CHAPTER IV

The Foreign Personal Representative and Immovable Property

IN ANGLO-AMERICAN law, decedents' estates are subject to the "split system of succession." This means that the rules determining the succession to immovable or real property are different from those relating to personal property. This distinction between movable and immovable property is also vital in problems of administration. The rules governing control of real property by a foreign personal representative are quite different from those dealing with the personal property of the decedent. This is the result of two general legal propositions. The first relates to succession. The succession to real property is determined by the law of the place where the land lies.[1] The second is that title to land cannot be transferred except in accordance with the law of its *situs*.[2] Since these questions can best be determined by a court sitting in the same jurisdiction as the land, and since courts are more jealous of their control over real property within the jurisdiction than over movable property, the general rule is that real property can be administered and sold only by a personal representative appointed in the state where it is situated. Any exception to this proposition must be made by the law where the land lies.[3] If that legal system refuses to recognize the validity of the acts of a foreign personal representative in attempting to ad-

[1] RESTATEMENT, CONFLICT OF LAWS, sec. 245 (1934).
[2] RESTATEMENT, CONFLICT OF LAWS, sec. 220 (1934).
[3] Clarke v. Clarke, 278 U.S. 186, 20 S.Ct. 873, 44 L.Ed. 1028 (1899).

minister the land, neither heir nor purchaser can rely with confidence on any transactions with him.

It must be remembered that at common law title to real property passes immediately on death to the heirs or devisees, and the only time that the administrator or executor deals with the realty of decedent is when it is necessary to sell it in order to pay claims against the estate.[4] Thus, the only problem with which we are concerned is whether the foreign personal representative can make a conveyance of immovable property lying in the forum. If he can make such a conveyance, the consideration will be included in the estate and he will have effectively collected the asset. Naturally, the determination of the validity of such a transfer will arise after the transaction has taken place. Usually, there will be an ejectment action brought by or against a person claiming under the foreign personal representative. Then the problem is how the forum will treat the conveyance. If it is held to be void, the purchaser does not receive any title, since the law of the forum is the only one which can determine title to immovables within its jurisdiction. This result causes the innocent purchaser to suffer. However, that suffering is not such as should cause the legal order to change its rules in this situation. Today purchasers of real property, or at least the business institutions which finance such purchases, insist almost uniformly that legal advice be obtained as to the validity of the title held by the vendor. Such advice should make it abundantly clear what limitations there are on the power of a foreign personal representative to make a conveyance of immovables in the jurisdiction.

[4] See *supra* Chapter I, p. 20.

1. Sale of Land by a Foreign Executor Who Has a Power of Sale

Only one exception has been made at common law to the requirement of a local administration in respect to land. It is generally held that an executor appointed in a will which gives him the power to sell decedent's real property and who qualifies as an executor in another state may make a valid conveyance to land lying in the forum.[5] It is said that the power an executor has to convey foreign lands was not given by the court which appointed him, but was created by the testator in the will. This is treated as a common-law power given to the executor. The only function of the qualification as executor is to determine the person who has the power, and the exercise of that power is completely independent of the administration in the foreign state. This is one of the few remaining situations where it is important to distinguish between the executor and the administrator as regards applicable legal rules. The only personal representative who can exercise this power to convey foreign lands is the executor, and then only when he has been given in the will itself the power to sell the real property owned by decedent.

Before the foreign executor can exercise the power of sale given to him in the will, that instrument must be established as the valid will of the testator in the state where the land lies. This may mean that the will must

[5] Bacharach v. Spriggs, 173 Ark. 250, 292 S.W. 150 (1927); McMillen v. Bliley, 115 Colo. 575, 177 P.(2d) 547 (1947); Niquette v. Green, 81 Kan. 569, 106 P. 270 (1910); Plenderleith v. Edwards, 328 Ill. 431, 159 N.E. 780 (1928); Green v. Alden, 92 Me. 177, 42 A. 358 (1898); Crusoe v. Butler, 36 Miss. 150 (1858); Newton v. Bronson, 13 N.Y. 587, 67 Am. Dec. 89 (1856); Hoysradt v. Tionesta Gas Co., 194 Pa. 251, 45 A. 62 (1899); Illinois Steel Co. v. Konkel, 146 Wisc. 556, 131 N.W. 842 (1911). *Contra:* Keith v. Proctor, 114 Ala. 676, 21 So. 502 (1896).

be probated in that jurisdiction. However, it is very common now for a state to have a statute providing that a will which has been probated in a foreign state may be filed in the county in which the land lies and that after this has been done, it can affect title to the realty.[6] While one case held that a deed from a foreign executor conveys a good title to local land which will be protected by a subsequent recording,[7] the majority of cases construe such statutes to mean that a deed from a foreign executor is not a valid conveyance unless, prior to its execution, the foreign will is recorded pursuant to such a statute.[8]

These decisions point up one of the most important inroads on the traditional attitude of the requirement of ancillary administrations. Land, by virtue of its fixed location in the jurisdiction, should represent the article of property which is most likely to require a local administration. The common-law approach is that land descends to the heir or devisee without being subject to an administration unless it is necessary to subject the realty to payment of decedent's debt. The procedure by which this would be done normally is a local administration at the *situs* of the land. Yet these decisions make it possible for a testator, by appointing an executor and giving him a general power of sale, to provide an oppor-

[6] Such a statute is found in Gen. Stat. of Kansas (1949), sec. 59–801: "Authenticated copies of wills, proved outside of this state according to the laws in force in the place where proved, relative to any property in this state, may be admitted to probate and record in the probate court of any county in this state where any part of such property may be situated; and such authenticated copies so admitted and recorded shall have the same validity as wills proved in this state in conformity with the laws thereof. . . ."

[7] Crusoe v. Butler, 36 Miss. 150 (1858).

[8] Plenderleith v. Edwards, 328 Ill. 431, 159 N.E. 780 (1928); Niquette v. Green, 81 Kan. 569, 106 P. 270 (1910).

tunity for the domiciliary executor to collect all the assets of real property owned by him wherever they may be located. The modern view is that the executor derives his authority from the appointment by the probate court, just as does the administrator.[9] Therefore, his power over any property located in other jurisdictions should generally be as limited as is that of the administrator. The authority which the executor exercises over the foreign land may come from the will. It is possible to say, as the courts have done, that the executor with a power of sale is in the same position as the devisee for the purposes of sale, and he will be able to sell the real property without having a local administration. However, it must be remembered that the forum can subject this realty to a local administration to insure that decedent's local creditors are paid before any heir or devisee is entitled to the enjoyment and control of the land. Since the forum permits a foreign executor having a power of sale to sell the realty without an administration at the *situs*, it must be regarded as an exception and indeed an important one to the general requirement of a local administration on all of decedent's property left within the jurisdiction.

An executor having the power of sale may make a contract to sell real property located in another state. That contract will be specifically enforced in the court in which the executor qualified. He will be compelled to execute a deed, just as equity has always compelled a defendant over whom it has jurisdiction in personam to perform specifically a contract for sale of foreign

[9] Burrowes v. Goodman, 50 F. (2d) 92, 77 A.L.R. 249 (2nd Cir. 1931), *cert. den.* 284 U.S. 650, 52 S.Ct. 30, 76 L.Ed. 551; In re Van Vleck's Estate, 123 Iowa 89, 98 N.W. 557 (1904).

land.[10] The efficacy of such a conveyance in passing title will have to be determined by the law of the state where the land lies. Generally, the state will treat the deed by a foreign executor as valid.[11]

There is a question as to who can exercise the power of sale conferred in the will. If the executor appointed in the will does not qualify, or qualifies and later dies before making a conveyance, can the administrator appointed as his successor exercise the power and make a valid conveyance to foreign land? An interesting Pennsylvania case is the only one which has considered the precise problem. That case held that a successor appointed in New York to an executor with power of sale could make a valid conveyance to Pennsylvania land.[12] It based the decision on the argument that the New York appointment was merely to fix the person who had the power of sale conferred in the will, and that the New York decree itself did not affect title to Pennsylvania realty. In deciding this question from a conflicts point of view, those cases which have determined whether the successor to an executor having a power of sale could make a valid conveyance to land located in the state wherein he was appointed should be helpful. These cases generally hold in the situation where a power of sale is coupled with an interest, such as managing the property, or if the power of sale amounts to a direction to sell, then the successor to an executor may exercise the power.[13] However, if the power of sale is a mere naked power, or if the power is one of personal

[10] Bacharach v. Spriggs, 173 Ark. 250, 292 S.W. 150 (1927); Newton v. Bronson, 13 N.Y. 587, 67 Am. Dec. 89 (1856).

[11] See cases cited *supra* note 5.

[12] Hoysradt v. Tionesta Gas Co., 194 Pa. 251, 45 A. 62 (1899).

[13] Taylor v. Benham, 5 How. 233, 12 L.Ed. 130 (U.S. 1847); Ex parte White, 118 Miss. 15, 78 So. 949, L.R.A. 1918E 1065 (1918).

confidence and trust, the general common-law rule is that the successor cannot exercise the power.[14] Many states have adopted legislation which permits the administrator appointed as successor to an executor having a power of sale to exercise the power.[15] It is very likely that the decision in a case where an administrator appointed in a foreign jurisdiction attempts to exercise a power of sale given by the testator to an executor named in the will by conveying lands located in the forum will turn on the same factors. Since this is a question relating to the transfer of title to land, the law which determines the right of the successor to make a conveyance will be that of the forum in which the land lies, rather than of the place of his appointment. If that law so provides, the foreign administrator will be permitted to give a valid deed if the power is coupled with an interest, is a direction to sell, or there is a statute which permits his exercise of the power. Otherwise, the land will have to be conveyed by an ancillary administrator appointed locally. It has also been held that the power of sale given to a foreign executor may be of such a personal nature that it can be exercised by that foreign executor to the exclusion of a locally appointed ancillary administrator.[16]

[14] Keel v. First Nat. Bank of Pikeville, 271 Ky. 745, 113 S.W.(2d) 33 (1938); McMillen v. Bliley, 115 Colo. 575, 177 P.(2d) 547 (1947).

[15] A typical one is the following: 47 Ala. 90 (1940). "Where lands are devised to one or more executors, or a naked power given by the will to sell, the survivor or survivors, where there are more than one named in the will, and the acting executor or executors, when any one or more of them dies, resigns, or refuses to act, or is removed by a court of competent authority, and also an administrator with the will annexed, has the same interest in, and power over such lands for the purpose of making sale thereof, as the executors named in such will might have had. Unless the contrary clearly appear by the terms of the will it shall be presumed that the power or trust imposed is not a personal trust or confidence."

[16] McMillen v. Bliley, 115 Colo. 575, 177 P.(2d) 547 (1947).

2. Statutes Affecting Sale of Land by a Foreign Personal Representative

Nearly a third of the states have passed statutes which deal directly with the problem of sale of real property in the forum by a personal representative appointed in another jurisdiction. These statutes take one of two general forms. The first is merely an adoption of the common-law rule by the legislature. Typical of this type of legislation is the following:

"When by any foreign will, filed and recorded in this State, as authorized by the four preceding articles, power is given an executor or trustee to sell any real or personal property situated in this State, no order of court shall be necessary to authorize such executor or trustee to make such sale and execute proper conveyance, and whenever any particular directions are given by a testator in any such will respecting the sale of any such property situated in this State, belonging to his estate, the same shall be followed unless such directions have been annulled or suspended by order of a court of competent jurisdiction."[17]

Such a statute would require that the personal representative making the conveyance must be an executor or trustee named in the will and must have been given a power of sale in the instrument itself. This is nothing more than a restatement of the rule at common law and adds little to our picture.

Some states have adopted statutes which represent a rather radical departure from the common-law rules relating to a sale of real property by a foreign personal representative. The changes made by such legislation

[17] Vernon's Tex. Civil Stat., Art. 8305. The following are similar statutes: Colo. Rev. Stat., sec. 152-6-4; Smith-Hurd Ill. Stat., Ch. 3, sec. 429; Iowa Code Ann., sec. 633.35; Gen. Stat. of N.C., Ch. 28, sec. 37; Code of Va., sec. 64–139, 64–140 (1950).

can best be made clear by giving an illustrative statute. The enactment in Ohio is a good example:

> "When an executor or administrator is appointed in any other state, territory, or foreign country for the estate of a person dying out of this state, and no executor or administrator thereon is appointed in this state, the foreign executor or administrator may file an authenticated copy of his appointment in the probate court of any county in which there is real estate of the deceased, together with an authenticated copy of the will. After filing such copies, he may be authorized, under an order of the court, to sell real estate for the payment of debts or legacies and charges of administration, in the manner prescribed in sections 2127.01 to 2127.43, inclusive of the Revised Code."[18]

It will be noticed that this authority is given not only to foreign executors, but to foreign administrators as well. Also, it does not require a power of sale to be conferred in the will. Nevertheless, such statutes contain rather important restrictions on the power of sale of local lands by a foreign personal representative. It is generally required that the domiciliary administration be elsewhere, since the normal provision is that the decedent not be domiciled in the jurisdiction when he died. In order to sell the land, a court order or license must be obtained. Usually, such authority can be given only when it is necessary to sell the land to pay debts of the decedent or the expenses of administration.

Such statutes as these mark an extremely important trend away from the rather rigid common-law theory. Actually, this type of statute is fairly well drafted to provide a unified administration of decedent's real

[18] Page's Ohio Rev. Code, sec. 2129.25. The following are similar statutes: 113 Ga. Code Ann. 2404; Burns Ind. Stat., sec. 7–951; Ann. Laws of Mass., Ch. 202, sec. 32; Rev. Stat. of Neb., sec. 30–1134 (1943); Rev. Laws of N.H., Ch. 358, sec. 12 (1942).

property. The limitation on sale for debts and administration expenses only is not at all harmful, because the only reason an administration needs control of the property is to satisfy claims against the decedent. It is not nearly so necessary actually to collect real property as it is movable property, since land will always be available if it is needed for the payment of claims. Title to the land passes automatically to the heirs or devisees without having to pass through a personal representative, so that an administrator has no need to deal with realty in a foreign jurisdiction unless there are debts and expenses to be paid. Although most statutes are not clear on this, they should permit only the domiciliary personal representative to administer the local realty in order to specify a single administrator for all the property. If this type of statute were adopted in each of the forty-eight states, the problem of multiple administrations of real property would be solved.

3. Assets Arising from an Oil and Gas Lease

The large-scale development of the oil and gas industry in the last hundred years has created a host of legal problems. The property interest in oil and gas is an anomaly. Because of this, much confusion has developed in regard to applicable legal rules. A brief discussion of the problems a foreign personal representative will have in collecting the assets arising from oil and gas interests will indicate this difficulty.

Oil and gas are minerals found below the surface of the earth. Because of the propensity of these minerals to move while underground and the difficulty involved in locating their *situs* as property until they have been reduced to posession by removal from the ground, there has been a serious theoretical dispute whether the

interest in oil and gas should be classified as realty or personalty.[19] It is, however, generally treated as an interest in land.[20] This mineral interest can be separated from the surface ownership and may itself be divided into a number of fractional interests.[21] The almost universal method of utilizing this mineral interest, because of the expense involved in drilling wells and setting up transportation systems, is for the owner to lease his mineral interest to an oil company which does the actual developing.[22]

The oil and gas industry in its early days experimented with a number of different types of leases, but in recent years the lease has become fairly well standardized, with a few variations in form.[23] The lease will have a definite primary term, normally of five years, during which the lessee or oil company may extend the lease from year to year by paying delay rentals. The clause may be of the "drill or pay" variety, under which the lessee must drill during the primary term or pay rentals during that term until production starts. If the lessee fails to pay the delay rentals or to drill, the lessor or owner of the mineral interest may forfeit the lease. With this type of clause, a "surrender" clause is included which gives the lessee power to surrender the lease during the primary term. On the other hand, the clause may be of the "unless" type. Under this clause,

[19] Summers, THE LAW OF OIL AND GAS, sec. 152 (1938).

[20] Morris, "Oil and Gas Interests in Decedents' Estates," TRUSTS AND ESTATES, Oct. 1954, 890.

[21] AMERICAN LAW OF PROPERTY, Vol. 2, sec. 10.6 at 516.

[22] An excellent discussion of the problems of obtaining and continuing oil and gas leases in relation to personal representatives, both domestic and foreign, written from the point of view of an oil company attorney will be found in Morris, *supra* note 20.

[23] Summer, *op. cit.*, *supra* note 19, sec. 292. A good general discussion of the modern oil and gas lease.

the lessee must pay a specified delay rental each year to have the lease continue for the next year throughout the primary term. If the delay rental is not paid, the lease terminates automatically. If, however, during the primary term, there is a well drilled and oil or gas is produced, the lease will thereafter continue as long as there is production in paying quantities. From the time production begins, the delay rentals cease and the lessor is compensated with royalty payments which will be the value of a fraction, usually one-eighth, of the oil produced. Thus under an oil and gas lease, the lessor will be entitled to receive from the lessee either delay rentals or royalties. On the death of the lessor, will his personal representative appointed in one state be permitted to collect royalties and delay rentals paid on an oil and gas lease in another state?

The oil and gas lease is generally regarded as an interest in land, and consequently the delay rentals and royalties are usually treated as analogous to rents and profits from land.[24] Therefore, the rules which determine who is entitled to receive rents and profits from land should determine who is entitled to receive delay rentals and royalties on oil and gas property owned by the decedent.

The rule at common law was that land went directly to the heirs and devisees and they were entitled to receive the rents and profits from the land.[25] In those states where the common law is still applicable, it would seem that the personal representative has no right to collect rents and royalties arising from an oil and gas lease.

However, many states have passed statutes which

[24] Morris, *supra* note 20 at 891.
[25] AMERICAN LAW OF PROPERTY, Vol. 3, sec. 14.6, 14.7.

give the personal representative control over decedent's real property and the right to collect the rents and profits.[26] Under such statutes, the royalties and rentals should be paid to the personal representative. Frequently, however, the personal representative will be appointed at the decedent's domicile, but the oil and gas lease will cover property in another state. As a general rule, the oil companies do not pay the rentals and royalties to a foreign domiciliary representative, but instead insist on the appointment of an ancillary administrator in the state where the lease is located whom they will pay.[27] The problem is very analogous to the case of voluntary payment of a debt to a foreign personal representative. As we shall see in connection with that problem, most courts would treat the payment as a valid discharge,[28] but there is enough doubt as to the result that the only completely safe course for a debtor in the absence of statutory protection is to pay only a local administrator. This same doubt exists as to the validity of payments of royalties and rentals to a foreign personal representative, and the oil companies will not take the risk. Therefore, it is very un-

[26] A typical statute of this type is found in Kansas:

"The executor or administrator shall have a right to the possession of all the property of the decedent, except the homestead and allowances to the surviving spouse and minor children. He shall pay the taxes and collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the heirs, devisees, and legatees. He shall keep in tenantable repair the buildings and fixtures under his control and may protect the same by insurance. He may by himself, or with the heirs or devisees, maintain an action for the possession of the real estate or to quiet title to the same." Gen. Stat. of Kan., sec. 15–401 (1949).

Among the states which are large oil and gas producers and have adopted similar statutes are the following: Deering's Cal. Code, Probate, sec. 581; N.D. Rev. Code, sec. 30–1304 (1943); 58 Okla. Stat. Ann. 290; S.D. Code, sec. 35.1101 (1939); Wyo. Comp. Stat., sec. 6–1309.

[27] Morris, *supra* note 20 at 894, 898.

[28] See *infra* Chapter V, pp. 151–163.

likely that a foreign personal representative will ever have the opportunity to collect the assets of decedent which arise out of oil and gas leases in the absence of legislation expressly providing for this situation.

One problem may be briefly considered in connection with oil and gas leases, which shows graphically the unfortunate consequences of traditional legal thought as to the authority of personal representatives. One type of oil and gas lease which is in common current use is that which contains the "unless" clause. The lease is extended from year to year during the primary term by the payment of a specified delay rental, usually on a per acre basis. This rental must be paid before the year expires or the lease will terminate automatically.[29] If the lessor dies during the term, there is a serious problem as to who should be paid the delay rental in order to keep the lease alive.

If the lessor under an "unless" lease dies domiciled in a state other than the one in which he owned the lease, there are three possible recipients of the delay rental. The lessor may pay the heirs or devisees of decedent, he may pay the domiciliary personal representative, or he may pay an ancillary administrator appointed in the state where the oil and gas lease is located. The problem which is raised should be distinguished from the collection of assets discussed in the next chapter. The delay rentals are not assets to which the estate is entitled. It is entirely in the discretion of the lessee whether they are to be paid or not. Therefore, this is not a fund to which local creditors are entitled, and the rules designed to protect them by limiting the authority of a foreign personal representative to act in the forum should not

[29] Summers, *op. cit.*, *supra* note 19, sec. 288.

be used in determining the result. The real problem is the question of extending the oil and gas lease. What acts are sufficient to constitute an effective extension? Since an oil and gas lease is treated as an interest in land, this question will be determined by the law of the state in which the oil and gas lease lies. The problem is to determine what sort of payment that state will treat as adequate to extend the lease.

It is frequently true that the lease will be a very valuable piece of property to an oil company and they will want to take every possible precaution to protect themselves. I have been told that in order to insure that the lease on oil property which is likely to be highly productive will be extended, an oil company may make double or even triple rental payments. This seems unnecessary. However, the seriousness of the problem is obvious when the lessor dies shortly before the end of the period during which payment may be made. The lessor must act rapidly and be sure that the right party is being paid. It would seem that the forum, in deciding whether the payment was satisfactory to extend the lease, should only be concerned with the question of whether the payment was made in good faith and to a person entitled to represent the decedent.[30] The forum

[30] This would seem to follow from the cases which have held that a payment in good faith by the lessee which through inadvertence does not reach the lessor in time will not cause the "unless" lease to terminate. Gloyd v. Midwest Refining Co., 62 F.(2d) 483 (10th Cir. 1933); Brazell v. Soucek, 130 Okla. 204, 266 P. 442 (1928). However, probably the majority rule and one adopted in recent cases is that time is of the essence in an "unless" lease and failure to pay the rental on time or payment to the wrong bank will cause the lease to terminate. Keeler v. Dunbar, 37 F.(2d) 868 (5th Cir. 1930); Ellison v. Skelly Oil Co., 206 Okla. 496, 244 P.(2d) 832 (1952) (where fault was attributable to lessee although done in good faith). The problem discussed in the text does not deal with time of payment, but the proper party to receive payment and the courts should be more likely to adopt the minority rule.

should not decide the payment was invalid on the basis that the rule designed to protect local creditors prevents a foreign personal representative from acting in the jurisdiction. The oil company should be protected either if it pays the money into the court which is handling the principal administration to be distributed by it to the proper party, or if it seeks an ancillary administration in the forum and pays the delay rentals into the local court on behalf of that administration.