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## Collecting a Decedent's Assets without Ancillary Adminsitration

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## COLLECTING A DECEDENT'S ASSETS WITHOUT ANCILLARY ADMINISTRATION

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## COLLECTING A DECEDENT'S ASSETS WITHOUT ANCILLARY ADMINISTRATION

Neill H. Alford, Jr.\*

THERE are two encouraging features in the current pattern of estate management. First, formal administrations are being avoided when they serve no special purpose; and even if a formal administration does become necessary, the personal representative and his advisors usually will attempt to limit the time expended and cost incurred. Second, many states now have small estate laws. These laws permit liquidation and distribution of certain small estates without formal administration and avoid the formalities and expense of judicial intervention. The independent executorship in Texas<sup>1</sup> reflects this wholesome trend toward simplicity and economy in administration. In states that do not have small estate laws, lawyers and judicial officers find other means of avoiding many administrations without appreciable hazard to the liquidator, distributor, distributees, or purchasers of the decedent's property.

Why then is a turbulent element found in this otherwise tranquil trend of development if the decedent leaves assets in other states or in foreign countries? Although there is no data available currently from which the proportion of ancillary administrations to domiciliary administrations can be estimated,<sup>2</sup> if foreign assets are involved the tendency is to seek ancillary letters in the foreign jurisdiction. Ancillary administration of a bank deposit of 1,500 dollars will cost today about 150 dollars. "Chicken-feed"? Not in a 20,000 dollar

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\* Professor of Law, The Law School, University of Virginia. This article is based partially upon a talk made by the writer during the Institute on Wills and Probate (1963) sponsored by the Southwestern Legal Foundation, and partially upon a series of talks also made in 1963 under the auspices of the Committee on Continuing Legal Education of the Virginia State Bar. Mr. Michael W. Maupin and Mr. W. Wesley Nagle, both of the Virginia Law Class of 1964, assisted the writer with meticulous research, and he is indebted to them.

Useful references bearing upon the collection of foreign assets without administration are III Beale, *Conflict of Laws* 1444-1597 (1935); McDowell, *Foreign Personal Representatives* 30-78, 123-169 (1957); Basye, *Dispensing With Administration*, 44 Mich. L. Rev. 329, 394-419 (1945); Beale, *Voluntary Payment to a Foreign Administrator*, 42 Harv. L. Rev. 597 (1929); Buchanan & Myers, *The Administration of Intangibles in View of First National Bank v. Maine*, 48 Harv. L. Rev. 911 (1935); Cheatham, *The Statutory Successor, the Receiver and the Executor in Conflict of Laws*, 44 Colum. L. Rev. 549 (1944); Goodrich, *Problems of Foreign Administration*, 39 Harv. L. Rev. 797 (1926); Hopkins, *Conflict of Laws in Administration of Decedent's Intangibles*, 28 Iowa L. Rev. 422, 613 (1943); Mersch, *Voluntary Payment to Foreign Administrator*, 18 Geo. L.J. 130 (1930); Stimson, *Conflict of Laws and the Administration of Decedents' Personal Property*, 46 Va. L. Rev. 1345 (1960).

<sup>1</sup> Tex. Prob. Code Ann. §§ 145-46 (Supp. 1963), 147-54 (1956).

<sup>2</sup> A committee of the Section on Real Property, Probate and Trust Law of the American Bar Association now is making a study of foreign personal representatives. Concrete information pertaining to the extent of ancillary administration may be produced by this group.

estate! Also, further costs may accrue in the domicile when the assets are remitted. Distributees, legatees, or domiciliary creditors will be fortunate if 1,300 dollars remain. An ancillary administrator bides his time, signs a few papers, publishes a few notices, and pays local court costs and taxes. Claims other than tax claims seldom are filed with an ancillary administrator unless he has been appointed on the petition of creditors. Although little is done for the amount charged, one can be relatively certain that local claims will be barred after the ancillary administration is completed. Thereafter, usually the assets are remitted to the domiciliary personal representative; but the case is not unknown in which a domiciliary personal representative has been confounded by a failure of the ancillary administrator to deliver the property.<sup>3</sup> If the local law of the foreign state permits the domiciliary personal representative to take out ancillary letters, judicial officers in the domicile will be thrown into a state of confusion when he seeks their consent to act in the other state. If he fails to obtain this consent, their disturbance will become distinct when he seeks credit on his domiciliary account for ancillary activities.<sup>4</sup>

In times past, the domiciliary representative could look in the other direction, ignore the assets in the foreign state, and leave the next of kin to their own resources to get the property from the ancillary administrator. One could learn to live with multiple administrations. No clear-cut fiduciary duty had developed which required him to collect assets outside the state of his appointment.<sup>5</sup> However, this situation exists no longer. The domiciliary personal representative now is liable for the full federal estate tax on land and personal

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<sup>3</sup> E.g., *In re Lane's Estate*, 199 Iowa 520, 202 N.W. 244 (1925); *In re De Lano's Estate*, 181 Kan. 729, 315 P.2d 611 (1957); *In re Estate of Robinson*, 25 Misc. 2d 9, 206 N.Y.S.2d 459 (Surr. Ct. 1960); *In re Horwich's Estate*, 11 Misc.2d 79, 170 N.Y.S.2d 472 (Surr. Ct. 1957); *In re Estate of McNeel*, 10 Misc. 2d 359, 170 N.Y.S.2d 893 (Surr. Ct. 1957); Comment, *Jurisdiction Over Administration of Intangibles in Light of the De Lano Decision*, 6 Kan. L. Rev. 439 (1958); 12 Chi.-Kent L. Rev. 219 (1934); 25 Mod. L. Rev. 468 (1962); Annot., 90 A.L.R. 1043 (1934).

<sup>4</sup> A domiciliary personal representative often will serve as ancillary representative if a nonresident is eligible for the ancillary appointment. Pains should be taken to clear ancillary expenses on the ancillary account. Travel expenses to and from the ancillary jurisdiction usually are approved in the domiciliary account. *But see* *Kyle v. Ribelin*, 188 Ark. 264, 65 S.W.2d 46 (1933); *Jones v. Jones*, 39 S.C. 247, 17 S.E. 587 (1893); 18 Minn. L. Rev. 601 (1934).

<sup>5</sup> In Tennessee, for example, which adhered to the strict theory of territorial jurisdiction, the personal representative was not expected to operate outside the state of his appointment. *Bowman v. Carr*, 5 Lea 571 (Tenn. 1880). If the personal representative had written evidence of the debt in his possession, he might be expected to collect it in another state. *Klein v. French*, 57 Miss. 662 (1880). For modern cases dealing with the duty to collect foreign assets, see *In re Brown's Estate*, 28 Del. Ch. 562, 52 A.2d 387 (Orphan's Ct. 1944); *Welsh v. Welsh*, 136 W.Va. 914, 69 S.E.2d 34 (1952).

property no matter where the assets are located.<sup>6</sup> He has to be familiar with this property in order to pay the tax, and he must know enough about the business of the decedent in other states to file his income tax returns and to determine his gift tax liability. Pressure probably will be brought to bear upon the personal representative to develop liquid assets in order to pay taxes and other estate obligations. These forces compel the domiciliary personal representative to discover and to recover any foreign assets that he can.

State taxes also present a problem in reducing the overall tax impact upon the estate. States of both "domicile" and "business" situs may impose inheritance taxes upon intangible personal property.<sup>7</sup> Tangibles are taxable where situated.<sup>8</sup> To avoid multiple taxation, the domiciliary personal representative usually is pushed to recover as much of the personal estate of the decedent as he can legitimately without subjecting it to crippling local tax blows. If an ancillary administration is commenced, it is assured that local taxes will be imposed upon the property.

Since good and sufficient reasons exist to cut ancillary administration to the bare minimum, it is disconcerting that so many ancillary administrations apparently are conducted. In the writer's opinion, many domiciliary personal representatives blunder into ancillary administrations through ignorance, although many judicial officers have been known to give kindly guidance to the wayward.<sup>9</sup> Some of the administrations arise through references to lawyers to collect foreign assets. For example, the local practitioner who is to collect debts without exact knowledge of the existence of local creditors may be inclined to seek ancillary letters for his own protection.

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<sup>6</sup> Int. Rev. Code of 1954, § 2002; Treas. Reg. § 20.2002-1 (1958); Alexander, *Personal Liability of Executors and Trustees for Federal Income, Estate, and Gift Taxes*, 9 Tax L. Rev. 1 (1953).

<sup>7</sup> *Graves v. Elliott*, 307 U.S. 383 (1939); *Curry v. McCanless*, 307 U.S. 357 (1939). The situs of intangibles may be divided for death taxes. *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942); *Graves v. Schmidlapp*, 315 U.S. 657 (1942); *People v. Cooke*, 370 P.2d 896 (Colo. 1962); Marsh, *Multiple Death Taxation in the United States*, 8 U.C.L.A.L. Rev. 69 (1961); Comment, *State Inheritance Taxes Interstate Conflicition, Confusion, Conformity*, 19 Ohio St. L.J. 106 (1958); Comment, *How Far Will Multi-State Death Taxation Go?* 1 Vand. L. Rev. 93 (1947); Annot., 67 A.L.R. 393 (1930).

<sup>8</sup> *Frick v. Pennsylvania*, 268 U.S. 473 (1925). United States bonds, certificates, and savings accounts are intangible personalty. *Blodgett v. Silberman*, 277 U.S. 1 (1928). Currency owned by a Virginia decedent in a safe deposit box in another state is tangible personalty and is taxable only where situated. *Thomas v. Virginia*, 364 U.S. 443 (1960), noted in 46 Minn. L. Rev. 393 (1961).

<sup>9</sup> The writer is indebted to Senator William Spong of Portsmouth, Virginia, for the incident of the North Carolina domiciliary personal representative who wrote Judge Brockenbrough Lamb of the Chancery Court of the City of Richmond, Virginia, inquiring how movable property located in Virginia might be removed to North Carolina. The Judge told him to "send a moving van."

Also, corporate fiduciaries may seek to avoid conflicts with their professional competitors in other states.

Some ancillary administrations clearly may be necessary. Perhaps title to foreign land must be cleared by elimination of creditor claims in the situs jurisdiction. A debtor may refuse to pay without a receipt from a local administrator. The biography of the decedent may be so obscure that neither his assets nor his debts in other states can be discovered with certainty without a formal administration. Also it is an unfortunate fact that some domiciliary fiduciaries lack the competence to be permitted to collect debts and to pay creditors without the supervision a judicial officer in a foreign state can provide.

Assuming the situation is favorable to the collection of foreign assets without an ancillary administration, under what special conditions can recoveries of foreign assets be executed with safety to the domiciliary personal representative and those who deal with him? What viable policies, if any, support ancillary administrations today? By what techniques can a domiciliary personal representative recover foreign personalty in a manner compatible with any of these policies that do exist? What new situations are developing which may present special problems in avoiding ancillary administration? This Article attempts to answer each of those questions.

### I. BACKGROUND OF MULTIPLE ADMINISTRATION

The practice of ancillary administration is founded upon vague but deeply rooted principles left as debris from the battle for jurisdiction between the common law and ecclesiastical courts in Tudor and Stuart England. These principles have retained vitality in the confusion in legal administration incident to a federal system of government in the United States.

The particular phase of the far-flung battle between the common lawyers and the civilians pertinent here is the effort, particularly by the Exchequer bar, to undermine supervision of the ecclesiastical courts over the administration of estates. The Bishop or his representative in the court of ordinary handled most of the problems in estate administration. However, competitive tension and potential for administrative schism existed between the two ecclesiastical Provinces of York and Canterbury. The policy of the lawyers was one of "divide and conquer." Set the Province of Canterbury against the Province of York; then, when the stalemate is complete and administrations have bogged down, "move in and grab the loot." Quite justly, when the stalemate occurred, the loot fell to the Chancery

Court rather than to the votaries of the common law; but, nevertheless, the debris of the battle still impedes and embarrasses us.

In *Byron v. Byron* in 1596,<sup>10</sup> Chief Justice Anderson had before him the case of a domiciliary administrator in the Province of York who had released the debt of a debtor domiciled in the Province of Canterbury. After collection of the debt, a court of the Province of Canterbury had issued letters to an ancillary administrator, who then sued the debtor for a second payment. The debtor pleaded in bar the release of the domiciliary administrator. Anderson held the release ineffective. If there were assets in both provinces, Canterbury, he reasoned, as senior province, should have issued the letters of administration. Also, the situs for administration was Canterbury, the residence of the debtor. Anderson remarked that two administrations in the same estate were *res inaudita*.

Although Anderson may never have heard of two administrations for one estate, multiple courts dealing with a single case, and each taxing their costs, had been a source of grievance to common Englishmen subject to the common law for generations. Writing more than two centuries before *Byron v. Byron*,<sup>11</sup> William Langland had Piers Plowman lament the expense of, and the number of courts dealing with, a single case.<sup>12</sup> No doubt this chirping, like that of a disgruntled cricket hidden in a cold and humble hearth, failed to reach the ears of the great and powerful. In any event, it would have made little difference if it had. In Langland's time, ecclesiastical jurisdiction over the administration of estates was securely beyond the influence both of secular reform and of secular avarice. But matters had altered by the time of Anderson. The ecclesiastical courts, when dealing with personal property, which had become an important element of wealth in an age of colonization, were being drawn rapidly under secular control. The judges in the ecclesiastical courts more often were laymen than churchmen, and the procedures of the courts of ordinary were scrutinized closely by the common law judges.

After the decision in *Byron v. Byron*,<sup>13</sup> the lawyers practicing before the common law courts mounted such a savage attack upon ecclesiastical jurisdiction that the Court of Exchequer was persuaded to rule that if assets above a specified amount were in both York

<sup>10</sup> 2 Cro. Eliz. 472, 78 Eng. Rep. 709 (Q.B. 1596). A collection of earlier cases involving dual administration may be found in Buchanan & Myers, *The Administration of Intangibles in View of First National Bank v. Maine*, 48 Harv. L. Rev. 911, 911-12 (1935).

<sup>11</sup> *Supra* note 10.

<sup>12</sup> Langland, *Vision of Piers Plowman* (Circa 1350) lines 447-448, Passus III (Wells ed. 1935).

<sup>13</sup> 2 Cro. Eliz. 472, 78 Eng. Rep. 709 (Q.B. 1596).



and Canterbury, there must be two administrations for the one decedent. Undiscovered assets, often still a concomitant of multiple administrations, could be sought by a bill of discovery in Exchequer.<sup>14</sup> Later English cases expanded this position. By 1700, three postulates relating to the administration of estates had been implanted firmly in the English law: (1) Jurisdiction in administration is territorial and does not turn principally upon the personal law of the decedent; (2) the authority of the personal representative is limited to this territory, like the authority of a sheriff to his shire; (3) the situs of assets within the territory determines which personal representative should administer them.

With a few exceptions, the American courts did not follow this precedent blindly. The American courts, however, were influenced by the English doctrine. The shell of the common law concept of territorial jurisdiction was retained, local meaning was worked into the shell by the legislatures and the courts, and a plethora of complicated embroidery was added by the doctrines of conflict of laws developed for federal purposes.

The authority of a personal representative appointed within a state was said to be limited to the territory of that state.<sup>15</sup> But if this personal representative, whether executor or administrator, was qualified or appointed in the domicile of the decedent, by comity (a growing point of law) his administrative title or right to possession for administrative purposes was said to extend to movable assets wherever found, subject to being divested when found in another state by appointment there of an ancillary administrator.<sup>16</sup> A few states—Missouri,<sup>17</sup> Vermont,<sup>18</sup> Tennessee<sup>19</sup> and perhaps New Hampshire—adhered to the strict territorial view.

Although comity was invoked to circumvent territorial limitations and to permit the domiciliary personal representative for com-

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<sup>14</sup> *Allison & Sharpley v. Dickenson*, Hard. 216, 145 Eng. Rep. 460 (Ex. 1661). In *Price v. Simpson*, 2 Cro. Eliz. 718, 78 Eng. Rep. 953 (C.P. 1599), it was held that two administrations were necessary if property was found in a "peculiar" (an ecclesiastical franchise jurisdiction) within a province.

<sup>15</sup> Although the executor derives part of his authority from nomination by the testator, both the executor and administrator derive authority from the court which qualifies or appoints them. *In re Ferris' Estate*, 234 Iowa 960, 14 N.W.2d 889 (1944); *Hargrave v. Turner Lumber Co.*, 194 La. 285, 193 So. 648 (1940).

<sup>16</sup> This doctrine has not been extended at common law to the power to sue in a foreign state, although suits have been allowed by comity under special circumstances. *Kirkbridge v. Van Note*, 275 N.Y. 244, 9 N.E.2d 852 (1937), noted in 7 Brooklyn L. Rev. 247 (1937); *In re Chisholm's Will*, 108 N.Y.S.2d 182 (Surr. Ct. 1951); Cheatham, *The Statutory Successor, the Receiver and the Executor in Conflict of Laws*, 44 Colum. L. Rev. 549 (1944).

<sup>17</sup> *Crohn v. Clay County Bank*, 137 Mo. App. 712, 118 S.W. 498 (1909).

<sup>18</sup> *Vaughn v. Barrett*, 5 Vt. 333 (1833).

<sup>19</sup> *Young v. O'Neal*, 3 Sneed 55 (Tenn. 1855).

mercial convenience to recover assets in another state, new confusion was generated by the complicated and obscure doctrines of conflict of laws. Not the least of the problems which became more complex was the *situs* of assets for administration. Equating *situs* with *jurisdiction*, the states agreed that the state in which land was located had jurisdiction over it for taxation, succession, and administration unless superseded by the federal government acting within its constitutional powers. This gave little comfort to the foreign personal representative who seldom had possession of the land for administration. Furthermore, the federal government, for administrative convenience, abandoned the state situs rule pertaining to land for the estate tax. The domiciliary personal representative paid the federal tax on the land no matter where it was located.<sup>20</sup>

The states tended to diverge in the situs rules they formulated for the personal estate. Commercial or administrative convenience gradually eroded older situs concepts. Demands for state revenue led to special situs rules for local taxation. The states, each travelling at its own speed and in its own direction, finally could be found at various points along the spectrum of possible situs formulae. The simple debt first was said to have a situs for administration where the debtor resided.<sup>21</sup> This situs concept later was extended to any place at which the debtor could be sued.<sup>22</sup> Some states adhered to the older view; some followed the newer. As corporate wealth became important, the older view that shares of stock had their situs at the domicile of the corporation began to yield to the idea that the place at which the certificates were found determined their situs. Some courts held that the domicile of the owner controlled administration of the shares.<sup>23</sup> Movables, such as chairs, vehicles, and specialty paper, were said, rather unimaginatively, to have a situs where found. It is not clear from the decisions whether the courts meant found only at the death of the decedent or found at any time after his death.<sup>24</sup> The latter position appears to have been taken in practice. A "shell game" could be played in each estate, with property moved from state to state after the death of the decedent until a personal repre-

<sup>20</sup> See note 6 *supra*.

<sup>21</sup> *Blackstone v. Miller*, 188 U.S. 189 (1903).

<sup>22</sup> *Fox v. Carr*, 16 Hun 434 (N.Y. App. Div. 1879).

<sup>23</sup> *Miller's Estate v. Executrix of Miller's Estate*, 90 Kan. 819, 136 Pac. 255 (1913). See *Russell v. Hooker*, 67 Conn. 24, 34 Atl. 711 (1895); *In re Nichol's Estate*, 24 Pa. D. & C.2d 247 (Pa. 1961); Goodrich, *Problems of Foreign Administration*, 39 Harv. L. Rev. 797, 805-07 (1926).

<sup>24</sup> See *In re Estate of Bobes*, 15 Misc. 2d 530, 182 N.Y.S.2d 468 (Surr. Ct. 1958); Goodrich, *Problems of Foreign Administration*, 39 Harv. L. Rev. 797, 798-801 (1926); Stimson, *Conflict of Laws and the Administration of Decedents' Personal Property*, 46 Va. L. Rev. 1345, 1358-60 (1960).

sentative took possession of it in one of the states for administration. Moreover, difficulty, of course, arose concerning the characteristics of property relevant to the situs test. What are "movables" and what are "immovables"? Are bonds, negotiable instruments, and shares of stock "tangibles" or "intangibles"? There have been differences of opinion concerning these matters.<sup>25</sup>

The catastrophic development befalling the administration of estates in the United States, however, was the policy that each state could determine the domicile of the owner for assets within its jurisdiction.<sup>26</sup> The "personal" law of the decedent, based on domicile, could determine succession to his personal estate, the place for its administration, and its taxation. If each state could make a determination of domicile, multiple successions, multiple administrations, and multiple taxes were the probable consequence. The possibility of multiple determinations of domicile hung like a malign albatross over the tax planning and administration of every estate.

Professor Ehrenzweig, commenting upon conflict of laws doctrines pertaining to succession, has noted the illusion of certainty and stability in this area that is created by the literature on this subject.<sup>27</sup> Professor Beale's treatment of administration of estates in his great treatise on conflict of laws,<sup>28</sup> for example, conveys this illusion and perhaps has done more to cultivate a favorable opinion of ancillary administrations among lawyers than any other legal writing in the present century. Actually, the conflict of laws doctrine relating to administration of estates is in chaos. If a personal representative by avoiding ancillary administration can avoid an unnecessary judicial intervention in the administration of the estate, he also can avoid the uncertainties of the conflict of laws doctrines pertaining to administration, succession, and perhaps even taxation. This is as strong an argument as any for avoiding ancillary administrations whenever it is legally and ethically possible to do so.

## II. CASE OF A HYPOTHETICAL DECEDENT

Assume you have just been appointed administrator in Virginia of the estate of Colonel Hobart Jones, USA. Virginia creditors urged the appointment. Colonel Jones died, we think, while domiciled in Virginia. We know he was killed in a two-car collision near Pine-

<sup>25</sup> See III Beale, *Conflict of Laws* 1476-1501 (1935).

<sup>26</sup> *Baker v. Baker, Eccles & Co.*, 242 U.S. 394 (1917); *Overby v. Gordon*, 177 U.S. 214 (1900).

<sup>27</sup> Ehrenzweig, *Conflict of Laws* 654 (1962).

<sup>28</sup> III Beale, *op. cit. supra* note 25 at 1441-1568 (1935). Although Professor Beale is no advocate of ancillary administrations, he does appear to regard these as the norm if multi-state assets are involved. His influence upon the Bar has been enormous.

hurst, North Carolina, where he had been on leave playing golf. The other driver probably was at fault. The Colonel's estranged, but not legally separated, wife lives with her mother in New York City. His two minor sons are in school in Virginia.

After inquiry, we have discovered possible assets in the Colonel's estate as follows:

1. Although stationed at Bremerhaven, Germany, the Colonel maintained an apartment at Groningen, Holland. He used the apartment as a place to enjoy coin and book collecting during his leisure hours. About 8,000 dollars in European gold coins are believed to be in a safe in the apartment with an unknown value in rare books. He is known to have some property at his military station in Bremerhaven—probably a small amount of cash and some personal items.

2. In New York he owns a completely furnished summer home on Long Island. The home is believed to have a safe in the basement containing heirloom jewelry. New York banks have 17,000 dollars on deposit in the Colonel's name. The trust officer of one of the banks, as custodian, holds stock certificates in a Texas corporation and bearer bonds for the Colonel.

3. In Texas the Colonel owned land subject to a gas lease and has accrued royalties. There are also unaccrued royalties and delay rentals under "drill or pay" type clauses in leases upon other land in Texas.

4. We are fairly certain that the Colonel has back pay due from the Army.

5. Upon his arrival at Pinehurst, the Colonel rented a safe deposit box in the Tarheel Bank. The North Carolina State Police have the key which was picked up at the scene of the wreck. We do not know the contents of this box.

How much of this property are you likely to collect without ancillary administration? How will you go about getting hold of the property in Holland? Can you sue under the North Carolina Death by Wrongful Act Statute without ancillary letters? How should you go about getting a look in that safe deposit box in Pinehurst? Quite obviously, there does not seem to have been any estate planning for the Colonel. Let us consider, first how we should go about collecting property in the United States. Then we will tackle collection of the property overseas.

### III. COLLECTION OF MOVABLE PROPERTY AND DEBTS IN NEW YORK

The most frequent policy justification for ancillary administration is protection of local creditors. There is something to be said for this position if limited to the tax creditor. After the local estate is

disclosed and inventoried, the decedent's contacts with the state can be exposed and examined to determine the tax liability. The tax claim then can be satisfied before the property is removed beyond the reach of the local tax commissioner.<sup>29</sup>

With respect to other creditors, the current importance of ancillary administration is doubtful. Unlike the claims of the foreign tax commissioner, the claims for goods, services, and money furnished the decedent probably will be respected in the domicile. It is possible these creditors might not hear of the decedent's death? This is unlikely in an age of installment buying and credit cards, in which a creditor has become more of an economic partner than an antagonist. Credit insurance—including life insurance upon the lives of debtors—is carried by many creditors who have numerous debtors and has reduced greatly pressure by creditors upon the foreign assets in an estate.

Professor Beale believed he detected in cases involving ancillary administration a "creditor prejudice" rule which might be raised when a debtor paid a foreign *domiciliary* representative who had taken no ancillary letters and when the debtor was ignorant of the existence of local creditors.<sup>30</sup> Professor Beale probably developed this idea from *Wolfe v. Bank of Anderson*,<sup>31</sup> in which a court, purporting to follow the United States Supreme Court case of *Wilkins v. Ellett*,<sup>32</sup> required a South Carolina bank which had paid a deposit to a Georgia *ancillary* administrator to pay a second time to a South Carolina *domiciliary* administrator *c.t.a.* It was not clear from the record at trial whether or not there were South Carolina creditors at the time of initial payment. Of course, it can be argued that a debtor who pays a foreign *ancillary* administrator should have a special duty to inquire concerning local creditors. In *Wilkins v. Ellett*,<sup>33</sup> however, a debtor was protected who paid a foreign *ancillary* administrator, although the

<sup>29</sup> Absent interstate agreements, no state enforces the revenue laws of another unless exceptions are made based on comity. III Beale, *op. cit. supra* note 25 at 1625-38 (1935); Annot., 78 A.L.R. 575 (1932). Non-tax creditors usually can reach the property in the domicile of decedent. *E.g.*, *Potter v. First Nat'l Bank*, 107 N.J. Eq. 72, 151 Atl. 546 (Ch. 1930). Local debtors and bailees sometimes are said to need protection, and thus an ancillary administration should be required. Their payment, however, is voluntary and they should be able to assess the facts. Concern also is expressed from time to time that a foreign personal representative, unless supervised locally, may fail to pick up collections in his domiciliary account. See *In re Nolan's Estate*, 56 Ariz. 366, 108 P.2d 391 (1940). Restless and suspicious distributees, legatees, and creditors place a heavy practical burden upon the personal representative to account for assets collected in foreign states.

<sup>30</sup> Beale, *Voluntary Payment to a Foreign Administrator*, 42 Harv. L. Rev. 597, 604-09 (1929); Mersch, *Voluntary Payment to Foreign Administrator*, 18 Geo. L.J. 130, 139-48 (1930).

<sup>31</sup> 123 S.C. 208, 116 S.E. 451 (1923).

<sup>32</sup> 108 U.S. 256 (1883).

<sup>33</sup> *Ibid.*

court emphasized that there were no creditors where the debtor resided. Courts generally have followed this decision, but there can be no assurance that a debtor always will be protected under these circumstances.<sup>34</sup> If the debtor went into the jurisdiction in which the ancillary administrator had been appointed and paid the debt, there would seem no chance of a second recovery since the debt would then be a domestic asset in the foreign jurisdiction. *Wilkins v. Ellett*<sup>35</sup> and its progeny, involving payments to foreign *ancillary* personal representatives, do not appear to form a sufficient basis for generalizations about a creditor prejudice rule if the payment is made to a foreign *domiciliary* personal representative.

As mentioned previously,<sup>36</sup> a few states have followed a strict territorial view at common law concerning the authority of a personal representative, although this position to some degree seems modified by statute in all of these states.<sup>37</sup> There are early cases in these states which imposed double liability. Other states have statutes dealing with collections of debts or goods by foreign personal representatives which the debtor should comply with before making payment.<sup>38</sup> With

<sup>34</sup> The demand for a single or unified administration is frequently echoed in decisions concerning a foreign ancillary administrator's collections. The ancillary administrator lacks the argument of extraterritorial power which an executor can make based upon the existence of a will. The concept of a "universal successor" also can be argued by the executor to sustain his collections.

<sup>35</sup> 108 U.S. 256 (1883).

<sup>36</sup> See notes 17-19 *supra*.

<sup>37</sup> Mo. Ann. Stat. §§ 456.240 - 456.350 (Supp. 1963) (Uniform Fiduciaries Act); Tenn. Code Ann. §§ 35-201 - 35-214 (1955) (Uniform Fiduciaries Act), §§ 35-901 - 35-911 (Supp. 1964) (Uniform Act for Simplification of Fiduciary Security Transfers). Vermont has only the Uniform Stock Transfer Act which, as subsequently indicated in this article, see text accompanying notes 49-51 *supra*, may facilitate stock transfers by fiduciaries. Vt. Stat. Ann. tit. 11, § 301-22 (1958).

<sup>38</sup> E.g., *Ferguson v. Morris*, 67 Ala. 389 (1880). See Ala. Code tit. 61, §§ 141, 151 (1960); Ariz. Rev. Stat. Ann. § 33-710 (1956) (confined to release of mortgage); Cal. Civ. Code § 2939½ (confined to release of mortgage); Conn. Gen. Stat. Rev. § 49-12 (1958); Fla. Stat. Ann. §§ 654.04 (1944), 734.30(3) (1964); Ga. Code Ann. § 113-2406 (1959); Idaho Code Ann. § 15-813 (1948) (limited to discharge of mortgage); Ill. Ann. Stat. ch. 3, § 266 (Smith-Hurd 1961); Ind. Ann. Stat. § 7-751 (1953); Iowa Code Ann. § 633.53 (1950) (limited to release of judgment and mortgage lien); Kan. Gen. Stat. Ann. § 59-1707 (1949); Me. Rev. Stat. Ann. ch. 154, § 89 (1954); Mass. Gen. Laws Ann. ch. 204, § 3 (1955); Minn. Stat. Ann. §§ 291.19 (1962), 525.273 (1947); Miss. Code Ann. § 622 (1956); Mo. Ann. Stat. § 473.667 (1956) (six-month waiting period); N.H. Rev. Stat. Ann. §§ 554:28, 554:29 (1955) (licensing by court and waiting period); N.M. Stat. Ann. § 31-16-9 (1953) (payment of tax), § 31-16-10 (1953) (notice to tax commissioner); N.D. Cent. Code § 35-01-25 (1960) (limited to release of mortgage); Okla. Stat. Ann. tit. 58, § 262 (1937) (limited to release of mortgage); Ore. Rev. Stat. § 116.186 (1963) (if over \$500, ninety-day waiting period and publication requirement); Pa. Stat. Ann. tit. 20, § 320.1101 (1950); R.I. Gen. Laws Ann. §§ 33-18-24, 33-18-26 (1956); S.C. Code Ann. § 19-600 (1962); S.D. Code § 35.0801 (Supp. 1960); Tenn. Code Ann. § 30-1631 (1955); Va. Code Ann. § 64-123 (1950); Wis. Stat. Ann. §§ 72.11 (1957), 235.56 (1957), 287.16 (1958), 316.30 (1958); Wyo. Stat. Ann. § 34-34 (1959). Compliance with the statutory provisions will protect the debtor against a second payment. *Carbondale Nat'l Bank v. Brown*, 66 F. Supp. 534 (E.D. Ill. 1946). Several states have

these exceptions, however, all of the reported cases protect the bailee, custodian, or debtor against a second recovery if (1) no local letters have been issued and (2) the bailee, custodian, or debtor has no actual notice of local creditors.<sup>39</sup>

In states lacking large commercial centers, a troublesome problem may arise concerning the precise quantum of notice necessary to result in double liability. In *Maas v. German Sav. Bank*,<sup>40</sup> a leading New York case, a New York bank paid a deposit to a New Jersey domiciliary personal representative five months after ancillary letters issued in New York. The debtor had no actual notice of these letters, and the New York ancillary administrator had not taken any action since his appointment. Mere recordation of the ancillary letters in the surrogate court was held insufficient constructive notice. A double recovery was not permitted because the bank lacked actual notice of the letters or of the existence of creditors. Regarding the quantum of notice necessary, the *Maas* rule probably is a fair reflection of the trend in large commercial centers in which the determination of all creditors in any event will be an extremely difficult matter. However, more stringent requirements of inquiry may be imposed upon debtors in communities in which the letters or creditors may be discovered easily. But even in those communities the chance is remote that a debtor will be made to pay twice if (1) he accepts the written word of a foreign domiciliary personal representative that all debts are paid, (2) utilizes the sources of information readily available to him—such as news files—and (3) then pays without actual notice of creditors. On the other hand, it is likely that he will have to pay twice if (1) ancillary letters actually have issued and (2) the ancillary administrator has commenced his administration by publication of notices. Of course, a debtor also will be protected against an ancillary administrator appointed after payment was made.

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statutes setting forth substantially the common law rule. N.J. Stat. Ann. § 3A:13-1 (1953); Ohio Rev. Code Ann. § 2129.03 (Page 1953); Pa. Stat. Ann. tit. 20, § 320.1105 (1950); R.I. Gen. Laws Ann. § 33-18-25 (1956). See Annot., 10 A.L.R. 272 (1921).

<sup>39</sup> Wilkins v. Ellett, 108 U.S. 256 (1883); Selleck v. Rusco, 46 Conn. 370 (1878); Citizens Nat'l Bank v. Sharp, 53 Md. 521 (1879); Schluter v. Bowery Sav. Bank, 117 N.Y. 125, 22 N.E. 572 (1889). See McCully v. Cooper, 114 Cal. 258, 46 Pac. 82 (1896); Gardiner v. Thorndike, 183 Mass. 81, 66 N.E. 633 (1903). Cf. *In re Estate of Tripp*, 29 Misc. 2d 153, 216 N.Y.S.2d 145 (Surr. Ct. 1961) (petition for ancillary letters refused after foreign domiciliary personal representative had collected only asset); Valentine v. Duke, 128 Wash. 128, 222 Pac. 494 (1924) (Alaska bound by agreement to allow Washington bank to convert assets and place in savings account). In *Volpe v. Emigrant Indus. Sav. Bank*, 277 App. Div. 543, 101 N.Y.S.2d 82 (1950), a bank which paid a foreign guardian was not required to pay a second time in an action by the ward. See *In re Starr's Trust*, 14 Misc. 2d 1, 178 N.Y.S.2d 586 (Sup. Ct. 1958); *In re Kiessling's Trust*, 11 Misc. 2d 660, 174 N.Y.S.2d 544 (Sup. Ct. 1958); Annot., 10 A.L.R. 276 (1921).

<sup>40</sup> 176 N.Y. 377, 68 N.E. 658 (1903).

*Morrison v. Hass*<sup>41</sup> is one of the leading cases concerning the collection of movable property when no ancillary administrator has been appointed and all known creditors (except the tax collector) have been paid. In this case testatrix died in Massachusetts, leaving movables in Massachusetts and in New York. Her son probated her will in New York, received letters testamentary there, and paid all known creditors both in New York and in Massachusetts. All assets in Massachusetts were removed to New York by 1911. In 1914 the Massachusetts tax commissioner attempted to secure payment of an inheritance tax by securing appointment of a Massachusetts administrator. The Massachusetts administrator sued for conversion the New York executor and others who had assisted him in removing the Massachusetts assets. Although the parties to this suit agreed that decedent had been domiciled in Massachusetts, the Massachusetts court by comity respected the New York decision allowing primary probate there. The record did not disclose whether the New York court had found New York domicile, but apparently the Massachusetts court also was prepared to respect this finding on the basis of comity. The court stated that at "common law" the executor's right to possession extended to "goods or credits of the estate in this State with the consent of the party having possession, provided he did not have to invoke the aid of the courts of this jurisdiction—especially as there were no local creditors of the deceased. . . ."<sup>42</sup> By emphasizing the comity element, the extra-territorial power of the foreign domiciliary executor is reconciled with the British postulate of a territorial limitation upon his powers.

No hard and fast distinction has been made between a domiciliary executor and a domiciliary administrator in applying an "administrative title" or "possession" theory based on comity. The "universality doctrine"—regarding the executor as universal successor of the decedent, but the administrator as a mere court appointee—might be a sufficient ground for a distinction between their extraterritorial powers.<sup>43</sup> However, no such distinction seems to have been made by

<sup>41</sup> 229 Mass. 514, 118 N.E. 893 (1918). In a companion case, *Morrison v. Berkshire Loan & Trust Co.*, 229 Mass. 519, 118 N.E. 895 (1918), the administrator brought a contract action against a bank which had paid an amount deposited by the decedent to the New York executor. A Massachusetts statute, designed to implement the collection of revenue, imposed liability for the inheritance tax upon a person or corporation delivering assets belonging to the estate of a non-resident decedent before the tax was paid. The action for the tax was to be brought by the terms of the statute by the Treasurer and Receiver General or his representative. Exceptions to a ruling in favor of the defendant were overruled, since the administrator brought the action and not the Treasurer and Receiver General and also because there was no mention of any inheritance tax liability in the record.

<sup>42</sup> *Morrison v. Hass*, 118 N.E. at 894.

<sup>43</sup> See III Beale, *op. cit. supra* note 25 at 1467-69 (1935).



the courts. For example, in *Swan v. Bill*<sup>44</sup> the New Hampshire Court applied the *Morrison* principle<sup>45</sup> to a Massachusetts domiciliary administratrix who took possession of a leasehold in New Hampshire.

The *Morrison* principle<sup>46</sup> may be based simply upon recognition that the situs of movables for administration can change after the decedent's death. No matter who brings the assets into the domiciliary jurisdiction the result should be the same if the domiciliary personal representative takes possession. Movables move whether the quondam owner dies or not. Courts have adjusted to this rule of commercial convenience, and will intervene only if a local personal representative has been appointed before the property is removed or if a fraud upon creditors who are known or should have been known to the debtor would be committed by its removal.

Special circumstances exist if the debt is represented by specialty paper. In that event a debtor must exercise sufficient prudence to obtain the promissory note or other document from the domiciliary personal representative. Strangely, problems have arisen in this context even among New Englanders, who by general repute exercise great prudence in these matters. In *Amsden v. Danielson*,<sup>47</sup> for example, a Connecticut debtor paid a specialty debt to a Connecticut ancillary administrator although he knew that a domiciliary executor in Rhode Island held the note. The debtor owned land in Rhode Island against which the Rhode Island executor thereafter quite easily obtained a judgment. If specialty paper is obtained and destroyed, there will be no double recovery from the debtor, regardless of whether an ancillary administrator has been appointed locally or whether local creditors exist.

Corporate stock has presented special difficulties in administration. Of course, the person who holds the share certificates can have them administered in the jurisdiction in which they are situated. Administration of the share certificates, however, does not mean the corporation or its transfer agent will transfer ownership or issue new share certificates. The corporation may insist upon an administration in the domicile of the corporation of the economic right which the certificates represent. With multiple findings of domicile possible, the corporation may be faced with claims by two "domiciliary" personal representatives. One of the older cases illustrating the latter difficulty is *Coca-Cola Int'l Corp. v. New York Trust Co.*<sup>48</sup> In this

<sup>44</sup> 95 N.H. 158, 59 A.2d 346 (1948).

<sup>45</sup> See text following note 41 *supra* and accompanying note 42 *supra*.

<sup>46</sup> *Ibid.*

<sup>47</sup> 19 R.I. 533, 35 Atl. 70 (1896).

<sup>48</sup> 22 Del. Ch. 344, 2 A.2d 290 (Ch. 1938), *aff'd sub nom.*, *Riley v. New York Trust Co.*, 315 U.S. 343 (1942).

case Georgia domiciliary executors had possession of share certificates in a Delaware corporation. There was also a finding of domicile by a New York court. The New York administrator demanded the issuance of new shares to it as corporate fiduciary. The Delaware corporation interpleaded the contestants in Delaware, and the Chancellor there made his own finding of domicile in New York, which he could do since the economic right represented by the certificates had its situs in Delaware.

Under the now generally adopted Uniform Stock Transfer Act,<sup>49</sup> transfer of the certificates is the key to title. The Act does not change the "situs rules" as such. But if the foreign personal representative obtains possession of the certificates and is prepared to surrender them to the company, the company will be amply safe in transferring ownership on its books and issuing new shares without ancillary administration or an adjudication in its domicile. The situation is much the same as if the company were called upon to pay a specialty debt by a foreign personal representative prepared to surrender the specialty paper.

Although the Uniform Stock Transfer Act will not preclude ancillary administrations at the domicile of the corporation, the Act does facilitate voluntary transfers of ownership by eliminating the problem presented in *Coca-Cola*<sup>50</sup> of a corporate decision among multiple claimants. Apprehension has existed under the Uniform Stock Transfer Act that a corporation nevertheless might be liable to an ancillary administrator appointed in the corporate domicile. The writer believes that this uncertainty has stemmed from misconceptions of the general common law rule imposing double liability upon bailees, custodians, and debtors.<sup>51</sup> However, the Uniform Act for Simplification of Fiduciary Security Transfers<sup>52</sup> appears to eliminate such hazards if reasonable precaution is exercised by the corporation and its transfer agent. The Uniform Act for Simplification of Fiduciary Security Transfers<sup>53</sup> simplifies the documentation required to register a security in the name of a fiduciary or to transfer a security assigned by a fiduciary. The executor or administrator need have only a court or clerk's certificate of qualification or appointment dated within sixty days of the change on the books of the

<sup>49</sup> 6 ULA 1.

<sup>50</sup> *Coca-Cola Int'l Corp. v. New York Trust Co.*, 22 Del. Ch. 344, 2 A.2d 290 (Ch. 1938), *aff'd sub nom.*, *Riley v. New York Trust Co.*, 315 U.S. 343 (1942). See text following note 48 *supra*.

<sup>51</sup> III Beale, *op. cit. supra* note 25 at 1501-03 (1935); Note, 31 N.Y.U.L. Rev. 1092 (1956).

<sup>52</sup> 9C ULA 74 (Supp. 1963) (adopted in 37 states as of 1961).

<sup>53</sup> *Ibid.*

corporation in the registered ownership of the security.<sup>54</sup> A person asserting a claim of beneficial interest adverse to such a change must give the corporation or transfer agent *written notice before* the change is made.<sup>55</sup> The corporation or its transfer agent can incur no liability by acting in accordance with the Act.

With these legal features concerning movables in mind, the first problem in dealing with the New York movables in the Colonel's estate<sup>56</sup> will be to dissuade the widow from attempting an ancillary administration. There is a chance she might challenge a Virginia finding of domicile. Furthermore, the fact that there appear to be no assets physically in Virginia—unless property held by the minor sons or deposited for their school expenses might be argued as local assets—may produce embarrassment if Virginia letters of administration are based solely upon decedent's domicile in the state.<sup>57</sup> Assuming the widow can be persuaded to agree to the Virginia administration, we can proceed safely with the collection of New York assets.

Since there is no money to pay New York creditors unless we can collect some or all of the bank deposits, these funds must be obtained first. The banks probably will give the administrator possession of the funds on deposit (unless they are Totten trust deposits<sup>58</sup>), and the trust officer probably will deliver the stock certificates and bonds if certain requirements are met: (1) production of a tax waiver from New York tax authorities; (2) delivery of authenticated copies of the Virginia letters of administration, showing domicile of the decedent in Virginia and bonding of the personal representative; (3) an affidavit that no creditors exist in New York or that all will be paid and that ancillary letters have not issued; (4) an agreement in writing to exonerate the bank and custodian from liability in the event of a second recovery.

After receiving the share certificates, the personal representative should be able to transfer ownership or have his name registered as owner by the Texas corporation, since Texas has adopted the Uniform

<sup>54</sup> Uniform Act for Simplification of Fiduciary Security Transfers § 4.

<sup>55</sup> Uniform Act for Simplification of Fiduciary Security Transfers § 5. As to voting of stock by foreign personal representative, see Annot., 41 A.L.R.2d 1082 (1955).

<sup>56</sup> See pp. 336-37 *supra* for the case of the hypothetical decedent discussed in this Article.

<sup>57</sup> III Beale, *op. cit. supra* note 25 at 1449-50. Cf. Stimson, *supra* note 24 at 1350-53 (advocating abandonment of domicile test and general adoption of situs standard).

<sup>58</sup> Under the New York Totten trust theory, a bank deposit with the depositor indicated as trustee for a designated beneficiary creates a trust of the residue in the account at the depositor's death. The New York banks will pay this amount only to the beneficiary named. The transactions have been sustained in a number of New York cases. *In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904) 70 L.R.A. 711 (1915); *In re Halpern's Estate*, 303 N.Y. 33, 100 N.E.2d 120 (1951).

Act for Simplification of Fiduciary Security Transfers.<sup>59</sup> Nevertheless, the personal representative will have to secure a guarantee of his signature by an officer of a bank which is a member of the Federal Reserve System or an officer of a banking corporation organized and existing under Texas law.<sup>60</sup> The terms upon which this guarantee is furnished will depend upon the rules of the guaranteeing bank. There will be no difficulty in transferring the bearer bonds if the transfer is necessary in order to raise cash.

If the administrator so wishes, he should be able to remove the furniture and jewelry from the summer home without ancillary letters, although to do so he will have to persuade the custodian, if any, to release the property. If he wishes, the administrator can make a bill of sale for the property and remove the cash proceeds to Virginia.

#### IV. THE DOMICILIARY PERSONAL REPRESENTATIVE AND INTERESTS IN LAND IN OTHER STATES

A personal representative's sole source of authority over land is a local statute at the situs thereof. In the absence of such a statute, the personal representative has no power. Although by the common law rule title to land passes directly to the heir or devisee, a personal representative may have to take possession of land to discharge debts. However, a foreign personal representative cannot act to acquire possession unless he is given this power by the law of the state of situs.<sup>61</sup>

There is only one exception at common law to this general rule. If a foreign domiciliary executor has conferred upon him by the will the power to sell land, he can exercise this power without local qualification if he probates the will locally.<sup>62</sup> Probate of the will usually will be required before the will can be recorded. Some statutes, however, permit the will to be recorded as a muniment of title without probate.<sup>63</sup> If an ancillary administration is conducted,

<sup>59</sup> Tex. Rev. Civ. Stat. Ann. art. 582-1 (Supp. 1963). See text accompanying notes 52-56 *supra*.

<sup>60</sup> Tex. Rev. Civ. Stat. Ann. art. 582-1 § 3a (Supp. 1963).

<sup>61</sup> *Clarke v. Clarke*, 178 U.S. 186 (1900).

<sup>62</sup> *Bacharach v. Spriggs*, 173 Ark. 250, 292 S.W. 150 (1927); *McMillen v. Bliley*, 115 Colo. 575, 177 P.2d 547 (1946); *Plenderleith v. Edwards*, 328 Ill. 431, 159 N.E. 780 (1928); *Niquette v. Green*, 81 Kan. 569, 106 Pac. 270 (1910); *Green v. Alden*, 92 Me. 177, 42 Atl. 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 Atl. 62 (1900); *Illinois Steel Co. v. Konkell*, 146 Wisc. 556, 131 N.W. 842 (1911); *Contra*, *Keith v. Proctor*, 114 Ala. 676, 21 So. 502 (1897).

<sup>63</sup> See *Tripp v. Hutchings*, 214 Ga. 330, 104 S.E.2d 423 (1958) (foreign will which could not be probated in Georgia recorded as muniment of title.)

the foreign executor will be in a position quite similar to that of a devisee and thus he cannot convey a clear title until the ancillary administration is concluded.<sup>64</sup> In Texas the common law rule concerning the executor is restated substantially by statute.<sup>65</sup> Statutes in other states that permit action by the executor with a power of sale vary in their terms. Usually he is required to file his papers in the court having jurisdiction over the land.<sup>66</sup> The Ohio statute, one of the most detailed, extends to administrators, but requires papers to be filed and sale by court approval.<sup>67</sup>

Assuming that the administrator has no power of sale conferred by a will, his only hope to obtain control over the land would seem to lie in the Texas and New York statutes giving the personal representative possession of the property during administration, even though title passes immediately to the heirs or devisees.<sup>68</sup> The difficulty with this approach is that both statutes are in derogation of the common law and will be strictly construed. Since neither applies specifically to a foreign personal representative, qualification at the situs would appear necessary to obtain possession; if so, the Virginia administrator can exercise no powers over the New York real property unless he qualifies in that state. The same is true of the Texas land subject to the leases. But what of the various royalties and delay rentals? Can these be recovered from the lessee company as personalty?

Accrued royalties from copyrights and patents are treated in the same manner as simple debts for purposes of collection by a foreign personal representative. Certain mineral royalties, such as the perpetual nonparticipating royalty, may be treated in the same way.<sup>69</sup> Accrued mineral royalties and accrued delay rentals technically may be personalty for administration. However, the trouble is that the

<sup>64</sup> See *Klemm v. Trustees of the American Red Cross*, 20 Ill. App.2d 482, 156 N.E.2d 258 (1959).

<sup>65</sup> Tex. Prob. Code Ann. §§ 105, 107 (1956).

<sup>66</sup> Colo. Rev. Stat. Ann. § 152-6-4 (1953); Ga. Code Ann. § 113-2405 (1959); Ill. Ann. Stat. ch. 3, §§ 271-73, 275 (Smith-Hurd 1961); Ind. Ann. Stat. § 7-951 (1953); Iowa Code Ann. §§ 633.35 - 633.36 (1950); Kan. Gen. Stat. Ann. § 59-1707 (1949); Me. Rev. Stat. Ann. ch. 163, § 14 (1954); Mass. Gen. Laws Ann. ch. 202, § 32 (1955); Minn. Stat. Ann. § 525.273 (1947); Neb. Rev. Stat. §§ 30-1133, 30-1134 (1956); N.H. Rev. Stat. Ann. §§ 554:28, 554:29, 559:12 (1955); N.M. Stat. Ann., §§ 31-16-9, 31-16-10 (1953); N.C. Gen. Stat. § 28-39.1 (1950) (retroactive); Pa. Stat. Ann. tit. 11, § 320.1101 (1950); Wis. Stat. Ann. § 316.30 (1958). If statutes of this type are in force, strict compliance usually will be required to convey a good title. E.g., see *Hutter v. Weiss*, 132 Ind. App. 244, 177 N.E.2d 339 (1961). See Stimson, *Conflict of Laws and the Administration of Decedents' Real Estate*, 6 Vand. L. Rev. 545 (1953); Annot., 81 A.L.R. 665 (1932).

<sup>67</sup> Ohio Rev. Code Ann., §§ 2129.14, 2129.25 (Page 1953).

<sup>68</sup> N.Y. Deced. Est. Law § 123; Tex. Prob. Code Ann. § 37 (1956).

<sup>69</sup> The "perpetual nonparticipating royalty" is a royalty interest created by grant or reservation prior to a lease. The owner does not participate in the execution of the lease or share in the cash bonus or delay rentals. Although "perpetual" is used, the royalty may be for a term of years. See 3A Summers, *The Law of Oil and Gas* §§ 599, 604 (1958).

existence of unaccrued royalties in the same estate will make necessary an ancillary administration in the state in which the mineral rights have their situs. Royalties which have *accrued* and delay rentals which have become due under the "drill or pay" clause during the lessor's lifetime should be treated as personalty for administration.<sup>70</sup> If delay rentals have been paid to a depository during the lifetime of the lessor under an "unless" clause, quite clearly the deposit should be treated as personalty.<sup>71</sup> But royalties which do not accrue until after the death of the lessor and delay rentals which do not become payable until that time are treated as land for administration.<sup>72</sup>

In many of the mineral states, such as Texas, a local personal representative is entitled to possession of land for administration.<sup>73</sup> Thus, if land or an interest in land exists, even though personal assets have been withdrawn from the state, there exists some possibility that ancillary letters may issue. The situation in which the lessee company finds itself is similar to that of the corporation which registered a change of ownership to the name of an executor or administrator in a foreign state prior to enactment of the Uniform Stock Transfer Act and the Uniform Act for Simplification of Fiduciary Security Transfers.<sup>74</sup> The difference is that the lessee company *knows* there is an asset in the state which cannot be administered except by a personal representative who qualifies locally. The writer has suggested hitherto in this article that the probability of double liability of the payor under such circumstances has been vastly overestimated by

<sup>70</sup> Under the "drill or pay" clause, if the lessee fails to drill within the time agreed he then is under a duty to pay a delay rental. The lessor cannot recover the rental until the end of the rental period unless there is an express stipulation that it is to be payable in advance. See 2 Summers, *op. cit. supra* note 69, §§ 338, 340. The accrued royalty or delay rental should be handled as a debt or as rent when it has become due during the lifetime of the lessor. *United States v. Noble*, 237 U.S. 74 (1915); *Kentucky Bank & Trust Co. v. Ashland Oil & Transp. Co.*, 310 S.W.2d 287 (Ky. 1958); *McCully v. McCully*, 184 Okla. 264, 86 P.2d 786 (1939).

<sup>71</sup> Under the "unless" clause, if a well is not completed by a certain date, the lease is void unless the lessee pays a stipulated sum for extension of his privilege. See 2 Summers, *op. cit. supra* note 69, §§ 337, 339. There is no duty to pay rental under the "unless" clause. It is, however, important under the clause to know to whom rental must be paid in order to avoid termination of the lease. Usually the lease permits payment to a depository. *Id.* § 348.

<sup>72</sup> *United States v. Noble*, 237 U.S. 74 (1915); *Standard Oil Co. v. Marshall*, 265 F.2d 46 (5th Cir. 1959); *Hughes v. United States*, 196 F. Supp. 37 (E.D. Tex. 1961); *B.H. & M. Oil Co. v. Graves*, 182 Ark. 659, 32 S.W.2d 630 (1930); *In the Matter of Estate of Patmore*, 141 Cal. App. 2d 416, 296 P.2d 863 (Dist. Ct. App. 1956); *In re Randolph's Estate*, 175 Kan. 685, 266 P.2d 315 (1954); *Kentucky Bank & Trust Co. v. Ashland Oil & Transp. Co.*, 310 S.W.2d 287 (Ky. 1958); *McCully v. McCully*, 184 Okla. 264, 86 P.2d 786 (1939). For the variation in treatment of these interests as realty or personalty, see 1 Williams & Myers, *Oil and Gas Law* §§ 213-215 (1962).

<sup>73</sup> Tex. Prob. Code § 37 (1956).

<sup>74</sup> See text immediately preceding note 48 *supra* and notes 48-55 *supra* and accompanying text.

the commentators.<sup>75</sup> The writer doubts that knowledge of an asset which can be administered only locally increases the risk of a double recovery, although undeniably some risk exists unless an ancillary administration is required.<sup>76</sup>

A lessee company could pay royalties accruing after the death of the lessor and delay rentals to the heirs or devisees. The current practice, however, seems to be to require an ancillary administration; the foreign personal representative cannot attack this policy successfully since generally it is settled that a local debtor cannot be compelled to pay without local qualification. The most, therefore, that our Virginia administrator might expect to recover in Texas without ancillary letters is royalties or delay rentals paid over by the lessee company to a depository during the lifetime of the lessor. These deposits should be handled like simple debts. Royalties due but not yet paid by the lessee company probably will not be paid except to an ancillary administrator in Texas.

#### V. THE NORTH CAROLINA ASSETS

##### A. *Obtaining Access To The Safe Deposit Box*

Two steps will be necessary to obtain access to the Colonel's safe deposit box at the Tarheel bank.<sup>77</sup> The State Police, who have the key and possibly other effects of the decedent picked up at the wreck, have inventoried these items and will deliver them to a personal representative who presents papers showing his authority.<sup>78</sup> Getting into the safe deposit box will be more difficult. A number of states still leave access to safe deposit boxes within the control of individual banks. In these states, such as Virginia, the rules concerning safe deposit boxes vary from locality to locality, and in some instances a variation will exist among branches of the same bank. A bank, for example, may admit the personal representative without question if he has the key and if he produces his letters. In contrast, some banks may require the personal representative to obtain a court order.<sup>79</sup>

North Carolina is one of a growing number of states which, for tax reasons, have placed controls upon the opening of safe deposit boxes.<sup>80</sup> The statute requires the bank to retain a sufficient portion of

<sup>75</sup> See text accompanying note 51 *supra*.

<sup>76</sup> Davis, *Ancillary Administration of Oil and Gas Leases in Kansas: A Legal Conundrum*, 5 Kan. L. Rev. 452 (1957); Morris, *Oil and Gas Interests in Decedents' Estates*, 93 Trusts & Estates 890 (1954).

<sup>77</sup> See pp. 336-37 *supra* for the case of the hypothetical decedent discussed in this Article.

<sup>78</sup> N.C. Gen. Stat. § 15-11 (1953).

<sup>79</sup> See Lamb, *Virginia Probate Practice* 10 (1957).

<sup>80</sup> N.C. Gen. Stat. § 105-24 (1958).

the contents of the safe deposit box to pay the taxes due upon the property unless the Commissioner of Revenue consents to the transfer. If the money found is 300 dollars or less, the clerk of the superior court of the resident county of the decedent can consent to the transfer. When the box is opened, the clerk of the superior court of the county in which the box is located or his representative must be present with an officer of the bank to make an inventory of the contents. Copies of this inventory are furnished to the Commissioner of Revenue, to the bank, and to the personal representative. This statute seems sufficiently broad to extend to a foreign domiciliary representative, but regardless of the amount discovered in the box, the tax waiver should be obtained from the Commissioner of Revenue rather than from the clerk. Upon presentation of the Virginia letters, the clerk or his representative and an officer of the bank will open the box. It is hoped that sufficient assets will be found to justify the ceremony.

#### *B. Action Under The North Carolina Death By Wrongful Act Statute*

By far the most important asset in North Carolina is likely to be the claim for wrongful death against the driver of the other car in the accident in which the Colonel was killed. Will local appointment be necessary in order to sue? If a local appointment is required, a North Carolina resident will have to be obtained as ancillary administrator. Although a non-resident administrator cannot be appointed in North Carolina, a non-resident executor may qualify locally.<sup>81</sup>

By the common law rule, generally a foreign personal representative cannot sue without local letters.<sup>82</sup> However, exceptions are made to the common law rule if the foreign personal representative sues in his own right (as upon bearer paper or upon a foreign judgment),<sup>83</sup> if a local court permits him to sue by comity to prevent injustice,<sup>84</sup> or if the defendant waives the incapacity of the personal representative to sue.<sup>85</sup> Furthermore, statutes in a number of states permit suit

<sup>81</sup> N.C. Gen. Stat. § 28-8(2) (1950).

<sup>82</sup> See III Beale, *Conflict of Laws* 1532 (1935) and cases cited therein; 11 Colum. L. Rev. 563 (1911); 36 Notre Dame Law. 218 (1961); 13 N.Y.U. Intra. L. Rev. 252 (1958).

<sup>83</sup> *Turner v. Alton Banking & Trust Co.*, 166 F.2d 305 (8th Cir. 1948); *Moore v. Kraft*, 179 Fed. 685 (7th Cir. 1910); *Schlörer v. Mangin*, 39 F. Supp. 65 (E.D.N.Y. 1941); *McCraw v. Simpson*, 208 Ark. 471, 187 S.W.2d 536 (1945); *Reed v. Hollister*, 95 Ore. 656, 188 Pac. 170 (1920); *Restatement, Conflict of Laws* § 509 (1934); 55 Mich. L. Rev. 261 (1956); 8 Minn. L. Rev. 544 (1924).

<sup>84</sup> *Kirkbride v. Van Note*, 275 N.Y. 244, 9 N.E.2d 852 (1937); *In re Chisholm's Will*, 108 N.Y.S.2d 182 (Surr. Ct. 1951).

<sup>85</sup> *Brown v. Nourse*, 55 Me. 230 (1867); *Farmers Trust Co. v. Bradshaw*, 242 N.Y.S. 598 (N.Y. City Ct. 1930) (pleading to the merits); *Jolley v. Sloan*, 61 Ga. App. 747, 7 S.E.2d 325 (1940) (filing a counter claim). An exception also may be made for an executor who has a power of sale over land because this power may be sufficiently broad



without local qualification if the foreign personal representative meets certain conditions, such as recording or filing his letters locally.<sup>86</sup> Under some of the Death by Wrongful Act statutes, an exception permitting suit by a foreign personal representative is made if the recovery is not for the estate generally and creditors cannot reach the assets recovered.<sup>87</sup> But these statutes are construed strictly, since they change the common law by creating a new remedy.

The North Carolina Death by Wrongful Act statute refers to the "executor, administrator or collector"<sup>88</sup> of the decedent as the person entitled to bring the action. A recovery is not applied as assets in paying debts or legacies, but it may be used to pay burial expenses and it is distributed in accordance with the North Carolina intestate law.<sup>89</sup>

Although the North Carolina Statute may seem at first glance to permit recovery by a foreign personal representative without local qualification, the North Carolina Supreme Court has required appointment of a resident personal representative to sue.<sup>90</sup> Since the

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to sustain a suit to implement it. *Doe v. McFarland*, 13 U.S. (9 Cranch) 151 (1815). A personal representative of a stockholder also may sue in a stockholder's derivative action without local qualification. *North v. Ringling*, 63 N.Y.S.2d 135 (Sup. Ct. 1946).

<sup>86</sup> Ala. Code tit. 61, § 146 (1960) (give security for costs); Ark. Stat. Ann. § 27-805 (1962) (execute bond); Colo. Rev. Stat. Ann. § 152-6-7 (1953); Del. Code Ann. tit. 12, §§ 1561, 1562, 1563 (1953); D.C. Code Ann. § 20-505 (1961); Fla. Stat. Ann. § 734.30 (1964); Ga. Code Ann. §§ 113-2401, 113-2402, 113-2403 (1959); Ill. Ann. Stat. ch. 3, § 265 (Smith-Hurd 1961); Ind. Ann. Stat. § 7-753 (1953); Kan. Gen. Stat. Ann. § 59-1708 (1949); Ky. Rev. Stat. Ann. § 395.170 (1960); La. Rev. Stat. § 13:3331 (Supp. 1963); Me. Rev. Stat. Ann. ch. 154, § 89 (1954) (perhaps extends to collection by suit); Md. Ann. Code art. 93, § 83 (1957) (limited to executor or administrator appointed in District of Columbia); Minn. Stat. Ann. § 573.05 (1947); Miss. Code Ann. § 622 (1956); Neb. Rev. Stat. § 30-807 (1956); N.J. Stat. Ann. § 3A:12-7 (1953); N.M. Stat. Ann. § 31-2-9 (1953); N.Y. Deced. Est. Law § 160 (Supp. 1963); N.D. Cent. Code § 30-24-18 (1960) (may be limited to executor appointed locally but resident elsewhere); Ohio Rev. Code Ann. § 2113.75 (Page 1954); Okla. Stat. Ann. tit. 58, § 262 (1937); Pa. Stat. Ann. tit. 20, § 320.1101 (1950); R.I. Gen. Laws Ann. § 33-18-26 (1956); S.C. Code Ann. § 19-600 (1962) (probably extends to collection by suit); S.D. Code § 35.1103 (1939); Wis. Stat. Ann. § 287.16 (1958). Extending the power to sue to a foreign personal representative may not extend to a power to sue to recover realty if this does not pass into the hands of the personal representative. *Bowen v. Willard*, 203 Minn. 599, 281 N.W. 256 (1938); 23 Minn. L. Rev. 373 (1939).

<sup>87</sup> *Wallan v. Rankin*, 173 F.2d 488 (9th Cir. 1949); *Cooper v. American Airlines, Inc.*, 149 F.2d 355, 162 A.L.R. 318 (2d Cir. 1945); *Carter v. Pennsylvania R.R.*, 9 F.R.D. 477 (S.D.N.Y. 1949); *La May v. Maddox*, 68 F. Supp. 25 (W.D.Va. 1946); *Demattei v. Missouri, K. & T.R.R.*, 345 Mo. 1136, 139 S.W.2d 504 (1940); *Wiener v. Specific Pharmaceuticals, Inc.*, 298 N.Y. 346, 83 N.E.2d 673 (1949); 12 Ga. B.J. 501 (1950); Annot., 65 A.L.R. 563 (1930). Usually the terms of the statute are such that the foreign personal representative cannot sue. *Seymour v. Johnson*, 235 F.2d 181 (6th Cir. 1956); *Barnes v. Union Pac. R.R.*, 139 F. Supp. 198 (D. Idaho 1956); *Noel v. St. Johnsbury Trucking Co.*, 147 F. Supp. 432 (D. Conn. 1956); *Siebenhar v. Wise*, 16 F.R.D. 479 (W.D. Ky. 1951).

<sup>88</sup> N.C. Gen. Stat. § 28-173 (1950). A "collector" under North Carolina law is the same as a "curator" or temporary personal representative. N.C. Gen. Stat. §§ 28-25, 28-28 (1950).

<sup>89</sup> *Hartness v. Pharr*, 133 N.C. 566, 45 S.E. 901 (1903).

<sup>90</sup> *Monfils v. Hazlewood*, 218 N.C. 215, 10 S.E.2d 673 (1940), *cert. denied*, 312 U.S. 684 (1941); *Hall v. Southern Ry.*, 146 N.C. 345, 59 S.E. 879 (1907). *Semble*, *Rybolt v.*

statute creates the right of action, there seems to be no escape from its limitations even if the tort-feasor could be found in another state having more liberal rules than North Carolina concerning suit by a foreign personal representative. North Carolina law still will be applied to determine the capacity of parties to assert rights pursuant to it.

Getting the case into a federal court will not help either. If a right of action is created by a federal statute, such as the Federal Employers Liability Act,<sup>91</sup> the foreign personal representative can sue in a federal court without ancillary letters.<sup>92</sup> However, the foreign personal representative is a state official and is subject to the rule in *Moore v. Mitchell*<sup>93</sup> and to the last sentence of federal rule 17(b), under which his capacity to sue is determined by the law of the state in which the district court sits.<sup>94</sup> If the law of the state requires recordation of letters before suit, the foreign personal representative should meet this condition before suing in a federal court.<sup>95</sup> But if the action is based upon a statute creating a new right and limiting the capacity of parties to assert it, the statute will be followed in the federal court no matter where the tort-feasor is found. In *King v. Cooper Motor Lines*,<sup>96</sup> a Maryland resident was killed in North Carolina in a collision with the truck of a South Carolina Corporation. A Maryland administratrix sued the South Carolina corporation in the Federal District Court in Maryland for wrongful death of her intestate based upon the North Carolina law. The complaint was dismissed on the ground that the administratrix had failed to qualify in North Carolina, which she could not do under the North Carolina law. The court stated:<sup>97</sup>

[I]n the light of the North Carolina statutes, decisions and practice, it is evident that North Carolina considers that it has a real interest in

Jarrett, 112 F.2d 642 (4th Cir. 1940); Noel v. St. Johnsbury Trucking Co., 147 F. Supp. 432 (D. Conn. 1956), noted in 35 Texas L. Rev. 714 (1957); Battese v. Union Pac. R.R., 102 Kan. 468, 170 Pac. 811 (1918). See 31 Harv. L. Rev. 1161 (1918); 47 W. Va. L. Q. 60 (1940).

<sup>91</sup> 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1958).

<sup>92</sup> Briggs v. Pennsylvania R.R., 153 F.2d 841 (2d Cir. 1946); Annot., 72 A.L.R. 1030 (1931). See Buchheit v. United Air Lines, 202 F. Supp. 811 (S.D.N.Y. 1962).

<sup>93</sup> 281 U.S. 18 (1930) (state tax officer lacks requisite legal capacity to sue in a federal court in another state for the collection of taxes due his state).

<sup>94</sup> Fed. R. Civ. P. 17(b). The principle of Rule 17b as applied to a natural person also should apply to a corporation suing in a representative capacity as fiduciary. U. S. Epperson Underwriting Co. v. Jessup, 22 F.R.D. 336 (M.D. Ga. 1958); Southern Ohio Sav. Bank & Trust Co. v. Guaranty Trust Co., 27 F. Supp. 485 (S.D.N.Y. 1939).

<sup>95</sup> Langford v. Merickel, 199 F. Supp. 242 (D. Minn. 1961); Rodgers v. Irvine, 161 F. Supp. 784 (W.D.Va. 1957). Cf. Smith v. Potomac Edison Co., 165 F. Supp. 681 (D. Md. 1958). See 3 Moore, Federal Practice ¶ 17.19 (2d ed. 1963).

<sup>96</sup> 142 F. Supp. 405 (D. Md. 1956).

<sup>97</sup> *Id.* at 407-08.

controlling the distribution of any amounts recovered in an action brought to recover for a wrongful death which occurred in that state, and that no one except an executor, administrator or collector qualified in North Carolina has a right to bring such an action in North Carolina or elsewhere. . . .

Although assignments have been used effectively to avoid limitations upon the power of a foreign personal representative to sue in some instances,<sup>98</sup> only the fiduciaries named can sue under the North Carolina statute and a local appointment cannot be avoided if the remedy is to be pursued. Therefore, the Virginia administrator will save time and money if he seeks to have a resident ancillary administrator appointed in North Carolina.

## VI. COLLECTING ASSETS UNDER FEDERAL CONTROL

A domiciliary personal representative attempting to collect foreign assets a generation ago might have expected, at the worst, difficulty in persuading a local official or local debtor to release the property without administration. Today, quite frequently he must deal with federal officials executing federal policies which may determine the number of administrations necessary to assemble assets in the domicile. For example, a large percentage of the United States population, male and female, will be at some time in the armed or civil services in this country or abroad, or will be dependents of these persons. Many will die while in that status. Tourists, businessmen, and tax exiles will die in foreign countries. Veterans and non-veterans will be admitted to and die in federal hospitals. If federal care for the aged is extended to providing shelter and subsistence in organized centers, federal authority may be extended to administration of the estates of persons who have enjoyed this largesse. To what degree do current federal policies concerning a decedent's property when under federal control invite ancillary (state) administrations?

### A. *Armed Services Personnel*

The Colonel has property at his military station in Bremerhaven.<sup>99</sup> He also has property in Groningen, Holland. Quite probably, he is due back pay from the United States. The problems encountered in collecting assets in these situations are somewhat different from those encountered if federal authority is not involved directly. If a federal

<sup>98</sup> E.g., *Petersen v. Chemical Bank*, 32 N.Y. 21 (1865). But the courts have not permitted an assignee for collection only to bring the action.

<sup>99</sup> The case of the hypothetical decedent considered in this article appears at pp. 336-37 *supra*.

officer holds the assets within a nondomiciliary state or in a foreign country, the threat of ancillary administration will become particularly acute.

In most of the federal statutes and regulations bearing upon inventory and distribution of decedents' assets, one can detect a basic policy of supporting state administrations of estates, of avoiding multiple administrations, and of expediting delivery of the property to those entitled thereto by the law of the state in which the decedent was domiciled. The domiciliary personal representative may be able to use the federal administrative machinery to avoid ancillary administrations or increased administrative cost. On the other hand, there always will be an element of latitude in administrative discretion to be exercised by the federal officer which might invite an ancillary administration if the domiciliary personal representative fails to act with due speed and care. Certain federal statutes and regulations also may establish policies in which the regular conduct of a domiciliary administration is a subordinate matter. An early aberration of this type was the statute directing payment of an enlistment bonus of a deceased Civil War soldier directly to designated members of his family without administration.<sup>100</sup> Similar departures may be seen today in the handling of death gratuities and back pay of deceased military personnel. Furthermore, if assets are located abroad, treaties and executive agreements likely will have a bearing upon the time and economy in collecting the assets of a decedent. Policies are expressed in these international transactions in which domiciliary administrations may be only of incidental importance.

Whatever these policies affecting distribution of decedents' assets may be, so long as they are shown to have a reasonable relation to the constitutional powers of the Congress or of the President, the tenth amendment cannot be expected to protect state jurisdiction in the administration of estates. In addition to the obvious inroads upon state control made by the federal revenue laws, recent rulings of the United States Supreme Court concerning co-ownership and survivorship provisions in United States savings bonds have indicated clearly the federal supremacy based upon the power of Congress to borrow money.<sup>101</sup> It thus behooves the domiciliary personal representative to avoid a clash between state and federal power in collecting assets because almost certainly the state power will yield. Instead, the domiciliary personal representative should work within the framework of the federal statutes and regulations, utilizing if he can the federal

<sup>100</sup> See Alford, *The Influence of the American Civil War Upon the Growth of the Law of Decedents' Estates and Trusts*, 4 Am. J. Legal Hist. 299, 318-21 (1960).

<sup>101</sup> *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964); *Free v. Bland*, 369 U.S. 663 (1962).

administrative institutions and acting promptly to avoid distributions of property which may invite ancillary administrations.

1. *Assets in Estates of Deceased Servicemen* Several categories of assets relevant to the problem of multiple administration may be involved in the estate of a deceased serviceman. If the serviceman is a non-professional, such as a soldier in an initial period of enlistment or an officer on a brief tour of duty, there likely will be *stationary* assets (such as a savings account) in his state of domicile, which may induce a domiciliary administration. At his temporary military residence—*i.e.*, his place of assignment or station—there will be *ambulatory* assets which he carries with him from assignment to assignment. Ambulatory assets are likely to include an automobile, bank accounts, currency, stock certificates, bonds, and sundry personal items. Generally, however, the assets of the nonprofessional serviceman will tend to be stationary. Therefore, the nonprofessional servicemen tends to create no great problems in the avoidance of ancillary administration.

On the other hand, the assets of the professional serviceman will tend to be ambulatory, and for this reason avoidance of multiple administration will be more difficult. The professional serviceman also tends to acquire at successive assignments real estate which he retains as rental property for income tax benefits. During World Wars I and II and the Korean War, the armed services were greatly expanded by calling nonprofessionals to duty, but the number of ancillary administrations for service personnel did not tend to increase in proportion to the expansion; rather ancillary administrations remained substantially fixed in number in relation to the size of the professional armed services.

The domicile of the professional serviceman also may be difficult to determine. The armed services have tended to rely upon the home of record at the date of enlistment or orders to active duty of the serviceman in determining domicile.<sup>102</sup> Although not conclusive upon state courts, of course, these determinations have probative value. If property of a deceased serviceman is in a foreign country and military or consular authorities do not assume control of it, the foreign country may apply a different domicile test than that familiar in the United States; or it may determine jurisdiction for administration and the persons entitled to distribution by "nationality" rather than by "domicile."<sup>103</sup> Thus, the professional serviceman should establish a domicile by developing evidence which will be persuasive in a

<sup>102</sup> *E.g.*, 1 Dig. Ops. JAG 350 (1951-52) Oct. 27, 1951.

<sup>103</sup> Problems raised by the doctrine of "universality of succession" and the succession doctrines based on nationality are discussed hereafter in this Article. See paragraph following note 181 *infra* and text accompanying notes 186-90 *infra*.

state court. He also should avoid concentrating his personal estate in any foreign country which might claim him or his relatives as domiciliaries or as nationals.

The ambulatory assets of deceased servicemen—the assets which are critical if a personal representative seeks to avoid multiple administrations—may be divided into three groups for ease in consideration. The first group consists of movable assets located in communities adjacent to the deceased serviceman's post, base, or station. Except in overseas areas, a situation discussed hereafter in this article,<sup>104</sup> these movables present the same problems of collection as those of non-military personnel. These assets do not pass under military control, and military authorities do not take possession of land or rentals or other income therefrom. The second group consists of movables which the decedent leaves at his military station, such as the assets we believe the Colonel left at Bremerhaven.<sup>105</sup> These assets do pass temporarily under military control, and federal policies are significant in planning for their collection. The third group consists of claims held by the decedent against the United States, such as claims for back pay and claims for soldiers' deposits with interest.

*2. Recovering Movable Personal Estate Under Military Control* The movable assets of deceased servicemen found at a post, station, or base at which the decedent was stationed are safeguarded and inventoried by his immediate commanding officer, the installation commander, or his representative.<sup>106</sup> If the deceased serviceman is not quartered upon the military post, these assets (other than bank accounts upon the post, securities and other commercial papers kept in a safe deposit box there, and a motor vehicle which might be upon the post at his death) seldom will be of sufficient value to excite an

<sup>104</sup> See text accompanying notes 171-81 *infra*.

<sup>105</sup> See pp. 336-37 *supra* for the case of the hypothetical decedent considered in this Article.

<sup>106</sup> The most detailed procedures for any of the services established by statute for disposition of the effects of deceased servicemen apply to the Army and the Air Force. These statutes are almost identical and are based upon old Article of War 112, 41 Stat. 809 (1920). See 10 U.S.C. § 4712 (1958) (Army); 10 U.S.C. § 9712 (1958) (Air Force). The statutory provisions for the Navy and Marine Corps are less detailed. See 10 U.S.C. § 6522 (1958); 32 C.F.R. § 718.3 (1962). The statutory provision for the Coast Guard is brief. See 14 U.S.C. § 507 (1958). The provision for the Coast and Geodetic Survey is negligible. See 70A Stat. 619 (1956), 33 U.S.C. § 857a (1958). The comments in this article are based primarily upon the statutes applying to the Army and Air Force and upon 32 C.F.R. § 511.4 (1962), which sets forth the Army Regulations for the disposition of assets under noncombat conditions. Army Regulation 643-55, 2 June 1961, covers disposition of personal effects under combat conditions. The Theatre Commander, if the situation permits, in his discretion may use the techniques used for disposing of assets under noncombat conditions. The effects are returned to the Army Effects Office, Continental United States, where procedures similar to those used in a noncombat situation are followed. The zeal of the foreign domiciliary personal representative in any event should not lead him to pursue assets in a combat area.

attempt to recover them by the domiciliary personal representative. The case of the Colonel, however, is one in which assets of significant value may have been left at his post in Bremerhaven.<sup>107</sup> The control of the commanding officer or installation commander does not extend to assets not found at the post, station, or base, although in foreign countries the concept of a post, station, or base may be extended to recover assets not under technical military jurisdiction.<sup>108</sup>

The commanding officer or installation commander assumes the function of a custodian of those assets which do come under his control and is limited to safeguarding and inventorying the items. This officer does, however, exercise some discretion concerning the person to whom these assets are delivered after his ministerial functions have been performed. The officer delivers the assets<sup>109</sup> to the "surviving spouse or legal representative" if either of these persons is "present at the installation" at which the effects are located.<sup>110</sup> In the usual case—unlike that of the Colonel, whose wife is living in New York—the surviving spouse will be present at the installation. Quite frequently she ultimately will qualify as executrix or will be appointed in the domicile as administratrix. But it is also quite obvious that if the decedent were stationed in California and his wife were living with him, the wife could not be expected to qualify in a distant state of domicile, such as Virginia, until much time had elapsed. She may be tempted to seek an ancillary administration in California, or be forced to do so by the importunities of local creditors. If so, she may face a subsequent domiciliary administration in Virginia.

Suppose the spouse is present at the installation and is not nominated in the will as executrix or for some reason cannot be appointed as administratrix? A domiciliary personal representative seldom will be able to qualify in Virginia (or anywhere else) and arrive at the California installation before the commanding officer delivers the assets to the surviving spouse. The domiciliary representative probably will be required to produce a certificate of death of the decedent or conclusive evidence of death before letters will be issued in the domicile. Obtaining this certificate will require time.<sup>111</sup> If the

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<sup>107</sup> See pp. 336-37 *supra* for the case of the hypothetical decedent considered in this Article.

<sup>108</sup> See Digest of Opinions, Judge Advocate General of the Army 1912-40 Dig. Ops. JAG 386, § 470(2), 210.871, Jan. 10, 1919, 220.871, Mar. 12, 1919.

<sup>109</sup> In addition to the less valuable items (such as automobiles, personal weapons and equipment), commercial paper, stocks, bonds, checks (including government checks payable to the deceased), military payment orders, and all domestic and foreign currency are delivered. See 32 C.F.R. § 511.4(2)(h) (1962).

<sup>110</sup> 32 C.F.R. § 511.4(2)(g) (1962).

<sup>111</sup> If the person is missing rather than known to be dead, the procedure under the

assets are delivered to the spouse, even though delivery does not affect title, the domiciliary personal representative may have to sue her in a foreign state in order to obtain possession. As indicated earlier in this article, the personal representative may need ancillary letters to sue.<sup>112</sup>

Suppose the unusual case arises in which both the surviving spouse and the personal representative are present at the installation and both claim the assets. Which claim will have priority? If the surviving spouse has been guilty of some impropriety, such as killing her husband, the balance may be tilted thereby in favor of the personal representative.<sup>113</sup> But there is no standard for judgment in the statute or in the regulations to serve as a guide to the commanding officer. The spouse may argue with some foundation that the "legal representative" described in both the statute and regulations<sup>114</sup> is her "agent" and not the "personal representative" of the deceased serviceman. The administrative construction of "legal representative" in the statute and in the regulations has been the duly qualified or appointed personal representative of the decedent.<sup>115</sup> The statute currently in force states that "the commanding officer of the place or command shall permit the legal representative or the surviving spouse of the deceased, if present, to take possession of the effects of the deceased that are then in camp or quarters."<sup>116</sup> This reference appears to describe a personal representative of a decedent. The provisions of the statute dealing with distribution by a summary court-martial, discussed hereafter,<sup>117</sup> only refer to "the surviving spouse or legal representative,"<sup>118</sup> and do not make the distinction clear. The regulations dealing with distribution by the commanding officer also refer to the case in which the "surviving spouse or legal representative is present."<sup>119</sup> In view of the infrequency with which the personal representative of the decedent might appear to receive an immediate delivery of the assets by the commanding officer, an agent for the surviving spouse reasonably

Missing Persons Act, 56 Stat. 146 (1942), as amended, 50 U.S.C. App. § 1012 (1958), 32 C.F.R. § 511.4(m)(2) (1962), follows substantially the procedure upon death. In cases of missing persons, it is usually impossible to obtain letters of administration or probate of a will without complying with detailed statutory procedures entailing considerable delay. Perhaps a temporary custodian or committee for the absentee could be appointed to claim the property.

<sup>112</sup> See note 86 *supra* for statutes permitting suit without local qualification.

<sup>113</sup> See 1912-40 Dig. Ops. JAG 389, § 470(6) 210.871, Sept. 22, 1923.

<sup>114</sup> 10 U.S.C. § 4712 (1958); 32 C.F.R. § 511.4 (1962).

<sup>115</sup> *E.g.*, 3 Dig. Ops. JAG 547 (1953-54) Sept. 2, 1953; 1912-40 Dig. Ops. JAG 387-88, § 470(4).

<sup>116</sup> 10 U.S.C. § 4712(a) (1958).

<sup>117</sup> See text accompanying notes 146-65 *infra*.

<sup>118</sup> 10 U.S.C. § 4712(d)(1) (1958).

<sup>119</sup> 32 C.F.R. § 511.4(g) (1962).



might have been intended by the Congress by the use of the term "legal representative." The positive statement by Colonel Winthrop, indicating that "legal representative" is the duly qualified personal representative of the decedent, refers to the provision in Article of War 127 of 1874,<sup>120</sup> which did not mention the surviving spouse but directed delivery "to the legal representative of such deceased officer or soldier."<sup>121</sup> Although the "legal representative" mentioned in the current law is almost certainly the personal representative of the decedent, the matter is not fully free from doubt since both the statute and regulations fail to define the term.

Assuming the surviving spouse does not prevail in her argument that the statute and regulations refer to her agent and not to the decedent's personal representative, it is likely in any event that the commanding officer will deliver the assets to her. The personal representative then will be left to his own resources to acquire them. The commanding officer would not wish, after all, to invite the risk that the surviving spouse might be stripped of her husband's assets and perhaps left at the mercy of local creditors while the domiciliary personal representative carries the assets back to the domicile and administers them there. This would be brutal treatment to a surviving spouse despite the death gratuity,<sup>122</sup> back pay,<sup>123</sup> dependency and indemnity compensation,<sup>124</sup> and survivor assistance<sup>125</sup> to which she probably will be entitled.

The amount or value of the assets held for delivery should have a bearing upon the judgment of the commanding officer. If the value is great, he well might distribute part to the surviving spouse and part to the personal representative, since this alternative is clearly not precluded either by the statute or by the regulations.<sup>126</sup> If ancillary letters have issued in the state or country in which the military post, station, or base is located, the assets should be delivered to the ancillary personal representative, even though the spouse and domiciliary personal representative also apply for the assets. Although the commanding officer is in the position of an involuntary bailee of the property<sup>127</sup> and not of a debtor owing money to the decedent, his

<sup>120</sup> 18 Stat. (Part 1) 241 (1873-74).

<sup>121</sup> Winthrop, *Military Law and Precedents* 763 (2d ed. 1896). The language is traceable to the British Articles of War of 1765, art. XVII of which was in force in the colonies at the beginning of the Revolution. The current wording was introduced in Article of War 112 of 1916, 39 Stat. 668 (1916).

<sup>122</sup> 10 U.S.C. §§ 1475-1480 (1958); 32 U.S.C. § 321 (1958); 32 C.F.R. §§ 533.1-533.7 (1962).

<sup>123</sup> 10 U.S.C. § 2771 (1958); 32 C.F.R. §§ 533.20-533.24 (1962).

<sup>124</sup> 38 U.S.C. §§ 401-422 (1958).

<sup>125</sup> See 32 C.F.R. §§ 511.8-511.10 (1962).

<sup>126</sup> 10 U.S.C. § 4712 (1958); 32 C.F.R. § 511.4 (1962).

<sup>127</sup> See Brown, *Personal Property* 399-415 (2d ed. 1955).

release of a decedent's property to a domiciliary personal representative or to the surviving spouse after issue of local letters may render him personally liable to an ancillary administrator for its value. However, a defense probably can be rested successfully upon the option as to delivery conferred upon the commanding officer by the federal statute. This case should be distinguished from that in which an ancillary personal representative from a state other than that in which the installation is located claims the property. In this situation either the surviving spouse or the domiciliary personal representative should receive the assets.

In any case in which the commanding officer delivers property to a personal representative from a state other than the state in which the installation is located, he should require in addition to the receipt stipulated in the regulations<sup>128</sup> an affidavit that all taxes and debts of the decedent in the state have been paid and that there is no local administration. The commanding officer also should obtain an agreement from the personal representative to indemnify him in the event of a successful recovery by a creditor, distributee, or legatee of the value of the property delivered.

To minimize the possibility of an ancillary administration if the commanding officer of the deceased serviceman has custody of the property, a prospective personal representative in the domicile should notify the commanding officer in writing as soon as practicable that domiciliary letters will be sought. Retention of the assets by the commanding officer should be requested until the domiciliary personal representative qualifies and has authority to receive delivery. Nothing in the regulations seems to prevent the commanding officer from waiting a few days until the personal representative appears at the installation. The commanding officer may act within his sound discretion unless neither the spouse nor the personal representative is present at the installation. In the latter case a summary court-martial must be appointed to take custody of the assets.<sup>129</sup>

Although the summary court does not administer the estate of the decedent under military control, it is authorized but not required to perform several functions normally performed by an executor or administrator. The court has discretionary power to collect debts due the deceased serviceman by *local* debtors and to pay *local* and *undisputed* creditors of the decedent *to the extent permitted by money* of the deceased in the court's possession. Under special circumstances the court is required to convert by sale certain of the decedent's assets

<sup>128</sup> 32 C.F.R. § 511.4(g) (1962).

<sup>129</sup> 10 U.S.C. § 4712(b) (1958).

into cash. The summary court may decide not to exercise the powers to collect local debts and to pay local creditors. Furthermore, under the administrative construction of the statute, a local debtor may refuse to pay the summary court after demand by the court for payment is made.<sup>130</sup>

The power of the summary court to collect debts and to pay creditors is limited. Only debts from *local* debtors may be collected. At installations in the United States, "local" is construed to mean only debtors at the installation and not those in adjacent communities. The Judge Advocate General of the Army has advised, for example, that bonds in the custody of a Federal Reserve Bank represented by a receipt among the effects of the decedent at the military installation cannot be recovered by the summary court.<sup>131</sup> However, the construction of "local" appears to be broader in overseas areas and may be extended to cover a collection of debts in the country in which the decedent was stationed.<sup>132</sup>

In addition to the limitation upon the power of the summary court to pay only local creditors, the claim must be undisputed or unquestionably valid. If the court elects to pay creditors with claims of this description, the payments must be made with currency which the decedent leaves.<sup>133</sup> The proceeds from negotiable instruments made payable to the decedent in settlement of debts due from local creditors probably will be treated as money of the deceased available to pay creditors.<sup>134</sup> The same treatment probably will be given to money collected in the discharge of simple debts. However, the proceeds from military pay certificates and payment orders,<sup>135</sup> and checks drawn payable to deceased on the Treasurer of the United States or on foreign depositories<sup>136</sup> cannot be used to pay creditors. Also foreign currency in excess of one month's basic pay and allowances of the

<sup>130</sup> See 1912-40 Dig. Ops. JAG 386, § 470(2), 210.871, Jan. 10, 1919, 220.871, Mar. 12, 1919. These opinions dealt with collection of a French debt under circumstances in which the Congress, lacking territorial authority, could not have required the debtor to pay. The underlying idea, however, appears to be that even if the Congress has power to require a domestic debtor to pay on demand, the summary court has not been made an administrator or executor, and there is no requirement (under state law at any rate) that a debtor pay unless the personal representative is acting under the authority of the state in which the debtor resides or is found.

<sup>131</sup> 7 Dig. Ops. JAG 238 (1957-58).

<sup>132</sup> A deposit by an American soldier during World War I in a bank in Paris has been construed as a "local" debt under Article of War 112. 1912-40 Dig. Ops. JAG 386, § 470(2), 210.871, Jan. 10, 1919, Mar. 12, 1919.

<sup>133</sup> 10 U.S.C. § 4712(c) (1958); 4 Dig. Ops. JAG 401 (1954-55), Dec. 21, 1954.

<sup>134</sup> See 32 C.F.R. § 511.4(h)(3)(i) (1962) ("the proceeds will be disposed of in the same manner as currency found among the effects.").

<sup>135</sup> 32 C.F.R. §§ 511.4(h)(2)(iv)(a-c), 511.4(h)(3)(iv) (1962).

<sup>136</sup> 32 C.F.R. § 511.4(h)(3)(iii) (1962). Bank deposit books, stocks, bonds, and negotiable instruments (including travellers checks and money orders) will be transmitted to the next of kin or legal representative with other effects.

decedent may not be converted to pay creditors.<sup>137</sup> In a foreign state, such as West Germany, in which the foreign currency might be accepted by creditors without conversion, there would seem to be no objection to its local use for this purpose even though such currency is in excess of one month's basic pay and allowances of the decedent. There also would seem to be no objection to payments to creditors with funds received from the domiciliary personal representative, although the summary court would act as the agent of the foreign personal representative for this purpose.

The summary court has no power of sale to raise funds for the payment of creditors. The Judge Advocate General of the Army has advised that an automobile subject to a chattel mortgage lien can be sold and the proceeds therefrom used to pay the secured debt, if such action is expressly directed by the person entitled to the vehicle under old Article of War 112.<sup>138</sup> The person entitled to the automobile, if *sui juris*, may be estopped to complain if the proceeds of sale are insufficient to discharge the balance of the debt. It seems clear that the summary court acts as agent for the owner in this situation and cannot claim the protection of the federal statute<sup>139</sup> pertaining to the duties of the court.

The deceased Colonel's assets in Bremerhaven<sup>140</sup> are probably now in the custody of a summary court, since neither the spouse nor the personal representative was on hand to claim them. Therefore, it will be in the interest of the estate to utilize the summary court procedures to the fullest extent possible. The "partial administration" by the summary court—even in countries such as West Germany which apply the rule of universality of succession, discussed hereafter<sup>141</sup>—will avoid the cost and responsibility for a foreign agent to make collections and to determine the propriety of claims. The domiciliary personal representative also will find that even in a domestic administration, the summary court can determine debts due the decedent and the propriety of creditors' claims more effectively than can a personal

<sup>137</sup> See 32 C.F.R. § 511.4(h)(2)(ii) (1962).

<sup>138</sup> 1912-40 Dig. Ops. JAG 392-93, § 470(10), 210.871, Oct. 11, 1932. Cf. 220.871, Aug. 24, 1927, in which the summary court was advised to deliver the automobile to the nearest relative and to notify the lienholder of the action contemplated. This is sound advice. If property is held under conditional sales agreements, the summary court may act properly in allowing the vendor to repossess the property; but the better course, again, would be to turn over the property to the next of kin or legal representative and to notify the creditor. 1912-40 Dig. Ops. JAG 391, § 470(8), 220.871, Oct. 6, 1931 (conditional sale of a watch); 451.1, Aug. 2, 1934 (could not determine widow and no legal representative so surrendered car to dealer who held chattel mortgage).

<sup>139</sup> 10 U.S.C. § 4712 (1958).

<sup>140</sup> The case of the hypothetical decedent discussed in this article appears at pp. 336-37 *supra*.

<sup>141</sup> See text accompanying note 43 *supra* and paragraph following note 181 *infra*.

representative who lacks knowledge of the customs of the post and access to channels of information to verify statements made to him. Care should be taken not to designate the summary court as an agent of the domiciliary personal representative unless the personal representative is in a position to evaluate the ability of the summary court and the probable prudence of the court in discharging its responsibilities.

Caution in the domiciliary personal representative's relationship to the summary court is especially important if the summary court is encouraged to exercise the power of sale. The advantages to be reaped by the domiciliary personal representative from a sale by the summary court are many. The sale probably will be conducted without cost to the estate. Also the expense of returning to the domicile certain types of property (such as automobiles) that are situated in another state or in a foreign country can be avoided, and at the same time a higher price often can be obtained by the summary court than can be obtained in the domicile.

The summary court has no general power of sale, but the commanding officer may authorize a sale of certain items if "the spouse or other person entitled to receive the effects is not present."<sup>142</sup> These items may include motor vehicles, bulky household equipment, and similar personal effects if the sale is in the interest of the government, if an emergency exists, and if a reasonable effort where practicable is made to determine the desires of the next of kin or the legal representative of the decedent. A sale also can be authorized by the commanding officer if the sale is in the interest both of the Government and the person entitled to receive the property and if the latter party has given a power of attorney to the summary court to sell. This case should be distinguished from that in which the summary court sells without the express authority of the commanding officer but upon the verbal or informal written authority of the person entitled to receive the property.<sup>143</sup> In either case, however, if the personal representative makes the summary court his agent, he is liable for the acts of his agent to the same extent that he would be if the agent were a military person acting in a private capacity.<sup>144</sup>

If the administrator can persuade the summary court in Bremer-

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<sup>142</sup> 32 C.F.R. § 511.4(m) (4) (1962). Pursuant to powers contained in the Missing Persons Act, technically the authority extends to a case in which a serviceman is known dead and his spouse or personal representative is not present but their whereabouts and addresses are known. 56 Stat. 146 (1942), as amended, 50 U.S.C. App. § 1012 (1958).

<sup>143</sup> See note 138 *supra*.

<sup>144</sup> The domiciliary personal representative thus should expect to have his conduct in appointing the officer serving as summary court as agent and his action in supervising this officer measured by the prudent man standard.

haven to collect local debts and pay local creditors, a substantial part of the estate work will be performed at the government's expense. Whether the court can be persuaded to collect the assets in Groningen, Holland,<sup>145</sup> is doubtful. But in order to eliminate sources of friction produced by the presence of a foreign military force, the local military authorities at Bremerhaven may be persuaded to settle the Colonel's affairs at Groningen also. However, the collection of these assets quite possibly will be left to the local United States consul.

After these short steps have been taken to gather the assets of the decedent and to pay some or all of his creditors, the property will be delivered to the person highest on a list set forth in the statute "who can be found by the court." The first category listed is "the surviving spouse or legal representative."<sup>146</sup> The same possibility of inviting an ancillary administration exists at this point as when delivery is made by the commanding officer without action by the summary court. However, more time usually will be available in which domiciliary letters can issue and in which the summary court can be notified of a claim by the personal representative. The Judge Advocate General of the Army has advised that if a decedent dies leaving a will, the summary court is put on notice that a personal representative may claim the property in preference to the next of kin. Under these circumstances the summary court should hold the assets for a reasonable time after receiving notice of the will to determine whether a personal representative will be designated.<sup>147</sup> If there is no spouse or legal representative, the assets are distributed by the summary court in the following order:<sup>148</sup> (1) son, (2) daughter, (3) father, (4) mother, (5) brother, (6) sister, (7) grandfather,<sup>149</sup> (8) grandmother,<sup>150</sup> (9) next of kin, (10) person standing in *loco parentis* to decedent,<sup>151</sup> (11) beneficiary designated in will of the decedent. The senior member of a class is entitled to delivery. Within the class of next of kin, the preferred member is the senior male who is in closest degree of kinship to the decedent as determined by the civil law method of computation.<sup>152</sup> The parents do not take if custody has been granted to another person by court decree, in which case the blood relative or parent by adoption who was granted legal

<sup>145</sup> See pp. 336-37 *supra* for the case of the hypothetical decedent considered in this Article.

<sup>146</sup> 10 U.S.C. § 4712(d) (1958).

<sup>147</sup> 1912-40 Dig. Ops. JAG 391, 220.871, Mar. 21, 1932.

<sup>148</sup> 10 U.S.C. § 4712(d)2-9 (1958).

<sup>149</sup> 32 C.F.R. § 511.6(a)(9) (1962).

<sup>150</sup> 32 C.F.R. § 511.6(a)(10) (1962).

<sup>151</sup> 32 C.F.R. § 511.6(a)(12) (1962).

<sup>152</sup> 32 C.F.R. § 511.6(a)(11) (1962).

custody is substituted. The father does not take if he has abandoned the support of his family.<sup>153</sup> The surviving spouse does not take if she was legally separated from the decedent or has remarried.<sup>154</sup>

Title to the property is said to be unaffected by delivery thereof by the summary court to persons in the categories described,<sup>155</sup> and the problem of the personal representative in eventually obtaining possession of the property is simplified by the distribution of all of the property to a single individual; however, ancillary letters may be required to sue to gain possession. The regulations also permit delivery of the property to a minor within the categories indicated.<sup>156</sup> If the property has any significant monetary value, however, it is believed that distribution should be made only to the guardian of the minor with a receipt taken from the guardian.

If the summary court cannot find a person in the described categories, it is *required* by the regulations to convert the assets, with certain exceptions, into cash by a public or private sale.<sup>157</sup> Excepted from sale are items valuable chiefly as keepsakes, such as medals,<sup>158</sup> watches, manuscripts and commercial paper.<sup>159</sup> The sale generally cannot be held until thirty days have expired after the date of death of the decedent, although it would seem that marketable perishables could be sold before this time has elapsed in order to avoid a loss through spoilage.<sup>160</sup> Prior to the sale, the summary court must make a formal finding in writing as to the efforts made to find persons to whom the property could be delivered in kind.<sup>161</sup> This finding is filed with the inventory (DA Form 54). A complete record of the sale with certified copies of the bills of sale is included in the summary court report. The money derived from the sale is inventoried carefully on DA Form 54 and is transmitted with the inventory and with currency and checks found among the effects of the deceased

<sup>153</sup> 10 U.S.C. § 4712(d)(4) (1958).

<sup>154</sup> 32 C.F.R. § 511.6(a)(1) (1962).

<sup>155</sup> The administrative construction of the statute has been that title is not affected by delivery by the summary court or by the commanding officer. *E.g.*, see 1912-40 Dig. Ops. JAG 388, 210.8, Aug. 12, 1918. The problem was not considered by Colonel Winthrop since distribution in 1895 was made to the personal representative of the decedent. Winthrop, *op. cit. supra* note 121, at 763.

<sup>156</sup> 32 C.F.R. § 511.6(a)(b) (1962).

<sup>157</sup> 32 C.F.R. § 511.4(k)(i) (1962). The statute appears to make this power discretionary, but under the conditions stipulated in the regulations the effects must be sold. See 10 U.S.C. § 4712(e) (1958).

<sup>158</sup> 10 U.S.C. § 4712(e) (1958); 32 C.F.R. § 511.4(k)(i) (1962).

<sup>159</sup> 32 C.F.R. § 511.4(k)(iv)(2) (1962).

<sup>160</sup> This point is not covered by the regulations, but a public or private sale of such assets seems permissible in order to prevent certain loss. Winthrop, *op. cit. supra* note 121, at 763.

<sup>161</sup> 32 C.F.R. § 511.4(k)(ii) (1962). Effects having no market value or sentimental value are destroyed by the summary court, and the fact of destruction is entered in his report. 32 C.F.R. § 511.4(k)(iii) (1962).

to the local disbursing officer. The local disbursing officer then receipts for the funds on the inventory, returns the original and one copy to the summary court, and deposits the funds in the applicable deposit fund account. The appointing authority reviews the summary court report and inventory. If the report is approved, the papers then are forwarded with commercial paper and keepsakes to the Quartermaster General. If an appropriate claimant appears after the sale but before transmission of the effects, the summary court may deliver the assets and the proceeds of sale to him.<sup>162</sup> If the proceeds of sale have been deposited and the other assets forwarded to the Quartermaster General, claims for the funds deposited may be filed with the General Accounting Office; claims for the other effects may be filed with the Soldiers' Home to which they will have been sent by the Quartermaster General.<sup>163</sup>

The Soldiers' Home will deliver the assets to the "legal" representative if he appears or to the "heirs." If no claim is made within three years following the death of the decedent, the home sells all effects except decorations, medals, and citations. The proceeds from sale are placed in the Soldiers' Home permanent fund. A claim to the proceeds in this fund must be filed in the General Accounting Office within six years following the death of the decedent or otherwise the claim will be barred.<sup>164</sup> The unsold medals, decorations, and citations are disposed of as the commissioners of the home consider in the public interest; there is no statutory provision barring a claim for them by a personal representative.<sup>165</sup> Ancillary letters will not be necessary to obtain the property from either the General Accounting Office or the Soldiers' Home.

Although the summary court procedure presents a risk of ancillary administration, it offers services of great potential value to the domiciliary personal representative. However, the summary court is not a fiduciary, even though standards of performance are exacted by the officer's professional code and the commanding officer that are higher than those required of fiduciaries in most states. Thus there exists no direct fiduciary remedy against the court for the negligent handling of an estate. If, in a rare case, a summary court negligently causes loss to an estate, a personal action may lie against the officer serving in that position. Losses caused by forging signatures on government checks and similar misfeasance may be recovered under the appropriate

<sup>162</sup> 4 Dig. Ops. JAG 401 (1954-55), Aug. 10, 1954.

<sup>163</sup> 32 C.F.R. § 511.4(k)(iv)(2)-(3) (1962).

<sup>164</sup> 10 U.S.C. § 4713(e) (1958).

<sup>165</sup> 10 U.S.C. § 4713(c) (1958).



Treasury Regulations.<sup>166</sup> Similarly, a claim against the United States may be settled on the theory that property has been lost by the negligence of a government official as bailee.<sup>167</sup> An action also may lie against the United States under the Federal Tort Claims Act for negligence or misfeasance by the summary court, although the plaintiff would have to prove that the officer failed to use "due care," a test distinguishable from that of the "ordinary prudent man managing his own affairs" which is applied to determine fiduciary liability under state law. The lack of judicial authority upon these points is a tribute to the diligence and care with which summary courts have handled the assets of deceased servicemen.

3. *Recovering Movable Personal Estate Not Under Military Control*  
Assets which do not pass into the custody of the commanding officer or summary court, except back pay, allowances, and soldier's deposits with interest, may be recovered by the domiciliary personal representative in the manner and subject to the limitations already discussed. If, for example, the decedent left land adjacent to a military post, the summary court would not collect the rents,<sup>168</sup> and in most instances the domiciliary personal representative would not do so unless the rent had fallen due prior to the deceased lessor's death. In most states the rent falling due after the death of the lessor will be payable to the heir or devisee until the personal representative exercises a power to sell the land to pay debts, in which case, as previously indicated,<sup>169</sup> ancillary letters may be necessary.<sup>170</sup>

A recovery of assets held by deceased military personnel in foreign countries—such as the property left by the Colonel at Groningen, Holland<sup>171</sup>—will present substantially the same problems as the collection of foreign assets of deceased civilians, unless military authorities can be persuaded to have the property recovered by the summary court. There are some distinctions however. Agreements such as the NATO Status of Forces Agreement of 1951<sup>172</sup> are silent concerning the administration of estates of deceased personnel of a sending state. Many of the receiving states lack a system of administration of a

<sup>166</sup> 31 C.F.R. §§ 359.0-359.4 (1959).

<sup>167</sup> 32 C.F.R. § 536.142(c) (2) (1962). To be settled by the Army, the claim must be limited to \$2,500. 32 C.F.R. § 536.29(d) (1962).

<sup>168</sup> See text accompanying note 108 *supra*.

<sup>169</sup> See text accompanying notes 61-76 *supra*.

<sup>170</sup> See statutes in note 56, *supra*, some of which may be sufficiently broad to permit a collection of rent by the personal representative. By the local law a personal representative may be entitled to possession of the realty for the period of administration.

<sup>171</sup> See pp. 336-37 *supra* for the case of the hypothetical decedent considered in this Article.

<sup>172</sup> North Atlantic Treaty Status of Forces Agreement, June 19, 1951 [1953] 2 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846.

decedent's assets as understood in Anglo-American law. But although these agreements do not cover administration expressly, they contain provisions which impinge upon administration. For torts or similar offenses committed by the decedent not in the performance of his official duties, the receiving state considers the claim and assesses compensation to the plaintiff. The sending state then has an opportunity to offer an *ex gratia* payment. If this payment is accepted by the claimant the case is closed, but if payment is not accepted the courts of the receiving state have jurisdiction to entertain the action.<sup>173</sup> Furthermore, the tax power of the receiving state is reserved in many instances; e.g., over profitable enterprises of a member of the force of a sending state.<sup>174</sup> The authorities of a force of a sending state must render all assistance within their power to ensure payment of duties, taxes, and penalties owed by members of the force or their dependents.<sup>175</sup> As previously noted,<sup>176</sup> the obligations assumed by the sending force under agreements of this type may induce a broad construction of the term "local" in defining the permissible ambit of activity of the summary court. The same policy to remove sources of possible friction will be found even if the military decedent enjoyed diplomatic immunity, as under the Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff,<sup>177</sup> or under mutual defense assistance pacts.<sup>178</sup>

The jurisdiction of the authorities of a military force in a foreign country with the consent of the local sovereign to marshal and to safeguard property of deceased members of the force has never been questioned. The underlying principle, as expressed in *Schooner Exch. v. McFadden*<sup>179</sup> and *Schwartzfger*,<sup>180</sup> is that the individual members of the visiting or transiting force remain subject to the jurisdiction of their own officers and to the laws of the country to which they belong. This principle is so well established that only major points of friction, such as criminal incidents and tortious injuries to persons and property, have stimulated treaties and executive agreements delineating the rights and obligations of the sending and receiving states.

<sup>173</sup> 2 U.S.T. & O.I.A. 1792, 1808, art. VIII(6), T.I.A.S. No. 2846.

<sup>174</sup> 2 U.S.T. & O.I.A. 1792, 1812, art. X(2), T.I.A.S. No. 2846.

<sup>175</sup> 2 U.S.T. & O.I.A. 1792, 1816, art. XIII(9), T.I.A.S. No. 2846.

<sup>176</sup> See e.g., note 132 *supra*.

<sup>177</sup> Sept. 20, 29, 1951, Dec. 12, 1951 [1954] 1 U.S.T. & O.I.A. 1087, T.I.A.S. No. 2992.

<sup>178</sup> E.g., Mutual Defense Assistance Agreement with the Federal Republic of Germany, June 30, 1955 [1955] 5 U.S.T. & O.I.A. 5999, 6001, art. VIII, T.I.A.S. No. 3443.

<sup>179</sup> 11 U.S. (7 Cranch) 116 (1812).

<sup>180</sup> *Panama v. Schwartzfger*, II Hackworth, Digest of International Law 405, 21 A.J.I.L.

182 (Panama Sup. Ct. of Justice 1925).

If for some reason the military authorities refuse to exercise their jurisdiction over assets of the decedent—as may well be the case with the Colonel's property in Groningen<sup>181</sup>—then either the personal representative will have to collect the property or the collection will fall to consular jurisdiction. The situation is exactly the same as if a civilian had owned the property except that if consular control is exercised, the usual consular fee is not charged for the property of the military decedent.

If the domiciliary personal representative plans to collect the property in foreign countries personally, he is favored by the fact that most of these countries apply the theory of "universality of succession," which is based upon the Roman law. Usually there is no formal administration of the estate in these countries. The heir or designee in the will of the decedent succeeds to his assets and liabilities, and he satisfies the claims of creditors without the costly judicial intervention, formal publications, and accountings familiar in the United States. Formal intervention, however, is possible. In Switzerland, for example, an official liquidator, who is appointed and supervised by cantonal officials, secures the assets to pay creditors if these creditors anticipate nonpayment by the heir and if the heir refuses to give security.<sup>182</sup> In Holland, the heirs are permitted to accept the assets under benefit of inventory by filing a statement with the clerk of the *Rechtbank*. By this procedure the heir can avoid personal liability for the debts of the decedent.<sup>183</sup> The usual pattern of liquidation is for the heir to receive the assets and pay the debts without formalities.

At first glance this happily informal environment for collecting foreign assets seems conducive to relatively economical marshalling with broadening foreign travel for the personal representative, but there are significant disturbing factors. These factors are diverse conflict of laws doctrines, local demands for public revenue, and currency controls. The domiciliary personal representative can collect relatively valueless movables without difficulty, but trouble begins when he attempts to collect bank deposits or valuables held in foreign depositories.

In the United States there is a fair uniformity of views on conflicts rules governing the distribution of movables. The law applied usually, but not always, is the law of decedent's domicile. Although there is more confusion in the conflicts rules pertaining to administration, the place of primary administration of movables ordinarily

<sup>181</sup> See pp. 336-37 *supra* for the case of the hypothetical decedent discussed in this Article.

<sup>182</sup> Nussbaum, *American-Swiss Private International Law* 31 (2d ed. 1958).

<sup>183</sup> Kollwijn, *American-Dutch Private International Law* 58 (2d ed. 1961).

is said to be where the movables are found.<sup>184</sup> For land, the law of the situs state controls devolution of title; and in those states in which a personal representative controls land during administration, the law of the situs also controls the administration of the land. There is general agreement upon a test for domicile, although as indicated previously<sup>185</sup> the "full faith and credit" clause has been construed to permit conflicting determinations of domicile of a decedent with respect to property of the decedent within the jurisdiction of the court.

In a foreign country in which the decedent leaves assets, "nationality" is the preferred basis for determining succession and such administrative controls over the liquidation of an estate as may exist. In international law, diverse bases for nationality have been recognized, and with some limitations each state determines nationality by its own standards.<sup>186</sup> Mexico, for example, determines the applicable law of succession by the nationality of the decedent; notwithstanding the inconsistency found in the succession law of most states, Mexico also determines the validity of wills and the law governing their construction by the place of execution of the instrument.<sup>187</sup> Brazil currently applies the law of domicile of the decedent in succession matters; but the law of Brazil controls succession with respect to the claims of a surviving spouse and children who are Brazilian nationals, if they receive more favorable treatment under Brazilian law than under the law of the decedent's domicile.<sup>188</sup> Even if domicile is accepted as the standard or preferred test for succession or administration, the features recognized as significant in establishing domicile may differ from those familiar in the United States. In Denmark multiple domiciles are recognized by the same court, but changes of domicile by operation of law, such as a woman's change of domicile by marriage, are rejected.<sup>189</sup>

Foreign countries applying a universality theory also tend to adhere to a unitary theory of succession or administration. Depending upon the applicable conflicts rules, a unified administration should exist. Furthermore, there is a tendency among these states to base

<sup>184</sup> See Stimson, *Conflict of Laws and the Administration of Decedents' Personal Property*, 46 Va. L. Rev. 1345 (1960) (in which the writer suggests a general shift to tests based upon the situs of property rather than upon the personal law of the decedent.)

<sup>185</sup> See text accompanying notes 26-28 *supra*.

<sup>186</sup> As to the international effect of these unilateral determinations upon a claim for state protection by a national, see *Nottebohm Case (Liechtenstein v. Guatemala)* [1955] Int'l L. Rep. 349, [1955] I.C.J. Rep. 4.

<sup>187</sup> See Wren, *Problems in Probating Foreign Wills and Using Foreign Personal Representatives*, 17 Sw. L.J. 55 (1963).

<sup>188</sup> Garland, *American-Brazilian Private International Law* 44 (1959).

<sup>189</sup> Philip, *American-Danish Private International Law* 18 (1957).

their conflict of laws doctrines upon a personal theory of law and to abandon distinctions based upon the physical location of the property in question. Thus, Denmark, which uses a domicile test (a personal theory of law), determines succession to land in Denmark by the law of domicile of the decedent, with exceptions being made for farm land and certain local restrictions.<sup>190</sup> There is, however, no consistent tie between the unitary theory of succession or administration and the personal theories of law. Denmark has a subsidiary administrative proceeding in which local creditors are satisfied before the property is delivered to a foreign domiciliary personal representative, although in that country a personal theory of law controls succession.

An informal withdrawal of assets in foreign states after payment of local creditors will tend to obviate an application of diverse conflict of laws doctrines, at least as to the movable estate. Although as previously indicated such a withdrawal can be done without great difficulty among states in the United States, currency controls in foreign countries and controls applied by the United States to certain foreign transactions limit the ambit of action of the domiciliary personal representative in making collections abroad. A detailed discussion of currency controls is beyond the scope of this article.<sup>191</sup> The controls of immediate concern to the foreign personal representative are developed in a licensing system over the operations of local banks. Certain accounts or estates may be blocked and transactions concerning them prohibited. Import and export of foreign currencies may be regulated. Much administrative discretion in the application of these controls is permitted, and a personal representative cannot predict with certainty the strictness with which the regulations will be applied. However, if a license is sought to export currency of the decedent, a question likely will be raised as to the status and authority of the personal representative, and such local law as there is concerning his authority will be brought to bear. If a license is denied, the money usually will be placed in a local blocked account until the controls are lifted. Also the transactions may be prohibited in particular cases by federal law—either under the Trading With the Enemy Act<sup>192</sup> or by special controls applied currently to Communist China, North Korea, and North Viet Nam.<sup>193</sup>

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<sup>190</sup> *Id.* at 43.

<sup>191</sup> The reader is referred to Nussbaum, *Money in the Law, National and International* 446-91 (1950), for a brief and readable account of these controls.

<sup>192</sup> 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 1-40 (1958); see 8 C.F.R. §§ 501-11 (1952).

<sup>193</sup> See 31 C.F.R. §§ 500.101 - 500.808 (1959).

To collect the assets in Groningen, Holland,<sup>194</sup> no local Dutch administration will be required, but the personal representative will have to pay all creditors and pay any taxes due before the property is removed. To determine the situs for administration, Holland applies the law of the domicile of the decedent and adheres to a unitary theory of administration when one is needed.<sup>195</sup> In estates of appreciable significance, a notary usually is retained to collect claims and to pay debts and taxes. The retention of a notary may be desirable in the case of the Colonel unless we can discover the precise extent of his activities in Groningen.

An alternative and more desirable procedure in the case of a serviceman—and usually in cases of deceased civilians also—is to secure a consular curatorship of the assets. The Treaty of Friendship and Commerce between the United States and the Netherlands<sup>196</sup> does not mention consular administration of estates, and the Consular Treaty Concerning Netherland's Colonies<sup>197</sup> appears to exclude consular administrations. A consul, however, basing his action on custom, should intervene to secure the assets of the decedent unless his claim is excluded by the claim of a local official based on Dutch law.<sup>198</sup> Although consular administrations were at one time covered in treaties of friendship and commerce between the United States and foreign countries, difficulties with state denials of the authority of consuls in this area have led to omission of references to consular administration or curatorship in current treaties and agreements.<sup>199</sup> Nevertheless, a claim based on custom can be asserted as effectively as one based on treaty.

Under the United States consular regulations,<sup>200</sup> subject to the local law and established custom, the consul takes possession of the personal estate left by any citizen of the United States who dies within his jurisdiction or who was residing therein at the time of his death, unless the decedent leaves a legal representative in the country of death or residence.<sup>201</sup> If a will is discovered naming a local personal

<sup>194</sup> See pp. 336-37 *supra* for case of the hypothetical decedent discussed in this Article.

<sup>195</sup> Kollwijn, *op. cit. supra* note 153, at 59.

<sup>196</sup> Dec. 5, 1957 [1957] 2 U.S.T. & O.I.A. 2043, T.I.A.S. No. 3942.

<sup>197</sup> Treaty Regarding Consuls in the Colonies of the Netherlands, May 26, 1855, art. XI, 10 Stat. 1150 (1855), T.I.A.S. No. 253.

<sup>198</sup> II Hyde, *International Law* 1349 (2d ed. 1947).

<sup>199</sup> See Coudert, *Rights of Consular Officers to Letters of Administration Under Treaties With Foreign Nations*, 13 Colum. L. Rev. 181 (1913). The consular claim today is one of curatorship abroad rather than appointment as a personal representative.

<sup>200</sup> 22 U.S.C. §§ 1175-1179 (1958); 22 C.F.R. §§ 72.15 - 72.55 (1958).

<sup>201</sup> 22 C.F.R. § 72.18 (1958). Legal representative means executor or administrator or their agent by power of attorney, a child of legal age, a parent, the next of kin, or the surviving spouse. If the decedent appointed a local trustee, the consul takes only nominal control.

representative, the consul may take the necessary action to protect the property until the representative qualifies; this procedure always will be necessary if the will appoints a domiciliary personal representative in the United States.<sup>202</sup> If the personal representative or his agent can appear promptly to receive the assets, the consul takes only nominal possession and charges no fee therefor. But if the personal representative or his agent is not present, the consul proceeds in a manner similar to the military summary court except that the consul's authority is broader and that a fee is charged in many cases.<sup>203</sup>

Movable personal property—including commercial paper, but excluding livestock and bulky items such as furniture usually found in residences or places of storage—<sup>204</sup> is taken into the consul's possession and is inventoried. Tangible items not taken into possession are safeguarded by placing the premises under seal or by placing the property in storage at the expense of the estate. Bank accounts are not recovered, but are reported to the legal representative with a description of the procedure necessary to withdraw them.<sup>205</sup> The consul sells perishables at auction, collects debts due the estate, and pays creditors from money found among the personal effects or from money obtained from the sale of perishables or from the collection of debts due the decedent. If these funds are not sufficient, the consul seeks funds from the personal representative. If funds cannot be obtained from the personal representative, the consul sells at auction that portion of the decedent's estate necessary to raise the funds required.

The consul normally does not accept appointment as a personal representative; but, if permitted by treaty and local law and if the Secretary of State consents, he may do so.<sup>206</sup> The consul does not act as attorney or agent for the estate and employs no counsel at the expense of the United States.<sup>207</sup> The consul is responsible to the court having probate jurisdiction over the estate in the United States and to the parties in interest for the personal estate in his possession. He must deliver this property to the appropriate legal representative

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<sup>202</sup> 22 C.F.R. § 72.22 (1958).

<sup>203</sup> No fee is charged for Defense Department personnel (including servicemen), although the dependents of Defense Department personnel are not included and a fee is charged for handling their property. No fee is charged for handling property of coast guardsmen, foreign service personnel, merchant seamen, or persons who die on the high seas. The fee is \$2.00 per \$100 in value, and the property is not released until the fee is paid. 22 C.F.R. § 72.52 (1958). The cost averages somewhat less than the cost of an ancillary administration in the United States.

<sup>204</sup> 22 C.F.R. § 72.29(b) (1958).

<sup>205</sup> 22 C.F.R. § 72.30 (1958).

<sup>206</sup> 22 C.F.R. § 72.40 (1958).

<sup>207</sup> 22 C.F.R. § 72.41 (1958).

upon presentation of a clerk's certificate of testamentary letters or of letters of administration. An affidavit by the next of kin must be supported by the sworn statements of two persons.<sup>208</sup> If rival claimants, such as a domiciliary personal representative and an ancillary personal representative, seek the property, the consul will not deliver the property until the claimants reach an agreement or until a judgment establishes a priority. If no agreement is reached or if no judgment is rendered within one year, the consul will sell the personal estate, including that part not originally taken into his possession but excluding jewelry, heirlooms, and articles of sentimental value. After payment of debts and deduction of the consular fee, the consul forwards the remaining proceeds from sale with unsold property to the Secretary of State for delivery to the General Accounting Office.<sup>209</sup> A similar sale will be conducted by the consul if the property is not claimed within one year;<sup>210</sup> the consul may elect a shorter period within which to sell the estate if a claim not supported by sufficient evidence is submitted.<sup>211</sup>

Certain property left outside the United States by citizens is not subject to the consular curatorship. If a citizen dies while a passenger on a vessel of United States registry on the high seas and there is no legal representative aboard who can take custody, the master will return the property to the shipping company in the United States. The shipping company then will forward the property to the domiciliary personal representative upon application. A similar death on a vessel of foreign registry is treated as if the decedent died in a foreign state, and, therefore, the consular curatorship may be initiated.

In some instances a consul may take custody of the property of merchant seamen enlisted upon United States vessels, although he lacks the authority to pay creditors of seamen as in cases of ordinary citizens. If the seaman dies in a foreign port leaving property not on board ship, the consul takes possession of it with a discretionary power of sale.<sup>212</sup> If the seaman dies leaving property on board, either during a voyage before the vessel touches at a foreign port or while the vessel is in port, the master is responsible for collecting and safeguarding the property, although the consul can demand the property in his discretion.<sup>213</sup> This property likewise can be sold by the consul, who returns quarterly the proceeds of sale and all other property of

<sup>208</sup> 22 C.F.R. § 72.44 (1958).

<sup>209</sup> 22 C.F.R. § 72.46 (1958). Presumably the one year period means one year after the death of decedent.

<sup>210</sup> 22 C.F.R. § 72.48 (1958).

<sup>211</sup> 22 C.F.R. § 72.47 (1958).

<sup>212</sup> 17 Stat. 272 (1872), 46 U.S.C. § 624 (1958); 22 C.F.R. §§ 85.4 - 85.9 (1958).

<sup>213</sup> 17 Stat. 271 (1872), 46 U.S.C. § 622 (1958).



the seaman in his hands to the federal district court at the port from which the vessel sails or in which the voyage terminates.<sup>214</sup> If the consul does not demand the property from the master, or if the seaman dies during a voyage in which the vessel is proceeding at once to a port in the United States, the master delivers the property within forty-eight hours after his arrival to the Coast Guard official serving as shipping commissioner; this official in turn delivers it to the federal district court.

The federal district court is required to deliver property exceeding 300 dollars in value to the legal personal representative of the deceased. This person presumably is the domiciliary personal representative. If the property has a value of 300 dollars or less, the court has discretion to deliver the property to the widow or children, to the person entitled thereto by the will of the decedent, to the next of kin, or to a person entitled to obtain probate or to take out letters of administration. The court can require probate or letters of administration in its discretion.<sup>215</sup>

If the Army summary court cannot be persuaded to collect the Colonel's assets in Groningen, Holland,<sup>216</sup> the expense to the estate will be minimized if the consular procedures are initiated for their collection, for which a consular fee will not be charged. Judicial officers approving fiduciary accounts in the United States tend to raise no questions about consular inventories, collections, payments, and charges, which are documented with greater care than in the usual domestic administration. These judicial officers, on the other hand, do question travel costs for the collection of assets abroad unless there is some very significant *quid pro quo* in saving to the estate. In view of the uncertainties in foreign law which will confront a personal representative if he seeks an informal collection of assets, there is as much to be said for the consular curatorship as there is to be said against the waste and uselessness of the usual domestic ancillary administration. In any event valuable information can be obtained from the consul if the personal representative decides to attempt the collection in person.

**4. Recovering the Back Pay of a Military Decedent** The major areas of trouble now existing in the collection of a military decedent's estate, and also in the collection of the estates of many civilian government employees as well, develop in the handling of back pay, allowances, soldiers' deposits, and the similar accrued claims. The

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<sup>214</sup> 17 Stat. 272 (1872), 46 U.S.C. § 624 (1958); 22 C.F.R. §§ 85.6, 85.9 (1958).

<sup>215</sup> 46 U.S.C. §§ 626-27 (1958).

<sup>216</sup> See pp. 336-37 *supra* for case of the hypothetical decedent discussed in this Article.

Death Gratuity<sup>217</sup> is not part of the estate of the decedent and the personal representative clearly is not entitled to it. Back pay and allowances, on the other hand, may be the major assets left by the decedent and ones which the personal representative logically might expect to recover. Under the present federal law governing collection of these accounts, the personal representative stands fifth in the order of payment; he is preceded by the beneficiary designated by the decedent, the surviving spouse, the decedent's children and their descendants (the descendants taking by representation), and the decedent's father and mother (taking in equal parts). If there is no personal representative, the money goes to the "person entitled under the law of the domicile of the deceased member."<sup>218</sup> Will a claim lie against the United States by the personal representative of the decedent if a payment is made in an improper order of precedence, (for example, to the next of kin when the personal representative was entitled)? After the payment has been made to the proper person, can the personal representative recover the payment from the payee for the benefit of the estate? Currently there is no clear answer to either of these questions. Since there is no certain answer, the personal representative may have to sue to recover the assets from a payee and this may entail ancillary letters.

In *Keown v. United States*<sup>219</sup> and in *Howell v. United States*,<sup>220</sup> the premise was that an action against the United States was not precluded under old 10 U.S.C. Section 868,<sup>221</sup> the predecessor of current 10 U.S.C. Section 2771. Under 10 U.S.C. Section 868, a duly appointed legal representative of the estate was entitled to pay in arrears before any survivors. In *Keown*,<sup>222</sup> the General Accounting Office paid the widow of a deceased serviceman against whom an action of annulment had been pending at the time of the husband's death. Notice had been received previously from the decedent's prospective domiciliary executrix and sole legatee in Iowa that the will of decedent would be probated and that no payment should be made

<sup>217</sup> 10 U.S.C. §§ 1475-79 (1958). This is a lump sum payment of six month's basic pay (plus special and incentive pay) to which the deceased serviceman was entitled at his death. The amount is neither less than \$800 nor more than \$3,000. If none of the persons designated in the statute survives the decedent, the benefit is not paid. See 32 C.F.R. § 533.4(c) (1962).

<sup>218</sup> 10 U.S.C. § 2771(a) (1958).

<sup>219</sup> 92 F. Supp. 628 (S.D. Iowa 1950), *aff'd*, 191 F.2d 438 (8th Cir. 1951).

<sup>220</sup> 159 F. Supp. 597 (Ct. Cl. 1958).

<sup>221</sup> The development of former 10 U.S.C. § 868, ch. 3914, § 1, 34 Stat. 750 (1906), as amended, ch. 35, § 4, 60 Stat. 30 (1946), is discussed in *Howell v. United States*, 159 F. Supp. 597, 599-600 (Ct. Cl. 1958). The parallel provision for the Navy and Marine Corps was former 34 U.S.C. § 941a, ch. 35, § 1, 60 Stat. 30 (1946), as amended, ch. 393, § 18, 63 Stat. 560 (1949). These sections were superseded by the present law, 10 U.S.C. § 2771 (1958).

<sup>222</sup> 92 F. Supp. 628 (S.D. Iowa 1950), *aff'd*, 191 F.2d 438 (8th Cir. 1951).

until the executrix qualified. The court held that the General Accounting Office had an absolute right to make payment to a survivor in the order of statutory preference until a demand was made by a "duly appointed" legal representative of the estate. In *Howell*,<sup>223</sup> on the other hand, the Court of Claims rejected this broad interpretation of the authority of the General Accounting Office and held that a step-mother of the decedent, named as executrix and sole legatee in his will, could recover the arrears from the United States after she had given notice of her intention to apply for letters in Florida. The General Accounting Office was held to be under a duty to give the prospective executrix a reasonable opportunity to qualify before payment was made.

The precise problem in *Keown* and *Howell* is not likely to recur except with respect to claims for settlement of accounts of deceased servicemen who died before January 1, 1956. Concerning these claims, the language "duly appointed" has been dropped, and the demand has been described as that of the "legal representative."<sup>224</sup> This provision may be construed to cover a demand by the executor of an unprobated but apparently valid will; however, the administrator of an intestate estate would be expected to produce his order of appointment. The current law,<sup>225</sup> as amended in 1958, permits payment to survivors before payment to the personal representative. Furthermore, subsection (d) of the current law states: "A payment under this section bars recovery by any other person of the amount paid."<sup>226</sup> This probably will be construed as barring claims only against the United States by adopting the "facility of payment" theory of *Keown*<sup>227</sup> and rejecting the "reasonable delay" philosophy of *Howell*.<sup>228</sup> Such a construction will be convenient for the military services and for the Department of the Treasury which now makes the payments subject to the regulations of the Comptroller General.<sup>229</sup>

If claims are barred against the United States under the current law after a payment has been made, in theory the personal representative is left to his remedies against the distributee to recover the payment. In *Howell*, for example, an action was instituted in the Maryland

<sup>223</sup> 159 F. Supp. 597 (Ct. Cl. 1958).

<sup>224</sup> 72 Stat. 1563 (1958), amending 10 U.S.C. § 2771 (1958).

<sup>225</sup> 10 U.S.C. § 2771 (1958).

<sup>226</sup> 10 U.S.C. § 2771(d) (1958).

<sup>227</sup> *Keown v. United States*, 92 F. Supp. 628 (S.D. Iowa), *aff'd*, 191 F.2d 438 (8th Cir. 1951). See text accompanying note 222 *supra*.

<sup>228</sup> *Howell v. United States*, 159 F. Supp. 597 (Ct. Cl. 1958). See text accompanying note 223 *supra*.

<sup>229</sup> 74 Stat. 473 (1960), amending 10 U.S.C. § 2771 (1958); 4 C.F.R. § 34.3(a)(1) (1961). If doubt exists as to the validity of the claim or the persons entitled to payment or if the claim involves uncurrent checks, the claim is still settled by the General Accounting Office. 4 C.F.R. § 34.3(b) (1961).

state court against the payee, with oral arguments postponed until the decision of the Court of Claims could be rendered.<sup>230</sup> The Circuit Court of Appeals, in affirming the District Court in *Keown*, stated broadly that Congress intended in 10 U.S.C. Section 868<sup>231</sup> to dispense with state administrations of arrears in pay unless the "duly appointed" personal representative made demand before payment to the General Accounting Office.<sup>232</sup> On the other hand, the Court of Claims in *Howell* placed primary emphasis upon the priority of the personal representative to demand payment as excluding an inference that Congress intended to supersede state administrative processes except perhaps in cases of intestacy.<sup>233</sup>

If a court finds an intent by Congress to supersede the state law concerning administration of estates, a constitutional problem is presented which probably will be resolved in favor of the federal power. No state courts have considered current 10 U.S.C. Section 2771<sup>234</sup> concerning payments of arrears. The state courts which considered the predecessor statutes<sup>235</sup> construed the intent of Congress not to supersede the state law.<sup>236</sup> Recoveries from the persons to whom payment was made by the federal authorities were permitted. In *Ashton v. Ashton*,<sup>237</sup> however, 5 U.S.C. Section 61(f)<sup>238</sup>—applicable to civilian employees of the United States rather than to military personnel, but in all material respects similar to 10 U.S.C. Section 2771<sup>239</sup>—was held to supersede the statute of distribution of the District of Columbia. The decedent failed to designate a beneficiary to whom his arrears in pay were to be delivered. Payment was made to the widow. The administrator of the estate contended that the widow did not become owner of the property by virtue of the payment and argued that Congress could not have intended to nullify the law of descent and distribution of the District of Columbia. In answer to this argument, the court stated:<sup>240</sup>

[O]ne who accepts Federal employment accepts all the terms and

<sup>230</sup> *Howell v. United States*, 159 F. Supp. 597, 599 n. 3 (Ct. Cl. 1958).

<sup>231</sup> Ch. 3914, § 1, 34 Stat. 750 (1906), as amended, ch. 35, § 4, 60 Stat. 30 (1946).

<sup>232</sup> *Keown v. United States*, 191 F.2d 438, 440-41 (8th Cir. 1951).

<sup>233</sup> *Howell v. United States*, 159 F. Supp. 597, 600-01 (Ct. Cl. 1958).

<sup>234</sup> 10 U.S.C. § 2771 (1958).

<sup>235</sup> Former 10 U.S.C. § 868, ch. 3914, § 1, 34 Stat. 750 (1906), as amended, ch. 35, § 4, 60 Stat. 30 (1946) (Army); former 34 U.S.C. § 941a, ch. 35, § 1, 60 Stat. 30 (1946), as amended, ch. 393, § 18, 63 Stat. 560 (1949) (Navy and Marine Corps). The statutes were substantially identical.

<sup>236</sup> *In re Kevil's Estate*, 98 Cal. App.2d 388, 220 P.2d 555 (1950); *Scammon v. Scammon*, 56 Ohio L. Abs. 65, 90 N.E.2d 617 (Ohio C.P. 1950); *Campbell v. Oliphant*, 185 Tenn. 415, 206 S.W.2d 406 (1947).

<sup>237</sup> 117 A.2d 459 (D.C. Munic. Ct. App. 1955).

<sup>238</sup> 64 Stat. 395 (1950), 5 U.S.C. § 61(f) (1958).

<sup>239</sup> 10 U.S.C. § 2771 (1958).

<sup>240</sup> 117 A.2d 459, 462.

conditions fixed by Federal law with respect to his compensation, as, for example, the law with respect to deductions from salary for Civil Service Retirement purposes. In the present case the employee was bound by the law which provided that at his death, unless he designated otherwise, his unpaid compensation would be payable to and would belong absolutely to his widow. This was a part of his contract of employment and in no way limited his right to dispose of his estate either by will or by the law of distribution. A somewhat similar question arose in numerous cases involving United States Savings bonds which permit the designation of one to whom they shall be payable on the death of the owner. By the great weight of authority such designation validly passes title on death of the owner and does not violate the local law of wills or distribution of decedents' estates.<sup>241</sup>

Although it is believed few state courts will be prepared to hold that their local law is superseded by a contract between the United States and its employee, it is still possible that a direct intent of the Congress to supersede state law may be found in 10 U.S.C. Section 2771.<sup>242</sup> Without a clear indication of this intent, the state law should prevail. The tenth amendment of the United States Constitution will prove to be no shield in this situation against an extension of federal power.

The Colonel's back pay and allowances<sup>243</sup> thus will be paid to the widow in New York rather than to the Virginia administrator. Possibly the widow might give up this money voluntarily, although under the existing case law she may be entitled to retain it. If the Virginia administrator has to sue in New York, he may do so without ancillary letters. However, he must file an authenticated copy of his Virginia letters of administration in the office of the clerk of the court in which the action is brought; he also must file an affidavit that decedent was not indebted to a resident of New York and that more than six months have elapsed from the death of the decedent without a petition for ancillary letters being filed in a New York court.<sup>244</sup> Whether he will succeed in recovering the amount paid to the widow is, as pointed out above, an open question.

#### *B. Collecting The Assets Of Non-Military Personnel Who Die In Federal Institutions*

Military custody and control of assets of a decedent as described previously in this article,<sup>245</sup> with "quasi-administration" by the sum-

<sup>241</sup> Citing *Reynolds v. Reynolds*, 325 Mass. 275, 90 N.E.2d 338 (1950).

<sup>242</sup> 10 U.S.C. § 2771 (1958).

<sup>243</sup> See pp. 336-37 *supra* for case of the hypothetical decedent discussed in this Article.

<sup>244</sup> N.Y. Deced. Est. Law § 160 (Supp. 1963).

<sup>245</sup> See text accompanying notes 106-65 *supra*.

mary court, is limited to persons subject to military law.<sup>246</sup> The property of deceased civilian employees upon a military post is secured by the commanding officer under whom the civilian was serving and is delivered to the legal representative or next of kin. Substantially the same problems in avoiding ancillary administration are raised in this case as in the case in which the commanding officer takes custody of the assets of a deceased serviceman. There is, however, no provision for action by a summary court. If the effects cannot be delivered by the commanding officer to the legal representative or next of kin, they will be forwarded with all available information concerning the decedent to the judicial officer of the local civil government having jurisdiction over estates of deceased persons.<sup>247</sup> In most instances the person designated to take custody of the property will be the public administrator, and an ancillary administration then is likely. Inventories and receipts for the property delivered are retained at the military installation.

Decisions by the United States Supreme Court removing civilian employees and dependents overseas from general court martial jurisdiction<sup>248</sup> have curtailed the action which otherwise might be taken by commanders abroad to avoid administrative complications and expenses in the foreign state. Summary court procedures now do not appear available to collect "local" debts and to pay "local" creditors,<sup>249</sup> although it is possible this action may be taken informally at the risk of the commanding officer or perhaps may be done upon instructions of the domiciliary personal representative. If the civilian is an employee who is subject to the Missing Persons Act,<sup>250</sup> his assets may be collected, some of them sold if necessary, and the remaining assets returned to the United States.<sup>251</sup> The Army Regulations have not been changed to reflect the necessity of reliance upon the Missing Persons Act for collecting the assets of deceased civilian employees overseas. In any event, the Act does not cover the situation in which a dependent of military personnel dies in a foreign country. The assets of these persons pass under consular jurisdiction or are administered in accordance with local procedures in the foreign country, unless the domiciliary personal representative or interested parties are able to remove the assets informally.

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<sup>246</sup> 10 U.S.C. § 4712(a)(1) (1958); 10 U.S.C. § 9712(a)(1) (1958).

<sup>247</sup> 32 C.F.R. § 511.5 (1962).

<sup>248</sup> *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Krueger*, 351 U.S. 470 (1956).

<sup>249</sup> See text accompanying notes 130-42 *supra*.

<sup>250</sup> 56 Stat. 143 (1942), as amended, 50 U.S.C. App. §§ 1001-15 (1958).

<sup>251</sup> 56 Stat. 146 (1942), as amended, 50 U.S.C. App. § 1012 (1958).

Property left by decedents at installation of the Veterans' Administration,<sup>252</sup> in hospitals operated by the United States Public Health Service,<sup>253</sup> and in St. Elizabeth's Hospital in the District of Columbia<sup>254</sup> can be obtained by the domiciliary personal representative with little hazard of ancillary administration. However, several problems are presented in collecting this property that usually do not arise in the collection of property left under military control. The property involved often will be small in value—typically items retained for sentiment—which will not stimulate petitions for ancillary administration. Nevertheless, a large number of cases are presented for the number of persons involved, since patients in hospitals have a higher mortality rate than the relatively healthy specimens in military service.

Upon entrance to the hospital, the patient will be given an opportunity to deposit his valuables. This will tend to secure them from pilferage and will simplify an inventory and accounting by the personal representative. If, however, the appropriate installation authorities distribute the property to the next of kin rather than to the personal representative, the personal representative may be forced into action to recover the property. This action may become necessary not because of the value of the property, but to allay jealousies and to suppress conflicts among the next of kin of the decedent which otherwise could impede an orderly administration of the estate. The difficulty is that many officers who must approve the accounts of personal representatives fail to appreciate this human element in administration. They will tend to look with jaundiced eyes upon any estate money expended to recover assets without market value. In many cases the domiciliary personal representative must be alert to collect the property of these hospitalized decedents not because he obtains items of significant value for the estate, but simply to clear away or to avoid obstacles to his effective administration. He must do so inexpensively. If he is put to expense in his collection, he must expect some pain when the time arrives for approval of his account.

The Regulations of the Veterans' Administration<sup>255</sup> are more favorable to the domiciliary personal representative than are the regulations of the Armed Services. There is, however, no procedure comparable to the military summary court by which some debts are

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<sup>252</sup> 38 U.S.C. §§ 5201-02, 5204-05 (1958); 38 C.F.R. §§ 12-12.23 (1964).

<sup>253</sup> 42 C.F.R. §§ 35.41-35.52 (1960).

<sup>254</sup> 34 Stat. 730 (1906), as amended, 24 U.S.C. § 177 (1958); 42 C.F.R. §§ 303.1-303.9 (1960).

<sup>255</sup> See note 252 *supra*.

collected and some creditors paid.<sup>256</sup> Under certain circumstances an inmate's property that is derived from compensation payments, automatic or term insurance, or emergency officer's retirement pay or pension will pass to the United States as trustee for the General Post Fund. This happens if an inmate who leaves no spouse, heirs, or next of kin entitled to such property dies intestate in a Veterans' Administration hospital or domiciliary activity, or in any other institution while receiving care and treatment there from the Veterans' Administration. The domiciliary personal representative cannot reach these assets for state administration. Creditors present their claims directly to the Veterans' Administration within one year after the death of the decedent. There is no escheat to a state.<sup>257</sup>

The domiciliary personal representative has priority to assets not in this category. The veteran is permitted to designate the person to whom he wishes the Veterans' Administration to deliver his property in case of death.<sup>258</sup> The designee is notified by the manager of the installation and may request the property within ninety days following receipt of the notice. If the executor or administrator of the estate notifies the manager of the installation in the meantime that he desires the property and if he presents appropriate documentary evidence of qualification or appointment, the property will be delivered to him instead.<sup>259</sup> If there is no designee and no notice of qualification or appointment of a personal representative, the effects other than money will be distributed to the next of kin in the following order: (1) widow, (2) child, (3) grandchild, (4) mother, (5) father, (6) grandmother, (7) grandfather, and (8) brother or sister.<sup>260</sup> If a class is entitled to delivery, a joint agent of the class will receive the property. Money is released to the person or persons entitled to distribution by the law of decedent's domicile.<sup>261</sup> In all of these cases the title is not affected by delivery of the property, and hence a recovery by the personal representative appears to be possible.

If a person other than an admitted veteran dies at a Veterans' Administration installation, the property will be inventoried and released to the executor named in a decedent's valid will<sup>262</sup> or to his administrator. If there is no personal representative, the property will be released to the person entitled by the statute of distribution

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<sup>256</sup> See text accompanying notes 130-39 *supra*.

<sup>257</sup> 38 C.F.R. § 12.19 (1964).

<sup>258</sup> 38 C.F.R. § 12.1 (1964).

<sup>259</sup> 38 C.F.R. § 12.4(1) (1964).

<sup>260</sup> 38 C.F.R. § 12.5(a) (1964).

<sup>261</sup> 38 C.F.R. § 12.5(b) (1964).

<sup>262</sup> 38 C.F.R. § 12.16(b) (1964).



in the decedent's domicile.<sup>263</sup> Property unclaimed for ninety days is sold, and the proceeds from sale are deposited to the account of the General Post Fund from which it may be reclaimed within five years by the personal representative.<sup>264</sup>

Property left by decedents in hospitals operated by the United States Public Health Service is delivered to the domiciliary personal representative by the officer in charge of the installation. The personal representative files his claim upon a form prescribed by the Surgeon General accompanied by a court certificate of qualification or appointment.<sup>265</sup> If the value of the property is 1,000 dollars or less, and the officer in charge has neither notice nor other knowledge of the appointment or qualification of a legal representative or reason to believe that a legal representative will be appointed or qualified, ten days after the sending of notices to possible claimants the property will be delivered to persons in the following order: (1) a designee in writing by the decedent, (2) the surviving spouse, (3) the child or children in equal parts, (4) the parent or parents in equal parts, and (5) any other person entitled to receive the property under the law of domicile of the decedent.<sup>266</sup> If no claim to the decedent's money is filed within 120 days, the money will be deposited in the Treasury in a trust fund account. If no claim to his other personalty is made within six months, all, except postal savings certificates and other evidences of indebtedness of the United States, will be sold at public auction or by sealed bid to the highest bidder; the proceeds from sale will be deposited in the Treasury trust fund account. Claims for these funds are filed with the General Accounting Office. Claims for the postal savings certificates and for other evidences of indebtedness are submitted to the issuing agency, to which they are returned by the officer in charge of the installation. Delivery of possession of property by the officer in charge does not affect title.<sup>267</sup>

The major problem confronting a prospective domiciliary personal representative of a decedent who dies in a hospital operated by the United States Public Health Service is a probable delay in obtaining notice of the decedent's death in time to forestall claims by the next of kin. In the United States Marine Hospital at Staten Island, New York, for example, large numbers of merchant seamen are hos-

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<sup>263</sup> 38 C.F.R. § 12.16(c) (1964).

<sup>264</sup> 38 C.F.R. § 12.17(b) (1964).

<sup>265</sup> 42 C.F.R. § 35.44 (1960).

<sup>266</sup> *Ibid.*

<sup>267</sup> 42 C.F.R. § 35.52 (1960).

pitalized, and some may die with substantial funds but without a known domicile or known relatives. This places a heavy burden upon the officer in charge to develop this information, and delays in informing members of the decedent's family may occur.<sup>268</sup> This problem is even more acute in a mental hospital, such as St. Elizabeth's in the District of Columbia. The patient upon commitment may be abandoned by his family. These patients seldom have substantial funds on deposit, and in many instances the hospital officials lack adequate information from which to determine the next of kin. If a personal representative qualifies, he will receive funds left by the decedent;<sup>269</sup> but if the personal representative is from a state and if the payment would work hardship on any near relative of the deceased, the Superintendent may require letters to be taken out in the District of Columbia.<sup>270</sup> If the amount involved is less than one hundred dollars and if no personal representative has been appointed, the decedent will be considered a domiciliary of the District of Columbia and payment will be made directly to the next of kin as determined by the local statute of distribution.<sup>271</sup> If a relative has incurred special expense in the interest of the decedent and if the amount due is less than one hundred dollars, payment may be made directly to this relative rather than to the next of kin.<sup>272</sup>

## VII. CONCLUSION

There is no invisible barrier to the collection of property without ancillary administration by a domiciliary personal representative in another state of the United States, unless this collection involves recourse to the local courts. Moreover, statutes in many states and in foreign countries now permit a foreign personal representative to sue without local qualification. Furthermore, the foreign personal representative must be alert to statutes which condition the method by which he must collect the property. Both barriers to and facilities for the collection of foreign assets have been built into federal statutes and regulations pertaining to the disposition of decedents' property passing under federal control. It is this expanding area of federal influence which now bears examination by the domi-

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<sup>268</sup> See 42 C.F.R. § 35.42-.43 (1960), which sets forth the procedures to be followed to determine the domicile and kinsmen of the decedent.

<sup>269</sup> 42 C.F.R. §§ 303.5, 303.8 (1960).

<sup>270</sup> 42 C.F.R. § 303.8 (1960).

<sup>271</sup> 42 C.F.R. § 303.9 (1960).

<sup>272</sup> 42 C.F.R. § 303.7 (1960).

ciliary personal representative and which will become increasingly significant as a condition to his plans for collecting assets in the future. The policies found in these statutes and regulations today are, to a degree, haphazard and inconsistent; but a thorough familiarity with those which appear to impinge upon the administration of a particular estate will go far toward avoiding unnecessary ancillary administrations.