Chapter 73

Administrators and Courts

I. Municipal Organization of Decedent's Estate

ALTHOUGH conflicts law is a rather minor part of the law of administration, it cannot be avoided in this survey; to understand its role, at least some account must be devoted to a legal situation that would frustrate even a research of several extensive volumes. Indeed, no true comparative study exists of the international relations in treating inheritances. Useful introductions to the several national laws and books advising practitioners about steps they may take, abound. But not one author has ever dared to probe the core of the international disorder. Nor can it be done here, for reasons that will become obvious to the reader. Within the United States, gratifyingly, some fruitful or at least promising attempts have been made to bring coherence into the interstate chaos.

1. Common Law

At common law, compulsory administration of decedents' estates was restricted to the personal estate, and the executor or administrator is therefore called a personal representative. In England and a few American states, administration now extends to real property. In most American jurisdictions, the independence of the heir's title to land has been preserved, but the personal representative exercises certain powers over the land, such as taking possession and sale, if necessary.

In modern Great Britain with its unitary court structure, and, excepting Scotch land, the full inclusion of immovables, there are still minor differences, but the system, though costly and potentially cumbersome, works out smoothly, at least within the present United Kingdom; the system of "resealing" probate judgments sets its courts in close reciprocity with dominions and colonies.[1] In the United States, the state statutes not only differ on many fundamental or formal points; they are often ambiguous and the local peculiarities are sometimes strongly stressed. Only a long and painful development, far from total achievement, offers a homogeneous scheme conquering the old self-confinement.

This survey is exclusively interested in the interstate and international effects of probate judgments and of the appointment of fiduciaries. These effects, however, depend basically on those which probate and letters of administration possess within the forum of the probate court itself.

(a) *Jurisdiction.* The main principle of the common law treatment of estates is *territorialism.* It is still much in view in the United States. Any court in whose territory assets of the inheritance are situated has exclusive jurisdiction to administer them; and the jurisdiction of each court is strictly limited to these assets. A few statutes have literally claimed authority over foreign executors or administrators as if they were appointed locally. The courts, not to assume that these statutes undertook to violate the Constitution, construed them as referring only to property located in the state.[2] Despite the law of the succession which includes all movables and chattels real irrespective of

[1] Administration of Estates Act, 1925, s. 168; Judiciary Act, 1925, s. 165; Colonial Probate Act, 1892, and Orders in Council.

[2] Thornton v. Curling (1824) 8 Sim. 310; Re Grassi [1905] 1 Ch. 584; DICEY (ed. 6) 828.

their situs, they are separated by their situs in matters of administration. Thus, the axiom retains its force that the law of the domicil governs distribution but the law of the state appointing the fiduciary governs administration. Accordingly, there is no privity between the fiduciaries of different states. Even if the same individual is appointed in these states, he acts in a separate capacity in each state.[3]

Usually most of a decedent's movables are situated at his domicil, and since its law governs distribution, the first—"original"—and "principal" probate is sought there. Even though no assets are found at the forum of the domicil, it is now settled by a British statute as well as in the United States that the domiciliary court has jurisdiction for probate and letters of administration.[4] Nevertheless, it is still one of the few certain rules in the majority of the American statutes that a will may be brought to original probate wherever there are assets.[5] A conforming statute has been adopted in New Jersey, where, to the contrary, no ancillary administration was granted if the domicil rejected probate.[6] In some other states, no ancillary probate at all is given, the parties being referred to the court of the last domicil.[7] It has also been said that the will of a person resident where he was domiciled should be probated originally only at that place.[8]

For succession to land, the original probate, accord-

[3] England: Cook v. Gregson (1854) 2 Drew 286.
United States: Restatement § 466, comment a.

[4] England: Administration of Justice Act, 1932, sec. 2.
United States: Restatement § 467; see comment c for the purposes of such grant.

[5] United States: Restatement § 469; this is the "better view," 3 BEALE 1464, § 469.2.

[6] "Rule of Chadwick's Case," 80 N.J. Eq. 471; see *In re* Dodge (1918) 89 N.J. Eq. 525, 104 Atl. 646; superseded by L. 1942, c. 335, p. 1186, § 1, N.J. Stat. Ann. Supp. 3:2-45.

[7] CAREY, in CARNAHAN, Cases 979 ff.

[8] WOERNER § 226.

ing to the old rule, must be at the situs. Statutes, however, derogate from this rule.

(b) *Effect of probate within the forum.* In Great Britain, a probate in "common form" is granted in uncontested cases by the court of the domicil if the court is convinced of the formal validity, the mental capacity of the testator, and absence of error and fraud. This judgment has force until attack. Then a litigated probate "in solemn form" has full effect, as it is "in rem," i.e., *erga omnes,* and only open to revocation on one of several grounds stated by successive decisions.[9] Thus, probate of a will is said to prove the nature of an instrument as a will, its formal validity, the mental capacity of the testator, the appointment of an executor, the contents ("what the will is"), so as to replace the original instrument until correction by the Probate Division and the vesting of title in land, though not a disposition of property.[10] But the effect is limited to the territory, except between the parties to the suit.

Where the deceased was domiciled abroad, an English probate indicates that the will of a British subject has been duly executed under Lord Kingsdown's Act but does not validate the will if incapacity, material invalidity, or illegality appear under the law of the domicil.[11]

In the United States, a probate decree, whether in common form or solemn form, with or without notice to all beneficiaries (depending on the various statutes), provided it is not "directly" attacked, is not challengeable by "collateral" attack with respect to those matters, as cautious language runs, which it purports to decide. What matters are these? This turns out to be a delicate question.

[9] See RANKING 52 ff.

[10] WILLIAMS, 1 Executors 118 § 180; PARRY, Wills 110.

[11] DICEY (ed. 6) 828; WILLIAMS *ib.*

Statutes,[12] courts, and writers use varying language. They all seem to agree that collateral attack is excluded on the ground that the will is formally insufficient, or that the instrument is not genuine. But the formulations extend this effect to one or more of the following matters: incapacity, undue influence, fraud and duress,[13] outright illegality,[14] invalidity,[15] construction,[16] and effect.[17] Atkinson states that probate is conclusive as to genuineness, due execution, testamentary capacity, and absence of revocation.[18] I think that this formulation is really supported by the cases in general, although the language of the statutes and courts is often broader.[19]

Within the state, of course, also a decree refusing probate on one of these grounds is conclusive.[20]

Letters of administration, except those with the will annexed, are conclusive in the same manner for the absence of a will and the legal shares of the beneficiaries.

2. Civil Law

Ordinarily the court at the place of the deceased's last domicil has jurisdiction over his estate, excepting foreign assets under the control of foreign law.[21] Compulsory ad-

[12] They were collected in Proceedings of the 24th Annual Conference of the Commissioners of Uniform State Laws, 1914, 172, but never again completely to my knowledge, and grouped by SIMES, Model Probate Code 306 f.

[13] BANCROFT § 163.

[14] 3 BEALE 1463 § 469.1 and n. 4.

[15] 3 BEALE 1466; BANCROFT 355; GOODRICH § 172.

[16] CAREY (*supra* n. 7) §§ 1001-1005, but see HENRY § 596; ATKINSON, Wills (ed. 2) 499 f.

[17] 169 A.L.R. 556 cites four state statutes.

[18] ATKINSON, Wills (ed. 2) 499 § 96, somewhat different from (ed. 1) 445 § 184. Similar, Model Probate Code § 80 (a), § 81.

[19] By far the majority of the cases cited by the authors involve nothing but formal validity and very few undue influence or mental capacity. But I am unable to check all the cases referred to in sometimes wild lists.

[20] Matter of Goldsticker (1908) 192 N.Y. 35.

[21] See, for instance, *supra* Ch. 70 n. 31.

ministration, comparable to that in common law countries, has been preserved in Austria where a regulation of 1854 has been only somewhat amended [22] and in the Scandinavian countries.[23] The purpose of these organizations is frankly patriarchal as well as fiscal, the latter aspect being now prominent also in the United States.

In the great majority of civil law countries a testator may appoint one or more testamentary executors, defining their powers up to a certain limit, or request the court to appoint one, but apart from this, the heir or heirs take custody of the assets, satisfy the creditors, carry out the last will, and distribute the residue. To some extent, officials such as public notaries, are frequently employed, and in some countries necessary. The jurisdiction of the court concerns protective measures, receipt of acceptance and renunciation from beneficiaries, care for the interests of minors, and noncontentious intervention on request. Some codes go farther than others in attributing functions to judicial assistance. Nothing, however, approaches the complete substitution at common law of officials for the heirs.

It is noteworthy that the German courts, against a strong current in the literature, constantly refuse to take jurisdiction for more than protective measures whenever the succession is governed by a foreign law. The measures they allow themselves involve affixing of seals, taking of inventory, delivery of a will from official deposit, and appointment of a trustee for a presumptive heir or a claim against the estate. They refrain, for instance, from discharging the testamentary executor of a foreign testator. Their reasoning is partly based on the ground that the scope of their activity is defined by international private

[22] Austria: Kais. Patent of August 9, 1854, amended by Fed. Law of Dec. 21, 1923, BG. 1923 No. 636, §§ 22-25, 137-140.

[23] SIEBECK, 6 Rechtsvergl. Hdw. 563.

law[24] and partly by the inconvenience of meddling with interests of foreign heirs and a foreign law and the probable absence of recognition in the foreign country.[25]

Equally, in Austria, the official administration there prescribed does not in principle take place where a foreign national leaves movables in the forum. When administration occurs, it follows Austrian inheritance law. This happens also, by exception, if by unanimous consent all appearing parties concerned submit the estate to the Austrian law.[26]

Similar provisions that the parties may choose the inheritance law of the forum occur in some Latin-American codes.

Bilateral treaties regulating consular intervention need only be mentioned.

3. Situs

In the Anglo-American system and all others that assign primary importance to the territory in which the assets of the estate are located, the question of the method of localization obtains particular relevance. But it is also pertinent everywhere in matters of procedure, taxation, escheat, and granting of certificates. Different approaches to this subject lead to the conflict of concurrent jurisdictions and sometimes to negative conflicts. Particulars transcend the framework of the present investigation. However, two observations may be added.

First, it is to be borne in mind that the situs for the purpose of administration is not necessarily identical with

[24] KG. (Feb. 4, 1937) Jur. Woch. 1937, 1728; IPRspr. 1937 Nr. 72, Clunet 1937, 832.

[25] KG. (July 11, 1911) 41 Jahrb. KG. 62; in accord RAAPE D.IPR 276; SCHLEGELBERGER, Komm. Freiw. Gerichtsbarkeit § 73, n. 2; § 74 n. 4; *contra* NIEMEYER, 13 Z. int. R. 21; 4 FRANKENSTEIN 627; LEWALD 329.

[26] Law of 1854 (*supra* n. 22) §§ 23, 24, 140.

that for such purposes as civil procedure, seizure, garnishment, or taxation.

Second, in the United States there has been a development with respect to negotiable instruments. The American cases present, in Beale's words, a "blurred picture." [27] In a decision of the Supreme Court of the United States,[28] administration was founded on the view that any debt is located at the domicil of the debtor, but the old doctrine of the ecclesiastical courts on mercantile specialty debts was adopted by the same Court in 1918.[29] Accordingly, the possession of an instrument by an administrator, though not its mere presence,[30] entitles him to administer the claim embodied in the instrument. Despite the insecure cases, the Restatement suggests that possession of a negotiable bill of lading or warehouse receipt determines jurisdiction.[31] Bills, notes, and bonds payable to order are practically subject to the same treatment; the Restatement says that they are exclusively administered by the administrator in possession.[32]

Shares of a corporation issued in states following the Uniform Stock Transfer Act,[33] are represented by certificates, although shares subject to the traditional method of transfer through the company books are localized at the place of the corporation.[34] Bills, notes, and bonds payable to bearer are treated like tangibles.[35]

[27] 3 BEALE 1480 § 471.8.
[28] *In re* Wyman (1884) 109 U.S. 654.
[29] Iowa v. Slimmer (1918) 248 U.S. 115.
[30] HOPKINS, "Conflict of Laws in Administration of Decedent's Intangibles," 28 Iowa L. Rev. (1943) 613, correcting 2 BEALE 1481.
[31] Restatement §§ 471, 476, 509.
[32] Restatement § 479.
[33] *Id.* § 477, *cf., supra* Vol. II, p. 75 and especially p. 76.
[34] *Id.* § 478; Vol. II, p. 75.
[35] STUMBERG (ed. 2) 448 n. 36, denying that the desirable proposition of the Restatement that the administrator at the situs is treated as the owner, is borne out by the cases.

4. Law Governing Administration

Whatever is substantive law in the operation of executors and courts at civil law is determined by the law of succession. Proceedings, of course, whether in litigious or in noncontentious matters, follow the *lex fori,* save for contrary positive rules.

Common law does not so distinguish. *Lex fori* controls everything, and since every court administers the assets situated in its territory, *lex fori* is identical with *lex situs.* But considering certain exceptions, the ordinary formula says that it is the law of the court appointing the administrator that controls administration.[36]

This rule was attacked recently, probably for the first time, with special regard to the case where administration of a decedent's estate is followed by trust operation.[37] Courts submitting the administration of a testamentary trust to the law intended by the testator feel the inconvenience of having all orders during the estate administration issued by the domicilary court, and often by several other courts competent solely because of the physical presence of assets.[38] Similar awkwardness may be experienced when ancillary courts give directions without contact with the principal court. As we shall see, dealing with the outstanding problem of this topic, the claims of creditors, difficulties are increased by the protection of local interests and alleged public policy.

What role, however, has the law of the place where an asset is claimed as part of the estate, irrespective of such special rules of territorial administration? It has been

[36] Restatement § 468.

[37] JAMES A. MOORE, "Estate Administration and the Conflict of Laws," 35 Va. L. Rev. (1949) 316.

[38] Will of Risher (1938) 227 Wis. 104, 277 N.W. 160, 115 A.L.R. 790; *In re* Keeler's Estate (Surr. 1944) 49 N.Y.S. (2d) 592.

contended by the neo-territorialistic writers in France that the *lex situs* is of primary importance for the legal situation of all property, prevailing over the law of succession,[39] or at least that the movables are subject to the *lex situs* in the first place because of the "public credit," which is safeguarded by the *lex situs*.[40] In the rightly dominating opinion, it is only true that a beneficiary, executor, or creditor demanding an asset must comply with the respective local rules of procedure and property law on acquisition of title, but the content of his cause of action is primarily determined by the law governing succession.

Nevertheless, in the common law doctrine an analogous problem can be discovered, if only in a few sporadic applications. Thus, Dicey and Beale have been understood as including the transfer of title in "administration"; it was concluded that movables left in Germany by an Englishman domiciled in England pass to the English universal legatee directly because German law would govern the transmission of the title as heir.[41] However, the Restatement § 300 declares that the title to chattels passes at the death of the owner "to the executor or administrator appointed by the court of the state in which the chattels are habitually kept." This is of no consequence for civil law countries, and the general assumption is still good that the English legatee or the English administrator may be treated in Germany as entitled to recognition not on the basis of German law but by reasonable adjustment on the basis of English law.

The validity of a gift *inter vivos*, conditional on survival of the donee, was classified as an incident of administration

[39] BARTIN, 3 Principes § 450 f.; see *contra* NIBOYET, 4 Traité 911 § 1366.

[40] LEREBOURS-PIGEONNIÈRE (ed. 6) §§ 361-363 who corrects his result by introducing the French system of a liability proportional to the values received (413), *infra* 433.

[41] BRESLAUER 245, 247 n. 2.

in *In re Craven's Estate,*[42] and likewise a promise not to change a will was conceived as pertaining to administration in *In re Rubin's Estate.*[43] The Restatement, however, in accord with many writers, characterizes rules pertaining to administration as "primarily designed to facilitate the quick, effective and inexpensive settlement of the estate of the deceased" (§ 300, comment b), and it enumerates specifically such questions as the following: "accounting, post a bond, invest money, sell chattels, pay debts, ascertain priorities and similar questions" (§ 468, comment a).[44] Administration, thus, concerns short range matters, whereas transfer of title, validity of gifts, and the permissibility of agreements on testamentary dispositions involve devolution of rights by death. It would be very strange and unsound simply to leave the rules affecting persons and assets participating in the succession to the pleasure of foreign laws and a host of courts of administration.

II. Extraterritorial Effect of Probate

1. Common Law Countries

(a) *Assets in the forum.* A probate decree primarily involves only the assets situated in the forum, and whether it is recognized as conclusive outside the state even with respect to these assets, is a question not universally answered in the same sense.

However, since a British probate in common form does not and a probate in solemn form does have force *erga omnes,* it may be treated everywhere under the principles relating to foreign judgments.

[42] *Supra* Ch. 68 n. x.
[43] *Supra* Ch. 69 n. x.
[44] Compare the relatively innocuous cases described by Dicey (ed. 6) 813 as lying on the borderline of succession and administration.

Within the United States, a probate has the same effect as it has within the forum in the sister states with respect to the assets found in its own territory. To this extent, the probate is endowed with full faith and credit.[45]

(b) *Assets in other jurisdictions.*

England. In connection with the principle that succession to personalty is governed by the law of the last domicil of the deceased, an English court of probate, as a rule, will adopt the decision of the probate court of a foreign country where the last domicil was and grant probate in its turn. This is "established practice." [46] Yet in every case, the court "exercises its own discretion and judgment." [47]

United States. Once, in a generous attempt, the Massachusetts Supreme Court held that an American probate judgment, as directed *in rem,* was effective in any sister state. "The court here can only inquire as to the sufficiency of authentication, jurisdiction of the court, existence of estate upon which the will may act, and perhaps fraud." [48] This tradition is followed by the courts of that state.[49] A similar tradition in Montana stems from a decision where the Full Faith and Credit Clause of the Federal Constitution was again expressly invoked.[50]

However, the Supreme Court of the United States, long ago, refrained from such construction of the clause and, on the contrary, announced the full independence of the

[45] Tilt v. Kelsey (1907) 207 U.S. 43, 53.

[46] Per Sir J. Hannan in Miller v. James [1872] L.R. 3 P. & D. 4, 5; In the goods of Malaver (1828) 1 Hagg. Ecc. 498.

[47] In the goods of Kaufman [1952] P. 325.

[48] Mass: C. J. Shaw in Crippen v. Dexter (1859) 79 Mass. (13 Gray) 330.

[49] Slocomb v. Slocomb (1866) 95 Mass. 38 (immovables); Mass. Ann. L. (1933) § 192.10; HOPKINS, 53 Yale L.J. at 229-231.

[50] Montana: State ex rel. Ruef v. District Court (1906) 34 Mont. 96, 85 Pac. 866 ff.; HOPKINS, *ib.* 235 ff.

states respecting their local assets.[51] On the ground of this "power policy," mutual consideration depends upon the local conflicts rules, except where identity of parties and litigated object allows a resort to the doctrine of *res judicata*.[52]

"Letters testamentary and of administration have no legal force or effect beyond the territorial limits within which the authority of the state or country granting them, is recognized as law." [53]

Every American statute book contains provisions facilitating the extension of foreign probate to personalty, or even to all assets situated in the enacting state. They allow either the grant of an ancillary probate or a simple recording of the foreign decree.

Unfortunately, the language of these statutory digressions from the common law is extremely varied and prevailingly uncertain. Moreover, the courts often cling to the traditional lack of privity between the probate administrations.

With the threefold restriction, to the *personal estate*, to the *domiciliary probate*, and to the decree of a *sister state*, courts more or less generally recognize the probate decrees in the full measure in which they operate at home. But even in this narrow limitation, cautious investigation into the practice of the particular court would be opportune.

The broad language of many statutes suggests that also a probate by a nondomiciliary court suffices, but this does not seem to agree with widespread practice.[54] That foreign

[51] See in the last instance *in re* Barries' Estate (1949) 338 U.S. 815, 881; Note, DAVENPORT, U. of Ill. L. Forum (1950) 129, 131.

[52] Iowa v. Slimmer (1918) 248 U.S. 115, 121; Riley v. New York Trust Co. (1942) 315 U.S. 343, 349. HOPKINS, 53 Yale L. J. at 256; ATKINSON, 3 Am. Prop. 752 § 14.45.

[53] WOERNER § 157; Restatement § 436.

[54] CAREY 988: "Courts do not attach larger and wider constitutional validity to domiciliary probates."

countries are included in the recognition is expressly stated in some statutes,[55] but presumably is not the general construction of the provisions. And although it appears certain that recognition of a foreign probate includes most matters for which it is conclusive where it originates, the doubtful question whether it extends to the construction of the will makes itself more conspicuous in this application.[56]

Finally, the common law principle that foreign probate is totally inconclusive at the situs of *real property* has firm roots to this day. Yet so many exceptions to this principle by statutes or judicial ruling are existent that an absolutely negative attitude is to be observed in only a few states.[57]

The distinct trend of the development is marked by many decisions, the efforts of the leading writers, and the uniform drafts.[58] Though different in particulars, they converge in the proposition that a probate obtained at the last domicil of the deceased should be conclusive to the full extent, as at its origin, certainly with respect to movables, but since "there is no sacrosanctity about reality," [59] also regarding immovables.

(c) *Effect of ancillary probate.* When, after the end of appropriate proceedings—subject to the procedural law of the court—a foreign probate is "resealed," "confirmed," recorded, or adopted by a local probate, it seems to be a general rule that—apart from nullity of an irregular grant —only the original probate at its own place may be attacked

[55] E.g., Indiana, Burns' Stat. (1933) § 57 p. 119; § 7 p. 415, 416; HENRY § 598.

[56] CAREY §§ 1001-1005; *Contra* HENRY § 595.

[57] For particulars, see GOODRICH §§ 173, 174; ATKINSON, 3 Am. Prop. 751.

[58] The Restatement § 470(1); 2 BEALE § 469.1, 3 *id.* 1466 and some authors take too much for actual law. But their result is strongly supported by the postulates of GOODRICH (ed. 3) 525 § 172; HOPKINS, 53 Yale L.J. at 249, 258; Note 169 A.L.R. 81, 93, and especially CHEATHAM, 44 Col. L. Rev. at 559; Uniform Foreign Probate Act, withdrawn 1943, but adopted by Ill., La., Nev., Tenn., Wyo.; Uniform Probate of Wills Act, 1950, § 1.

[59] ATKINSON *l.c.* with HOPKINS *l.c.* 253.

by the means permitted at the same place.[60] An independent ancillary probate, however, may be treated differently, and some exceptional statutes establish their own rules on remedies even though a foreign probate was followed.[61] Indeed, the Commissioners of Uniform State Laws criticized, as early as 1914, the tendency to diminish the protection of local interests and proposed that remedies should be allowed against the ancillary grant.[62]

Clearly, however, a slow process is in the making to elevate the domicil to a determinative factor also in these matters and to subordinate the ancillary to the domiciliary fiduciary. In the same development, immovables are being increasingly brought within the powers of the administrator of personalty. And the fact that every fiduciary is answerable to his own appointing court, acquired a limited appreciation in other courts, leaving him more freedom from their supervision.

As an illustration of the transition of a jurisdiction, known for adherence to "power policy" respecting succession to land, to a liberal policy, a 1946 decision of the Illinois Supreme Court may be singled out which sketches the whole picture of contesting a domestic probate and then describes the effect of a foreign domiciliary probate on land in Illinois: everything involving the land depends on the Illinois law. The statute modifies the common law (i.e., absence of privity) only insofar as foreign wills are admitted, if they are (executed according to the law of the domicil or the law of the place of execution or) admitted to probate in a foreign state, Ill. Rev. St. 1945, Ch. 3, § 237. If so admitted, the will is "valid for all purposes, unless set aside in a suit brought to contest it. It cannot

[60] BANCROFT 394 § 163; Sternberg v. St. Louis, *infra* n. 63.
[61] See, e.g., BANCROFT § 163.
[62] Proceedings of the Commissioners of Uniform State Laws, 1914, 172.

be collaterally attacked in any other proceeding." But it can be attacked like a domiciliary will.[63]

2. Recognition in Civil Law Countries

From the European point of view, English and American probate judgments have not often been given attention, except with respect to the powers of administrators which will be discussed later. But a thorough Italian study has demonstrated that by its nature such probate of a will includes an official acknowledgment of the validity of the will—which is true within the limits mentioned above—and as a judicial instrument enjoys public credit also in foreign countries.[64] The Italian Supreme Court, already on the way to this thesis, was entirely convinced by the study. In consequence, an uncontested probate judgment is considered to be an act of voluntary jurisdiction, acceptable as a public attestation without the necessity of proceedings for enforcement of foreign judgment *(delibazione)*.[65] In addition, it was stated that the regular court in the United States was exclusively competent for a suit to contest a probate in common form rendered by an American court.

In other countries the official character of probate decrees is likewise recognized, but proceedings for examining uncontested foreign probates are usual and, e.g., in France necessary.

[63] Sternberg v. St. Louis (1946) 394 Ill. 459, 68 N.E. (2d) 892, 169 A.L.R. 545; on other kinds of statutes the not very satisfactory note *ibid.* at 567.

[64] GIUSEPPE PALLICCIA, "Testamento e probate nei paesi anglosassoni, con speciale reguardo al D.I.P. e ai beni italiani," Giur. Ital. 1935 IV 113.

[65] Italy: Cass. Civ. (May 12, 1937) Giur. Ital. 1937 I 667; *cf.*, also DE MARTINO, 7 Giur. Comp. Dir. Civ. 86 No. 106; Trib. Bari (Feb. 4, 1949) Foro Ital. 1949 I 1114.

3. The German Certificate of Heirship

Among the official certificates acknowledging the title of heir or other beneficiary, issued in the various jurisdictions and frequently required by courts, other state agencies, and banks, the German "*Erbschein*" is particularly elaborate and the nearest analogy to letters testamentary.

If the succession is controlled by a foreign law, the universal successor—in the case of an American estate, the heir, or statutory or testamentary residuary beneficiary—may obtain a certificate, limited to the assets situated in Germany and based on the foreign inheritance law (BGB. § 2369). At least a limited certificate is also given respecting real property under German law in the cases where a foreign inheritance law governs and refrains from including German immovables, as Anglo-American law does.[66]

The German *Erbschein* is an instrument endowed with public faith; its content is presumed to be correct and third persons dealing in good faith with its holder are protected. But this effect is, as a rule, limited to transactions effected in Germany.[67]

Analogous rules provide for a limited certificate to be granted to a testamentary executor (§ 2368). They are also applied to a foreign intestate administrator.

The presumption attached to these documents is extended to a few other countries by the respective treaties.

III. Extraterritorial Powers of Fiduciaries

1. Extraterritorial Scope of Appointment

(a) *Common law countries.* To enable an executor or administrator to act in a foreign territory, his powers

[66] Schwenn, "Die Anwendung der §§ 2369 und 2368 BGB. auf Erbanfall mit englischen oder amerikanischem Erbstatut," N. Jur. Woch. 1952, 1113.
[67] Nussbaum 369 n. 4.

must not be rigidly confined by his appointment itself to the forum in which he was appointed. The English doctrine satisfies this need. Although the court has only a territorially limited jurisdiction, the English grant extends to property no matter where situated.[68] He is charged with collecting all assets of which he can get hold; the assets in his hands are accountable to the English court and liable to all debts whether incurred in England or abroad.[69] This conception permits the personal representative to receive voluntary payments by debtors abroad and even to appear in foreign courts, provided this is agreeable to the latter. He may appropriate all chattels and claims as allowed by the *lex situs*,[70] and transfer them to England. Assets, however, possessed by a foreign administrator and brought to England, remain accountable to the foreign court.[71]

Occasionally, the one relevant difference [72] that continues between an executor and an administrator in the narrow sense, despite their large assimilation, may be noticeable:

> "Since an executor derives his title from the will and the property of the testator vests in him on the latter's death, he is able to do any act of his office with the sole exception of pursuing an action in court. He may even commence proceedings until he has to prove his title which can only be done by probate." [73]

An executor, hence, may sell, assign, or pledge any portion of the personal estate. It has been held that the sale of land, if executed according to the *lex situs*, cannot be attacked by the purchaser on the ground that probate was

[68] CHESHIRE (ed. 4) 514.
[69] DICEY (ed. 6) 811.
[70] WESTLAKE 167 ff.; DICEY (ed. 5) rules 85, 87, 131.
[71] DICEY (ed. 6) 811 ff.
[72] For another, practically superseded difference, see *infra* 438.
[73] PARRY 47 ff.; RANKING 140.

not granted to him.[74] By the same consequence of his position, an executor may be sued by creditors or beneficiaries even before probate.[75]

The American position is basically similar,[76] but as the several states are to be viewed as both the forum and a foreign jurisdiction, emphasis lies on the powers of a foreign representative of whom we have to speak presently.

(b) *Civil law countries.* Testamentary executors are permitted in all systems, but they are never the owners at law of the estate. Their powers are limited by the statutes to a varying maximum, always less extensive than at common law. Within these limits, the testator may define the authority of the executor. The radius of the executors is never restricted territorially.

2. Recognition of Foreign Fiduciaries

(a) *Common law countries.* In England, to exercise full powers, a foreign representative must apply for appointment as ancillary administrator. In England, whether the inheritance law is British or foreign will not make a difference in normal situations.[77] The foreign fiduciary is accepted as ancillary administrator ordinarily, though not necessarily, according to the discretion of the court,[78] and he is subject to its directions.

In the United States, sometimes a foreign fiduciary is considered in the older manner as lacking title in the assets; but prevailingly he can at present, without auxiliary probate, take possession, remove and administer a chattel

[74] National Trust Co. Ltd. v. Mendelson (Ont. H.Ct., 1941) 1942 1 D.L.R. 438.

[75] Mohamidu Mohideen Hadjar v. Pitchey [1894] A.C. 437.

[76] Restatement § 474; GOODRICH § 182 (highly informative).

[77] *In re* Kehr, Martin v. Foges [1952] Ch. 26.

[78] Court of Probate Act 1857, s. 73; In the goods of Brieseman [1894] P. 260; in the goods of Earl [1867] L.R. 1 P.D. 450.

as well as receive payment of and assign claims, until a local administrator is appointed or, in another version, until he knows of such appointment.[79] At the same time he remains generally unable to sue on behalf of the estate, though some statutes do allow it, at least where no interested local party requests an ancillary administration.[80]

A variety of other concessions to foreign fiduciaries include the possibility to have an assignee sue [81] or to sue in his own name rather than on behalf of the estate,[82] which "artificial" distinction has been used for further liberalization of the principle.[83]

Nevertheless, the basic principle remains lack of privity between the territorial administrations; it shows itself strikingly when the same person appears in several states in the name of the estate in the same cause, and the judgments are devoid of effect except where they are rendered.[84]

Where the domicil of the testator was in a civil law country and his testamentary executor possesses sufficient powers under the law of that domicil, he (or his local attorney) will ordinarily be accepted as ancillary administrator according to the same rules. If, however, the heirs are authorized to act and present themselves, a common law court is correct in considering that such heirs—as I would put it—unite in their persons the functions of beneficiaries

[79] United States: Restatement §§ 474, 481; 2 BEALE 1533 ff.; HOPKINS, *l.c.* 635 cites three statutes. See the new survey of the topic by OPTON, "Recognition etc." 19 Geo. Wash. L. Rev. 156, 165-167.

[80] OPTON, *ibid.* concludes that in the prevailing view the title of the foreign fiduciary is recognized although he is barred from suing for the estate. *Cf.*, GOODRICH § 182 n. 69.

[81] Peterson v. Chemical Bank (1865) 32 N.Y. 21.

[82] Thus Turner v. Alten Banking & Trust Co. (C.C. 8, 1948) 166 F. (2d) 305.

[83] Mr. Justice Cardozo in Wilkins v. Ellett (1883) 108 U.S. 256; Kruskel v. United States (1949) 178 F. (2d) 738; CHEATHAM, *supra,* 44 Col. L. Rev. at 549.

[84] Restatement § 468. See the exceptions to the principles *infra* 437-438.

and managers of the estate. The court in England, in fact, will either appoint them as ancillary administrators or order an ancillary administrator to surrender the surplus to the heirs.[85]

American practice emphasizes rather the discretion of the court as exercised under statutory directions.[86]

The foreign representative appointed in an ancillary administration has to follow the local law and court orders and to account to the court that appointed him. Some courts even require a bond from a nonresident executor relieved from giving security in the will.[87]

(b) *Civil law countries.* Almost unanimous consent advances the conflicts rule that the law of succession determines the requirements and effects of a testamentary appointment of executor.[88] A divergent opinion of a few French writers in favor of the *lex situs* has remained isolated.[89]

The inheritance law controls in particular capacity and power of fiduciaries, also when that law entrusts them with larger activities than the forum. The literature is practically unanimous on this point,[90] decisive for the recognition of

[85] *In re* Achillopoulos [1928] Ch. 433; Laneuville v. Anderson (1860) 2 Sw. & Tr. 24; In the goods of Dost Aly Khan (1887) 6 P.D. 6.

[86] BEALE 1417.

[87] New York: GRANGE 117.

[88] France: Trib. Seine (Dec. 8, 1924) Clunet 1925, 711; Cour Paris (June 28, 1941) Rev. crit. 1946, 243; Cass. req. (Nov. 19, 1941) S. 1942.1.129; WEISS, 4 Traité 594; JOUSSELIN 76 ff.; 10 Répert. Successions no. 90; NIBOYET, 4 Traité 863; DELAUME ET FLATTEL, 90 J. Trib. (1951) 1, 6.

Germany: RG. (Jan. 25, 1888) 6 BOLZE 4 no. 11; (April 21, 1890) 26 RGZ. 380; (Nov. 5, 1928) Jur. Woch. 1928, 3139; KG. (July 16, 1925) Jur. Woch. 1925, 2142; 2 BAR 338; 4 FRANKENSTEIN 485.

[89] CHAMPCOMMUNAL 384.

[90] France: Despagnet (ed. 5) 1116 § 380; LAURENT, 7 Dr. civ. § 109; WEISS, 4 Traité 671; NAST, BATIFFOL AND MAURY in notes to Cass. Crim. (June 4, 1941), see *infra* n. 96; BATIFFOL, Traité 673 § 668.

Germany: 4 FRANKENSTEIN 488; LEWALD 338; WOLFF, D.IPR. (ed. 3) 229; NUSSBAUM, D.I.P.R., 352, n. 4; SCHWENN, N. Jur. Woch. 1952, 1113, 1116 II.

Italy: FEDOZZI in 22 Dig. Ital. at 833; FEDOZZI 593; PALLICCIA, Rivista 1932, 347.

Anglo-American executors and administrators exercising powers by far more extensive than any known at civil law.

Accordingly, the German courts, aware of the diversity of the authority with which administrators of decedents' estates are endowed in the various laws, recognize without hesitation the foreign-derived powers and especially the ample task of Anglo-American fiduciaries.[91] The Reichsgericht, like the Anglo-German Mixed Arbitral Tribunal, even exaggerated the principle; they concluded that the British nationality of a personal representative, as distinguished from the beneficiaries, sufficed for admitting a claim to the clearing-procedure between England and Germany.[92] The same basic approach is taken in Italy, Spain, and Cuba.[93]

In France, after older decisions,[94] a decision of the Seine Tribunal [95] was widely noted which recognized Spanish testamentary executors and liquidators with larger powers than French executors; they would continue the personalty of the testatrix, receive funds, and create a new foundation (the validity of which was thus rescued).

[91] Germany: OLG. Hamburg (Oct. 1, 1887) Hans. Ger. Z. 1887 HBe. 289 no. 124 (English executor) ; RG. (April 25, 1932) 86 Seuff. 271 No. 152, IPRspr. 1932; 6 No. 1; KG. (May 13, 1912) 42 Jahrb. KG. 141; *supra* Ch. 69 n. 30; (July 2, 1925) Jur. Woch., 1925, 2142.

[92] RG. (Feb. 18, 1926) Jur. Woch. 1926, 1788, invoking as support Anglo-German TAM. (Feb. 4, 1924) 4 Recueil Trib. Arb. Mixt., Klingenstein v. Maier, see the just criticism by Ernst Wolff, Jur. Woch. *l.c.*

[93] Italy: Cass. Roma (Feb. 21, 1899) Foro Ital. 1899 I 333, Giur. Ital. 1899 I 1, 2161: powers of a trustee did not offend Italian public policy; Cass. (July 9, 1941) Foro Ital. Mass. 1941, 511 No. 2062: Swiss executor.

Spain: Trib. Sup. (Feb. 1, 1910) also in Revue 1911, 771: the testatrix was a subject of Catalonia; therefore Catalonian law governed the powers of the executors.

Cuba: Trib. Sup. (Jan. 16, 1908) also in Revue 1911, 131: the American personal representative had authority to sue and collect as provided by the Pennsylvania law of succession, the national law of the testator.

[94] Cass. req. (Apr. 19, 1859) D. 1859.1.277; Trib. Seine (April 20, 1898) J.C. 1899, 765; (July 13, 1910) Clunet 1911, 912.

[95] (Dec. 8, 1924) Gaz. Pal. 1926.1.293; Revue 1925, 76, Affirmed on other grounds Paris (July 1, 1926) Revue 1926, 540.

Finally, the criminal section of the Court of Cassation adopted the proposition that a fiduciary appointed in a common law court acts in France in his own name though on account of the estate.[96]

From this recognition must be distinguished the permission to undertake certain activities in the territory. Although not in Italy, in Belgium and France a formal judgment of *exequatur,* enforcing the original appointment [97] and in Germany a certificate of authority [98] are needed for certain purposes, although merely advisable for others.

Although the usual practice, analogous to the Anglo-American, requires a foreign executor to follow the local law, the German courts, in consistency with their conception that they only assist foreign law governing a succession, apply that law in case they intervene.[99]

[96] Cass. Crim. Section (June 4, 1941) D. 1942 C. 4, S. 1944.1.133, Juris Classeur 1942.II 2017: the testator may give the executor *saisine* under C.C. art. 1026.

[97] Belgium: Rb. Brugge (March 10, 1939) Rechtskund W. 1939 c. 105: a Michigan administrator in intestate succession is authorized to demand recovery of a debt, but needs an *exequatur.*

France: Trib. Seine (July 23, 1920) Clunet 1920, 684.

[98] Testamentsvollstrecker-Zeugnis, BGB. §§ 2368 f.

[99] OLG. Frankfurt (July 11, 1898) 33 Frankfurter Rundschau (1899) 88 (sworn inventory); RG. (Nov. 5, 1928) Jur. Woch. 1929, 434, IPRspr. 1929, No. 1 (accounting).