 (1843). An early Tennessee case held similarly. Rice v. Henly, 6 Pick. (90 Tenn.) 69, 15 S. W. 748 (1891). But see Weaver v. Hughes, 26 Tenn. App. 436, 173 S. W. (2d) 159 (1943), which held that an appointment of an executor after the expiration of ten years could not be attacked collaterally.
298 Gwinn v. Melvin, 9 Idaho 202, 72 P. 961 (1903).
304 Wyo. Laws, 1945, c. 69 (two years).
of creditors unless administration is granted within a specified time after death. These are special statutes of nonclaim applying in the absence of administration. The basic idea behind these statutes is that when the parties immediately interested in an estate fail to have an administrator appointed within the time fixed by the statute, then any creditor may cause one to be appointed, and the statute of limitations then begins to run against the creditor. Failure to apply for administration within the prescribed period operates to bar the claim as effectively as does the statute of nonclaim when administration has been granted. To permit the statutes of limitation to be tolled indefinitely in the absence of administration would be to defeat their fundamental purpose as statutes of repose. General nonclaim statutes operate only after administration is granted. There seems no adequate reason to authorize creditors to effect collection of their claims by demanding administration and at the same time toll the statute of limitations in their favor when they do not employ the means afforded to enforce their claims. In Michigan and Minnesota statutes differing in form but not in substance require creditors to file their claims in the probate court within a designated period of time or be forever barred, implying that they or some other interested person must initiate proceedings for administration in ample time prior thereto.

Third, statutes exist in Missouri, Nevada, New Hampshire, New Mexico, Rhode Island, Washington and Wisconsin, pro-


Nev. Comp. Laws (Hillyer, 1929) § 8534 (three years).

N. H. Rev. Laws (1942) c. 355, §§ 29, 30 (two years).


Wis. Stat. (1943) § 316.01 (three years).
hibiting creditors from subjecting land of a decedent for the payment of their claims if administration is not granted within a designated period of time following death.\textsuperscript{315} All statutes of this kind do not apply to personalty. They are primarily statutes of repose, passed in the interests of marketability of titles of land. Idaho statutes\textsuperscript{316} provide a method for a determination of heirship after two years have elapsed from the date of death of a decedent upon whose estate administration is not contemplated in Idaho. Provision is made for creditors to file their claims in that proceeding, failing which all claims are barred.

In regard to the statute of limitations it is ordinarily held that its running is interrupted from the date of death until the appointment of a personal representative.\textsuperscript{317} Even if no such interruption occurred it would be difficult to determine with any great certainty when all debts have become barred, for maturity dates may not occur until long after death, or disabilities of creditors may prevent the continuous running of the statute. A North Dakota statute\textsuperscript{318} suspends the running of the statute of limitations upon death only until a creditor is authorized to apply for letters of administration. For the reasons mentioned, it is doubtful how effective this statute is for the purpose of determining the non-existence of creditors' claims at any particular time.

Closely associated with the liability of the decedent's property for his debts is its liability for inheritance or succession taxes. A frequent, though not universal, procedure, is for such taxes to be assessed in connection with or as a part of the administration proceeding. If administration is not had and there is no separate assessment of inheritance taxes, what is the duration of liability of the property of the estate in the hands of distributees? A common provision of tax statutes

\textsuperscript{315} Austin v. Shipman, 160 Mo. App. 206, 141 S.W. 425 (1911) (dictum); Kling v. Greif Realty Co., 166 Mo. App. 190, 148 S. W. 203 (1912) (dictum); In re Smith's Estate, 25 Wash. 539, 66 P. 93 (1901); Gleason v. Hawkins, 32 Wash. 464, 73 P. 533 (1903); Murphy v. Murphy, 42 Wash. 142, 84 P. 646 (1906); Fuhrman v. Power, 43 Wash. 533, 86 P. 940 (1906); State ex rel. Speckart v. Superior Court, 48 Wash. 141, 92 P. 942 (1907); Duvall v. Healy Lumber Co., 57 Wash. 446, 107 P. 357, 109 P. 505 (1910); In re Mason's Estate, 95 Wash. 564, 164 P. 205 (1917); In re Peterson’s Estate, 137 Wash. 137, 241 P. 964 (1926); Scott v. Stanley, 149 Wash. 29, 270 P. 110 (1928) (dictum); In re Mundt's Estate, 169 Wash. 593, 14 P. (2d) 59 (1932) (dictum); In re Patrick’s Estate, 195 Wash. 105, 79 P. (2d) 669 (1938); Scholl v. Adams, 206 Wis. 174, 239 N. W. 452 (1931); Estate of Koebel, 225 Wis. 342, 274 N. W. 262 (1937).


\textsuperscript{318} N. D. Rev. Code Ann. (1943) § 30-1809.
is that inheritance taxes remain a lien until paid, which is another way of saying that the statute of limitations does not run against the state on its claim for inheritance taxes. In some states this would compel an entire administration proceeding in order to obtain an assessment of inheritance taxes. Several states have statutes providing for the assessment and payment of taxes in a separate proceeding when no administration is had, or for a determination that none is due. Some statutes now provide that the claim of the state for such taxes is barred after the expiration of a stated period of time. Such special limitation statutes are representative of a larger trend toward barring the state in respect to certain claims affecting land and promoting marketability. In some cases, however, these statutes of limitation bar the state only with respect to property in the hands of purchasers. Irrespective of the form of these statutes of limitation, they are intended primarily to promote marketability of titles and in some instances to give repose to the possession of the heirs.

2. Right of heirs to collect assets

The problem of making collection of assets belonging to an estate is the first concern of heirs where no administration is contemplated. It is often said that when there are no debts, the heirs may take possession of the estate without administration. An ability to make


320 Johnson's Administrator v. Longmire, 39 Ala. 143 (1863); Walworth v. Abel, 52 Pa. 370 (1866); McLean's Executors v. Wade, 53 Pa. 140 (1866); Weaver
an effective collection is an essential for a successful informal settlement. If the heirs are already in possession of the decedent's property or can make a physical assembly of it, well and good; but when the assets include property in the hands of or claims against third persons, difficulties may be encountered. Immediately the question arises as to whether the heirs may successfully sue to recover specific property or a debt from the third party. It will probably be agreed that such actions should not be allowed as a matter of general policy unless all debts have been paid or the estate is not subject to them. Suppose, however, that it is proved to the satisfaction of the court that all debts have been paid. May recovery be permitted? A negative answer has been given in most cases on the theory that the decedent's creditors, if any, are not parties to the action and that the non-existence of debts can only be judicially determined by an official administration. As was said in one case, "One of the purposes of administration is the payment of the debts of the deceased and the barring of claims against the estate. A mere statement or affidavit that there are no such claims cannot establish that fact. Such fact can only be judicially established by due course of administration." 

Such decisions are predicated upon three implicit assumptions. First, it is said that the heirs cannot know or prove with absolute certainty whether the decedent was indebted or not. But absolute proof of a fact is seldom, if ever, required. Why should it be required in actions of this kind? Something less than absolute verity could well be accepted here. Should it always be doubted that the decedent's family never know of his financial affairs? In proceedings for the summary administration of estates or for an order of "no administration" their word is accepted by the probate court as a basis for action. Second, it is said that if payment is required of a debtor or if payment is voluntarily made by him, he would also be liable to a subsequently appointed administrator. This

v. Roth, 105 Pa. 408 (1884); Needham v. Gillett, 39 Mich. 574 (1878); Woodhouse v. Phelps, 51 Conn. 521 (1884); Vail v. Anderson, 61 Minn. 552, 64 N. W. 47 (1895); Richardson v. Cole, 160 Mo. 372, 61 S. W. 182 (1901); Moore v. Brandenburg, 248 Ill. 232, 93 N. E. 733 (1910). 


822 State ex rel. Mann v. Superior Court, 52 Wash. 149 at 152, 100 P. 198 (1909).
oft-repeated statement has just enough truth in it to justify caution in allowing recovery or to justify a debtor in refusing payment voluntarily. But it will be shown later that the actual cases do not support this statement as a general proposition. If payment is made, courts will go to unusual lengths to relieve the debtor from making a second payment. Third, it is assumed that the payment of money to the heirs will result in its immediate dissipation by them and that recovery of it from them by a subsequently appointed administrator would be impossible. It is never assumed that the heirs might apply it to the payment of claims, particularly to funeral expenses or other preferred claims. Insolvency or dishonesty on the part of heirs is too readily assumed. Why not assume that money or property in their hands would be as safe there as in the hands of the third person? These are the arguments advanced to deny recovery by the heirs. They are not without some weight. Their validity, however, as expressions of human conduct may be open to some question as a basis for an absolute rule of law.

More courageous courts have seen fit to depart from this strict rule and have permitted the heirs to show, by whatever evidence available to them, that there are no creditors with outstanding claims at the time of trial or that the assets of the estate would not be subject thereto. Recovery from debtors is permitted upon such proof. The functions of a personal representative, if appointed, would be purely formal and perfunctory, it is said, and would serve no useful purpose. Under such circumstances the only office of administration would be to make distribution and this may be accomplished equally well in an action to recover assets. Such a rule is found to be in particular favor in Alabama and Mississippi where courts of equity have traditionally administered estates. Courts of other states, however, have not hesitated to allow similar actions, even though not instituted in equity.

Even courts which ordinarily refuse recovery from debtors generally permit it under special circumstances. For example, recovery has.

323 Cooper v. Davison, 86 Ala. 367, 5 S. 650 (1888); Braun v. Pettyjohn, 176 Ala. 592, 58 S. 907 (1912); Metropolitan Life Ins. Co. v. Fitzgerald, 137 Ark. 366, 209 S. W. 77 (1919); Business Men's Accident Assn. v. Green, 147 Ark. 199, 227 S. W. 388 (1921); Battey v. Meyerhardt, 157 Ga. 800, 122 S. E. 195 (1924); Moore v. Brandenburg, 248 Ill. 332, 233 N. E. 733 (1919) (lack of indebtedness admitted by demurrer); Merchants' Natl. Bank of Muncie v. McClellan, 40 Ind. App. 1, 80 N.E. 854 (1907); in general, see 2 Woerner, American Law of Administration, 3d ed., 201 (1923); 70 A.L.R. 386 at 389-393.

324 See cases from those states cited in note 323, supra. In Weiland v. Weiland, 297 Ill. App. 239, 17 N. E. (2d) 625 (1938) it was mentioned that although this was originally the rule in equity it would be applied in law as well.
been permitted when the decedent was a minor or insane person and presumably incapable of contracting debts. Occasional cases have said that the non-existence of creditors will be presumed from the mere lapse of time without administration having been had. Of course, the lapse of time required by various statutes for the barring of claims when no administration is sought, will serve equally well as a sufficient basis for allowing recovery. Where a formal administration has proceeded beyond the nonclaim period, recovery by the heirs has sometimes been permitted. But this seems an unsound practice, for it has the effect of a partial distribution in an official administration without satisfying the ordinary requirements therefor. As long as administration has been started, the better practice would seem to be to require its completion before permitting final or partial distribution by a process of a direct collection by the heirs.

As a basis for denying recovery in a direct action by the heirs, the argument is frequently made that the debtor might be called upon to pay a personal representative who might be appointed subsequently. This argument is employed not only by courts in formulating or applying a rule of policy, but it is also constantly reiterated by debtors of the decedent who are requested by heirs to make voluntary payment to them. The comment made by the Supreme Court of Mississippi on this subject is pertinent here:

“If a presumption may be indulged that creditors are barred, or if a reasonable time has elapsed since the death of decedent

Vanzant v. Morris, 25 Ala. 285 (1854); Graves v. Davenport, 45 Colo. 270, 100 P. 429 (1909); Lynch v. Rotan, 39 Ill. 14 (1865); McCleary v. Menke, 109 Ill. 294 (1884); Hargroves v. Thompson, 31 Miss. 211 (1856) (two months old child); Gobb v. Brown, 17 Speers (S. C. Eq.) 564 (1844). In Cobb v. Brown, supra, it was said that this exception dispensing with administration on estates of deceased infants may be going too far “because even infants may be liable for necessaries.”


Jones v. Brevard, 59 Ala. 499 (1877); Anderson v. Smith, 3 Met. (60 Ky.) 491 (1861) (twenty-eight years); Richardson v. Cole, 160 Mo. 372, 61 S. W. 182 (1901) (twelve years); McDowell v. Orphan School, 87 Mo. App. 386 (1901); McLean's Executors v. Wade, 53 Pa. 146 (1866); Dixon v. Roessler, 76 S. C. 415, 57 S. E. 203 (1906); Duncan v. Veal, 49 Tex. 603 (1878) (fourteen years); Mott v. Riddell, (Tex. 1880) 2 Posey, Unrep. Cas. 107; Hill v. Young, 7 Wash. 33, 34 P. 144 (1893) (eight years); Murphy v. Murphy, 42 Wash. 142, 84 P. 646 (1906); State ex rel. Speckart v. Superior Court, 48 Wash. 141, 92 P. 942 (1907); Duvall v. Healy Lumber Co., 57 Wash. 446, 107 P. 357, affd. on rehearing, 57 Wash. 452, 109 P. 305 (1910) (thirteen years); In re Peterson's Estate, 137 Wash. 137, 241 P. 964 (1926) (twenty-seven years).

See notes 289 to 319, inc., supra.

to give creditors a full opportunity to open on administration, ... and they have failed to do so, a stranger, who is called to an account at the suit of the distributees, ought not to be permitted to defeat a recovery, for the reason that there are or may be outstanding debts. A recovery by them does not cut off creditors or put them in a worse predicament than they were before. ... After so long a time, with no steps taken by the creditors to take out letters, or otherwise move toward its collection, it would be inequitable to permit ... defendant to set up the right which this stale creditor may or may not have, might or might not assert, to cut off the right of the distributee.”

However, where payment has been made voluntarily to the heirs, where no creditors appear or demand administration, and where a personal representative is later appointed who brings an action on the debt, courts have seldom hesitated to deny a second recovery. For example, in Molendorp v. First National Bank of Sibley, a decedent by his will left all of his estate to his wife. A son was later appointed administrator with the will annexed and sought recovery of a bank deposit which had previously been paid to the widow, although she had not taken out administration. There were ample funds in the estate to pay all debts. In denying the right of the administrator to make a second collection of the deposit from the bank, the court said:

“The one chief purpose of administration upon an estate is to collect the assets, apply the same to the payment of all proper charges and expenses, and turn the remainder over to the heirs or legatees entitled thereto. For this purpose, it is true that the legal title to the assets is in the administrator, and, in strict regularity, one who is indebted to the estate should make payment to him; but if, instead of so doing, the debtor, acting in good faith, should, by mistake of law or fact, make payment directly to the person who would be entitled to receive it through the administrator, and the money is not needed or required by the administrator for the payment of claims or expenses, the end of the law is accomplished, and it would be little less than ridiculous to hold the debtor liable to pay his debt over again .... The law requires no vain things.

Ricks v. Hilliard, 45 Miss. 359 at 363-364 (1871).
When the deposit was paid to the widow, the money reached the hands of her who was vested with the ultimate right to receive it; and, as no part of it was required to meet or defray the needs of administration, no one was in any manner injured or wronged by the 'short circuiting' of the deposit from the bank to the widow, instead of passing it through the hands of the administrator.382

The risk entailed in paying out money to those persons apparently entitled to it can be reduced to a minimum by applying it or by seeing that it is applied to the payment of funeral expenses and other preferred claims. If a personal representative is subsequently appointed, the debtor is subrogated to the right of the preferred claimant to whom the payment has been made and thus freed from any further liability to the estate.383 Thus in Van Meter v. Illinois Merchants Trust Co., a decedent left $355 on deposit in a Chicago bank. At the instance of a sister the deposit was applied in payment of the funeral expenses amounting to some $367. Subsequently the public administrator applied for and was granted letters and attempted to make a second collection of the deposit. In denying recovery and saying that administration should not be granted merely for the sake of administration, the court said:384

"It is stated in defendant's brief that it is a long-established and well-known custom among Chicago banks generally voluntarily to pay over, without administration, small balances to either the undertaker or heirs of depositors reported dead upon being furnished with proper affidavit, inheritance tax release, receipted funeral bills, and an undertaker's assignment. Such a custom, especially where the heirs consent, would seem to be desirable and commendable and should not be disturbed by officious meddling for the sake of possible administration fees."

In small estates also where there are but a few debts owing to a decedent and these small in amount, the practice of requiring formal administration seems an unnecessary burden imposed upon the decedent's family. Ordinarily, such debts include nothing more than small bank accounts, wage or insurance claims, all of which would ordinarily not be more than sufficient to pay funeral expenses and perhaps a small family allowance. Often they are less than the amount to which the surviving family is entitled as exempt property.

382 183 Iowa 174 at 176, 166 N.W. 733 (1918).
384 239 Ill. App. 618 at 622 (1926).
Under such circumstances, methods should be available to permit collection of these assets by the surviving family or other relatives, irrespective of the existence of debts against the estate. Administration could only decrease the net amount available to them and prolong the time of its realization. An historical survey of existing legislation reveals that numerous statutes have been passed, particularly during the last decade, authorizing the payment of small bank accounts, wage claims, savings and loan shares and proceeds of insurance policies to designated surviving members of the decedent's family. These statutes vary considerably in the kind of debts and property to which they apply and the amount or value which they permit to be paid without administration. All of them represent wholesome legislation although the maximum amounts of money provided in many of them are often appallingly small. For example, the amount of wages which may be paid to a surviving widow under such a statute must not exceed


$75 in Delaware, $100 in Alabama, and $150 in Indiana, New York, Ohio and Pennsylvania. The Connecticut statute is more liberal, allowing up to $500, and the Wisconsin statute does not limit the amount. Corresponding variations exist in the amounts of bank deposits thus payable.

The singling out of particular kinds of property or debts for allowing payment direct to the heirs seems an unsound practice. Much of it appears to be banking or employer legislation, rather than probate legislation. A better method is not to restrict the payment of such claims to a particular type of property such as bank deposits or wages, but to permit the payment, delivery or transfer of any kind of debt or property where the total amount of the estate does not exceed a stated sum. This has been done in California, Florida, Illinois, Montana, New Jersey, North Carolina, South Carolina and Virginia. In New Jersey, however, the amount thus payable must not exceed $200. A more liberal sum is allowed in California and Illinois where a maximum of $1,000 may be paid, transferred or delivered. The sum thus payable under the California statute is not considered exempt property, however. It is payable to a surviving spouse or other relative as a temporary expedient with the expectation that it will be applied to the payment of funeral expenses and used as a kind of family allowance. If administration is later granted, then the person receiving such funds must account for them to the personal representative. In Brezzo v. Brangero, the California Court of Appeals said that such collection does not give a surviving spouse title to the fund but that “the purpose of legislation... was to provide the family of the deceased with temporary funds for such immediate necessities as funeral expenses, and perhaps to provide ready money for their support pending the probate of their estate. This being so, the husband... was en-

titled to withdraw the funds from the bank, but this did not give the husband title to the fund, that is to say, it was not intended by the provisions of the section that the fund should become the property of the husband.” On the contrary, it must be accounted for or paid over to the personal representative, if one is later appointed. It seems probable, however, that in the great majority of small estates no administration would later be granted and that the collection and application of the money by the surviving spouse or other relative would never be questioned or disturbed.

The procedure contemplated by the statutes of California, Illinois and New Jersey is for some member of the family to present an affidavit to the debtor to the effect that the total amount of the decedent’s estate does not exceed the statutory amount. The debtor is thereupon entitled to accept and rely upon the facts stated in the affidavit. This appears to be a highly desirable way of permitting the collection of small estates without resort to some judicial procedure. It provides a simple and inexpensive method of administration for a small estate, and at the same time it provides adequate and complete protection to a debtor who is willing to make payment. The Illinois act, said Professor Freund at the time of its enactment in 1927, “legalizes a practice which it is understood has in the past been indulged in to some extent by institutions at their own risk.”

These statutes vary in another respect. Some are obligatory upon the debtor while others are only permissive. The Indiana statutes, for example, provide that “It shall be lawful for any employer” to pay wages or earnings owing to a decedent to the surviving spouse, children over the age of eighteen years, or certain other relatives. It is further provided that “The payment of such wages or personal earnings shall be a full discharge and release to the employer.” Corresponding provisions exist for the payment of bank deposits. Such statutes are to be contrasted with the Illinois statutes which provide that “Upon receiving an affidavit that a resident of this state died leaving personal estate not exceeding one thousand dollars in value, that no letters are then outstanding on the estate in this state, that no petition for letters on the estate is pending in this state, that all funeral expenses of the decedent have been paid, that thirty days have elapsed since the death of the decedent and that the affiant has knowledge of the facts, any person or corporation indebted to or holding personal estate of the decedent

may pay the indebtedness or deliver the personal estate" to certain designated members of the decedent's family. This statute, standing alone, is purely voluntary as is the Indiana statute. A companion Illinois statute provides, however, that if such person or corporation to whom the affidavit is delivered refuses to pay, deliver or transfer the personal estate, "it may be recovered in a civil action by or on behalf of the person entitled to receive it upon proof of the facts required to be stated in the affidavit." It is also provided that "For the purpose of the action the affidavit is prima facie proof of the facts stated therein." Such a statute has the advantage of permitting a recovery of property without taking out administration where the heirs are actually entitled to it. It is not only permissive in character, but it also permits direct action to be brought to recover money or property where the amount is sufficiently small as not to justify formal administration. Whether payment or delivery is made by the third party voluntarily or pursuant to a judgment rendered in an action by the heirs, such third party is adequately protected and becomes fully discharged of his obligation to the estate of the decedent. Whether the estate actually exceeds the statutory amount does not affect the debtor's discharge. He is entitled to rely upon and have the benefit of the recitals contained in the affidavit. Similar provisions of this latter kind exist also in the California and New Jersey statutes. Another desirable feature of the Illinois statute is that it requires a thirty-day waiting period before such payment or delivery may be made. If there are outstanding creditors and the family has not applied for administration, the creditors would doubtless have taken action by this time. Such a requirement operates as a practical protection to creditors by affording them a reasonable opportunity to apply for administration during this period.

A further difference in these statutes authorizing the collection of wages, bank deposits and the like, concerns the stated maximum. In California, Connecticut, Florida, Illinois and New Jersey, the entire estate, including the bank deposits, wages and all other property must not, in the aggregate, exceed the amount specified in the statute. On the other hand, the statutes of Arizona, Georgia, Indiana, New Mexico, New York, Oregon, Utah and Washington treat each item separately. As a result, it is possible in any of these latter states for the family of the decedent to collect bank deposits, wages, insurance and building and loan shares each in the maximum amount stated in the statute. This selection of different kinds of property as a basis for allowing recovery by the heirs seems unjustified in view of the primary purpose of these
statutes. The total amount of the estate, not the separate amounts of different kinds of property, should be the basis for their application.

3. Distribution of residue

Assuming that neither heirs nor creditors have demanded administration or that they have been successfully resisted, and that the heirs have been able to make a full collection of all assets belonging to the estate, the next question concerns the efficacy of distribution and partition of the assets of the estate among the heirs. With the property in their possession there might seem to be no obstacle to its distribution as long as all of the parties in interest are sui juris and have reached an agreement as to its division. So long as no one is adversely affected by such a family settlement, such a procedure is a commendable one. It relieves the burden of the courts, it promotes good feeling among the heirs, and it returns property to commerce sooner than would ordinarily be possible by the processes of an administration proceeding.

The solution of the problem, however, is not always possible or as simple as above stated. As indicated, three conditions must exist: the absence of creditors with existing claims, the legal capacity of all heirs who are entitled to share in the estate, and their agreement as to how the property is to be distributed. It is assumed that there is a participation by all heirs and that no question exists as to their identity or relationship. Only in relatively rare causes is there likely to be any difficulty as to who is entitled to the estate under the statute of descent and distribution, or under any agreement which the parties may enter into. It is entirely possible also that the nature of the property interests involved is so complex, or the rights of the parties so various, that a division may be impracticable if an attempt is made to distribute according to the statute; but, of course, there is no requirement that they make division in that precise manner. Any agreement among the heirs, fairly entered into, will be given full effect as between all persons bound by it. Any attempt by an heir to withdraw or repudiate such an agreement by seeking the appointment of a personal representative will ordinarily meet with failure. To permit an administrator so appointed to recover

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849 See, for example, Bennett v. Morris, 111 Ill. App. 150 (1903), where an agreement between the widow and heirs to distribute the estate became impossible to carry out and the court thereupon granted administration and ordered distribution made as though no such agreement had been made.

property from the heirs, only to redistribute it to them later, would be utterly futile.

4. Effectiveness of distribution as conferring marketable title

Another aspect of this problem arises when the assets of the estate consist of land, registered securities or other property the title to which is registered. The heirs may be in perfect accord as to its division and distribution. They may even make division and distribution among themselves. In this connection two matters need consideration, one presently, the other prospectively. For registered securities or other similar property immediate transfer will usually be desired. The heirs will ordinarily have physical possession of such securities or property but the transfer agent or public officer must be satisfied of the validity and effectiveness of such a family settlement to justify his transfer to those persons entitled to succeed to their ownership. This means compliance with the three conditions already enumerated: An examination of existing legislation discloses several statutes, most of them recently enacted, designed to provide for the transfer of such registered property without the necessity of formal administration.

As to registered securities and stock in a corporation, the statutes of California\textsuperscript{851} and Illinois\textsuperscript{852} are specific in authorizing their transfer upon the furnishing to the corporation or transfer agent of an affidavit of the same kind as is required for the payment of money or the delivery of property where no administration has been had. This would probably also be true under the New Jersey statutes\textsuperscript{853} although it is not explicitly declared. In the absence of such legislation, there are those occasional instances in which corporations or transfer agents do make transfers of registered securities and stock upon evidence satisfactory to them that the transferee is entitled thereto and that there is no outstanding indebtedness.

As to automobiles for which certificates of title are now generally issued, a similar problem is presented. The public official, whose duty it is to issue a new certificate of title in place of the old one issued in the name of the decedent, ordinarily relies upon an order of transfer or decree of distribution made by the probate court having jurisdiction over the decedent’s estate. In the absence of administration the transfer of the family car involves much the same problem as payment of wages or bank deposits. Within the past decade statutes have been adopted in

California, Maryland, Michigan, Montana, Utah, Virginia and Wyoming authorizing the transfer of a registered title to motor vehicles when their value is less than a stated amount, upon presentation of an affidavit showing the value of the estate left by the decedent and the right of the person seeking the transfer.

As to land, the heirs may make immediate partition or division among themselves by an exchange of deeds. There is no transfer agent or public officer to question the validity of such a procedure. And the respective heirs may continue to possess and enjoy the property so allotted to them. Only upon a future sale by the heirs to some third party will the subject of the validity of the family settlement be presented. This future purchaser will want to know that the land is not subject to claims against the decedent and that those who participated in the settlement constituted all the heirs of the decedent. In some few states the bar of creditors may not be possible in the absence of administration, but statutes of the kind already discussed may be determinative of the question.

As earlier indicated, a separate determination and assessment of inheritance taxes may be had in most states where no official administration is had. Such proceedings will afford the basis for a clearance of the state's lien. And in a substantial number of states there are statutes which bar the state in the assertion of its tax lien after the lapse of a period of time without administration and without any action having been taken by the state to make collection.

The determination of heirship alone remains. In some states there is an official and conclusive determination of heirship in an administra-

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354 Cal. Vehicle Code (Deering, 1943) § 185 ($1,000).
355 Md. Ann. Code (Flack, Supp. 1943) art. 93, § 243A, as amended by Md. Laws, 1945, c. 35. By art. 93, § 243B, added by Md. Laws, 1945, c. 466, the certificate of registration of a boat or vessel not exceeding $500 in value may likewise be transferred.
357 Mont. Laws, 1943, c. 148, § 2(e) ($1,000).
358 Utah Code Ann. (1943) §§ 57-32-70 ($1,000).
359 Va. Code Ann. (Michie, Supp. 1944) § 2154(74) (f) (when automobile is only personal property belonging to decedent and his debts have been paid or will be paid out of proceeds of sale of motor vehicle).
360 Wyo. Laws, 1945, c. 112 (when there is no other property necessitating administration and there are no unpaid debts; and after creditors have been given twenty days' notice).
362 See notes 289 to 319, supra.
363 See note 319, supra.
tion proceeding. Elsewhere, where the land passes directly to the heirs and the personal representative obtains no jurisdiction over it unless needed for the payment of debts, an affidavit is employed or the heirship is inferred from the record or from recitals in a conveyance from the heirs. The absence of administration does not affect the problem of determining heirship except in those states where there is an official determination of heirship in connection with the administration proceeding or as a part of the decree of final distribution. And, of course, where it is inferred in some manner from the record in the administration proceedings, some substitute is needed when no administration is had.

Where an affidavit or a recital in a deed from the heirs is customarily employed to prove heirship and is accepted as a basis for marketable title, the same procedure should be followed where no administration has been had. But when a decree of heirship in an administration proceeding is customarily relied on, obviously some substitute for it will be necessary here. In several states statutes have accordingly been passed providing for a summary determination of heirship where there has been no administration proceeding. Some of these statutes purport to make the determination conclusive in the same manner as a similar decree made in connection with an administration proceeding. Usually, however, decrees of heirship have only prima facie effect as to their correctness. Despite this shortcoming, they do have some value and are readily accepted as evidence of heirship by title examiners.

Special statutes have been enacted in Idaho, Nebraska and

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3 Woerner, American Law of Administration, 3d ed., § 561 (1923); 3 Bancroft's Probate Practice, § 1147 (1928).

3 Patton, Land Titles, § 288 (1938).


New Mexico providing that where a certain period has elapsed since the death of a person owning real property in such state, and upon whose estate no administration has been had or applied for, the heirs of the decedent or other person having an interest in said real property, may file a petition in the probate court and ask for a determination of heirship. After notice by publication, the court makes an official determination of heirship which has the same effect as a decree of final distribution in those states where such a decree is regarded as having full effect with respect to the decedent's property. Under the Idaho statute, if a creditor appears and presents a claim, then the court must grant administration in the usual manner; otherwise the decree of heirship is final. Under the Nebraska and New Mexico statutes, however, no such permission is given for creditors to present their claims, for the reason that their claims, insofar as land of the decedent is concerned, have ceased to be a lien thereon. Since there is no such statute in Idaho barring claims after the lapse of two years when there has been no administration, it is only proper that creditors be given the right to present their claims in connection with such a proceeding and ask for administration in the usual manner. Being afforded such an opportunity, creditors are not deprived of any right without due process of law.

E. Dispensing with Ancillary Administration

When a decedent dies owning property in states other than that of his domicile, it is conceivable that one administration upon his estate would suffice. The domiciliary representative would need powers to collect assets throughout all the states; and local creditors in each state would be required to come to the state of domicile where administration is being had to present their claims. The law has not developed in this fashion, however. The orthodox view is that, in the absence of statute, the powers of a personal representative cease at the borders of the state which appointed him. And other states in which the decedent's property may be located have sometimes insisted on local administration in order to simplify the problem for the decedent's creditors residing there. The phenomenon of ancillary administration has resulted.

Assuming that domiciliary administration is had on the estate of a

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370 For an extended consideration and analysis of the problems here considered from the point of view of conflict of laws, two studies should be mentioned: Buchanan and Myers, "The Administration of Intangibles in View of First National Bank v. Maine," 48 Harv. L. Rev. 911 (1935); Hopkins, "Conflict of Laws in Administration of Decedents' Intangibles," 28 Iowa L. Rev. 422 (1943).
decedent, to what extent may the requirements of administration be dis­pensed with in a second state in which assets are located? The answer to this question will depend on two factors: (1) how far the second state will give recognition to the appointment and powers of the per­sonal representative of the state of domicile; and (2) to what degree and for what duration it desires to protect local creditors by making assets located there available to their claims.

If a personal representative could make physical collection of assets located in states other than that of his appointment, administration would then, as a practical matter, be confined to that state. This is a practical possibility only if debtors and persons in another jurisdiction are willing to make payment, or deliver property voluntarily to the personal representative, or are under a legal obligation to do so. The conflict of laws rules of such jurisdiction thus become the determining factor in the solution of the whole problem of dispensing with ancillary administration.

If the domiciliary representative be regarded as succeeding to the “title” to all property of the decedent, irrespective of its location, it would seem to follow that extraterritorial recognition should be given to his rights and powers. Unification of administration on decedents’ estates would be the rule rather than the exception. Opposing this view is the theory which confines the official personality of the personal re­presentative to the state of his appointment. Multiplication of admin­istrations is the result of this latter view. Despite the existence of both of these theories it would be untrue to say that any state recognizes one to the complete exclusion of the other. Often both theories have under­gone a measure of contemporaneous development in the same jurisdic­tion.

As will be shown in the discussion that follows, the protection of local creditors has been the primary argument for denying to foreign domiciliary representatives the right to collect assets or to maintain an action therefor. This alleged reason of policy, it is submitted, has little or no basis in fact in the great majority of estates. The resulting re­quirement of ancillary administration leads only to a wasteful expendi­ture of time, effort and expense. It is time to re-examine the question whether the alternative of requiring all creditors to file their claims in the domiciliary administration would not be a more desirable solution from every point of view.

Despite the risks involved in making payments or delivering prop­erty to foreign domiciliary personal representatives in the absence of statutory authority, the fact is that many debtors and persons having
possession of property take such risks and make payments or deliver property to the foreign administrator. It is seldom that such persons are called upon to account again to a local administrator. The problem involved is similar to that which arises when a debtor of a decedent makes payment direct to the heirs when no personal representative has been appointed and administration is not contemplated.

I. Voluntary payment to foreign personal representatives

Behind such cases as *Crohn v. Clay County State Bank*, in which a Missouri debtor was held not discharged in making voluntary payment to an Iowa administrator, lies a policy of protecting local creditors. Such a result is often explained by saying that the legal personality of the administrator does not extend beyond the borders of the state from which he derives his authority. While there is a logical basis for such a view, the alleged protection of local creditors is more often a myth than a reality. An early decision of the Supreme Court of the United States, *Wilkins v. Ellett*, gave momentum to a contrary view when it held that voluntary payment by a debtor to a foreign administrator was a valid discharge of the debt. Reference was made in the opinion to the doctrine of *mobilia sequuntur personam*. This timeworn rule, so often of late disregarded in matters of taxation, was thought to be socially serviceable in that situation. Fortunately this decision has influenced others and today its rule serves as the controlling guide in most states.

It should be said, however, that most of the decisions which have upheld voluntary payments to a foreign administrator have been those in which creditors did not exist or did not assert their rights in the state where payment was being made. When creditors do exist or when an ancillary personal representative has been appointed, it may be arguable that a contrary decision would be justified. In either of these events, two other inquiries become pertinent. First, the existence of local creditors may not be known to the debtor; indeed, it is often said that local administration is a prerequisite to the determination of the existence or absence of creditors. Second, the appointment of a local ancillary administrator may not be known, especially since the venue for administration on the estate of a nonresident decedent may be the result of

372 9 Wall. (76 U.S.) 740 (1869).
373 3 BEALE, CONFLICT OF LAWS 1472 (1935); GOODRICH, CONFLICT OF LAWS, 2d ed., § 183 (1938); BEALE, "Voluntary Payment to a Foreign Administrator," 42 HARV. L. REV. 597 (1929).
a wide choice on the part of those applying for it.\textsuperscript{374} The New York Court of Appeals remarked in one case\textsuperscript{375} that to require that there be no local administrator as a prerequisite for discharging a debtor who made voluntary payment to a foreign personal representative would, in effect, require the debtor to examine the records of every surrogate's office in the state. Such a rule, it was most appropriately said, would be exceedingly burdensome to debtors and seriously interfere with the collection of debts. The \textit{Conflict of Laws Restatement}\textsuperscript{376} has adopted the pronouncement of the New York court by making the lack of knowledge on the part of the debtor of the appointment of a local personal representative the sole condition for his discharge. But while voluntary payments made to a foreign personal representative have in some instances been recognized as a valid discharge of the debtor's obligation if he has received no notice of the appointment of an ancillary representative,\textsuperscript{377} some states are willing to give an acquittance to the debtor only in the event that no ancillary representative has in fact been appointed,\textsuperscript{378} and still others only in the event that an ancillary representative is not appointed later.\textsuperscript{379}

In a few states\textsuperscript{380} legislation expressly provides that local debtors may pay debts to a decedent's personal representative in another state if they have no knowledge of local administration proceedings. Of this legislation, the Ohio and Rhode Island statutes permit payment at


\textsuperscript{375} Maas v. German Savings Bank, 176 N.Y. 377, 382, 68 N.E. 658 (1903).

\textsuperscript{376} \textit{Conflict of Laws Restatement}, § 482 (1934).


\textsuperscript{379} Crohn v. Clay County State Bank, 137 Mo. App. 712, 118 S. W. 498 (1909); Young v. O'Neal, 3 Sneed (35 Tenn.) 55 (1855).

any time; the Oregon statute requires thirty days notice to the state treasurer; and the Virginia statute authorizes such a procedure only after ninety days from the death of the decedent, unless the amount is more than $1,000, in which event public notice for four weeks is required followed by an additional thirty days before making such payment. In the Illinois statute provision is made for the debtor to rely upon an affidavit furnished by the foreign personal representative that he has no knowledge of any letters issued in that state.

This rule is also contained in the Uniform Powers of Foreign Representatives Act in which it is provided that, in the absence of local administration or application therefor, a foreign personal representative may exercise all powers which would exist in favor of a local personal representative. Payment by the debtor is clearly obligatory and his acquittance, upon payment, is equally certain. The debtor is thus relieved of any uncertainty as to the effect of payment by him under such circumstances. Another section of this act expressly provides that no person who, before receiving actual notice of local administration or application therefor, shall be prejudiced if he makes payment to the foreign representative, although local proceedings have been begun or applied for. Simplification and unification of administration on decedents' estates are thus rendered possible.

A larger number of statutes authorize such payments only if no administration has in fact been commenced. In most instances authenticated copies of domiciliary letters must be filed in local probate courts or furnished to the debtor. The Alabama statute permits such payments

381 Uniform Powers of Foreign Representatives Act, § 2.
382 Uniform Powers of Foreign Representatives Act, § 5.
only after sixty days, the Oregon statute after ninety days, and the Maine statute after six months. The Vermont statute is unnecessarily narrow in confining its application to bank deposits. Notice to local creditors or other interested persons is required in Maine and New Hampshire; and in Maine the foreign personal representative must obtain permission from the local probate court to entitle him to receive such payment.

2. Actions by foreign personal representatives

One might expect to find that the right of foreign personal representatives to enforce payment of debts due their decedents would follow this same pattern as in the cases of voluntary payment by debtors. While it might be agreed that the foreign personal representative had such title to his decedent's property as to entitle him to give a valid receipt for voluntary payment by the debtor, it is another thing to say that he may sue to enforce payment in the courts of another state. In its early stages the law developed the rule that a personal representative could not maintain an action outside the state of his appointment in the absence of statutory permission.\(^{384}\) It is still generally accepted that a personal representative is an officer only in the jurisdiction of the court which appointed him, although he has authority extending throughout the state. He has no authority outside the borders of that state by virtue of his appointment there. Consequently, unless a statute of the debtor's state authorizes actions by foreign personal representatives, the domiciliary representative is powerless to enforce collection and ancillary administration may be a necessary consequence.

Over a period of years, however, states have gradually opened their doors and given permission to a foreign personal representative to sue in the local courts.\(^{385}\) The general tenor of legislation on this subject is to grant power to foreign representatives to maintain actions

\(^{384}\) 3 Beale, Conflict of Laws, § 507.1 (1935).

in much the same manner as local representatives are authorized to do. The recent Uniform Powers of Foreign Representatives Act, \textsuperscript{386} authorizing such actions in the absence of local administration or application therefor, should give added impetus to this desirable method of procedure. A needless administration is thus dispensed with in many cases where the only function of a personal representative is to enforce payment of a debt. Unless there are local creditors whose interests also deserve local protection, there is no reason why a foreign personal representative should not be allowed to enforce such payment.

If it is thought that this does not afford adequate protection to local creditors, it may be said that they are or should be afforded ample time either before or during the pendency of such actions to apply for letters and thus make sure that they may receive payment through local administration. If local creditors do not take advantage of their right to apply for administration within a reasonable time after death, no valid objection should be raised against the maintenance of actions by the domiciliary representative. If statutes have barred the rights of creditors when no local administration has been applied for or granted within a reasonable time, this right to sue would seem to follow. However, no specific statute to this effect has been noted. Since only the rights of local creditors to local enforcement of their claims is involved and not a liability to complete extinction, \textsuperscript{387} the period allowed to local creditors to apply for administration should be quite short, say sixty or ninety days. This would give a reasonable amount of protection to local creditors and at the same time obviate the requirement of needless administration. A few of the statutes noted above \textsuperscript{388} attempt to secure a measure of convenience to local creditors. Thus, Alabama permits local creditors or distributees to intervene; Colorado, Delaware, the District of Columbia, and Kentucky require a bond for the protection of local creditors; and Illinois requires the substitution of a local personal representative if one should be appointed pending the action. Actions by a foreign personal representative are not permitted in Florida prior to the expiration of three months, nor in Rhode Island prior to the expiration of six months after the decedent's death. This much of an opportunity is afforded to local creditors to institute ancillary administration or otherwise obtain local enforcement of their claims.

\textsuperscript{386} Uniform Powers of Foreign Representatives Act, §§ 2, 3.

\textsuperscript{387} The state of domicile must entertain the presentation of claims by all creditors irrespective of their residence. The Federal Constitution requires this. Blake v. McClung, 172 U.S. 239, 19 S. Ct. 165 (1898).

\textsuperscript{388} See statutes cited in note 385, supra.
If actions by foreign representatives are not permitted, the recovery of assets may be possible by assigning the debt or other interest in property to a third party who may then institute an action in his own name and in his own right. In a majority of states where the question has been directly presented, such actions have been permitted.\textsuperscript{389}

3. \textit{Transfer of mercantile specialties}

Much the same considerations apply to the transfer of stock or other registered securities by corporations in a state other than that of the decedent’s domicile. The traditional view has been to treat shares of stock as having a situs at the domicile of the corporation so as to require administration there.\textsuperscript{390} Opposing this is the mercantile theory which treats the attributes of ownership of stock certificates and similar instruments which pass by endorsement or delivery as having the same situs as the instruments themselves, and which places the power of the domiciliary representative to transfer the stock on the same basis as other chattels physically located at the decedent’s domicile.\textsuperscript{391} Thus transfers of stock certificates by a domiciliary representative, supported by appropriate documents showing authority to make such transfers, are entitled to recognition in other states. The elimination of numerous ancillary administrations would follow as a matter of course from this theory. In an attempt to simplify to this extent the problem of administering estates, several states have passed statutes\textsuperscript{392} which specifically authorize corporations to make transfers of stocks and registered bonds from the domiciliary representative in the absence of ancillary admin-


\textsuperscript{390} 3 Beale, Conflict of Laws, §§ 477.1 to 477.4 inc. (1935).

\textsuperscript{391} 3 Beale, Conflict of Laws, §§ 477.1, 477.2 (1935). See also the opinion of Mr. Justice Holmes in Direction der Disconto-Gesellschaft v. United States Steel Corporation, 267 U.S. 22, 45 S. Ct. 207 (1924).

istration in the state of the corporation’s domicile. The Restatement\textsuperscript{393} has likewise adopted this rule of convenience.

4. Release of mortgages by foreign personal representatives

While local prejudices have tended to confine the activities of foreign representatives to the state of their appointment, certain situations have operated to extend their activities. For example, when a decedent dies owning a mortgage on property situated in another state, it may be highly advantageous for the mortgagor to have the mortgage satisfied of record by the foreign personal representative, without requiring ancillary administration. This would be especially true if the mortgage had been paid prior to the death of the mortgagee but formal satisfaction had not been made. No useful purpose would be served by requiring the appointment of an ancillary representative for the mere purpose of making formal satisfaction. If such were required, local land titles would too often be clouded with unreleased mortgages.

As might be expected in this situation, legislation\textsuperscript{394} has been extremely liberal in authorizing a foreign personal representative to satisfy local mortgages left by their decedents, upon recording an authenticated copy of his letters. Statutes of this kind greatly facilitate land title procedure and obviate unnecessary ancillary administration; it is not surprising therefore to find that this procedure is authorized irrespective of the possibility of the existence of local creditors. The interests of local creditors are subordinated to the paramount interests of local mortgagors.

5. Collection of tangible personal property.

The preceding discussion has been largely confined to the administration of intangibles. The problems incident to the reduction to possession or recovery of tangible personal property arises much less frequently today than formerly. Nevertheless it is an important part of the larger problem under consideration. It has often been said that the domiciliary representative has all the rights of ownership which

\textsuperscript{393} CONFLICT OF LAWS RESTATEMENT, § 477(2) (1934). See also 72 A.L.R. 179 et seq. (1931).

the decedent had during his lifetime with respect to property owned by
him. 395 In application, however, this generalization is an overstatement,
if not a misstatement. Certainly if a local personal representative is
appointed in the jurisdiction where tangible personalty belonging to the
decedent is located, he and he alone is entitled to receive delivery of it
or to sue for its possession. 396 On the other hand, if no local personal
representative is appointed, there is authority for permitting the volun­
tary delivery of tangible personal property to the domiciliary repre­
sentative, 397 or even to the heirs directly under some circumstances. 398
There is no substantial difference in the policies permitting the volun­
tary payment of a debt and those permitting the voluntary delivery of
chattels under such conditions. But if the person in possession or control
of the property refuses to deliver it and an action for recovery is neces­
sary, the same rules exist as were considered in the bringing of actions
by foreign personal representatives. As seen previously, actions by a
foreign personal representative are not ordinarily allowed in the ab­
sence of statutory permission. Whether the denial of this right be due
to lack of title or is merely a procedural obstacle, the result is the same
—an inability to collect assets in a foreign jurisdiction without taking
out ancillary administration there.

6. Sale of land by foreign personal representatives

Another purpose for which foreign personal representatives are
allowed to extend their activities outside the state of their appointment
is that of selling, leasing or mortgaging land 399 for the purpose of
paying debts or legacies. From considerations already discussed, it
would seem to follow that in carrying out this function the foreign
personal representative would be encroaching upon local prerogatives.
Nevertheless the land is an immovable and cannot be removed out of
the jurisdiction, although the proceeds from its sale may be so removed.
Several statutes 400 have been passed to authorize foreign representa­

395 Wilkins v. Ellett, 9 Wall. (76 U.S.) 740 (1869); Peterson v. Chemical Bank,
32 N.Y. 21 at 43 (1865).
396 McCully v. Cooper, 114 Cal. 258, 46 P. 82 (1896).
397 CONFLICT OF LAWS RESTATEMENT, §§ 472-475 (1934).
398 See discussion in part III D 2, supra.
399 Personal powers conferred upon a representative by the will of a decedent are
not included. The discussion here refers only to statutory powers given to foreign per­
sonal representatives in their representative capacity and not to personal powers con­
ferred upon executors.
tives, without obtaining local letters, to apply to local probate courts and obtain authority to sell land for these purposes. It is customary to require the foreign representative to furnish authenticated copies of the domiciliary proceedings and also to give a bond to secure creditors and other interested parties. As in the case of authorizing foreign representatives to satisfy mortgages, local creditors are not unduly inconvenienced.

7. Clearing title to land

It is a well-known fact that where a decedent leaves only real estate in a foreign jurisdiction, ancillary administration is frequently taken out as a formality in order to bar the rights of possible creditors and to give a marketable title. In the vast majority of these cases no creditors appear and the whole procedure becomes a mere formality which serves to restrain the alienation of the real estate in the interim. Special statutes of nonclaim applying in the absence of administration have already been discussed. These are fully effective for the purpose. The practical objection to most of these statutes is that the period provided to bar creditors is too long to afford free alienability and marketable title within a reasonable period. At the present time the best legislation designed to promote marketability and alienability of land left by nonresident decedents is found in Ohio. There it is provided that when administration has been granted in any other jurisdiction on the estate of a decedent and no administration has been had in Ohio, the domiciliary representative may file in any county in Ohio where the decedent left real estate an authenticated copy of his letters, whereupon creditors are notified by publication for three weeks. If creditors make claims within six months and their claims remain unsatisfied after reasonable notice to the nonresident personal representative, ancillary administration may be had. Otherwise the lien of creditors is extinguished.

A similar procedure is suggested in the Uniform Powers of Foreign Representatives Act. Upon application by a foreign representa-
tive to the probate court where land of a decedent is located, notice of his appointment is published, and unless creditors file their claims within a specified time, their claims are barred as a lien upon all property of the decedent within such state. If claims are presented and remain unpaid after reasonable notice to the foreign representative, ancillary administration may be granted. The effect of this act, like the Ohio statute, is to provide an opportunity for local creditors to enforce their claims in their own jurisdiction, and to specify a period of non-claim in much the same manner as if ancillary administration were carried out.

Other statutory methods also exist to facilitate the transfer of property in a foreign jurisdiction without requiring ancillary administration there. When a nonresident decedent leaves property in South Dakota 404 or Wyoming 405 which has a value not to exceed $10,000 and administration has been had in another state, administration in either of the two states named may be dispensed with after one year from the decedent's death on filing with the probate court a verified petition therefor with certified copies of the petition, the order of appointment of the domiciliary representative, and the inventory and final decree of distribution therein. After notice by publication for three weeks, the court is authorized to have the domiciliary probate proceedings admitted as a probate or administration of the estate in those states. If creditors appear, the hearing is postponed to permit such creditors to apply for letters of administration. But if no creditors appear, this summary procedure affords a satisfactory substitute for full ancillary administration.

Proceedings to determine heirship or distributees have already been discussed 406 in another connection. Proceedings of this kind are particularly useful in the case of nonresident decedents, although they are applicable to resident and nonresident decedents alike. Where administration proceedings have not been had in a state other than the decedent's domicile and creditors have become barred by the lapse of time, such proceedings will often furnish a simple and effective method of supplying the final indicia of marketable title to land located in the other state. 407

406 See part III D 4, supra.
407 There is also always the question of the determination and discharge of the state's lien for inheritance taxes. See note 363, supra.
Conclusions and Recommendations

The current demand for the improvement of probate procedure is toward two objectives: clarity and simplicity. Much has been done in the past decade in revising, and also in rewriting entire probate codes. Much will be done in the years just ahead. In undertaking the task of simplification the primary functions of administration should be constantly kept in mind. By way of summary and recommendations for methods to dispense with administration in whole or in part, several things may be said.

First, when an estate is small and administration is neither had nor contemplated, statutes should afford the surviving family of a decedent a means of collecting the assets of the estate without the necessity of resorting to administration. Estates up to some agreed value should be embraced within such legislation. This amount should not be so small as to render such legislation useless except in insignificant estates. Furthermore, the family of the decedent entitled to invoke its provisions should not be limited to those entitled to homestead, exemptions or family allowance, but should include all persons who would be classed as distributees. The Model Probate Code\(^{408}\) contains concrete suggestions for legislation of this kind. A lapse of thirty days after death is required before invoking its provisions in order to afford creditors an opportunity to apply for administration. The payment or delivery of assets to the heirs pursuant to the terms of such statutes is not intended, however, to preclude administration at a subsequent date. If letters are granted later, only the heirs to whom such payment or delivery may have been made should be accountable to the personal representative who is appointed.\(^{409}\) In the absence of administration, such statutory devices supply a much needed method for the small estate which is not indebted. For several years statutes of this kind\(^{410}\) have functioned well in California and Illinois where they are primarily utilized to collect bank deposits, wage claims, insurance proceeds and the like, and to transfer the family automobile and small amounts of registered securities. Statutes in some states authorizing the payment of wages, bank accounts or only one kind of debt are unnecessarily restricted in function.

\(^{408}\) §§ 86, 87.
\(^{410}\) See discussion in part III D 2, supra.
Second, if the value of the estate does not exceed that to which the surviving family of the decedent would be entitled as homestead, exempt property and a family allowance, a wholesome provision would authorize the surviving spouse or minor children to petition the probate court asking that the same be set aside to them for these purposes, and that an order then be made that no administration is necessary. Procedure of this kind should be as simple as possible, eliminating all unnecessary formalities. Inasmuch as notices may not be required to creditors and others who may have a possible interest, such an order may well be made subject to revision, correction or annulment within a substantial period of time after it has been made. This will encourage full disclosure and an opportunity to all interested persons who may not have had an opportunity to be heard at the time the order was made. The Model Probate Code contains such provisions and places an upper limit of $2,500 upon the value of estates, exclusive of homestead and exempt property, to which it applies. Since the expenses of the last illness and funeral charges must be paid by the surviving family as a condition precedent to invoking these provisions, the amount of $2,500 will do no more than furnish a minimum of a family allowance. Such an estate should not be subjected to the expense of formal administration.

Third, if letters have been granted to a personal representative and it later appears that the estate of a decedent, exclusive of homestead, exemptions and family allowance does not exceed the amount of preferred claims, the personal representative should be authorized to distribute the estate for these purposes so far as may be done and thereupon present his report and account for final settlement, and upon the approval and allowance thereof, be discharged. As already mentioned, statutes of this kind or some variation thereof exist in many states at the present time. A similar section is contained in the Model Probate Code.

All of the foregoing methods, it will be noted, are intended to aid the summary administration or to eliminate the necessity of administration on small estates. To require the family or dependents of a decedent of small means to pursue the regular routine of administration, with its delays in transmitting the property to those entitled to it, and subject to the expenses incidental thereto, seems obviously unfair and unnecessary in an enlightened age. In none of these situa-

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411 §§ 88-91.
412 See discussion in part III B 1-a, supra.
413 § 92.
tions are the interests of creditors adversely affected. In the third method, court supervision is fully provided for. In the second method, court inspection and authorization are required. And in the first method, resort to judicial administration is always possible by a creditor or other person interested, to the end that the interests of every interested person are amply protected.

In larger estates it is true that all the heirs may make distribution of the decedent’s property by an informal family settlement, if they are able to make collection of all the assets and there are no creditors to insist upon administration. It is also true that most states recognize the validity of such settlements when made, insofar as the parties to them are concerned. In view of the possible interests of creditors in all cases, and of distributees in some cases, the advisability of authorizing such a procedure by statute seems questionable. A contrary opinion may be supported from the experience of those few states which do authorize such a procedure but, generally speaking, it is likely that a more orderly and satisfactory distribution of a large estate can be effected by a formal administration. This is not to say that informal family settlements should not be recognized. On the contrary they should be fully recognized when made. But problems arising in connection with such settlements are probably better solved by ordinary case law, as they have largely been solved in the past.

As to actions by the heirs to enforce payment of debts due the decedent, without resorting to administration, an argument can be made for permitting or for denying them. While it is true that in rare instances creditors may be prejudiced, it is also true that creditors may invoke their right to apply for administration. And if such debts are collected by the heirs, it does not follow that they are lost to creditors. In fact, they are subject to administration, if a personal representative is subsequently appointed. The more pertinent inquiry is whether the proceeds are more likely to be lost or dissipated in the hands of the debtor or in the hands of the heirs.

In addition to these three basic methods for dispensing with administration, various other devices have been discussed in the preceding pages. Some of these, such as the independent executor under a nonintervention will and the withdrawal of an estate from administration, are said to work satisfactorily in the states where they

414 An informal family administration and distribution is meant here, not a compromise settlement involving adversarial rights of distributees under a will or by the laws of intestacy.

415 See discussion in part III B 3 and 4, supra.
are used. Others, in particular instances, are no more than alternative ways of accomplishing the objectives outlined and authorized by the basic methods above described. This is often true in such matters as making distribution to the heirs of a distributee who dies during administration, or in making distribution of an estate of a person who dies while under guardianship. In both of these latter instances, there is the added advantage of having distribution made pursuant to the order of a probate court having jurisdiction of a decedent's estate in one case and of a ward's estate in the other. In the final analysis, the virtue of any given method for dispensing with administration is dependent upon the extent to which the basic functions of administration are accomplished in the particular situation.

Administration may be dispensed with in any case in which the heirs can and do make collection and distribution of assets, irrespective of amount, to all those entitled to them, including creditors, and to the federal and state governments for estate and inheritance taxes. The efficacy of any such informal settlement will depend upon the agreement of all the heirs and the actual satisfaction of all creditors. In no case should it be said that administration is a required proceeding. An administration proceeding is intended to secure useful functions in society—to be a servant, not a dictator of procedure for its own sake.

The dominant function of administration in Anglo-American law has been the protection of creditors. It is submitted, however, that we have carried this to an extreme. Ordinarily, the running of the statute of limitations is stopped upon death. The statute of nonclaim is substituted after administration is granted. But ordinarily no general nonclaim statute operates against creditors in the absence of administration. Whatever arguments may be made in favor of the retention of this as a rule, the fact remains that the marketability of property, both real and personal, is usually impaired. In a commercial society free marketability is an objective in itself. Statutes in a number of states have barred the claims of creditors after the expiration of specified periods of time following the death of a decedent when administration has not been had. Such a statute should exist in every state. It should apply to personal as well as to real property, and it should bar any creditor from applying for administration. The trend toward shortening the period of time could well be carried further.

Similarly the state should be required to be diligent in asserting

\footnote{416 See discussion in part III D 1, supra.}

\footnote{417 See Model Probate Code, § 135 (d).}
its lien for estate or inheritance taxes. Failure to take steps for their determination and collection within some reasonable period of time should likewise operate to free the assets of the estate from the state's lien.

When a decedent leaves property located in several jurisdictions, administration in more than one jurisdiction should be rendered unnecessary as far as possible. If domiciliary letters are granted, payments to, actions by, and the transfer and delivery of property to the domiciliary representative in any state should be an established procedure upon some reasonable basis. The rights of local creditors and distributees are important, but their assumed existence has been emphasized to the point of making ancillary administration a requirement all too often to no real end. It is suggested that the lapse of some short period of time without the commencement of proceedings for local administration should be sufficient to justify full recognition of the powers and authority of the domiciliary representative in that state. Thus the interests of local creditors and distributees are not extinguished but are merely relegated to the domiciliary state for assertion.418

The problem of clearing title to land in a state other than that in which the decedent was domiciled remains. The experience under the Ohio statute,419 which has been followed in the Uniform Powers of Foreign Representatives Act,420 reveals a simple expedient for the purpose.

When a decedent leaves a will, the question may arise as to whether administration may be dispensed with, even though the will is probated. A statute, of course, may require the delivery of a will by the person in possession of it to the court. Its probate, however, is not automatic upon delivery. A proceeding to probate the will is distinct from a proceeding to administer the estate of a decedent. The fact that the latter is customarily carried on in connection with the former, at the same time, and in the same court, is likely to lead to the conclusion that the two constitute a single proceeding. Historically and functionally, however, they are separate. A proceeding to administer an estate is not a necessary consequence of the probate of a will. If the devisees or legatees are able to make physical collection of the assets and agree upon a distribution among themselves, and if there are no

418 For concrete suggestions in this respect see Uniform Powers of Foreign Representatives Act, §§ 2, 3.
420 § 4. See discussion in part III E 6, supra.
creditors to insist upon administration, their action is clearly lawful. Although not usually stated in so many words, it is expressed or implied in several statutes that a will may be probated without being followed by administration. The rights to the decedent’s property will be governed by the provisions of the will, but subject to the rights of homestead, exemptions and family allowance, which are independent of a will. Under the usual statutes dispensing with administration, the rights of devisees and legatees, as such, are not important, for the estate of the decedent is entirely consumed in setting off homestead and exempt property and in paying a family allowance. However, where the beneficiaries of a decedent’s will, without taking out administration, proceed under a statute authorizing the collection by them of assets less than a designated sum, they may be permitted to avail themselves of this power without first probating the will.

A general survey of the legislation discussed in this study indicates that the eastern states are far more inclined to regard administration on a decedent’s estate as the normal course of procedure. This is particularly true where inheritance taxes are applied to successions without allowing more than a bare minimum of exemptions. In those states, debtors cannot safely pay the heirs without incurring a possible liability to the state for inheritance taxes as well as to creditors for their claims. The natural tendency of such tax laws is to exert a strong pressure upon heirs to take out administration in every estate. The tendency in the west is in the other direction, particularly in small estates. Furthermore, the large majority of statutes barring creditors, upon the expiration of a designated period of time after death and in the absence of administration, are in the west. Such devices as the independent executor acting under a nonintervention will, the withdrawal of estates from administration, and direct distribution to the heirs of a distributee who dies during administration may be local examples, but they also represent a feeling that the traditional process of administration is not an absolute for every decedent.

In states where it is felt that administration upon estates should

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[422] Under Cal. Prob. Code Ann. (Deering, 1944) §§ 630 and 630.5 an unprobated will may be the basis of payment of money or delivery of assets to the beneficiaries designated therein. See also Fla. Stat. Ann. (Supp. 1945) §§ 735.01 to 735.13.
be retained as a norm, probate procedure should be streamlined. Every method possible should be employed to shorten and to simplify the task of the personal representative in his duties in order that distribution of the estate may be made to those entitled to it as soon as possible. Notices could be combined; notices by mail could be substituted for notices by publication; and times of notice could be shortened. And most important of all, the nonclaim period should be shortened so as not to exceed six months. The trend to reduce the nonclaim period which has already acquired a momentum during the past decade, will likely continue along with the larger movement of procedural reform under way.

From a consideration of the functions to be achieved by administration, it would seem that legislation for dispensing with administration should be confined primarily to the small estate. Other legislation for the same purpose should be valued according to the manner in which it permits the accomplishment of the basic purposes of administration. In no event should administration be required as a process. If heirs can make collection and distribution of an estate and pay all claims, legislation should not prohibit it. In larger estates both the problems of claims, including the determination of estate and inheritance taxes, and of distribution are such as to cause the persons interested to pursue the usual course of administration.