THE ADMINISTRATION OF AMERICAN ASSETS OF THE ESTATES OF FOREIGN DECEDENTS.

Smollett in one of his travel letters written from Boulogne in 1763 wrote: "If a foreigner dies in France, the king seizes all his effects, even though his heir should be upon the spot; and this tyranny is called the 'droit d'aubaine,' founded at first upon the supposition, that all the estate of foreigners residing in France was acquired in that kingdom and that, therefore, it would be unjust to convey it to another country."

To-day no enlightened State would expropriate the estate of a non-resident decedent at the expense of the heirs. Of course, where a decedent leaves no will, and no heirs or next of kin can be found, the doctrine of escheat will apply.

But even to-day where the decedent leaves substantial assets in foreign countries, legal red tape may cause vicious delays and legal fees may eat into the corpus, but much time and money can be saved by lawyers who are willing to take advantage of practical short cuts. The writer can cite two contrasted examples which are now under his observation.

An American lawyer A represents the administrator appointed by the proper American Court in the domicile of a decedent; A engages a lawyer in Australia B and gives him power of attorney to collect the decedent's share, £4,500, in an Australian estate; B has himself appointed Administrator in Australia and engages his own law firm C as counsel for the Australian administration; and he then engages D an American law firm to check the law and the taxes in America, although these matters do not properly come within the province of the Australian Ancillary Administrator, whose sole duty is to collect the Australian legacy and pay it over to the principal Administrator in America. This simple transaction then becomes further involved by the Australian Administrator's engaging a firm of British solicitors E to whom he relays the Australian pounds to transmit the funds to America, but only upon their duplicating C's original inquiries of D. The net result is that the legacy of £4,500, thanks to all the legal refinements, has shriveled to £2,150.

The other case involved the collection of two bank deposits in Philadelphia. Both the banks demanded an Ancillary Administration, which would have meant incurring a substantial legal expense

just to satisfy the banks' natural desire for formalistic protection. But the expense problem was solved in a businesslike way by inducing the banks to pay the funds to the foreign Administrator under a bond of a strong insurance company, which guaranteed full protection to the banks.

In the ordinary case, an Ancillary administration may be dispensed with because in most American jurisdictions the more common winding-up steps may be performed by the foreign Administrator under his foreign appointment. He has authority to file tax returns, to arrange tax settlements and to pay the taxes.

He may collect debts, unless there are local creditors, and give binding receipts.[1]

In nearly half the states the foreign Executor or Administrator is even permitted to bring proceedings in the courts under his home appointment and without securing any Ancillary authority. These States are the following:

Alabama	Indiana	Nebraska
Arkansas	Iowa	New York
Colorado	*Kansas	Ohio
Delaware	Kentucky	Oklahoma
Florida	Maryland	South Dakota
*Georgia	*Minnesota	Tennessee
*Illinois	Mississippi	Wisconsin

But even in the other States where he does not have the common law right to sue, he may, nevertheless, accomplish the same object by making an assignment and the assignee may sue in his own name.

Usually the most important function in the administration of the American assets will be to secure the transfer of securities held. Nearly all the states, and the great majority of the larger corporations recognize the title of the foreign representative for the purpose of security transfers, but in Missouri and a few other States, the statute requires either the appointment of an Ancillary Administrator or a certificate of its own local probate court permitting the transfer. Likewise there are a few corporations which are extremely strict and will not transfer their shares held by a foreign decedent unless there is an Ancillary Administration.

The corporate requirements for the transfer of stock held by decedents show considerable variance. The following is an attempt

[1] *Wyman* v. *Halstead*, 109 U.S. 654.

* He must first file his letters testamentary or of administration in the county where he brings suit.

at an inclusive list of all requirements (and all of these are not required in every case, of course), except most unusual ones:

(1) An officially certified copy of the Will and all Codicils.

(2) A probate certificate or an officially certified copy of the court order showing the appointment of the Executor or Administrator and that such appointment is still in force. Such probate certificate or court order should be of a date not earlier than three months prior to the date of the application for the transfer of the stock.

(3) An affidavit from the Executor or Administrator showing the following:

(a) Date and place of death of decedent.

(b) That all debts and claims against the estate have been paid or that ample provision has been made therefor. If this statement cannot be made, a detailed explanation of the situation with regard to dates and claims will usually be sufficient, although certain corporations follow the practice of demanding an Ancillary administration.

(4) Proper evidence that the Executor or Administrator has power to make the transfer requested, if such evidence is not contained in the Will itself. This evidence may usually be furnished by an affidavit of the Executor or the Administrator himself.

(5) A waiver from the Inheritance Tax authorities of the state where the corporation is incorporated.

(6) A Federal Estate Tax Waiver or Certificate of Payment issued by the Bureau of Internal Revenue of the United States Treasury Department.

(7) Federal Internal Revenue stamps. The present rate of two cents per share will undoubtedly be increased to four cents as proposed.

(8) State transfer tax stamps, if required by the state where the corporation is organized.

When the representative of the estate desires to have the stock transferred to himself individually, he will be required by some corporations to furnish a court order or a consent of all the legatees or next of kin to such transfer, although many corporations will be satisfied by his affidavit that all prior legacies have been paid.

These, however, are comparatively simple situations. But where there are local creditors or a business to be wound up or continued or other complications, an Ancillary Administration must be had.

It will be understood, of course, that in the case of an alien domiciled in the United States the principal and primary administration of the estate will be conducted at the American domicile of the defendant. This is based on the commonly accepted principle that the personal estate has its situs in the domicile of the decedent, regardless of his nationality.[2] As to real property, the law applied is that of the situs of the property;[3] so if a foreign decedent, whether domiciled or not in the United States, had real property in one of the states and devised the property by Will, the Will would have to be probated in the state or states where the property is situated; and if he left no Will, an Ancillary Administration would be required in such state or states to clear up any tax liability, and the property would pass according to the local succession law of the situs of the property.

But this subject of the principal or domiciliary administration of the states will not be discussed, except incidentally, because it is too ramified and is not within the scope of this article.

"Domicile" means the place where one has his fixed and permanent home, to which, when absent, he has the intention of returning. The question of domicile is often a nice one to decide, but it is primarily a question of intention, and overt acts, such as residence, the giving up of one's home in the country of nationality, the payment of residential taxes, etc., are important only as reflecting the intention.

Domicile is often confused with residence.[4]

Although a person in fact may have but one domicile, the courts of different states may differ as to which was the domicile of the decedent and there may be conflicting adjudications.[5]

[2] "It has long been settled, and is a principle of universal jurisprudence, in all civilized nations, that the personal estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile; and, if he dies intestate, the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated." *Wilkins* v. *Ellett*, 76 U.S. 740, 741.

[3] *Clarke* v. *Clarke*, 178 U.S. 186.

[4] "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile." *Matter of Newcomb*, 192 N.Y. Ct. of Appeals, 238.

[5] "It is thoroughly settled that the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States, does not preclude inquiry into the jurisdiction of the court in which the judgment is rendered, over the subject-matter, or the parties affected by it, or into the facts necessary to give such jurisdiction." *Thormann* v. *Frame*, 176 U.S. 350 at p. 356.

The objects of ancillary administration are (1) to protect local creditors, and put them in a position to collect their debts; and (2) to have the residue, after the payment of debts and expenses, transmitted to the principal or domiciliary administrator.

We must distinguish two classes of ancillary administration: (1) that based upon a foreign probate, i.e., where there is a Will which was probated in another country; and (2) that based upon a foreign administration without a Will.

In the first class, the American court will issue ancillary letters testamentary or letters of administration with the Will annexed.

Where the Will relates to personalty, the general rule is that all that is required is to file with the American court the following:

(a) Authenticated copy of the Will.

(b) Authenticated copies of the Decree, Judgment or Order of the foreign court that granted the probate, and of the letters issued.

(c) A petition setting forth the facts relative to the foreign probate, and the facts giving jurisdiction to the local court.

This is the simple procedure in all of the states with the exception of the following:

Kentucky	New Mexico	District of Columbia
Louisiana	North Dakota	Territory of Alaska
Maryland	Utah	

However, it should also be noted that in the following states notice of application for ancillary probate must be given to the interested parties:

California	Minnesota	New Jersey
Connecticut	Montana	Ohio
Kansas	Nebraska	Rhode Island
Maine	New Hampshire	South Dakota
Massachusetts	Nevada	Vermont

In Oklahoma, notice is required only when letters testamentary are sought.

The method of authentication is explained below.

The ancillary probate can only go into the authenticity of the foreign proceedings. It cannot go into the genuineness and validity of the foreign Will.

However, where the Will relates to realty, it will also be necessary to adduce proof of the validity of the Will, according to the law of the state where the ancillary probate is sought, but Connecticut,[6]

[6] *Irwin's Appeal,* 33 Conn. 128, 140.

Illinois,[7] Maine[8] and Michigan[9] hold that the original probate is controlling even as to realty.

Now to take up the second class of ancillary administration, i.e., where there is no Will. The procedure, as in the case of proving the foreign probate, is simple. All that is required, according to the prevailing practice, is an authenticated copy of the foreign letters of administration, and the requisite petition. The petition may ask for the appointment of the foreign administrator or of some other designated person or trust company as ancillary administrator. The statutes of most of the states provide that the domiciliary executor or administrator shall be preferred, and that if he does not choose to act, he may appoint an attorney-in-fact to act for him in such capacity. If ancillary administration is necessary, and the domiciliary administrator fails to act, any creditor or other interested party may be appointed in the discretion of the court. Where there is no statutory preference, ancillary appointment may be obtained by such interested party.

Where there are two or more domiciliary executors or administrators, it is usually not necessary to have them all appointed as ancillary administrators. The appointment of a single ancillary administrator is more convenient, and where there is much work to be performed, having a single representative saves the delay incident to securing several signatures to each document.

In all States, the court has power to pass upon the competency of the person or persons applying for appointment. This is true even where the applicant is the foreign executor seeking ancillary letters on the foreign probate. Objections may always be raised by any properly interested party to the integrity and competency of a person seeking to qualify as executor or administrator.

A citation or formal notice of the proceeding must be served on all local creditors, and in some states the advertising of the notice is required for a certain period.

The citation is not required to be served on legatees and next-of-kin, but they may intervene in the proceedings.

The ancillary administrator even though he be the executor named in the Will must furnish a bond of a competent surety in an amount named by the court for the faithful performance of his duties, and he is not qualified to act until he does post such bond.

As to the method of authentication, the following requirements should be observed in order to fulfill statutory requirements:

[7] *Amrine* v. *Hamer*, 240 Ill. 572.
[8] *Lyon* v. *Ogden*, 85 Me. 374.
[9] *Wilt* v. *Cutler*, 38 Mich. 189, 196.

(1) The copy of the authenticated document should bear a certificate by a Judge of a court of record, or by the chief officer of the Department of Justice of the foreign country, to the effect that the document is authenticated in conformity with the laws of such country, and that the court or officer by which or by whom the Will was admitted to probate, or the letters granted, was duly authorized by the laws of the country to admit Wills to probate and to grant letters testamentary or of administration and to keep records thereof.

(2) The signature and official position of the Judge of the court, or the chief officer of the Department of Justice, who signed the certificate of authentication, should be attested by a consular officer of the United States.

What are the steps in the ancillary administration? The ancillary administrator, of course, may act only within the jurisdiction and with reference to the assets within the jurisdiction. Thus, for example, if an ancillary administrator is appointed in the State of Pennsylvania, he has no control over assets in the State of New York.

The usual steps to be taken would be these:

(1) The collection of assets. This includes the closing out of bank accounts, the right to sell in order to convert movables into cash, and the power to bring suit if necessary.

(2) The transfer of securities. This we have discussed above.

(3) Allowance and payment of claims. It is the duty of the ancillary administrator to pass upon claims of local creditors. In the event that he disallows a claim, he must give a formal notice of rejection to the claimant, who then has his remedy of suit. In order to shorten the time for the presentation of claims and thereby shorten the period of administration, the statutes in most states provide for the shortening of the usual period by publishing a certain prescribed notice directing the presentation of claims. As to the right of a non-resident creditor (and foreign creditors are classed as non-residents and treated in the same fashion), the decisions are conflicting. Kentucky gives non-resident creditors the same rights as local creditors.[10] In Mississippi, it has been held that a non-resident creditor whose claim was barred in the domiciliary jurisdiction because of the estate's plea of the statute of limitations, may have an

[10] *Bertram* v. *Jones*, 205 Kentucky 691, 266 Southwestern Reporter 385.

ancillary administrator appointed in Mississippi where the decedent owned realty, and present his claim in such ancillary administration.[11]

In New York the recognition of the rights of foreign creditors and beneficiaries, as well, is a matter purely in the discretion of the court.[12]

(4) Transmission of residue of local estate. As stated above, one object of the ancillary administration is to enable local creditors to be paid out of the local assets. Another object is to secure the transmission of the net local estate to the principal or domiciliary administrator. So when the ancillary administration has been completed, it becomes the duty of the administrator to transmit the residue to the principal administrator, but before doing this, the ancillary administrator should submit an accounting to the court which appointed him and obey the direction of the court. This usually will simply direct the payment of the allowed claims of creditors, the allowance of proper expenses, and further direct the sending of the residue to the principal administrator, but in most states the Probate or Surrogate's Court is given permission to direct the distribution to the legatees or to the next of kin, but the statute usually provides that where distribution is made to the next of kin, it must be according to the laws of the domicile of the decedent.

Finally, there is the important subject of Estate and Inheritance taxes. How do they affect estates of foreign decedents? Until recently such estates were badly hit by multiple death duties. Much criticism was properly directed in recent years at the oppressive death taxation, but now the whole matter has been clarified and death taxes on non-resident estates (and the estates of foreign decedents come in this class) have been put on an equitable basis, thanks to recent decisions of the United States Supreme Court.

Strange to say the system of multiple taxation grew and developed under the judicial sanction of earlier decisions of the Supreme Court. But this potent and august Tribunal has now completely and frankly reversed these precedents.

[11] *Buckingham Hotel Co.* v. *Kimberley, et al,* 138 Mississippi 445, 103 Southern Reporter 213 at p. 215:

"An administration in this State is not ancillary to an administration in any other State where real estate or personal property is located here, and the law of the domicile does not control our statute in the administration of an estate of which the courts of our State have jurisdiction, but they are administered in all respects as though there were no other administration."

[12] *In re Meyer's Estate,* 211 N.Y. Supp. 525, 528.

The former attitude of the court was shown in the leading case of *Blackstone* v. *Miller.*[13] In that case the issue was whether the State of New York had the right to levy a tax on the transfer by will of debts due from residents of the State of New York to the decedent who died domiciled in the State of Illinois. The tax legislation under which the tax was assessed, provided that the situs of debts should be at the domicile of the debtors and not at the domicile of the creditors. The court, in upholding the tax, said that double taxation was regrettable, but that nevertheless the state, having control over the person of the debtor, had the power to tax, as well as the government of the decedent's domicile.

This general principle was upheld in several other cases that came before the court. But in January, 1930, the court, in the case of *Farmers Loan & Trust Co.* v. *Minnesota,*[14] wheeled completely around from its former decisions and held that the taxable situs of bonds was the domicile of the owner and that they could not be taxed at the domicile of the debtors. The court, in its decision, applied the rule *mobilia sequuntur personam.* The court made the following practical, but in view of its earlier decisions, startling statement:

> Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota.

A little later came the case of *Baldwin* v. *Missouri.*[15] There the Supreme Court held as unconstitutional the law of the State of Missouri under which an inheritance tax had been levied on bank accounts, United States Government bonds and promissory notes executed by debtors in Missouri and evidenced by documents located in Missouri but belonging to a decedent domiciled in Illinois. The court stated that the tax here was based on

> choses in action with situs at the domicile of the creditor. At that point they too passed from the dead to the living, and there this transfer was actually taxed. As they were not within Missouri for taxation purposes the transfer was not subject to her power.

These two cases established the non-taxability of various classes of intangibles held by a non-resident, or foreign decedent. But

[13] 188 U.S. 189 (decided 1903).
[14] 280 U.S. 204 at p. 212.
[15] 281 U.S. 586 at p. 593.

they did not specifically cover the most important class of all—corporate securities. However, the same principles were applied to corporate shares in the decision rendered by the Supreme Court on January 4, 1932, in the case of *First National Bank of Boston, Executor* v. *State of Maine.*

In the light of these recent and far-reaching decisions, we may now summarize the tax situation as to the American assets of foreign decedents. Preliminarily, it must be kept in mind that there is the Federal Estate Tax imposed by the Federal Government, and also in most states, a state tax. Real estate, chattels and other taxables located in the United States are taxable, both by the Federal Government and by the particular state government where the property is located. Intangibles, by virtue of the recent decisions of the Supreme Court to which we have referred, are immune from taxation by the states, except in two cases:

(1) Where the intangibles have been legally transferred and actually delivered to a trustee who is domiciled in the United States.[16]

(2) Where the intangibles have a business situs in one of the states.[17]

The United States Supreme Court has on several occasions referred to the business situs of intangibles as constituting an exception to the general rule, but it has not yet defined or explained what is meant by a business situs. But it may be suggested that if the intangibles are deposited in the United States as part of the capital of a business, that they would then probably come under this exception.

The question of the taxability of the intangibles of a foreign decedent under the Federal Estate Tax has not yet reached the Supreme Court. The Lower Court, i.e., the United States Board of Tax Appeals, in 1931, applied the same principles that we have discussed, to the Federal Estate Tax with regard to intangibles in general, but made an exception with regard to stock in American corporations. It is believed, however, that the exception is wrong in principle, and that the United States Supreme Court, to be fair and consistent, will have to apply the same rules to Federal taxation as to State taxation.

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[16] *Safe Deposit & Trust Co.* v. *Commonwealth of Virginia,* 280 U.S. 83.
[17] *Beidler* v. *South Carolina Tax Commission,* 282 U.S. 1, 8.