COMMENTS

JUDICIAL JURISDICTION OVER FOREIGN EXECUTORS AND ADMINISTRATORS

One of the more firmly entrenched common law rules of decedents' estates provided that an executor or administrator could not sue or be sued outside the state in which he received his letters of appointment. The results reached by applying these rules bottomed on the domiciliary contact were logical, predictable, and generally reasonable. But the interstate flavor of many transactions arising from extensive changes in transportation, communication, and commercial finance raise the question of the continued soundness of the solutions which the application of these rules dictate. Whether more realistic predicates than the categorical "no" of precedent can be formulated to determine a foreign executor's amenability to suit is the question pursued in this article.

The Common Law

The unquestionable common law rule in England and the United States was that a foreign executor or administrator could not sue or be sued without ancilliary letters of administration.[1] The numerous statements to this effect indicate an assumption that the rules were generally thought to be corollaries.[2] For all practical purposes, the rule denying the foreign executor capacity to sue has been rendered inoperative by legislative and judicial relaxation.[3] Removal of the foreign executor's immunity from suit has met greater resistance. However, the extensive overlapping of the legal foundations upon which the two rules once rested makes singular treatment impossible.

Traditionally, the limitation was premised on the territorial concept of the law.[4] In essence, it was reasoned that maintenance of a suit by a foreign jurisdiction would impinge on the sovereignty of the domiciliary court. Another rationalization was the defect of power

[1] Story, Commentaries on the Conflict of Laws, § 513 (2d ed. 1841). "It has hence become a general doctrine of the common law, recognized both in England and America, that no suit can be brought or maintained by any executor or administrator . . . in his official capacity, in the Courts of any other country, except that from which he derives his authority to act in virtue of the probate letters testamentary or the letters of administration there granted him. . . ." See Beale, A Treatise on the Conflict of Laws, 1935, n. 1 (1916) [hereinafter cited as Beale]; McDowell, Foreign Personal Representatives, 31, n. 2 (1957) [hereinafter cited as McDowell].

[2] Woerner, The American Law of Administration § 160 (3d ed. 1923); Beale *supra* note 1, § 507.

[3] Beale, *supra* note 1, § 512.1; Goodrich, Conflict of Laws § 190 (3d ed. 1949); Note, 52 Mich. L. Rev. 144, 147 (1953); Note, 56 Colum. L. Rev. 915 (1956).

[4] *Ibid.*

position taken by the *Restatement*.[5] This view denies extra-territorial recognition on the basis that the administrator is a statutory creature, and as such has a power limitation imposed upon him the same as any other self-operating statute. A third position was to dismiss the suit because the appointing court to whom the fiduciary would have to account would not be bound to give the judgment effect.[6] A further justification sometimes presented was the desire of giving additional insurance of equal administration for the protection of local creditors.[7]

Carrying the first two propositions to their logical extremeties would create an absolute jurisdictional defect, that, when combined with the due process barrier, would prohibit *any* activity outside the appointing state. Such was not the case. All courts recognized an exception for extra-judicial conduct.[8] In addition, suits by a foreign executor were permitted on negotiable instruments,[9] judgments received in the domiciliary state,[10] and in some jurisdictions, "as a matter of comity in the interest of justice."[11] If the foreign representative was the plaintiff, the other party could waive the defect of capacity.[12]

By creating exceptions in the hard cases the courts implicitly undermined some of the assumed foundations of the rules. First, on its face it rebuts the argument that the rule is founded on a lack of power or territorial limitation. Secondly, the concession that the jurisdictional power exists in some instances discredits the position that the appointing court need not give the judgment effect. If jurisdictional power exists, the final determination of which rests in the enforcing court subject to review by the United States Supreme Court, the full faith and credit clause compels enforcement.[13] While the want of power to enforce a

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[5] "The foreign representative has no power to act for the estate out of the jurisdiction of the appointing court," RESTATEMENT, CONFLICT OF LAWS § 512 comment *a* (1934); annot. 40 A.L.R. 292 (1926).

[6] Knoop v. Anderson, 71 F. Supp. 832 (N.D. Iowa 1947).

[7] MCDOWELL, *supra* note 1 at 57; The real reason for prohibiting suits by foreign personal representatives was the policy of protecting domestic creditors.

[8] Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913).

[9] "An administrator in possession of a negotiable instrument . . . can sue upon the duty represented by such document wherever jurisdiction can be secured over the debtor or his property," RESTATEMENT, CONFLICT OF LAWS, § 509 (1934). See Petersen v. Chemical Bank, 32 N.Y. 21 (1865), the leading case which permitted suit by the assignee of a foreign personal representative.

[10] Moore v. Kraft, 179 Fed. 685 (7th Cir. 1910); McCraw v. Simpson, 208 Ark. 471, 187 S.W.2d 536 (1945); Reed v. Hollister, 95 Ore. 656, 188 Pac. 170 (1920).

[11] Vaughan v. Northrup, 40 U.S. (15 Pet.) 1 (1841); Cooper v. American Airlines, 57 F. Supp. 329 (S.D.N.Y. 1949); Kirkbride v. Van Note, 275 N.Y. 244, 9 N.E.2d 852 (1937); An exception to the prevailing view that foreign administrators have no standing in our courts is sometimes made as a matter of comity in the interests of justice.

[12] MCDOWELL, *supra* note 1 at 35.

[13] U.S. CONST. art. IV, § 1. Full faith and credit can be denied when the

judgment or decree may afford a reason against entertaining jurisdiction, it has nothing to do with the validity of the decree when made.[14] Concurrent judicial jurisdiction is a common occurrence in American jurisprudence. And further, the fear of unequal administration of the estate to the detriment of local creditors should be fully dissipated by the interpretation the Supreme Court has given the privileges and immunities clause.[15] Reduced to this level, the activities of foreign fiduciaries become proper subject matter for legislative intervention.

Statutory Modification

From the point of view of efficient estate administration, the inadequacy of the common law is displayed by the extensive legislative modification. About half the states have adopted statutes permitting the foreign executor to sue.[16] These statutes eliminating the necessity of obtaining an expensive ancilliary administrator to collect the decedent's assets have been uniformly upheld.[17] The results have been so satisfactory that this procedure has been submitted and adopted by the National Conference of Commissioners on Uniform State Laws.[18]

Attempts to abolish the foreign executors' immunity from suit have generally met with a different fate. In Pennsylvania the immunity was rejected by judicial decision.[19] As early as 1907 the Kansas Supreme Court upheld a statute that subjected the foreign executors to suit.[20] However, legislation in other states has uniformly met with judicial resistance.[21] New York is representative. In *Helme v.*

forum had no jurisdiction; if it exists the issues should be forclosed. Holt, *Extension of Non-resident Motorist Statutes to Non-resident Personal Representatives,* 101 U. Pa. L. Rev. 223 (1952). It is contended that this conclusion follows because in Morris v. Jones, 329 U.S. 545 (1947), corporate assets of an Illinois corporation in Illinois were subject to a Missouri judgment and full faith and credit had to be given by the Illinois court.

[14] In Michigan Trust Co. v. Ferry, *supra* note 8 at 356, the Supreme Court speaking through Justice Holmes stated: A decree in equity against a defendant who had left the state after service upon him and had taken all his property with him would be entitled to full faith and credit where he was found. *The judgment of a "court" may be complete and perfect and have full effect independent of the right to issue execution.* (emphasis added.)

[15] Blake v. McClung, 172 U.S. 239 (1898).

[16] *See,* Beale, *supra* note 1, § 507.2; Note, 56 Colum. L. Rev. 915, n. 45 (1956).

[17] *Ibid.*

[18] Uniform Powers of Foreign Representatives Act (1944) §§ 1-5; See also the handbooks of the National Conferences commencing 1940; "When there is no administration or application therefore pending in this state, a foreign representative may exercise all powers which would exist in favor of a local representative, and maintain actions and proceedings in this state subject to the conditions imposed on non-resident suitors generally." Simes, Model Probate Code (Michigan Legal Studies 1946) Part V. p.234.

[19] Giampalo v. Taylor, 335 Pa. 121, 6 A.2d 499 (1939).

[20] Dewey v. Barnhouse, 75 Kan. 214, 88 Pac. 877 (1907).

[21] Kan. Gen. Stat. Ann. § 59-1708 (1949); Md. Ann. Code, art. 16, § 158

Buckelew[22] Justice Cardozo dealt a crushing blow to a 1911 statute which indiscriminately made foreign executors amenable to suit.[23] In *McMaster v. Gould*[24] a subsequent amendment providing for substitution of the executor when a defendant died during the pendency of an action was held unconstitutional. The next year the statute was repealed.

The Ohio statute may be in a position of equal jeopardy. Revised Code Section 2113.71 provides that:

> The several probate courts, courts of common pleas and superior courts have the same authority over foreign executors and administrators as if they were appointed in this state.

By way of dictum the Ohio Supreme Court in two early cases indicated that the statute meant just what it appears to say.[25] In *Craig v. Toledo R.R.*[26] a lower court sustained the service on a foreign executor when there were no assets in the state.

However, the 1957 decision of *Brownewell v. Columbus Clay Corp.* casts serious doubt on the continued vitality of these precedents.[27] In that case an action was filed to declare an express trust (or at least constructive) of shares of stock held by a California executor. A general appearance was entered by the foreign executor. In dismissing the suit Judge Bell stated:[28]

> The defendant bank, being an executor appointed by the Probate Court in California is an officer of the Court and as such cannot be ordered by an Ohio Court to perform any act dealing with the administration of its trust. *Some members of the Court entertain the doubt that such executor can validly enter its appearance without first being authorized or directed to do so by the court exercising jurisdiction over it.* (emphasis added.)

The Ohio statute was neither cited nor discussed by the court.[29]

(1951); N.J. STAT. ANN., § 3A:12-7 (1953); N.M. STAT. ANN., § 31-2-9 (1953); N.D. REV. CODE § 28-0202 (1943); WISC. STAT. § 287.16 (1951).

OHIO REV. CODE § 2113.70 (1953); OKLA. STAT. ANN., Tit. 58, § 262 (1951);

[22] 229 N.Y. 363, 128 N.E. 216 (1920).

[23] N.Y. SESS. LAWS 1911, c. 631, § 1.

[24] 240 N.Y. 379, 148 N.E. 556 (1925).

[25] Williams v. Welton, 28 Ohio St. 451 (1876); Swearington v. Morris, 14 Ohio St. 424 (1856).

[26] Craig v. Toledo R.R., 2 Ohio N.P. 64, 3 Ohio Dec. N.P. 146 (1895); see also Hamilton v. Taylor, 13 Ohio Dec. Rep. 975 (1873) where a foreign executor who filed suit in the Ohio courts was held subject to a counterclaim.

[27] 166 Ohio St. 324, 142 N.E.2d 511 (1957).

[28] *Id.* at 328.

[29] The court's finding that the situs of the stock under the Uniform Stock Transfer Act was in California has been interpreted as precluding further inquiry by the court. *Survey of Ohio Law,* 9 W. RES. L. REV. 268 (1957). *But see* Baker v. Baker, Eccles & Co., 242 U.S. 394 (1916), where the Supreme Court held that due process precludes determination of the course of devolution of personal property

The above excerpt exemplifies the general reaction of the courts. It also points up the reason for the different attitude accorded legislative abrogation of the foreign executor's immunity as opposed to the removal of the limitation on his capacity to sue. The confusion the courts create when confronted with statutes removing the immunity stems from regarding the executor as having a dual personality.[30] He is both a private individual and legal representative for the estate. Therefore, if the basis of jurisdiction is the executor's appearance and the action is in the nature of *in personam*, the suit cannot be maintained because the executor is not personally liable. On the other hand, if it is contended that the suit is *in rem* or *quasi-in-rem*, the suit is dismissed because the estate, even if it is considered a *res*, exists only in the domiciliary state. Thus, unless the decedent has left property in the state over which the plaintiff can obtain *in rem* jurisdiction the suit is dismissed because of the jurisdictional defect.

Relief from the dilemma in which this conceptualism casts a plaintiff is offered from two sources. First is the view taken by Professor Scott that the suit need not be either *in rem* or *in personam*.[31]

> The judgment . . . is not exactly a judgment *in rem* or a judgment *in personam;* but it is a judgment which makes res judicata the existence and extent of the plaintiff's right to damages.

Another analysis is that taken by the United States Supreme Court in the 1848 case of *Stacy v. Thrasher*.[32] The court in rejecting the argument that a privity exists between an executor and administrator appointed in different states said the position:[33]

> [A]ssumes that the judgment is *in rem* and not *in personam*, or that the estate has a sort of corporate unity or entity. But this is not true in either fact or legal construction. The judgment is against the person of the administrator that he shall pay the debt of the intestate out of funds committed to his care.

The reasoning of these two views was implicitly adopted in two recent New Jersey decisions brought against foreign executors.[34] But before turning to these cases a review of a body of law evolving from the non-resident motorist statutes is imperative.

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situated in another state as against residents of the latter, *who do not appear* in the proceeding. The general appearance by the foreign executor in the *Brownewell* case would have met this type of due process argument.

[30] Knoop v. Anderson, 71 F.Supp. 832 (N.D. Iowa 1947); Leighton v. Roper, 300 N.Y. 434, 91 N.E.2d 876 (1950).

[31] Scott, *Hess and Pawloski Carry on*, 64 HARV. L. REV. 98, 104 (1950).

[32] 47 U.S. (6 How.) 44 (1848).

[33] *Id.* at 60.

[34] Farone v. Habel, 22 N.J. 66, 123 A.2d 506 (1956); Jacobs v. Rothstein, 23 N.J. 641, 130 A.2d 384 (1957).

THE NON-RESIDENT MOTORIST STATUTES

The story of *Hess v. Pawloski*[35] and its successors is too well known to necessitate citation. All states and the District of Columbia have since enacted legislation subjecting the non-resident who uses the highways to the court's jurisdiction. As originally enacted no provision was made for service on the non-resident executor or administrator in event of the non-resident's death before or during a suit. It was uniformly held that jurisdiction could not be obtained in these situations because the statutory agency, not being coupled with an interest, was terminated on the principal's death.[36] Further justification was based on the necessity of strict construction of statutes in derogation of the common law.[37]

Thus, in accidents serious enough to result in the death of the non-resident defendant—where there would be greater probability of injury to other persons—the immunity of the foreign executor completely frustrated the objective of the statute. To remedy this weakness nine states including Ohio have implemented the non-resident statutes by providing for an irrevocable agency.[38] The statutes bind the personal representative to service of process in the same manner the motorist would have been served had he survived, or in event of his death after service, provide for substitution of the representative as the defendant.

A federal district court in Iowa was the first to adjudicate the constitutionality of this type statute.[39] In striking the statute down as unconstitutional the court in *Knoop v. Anderson* based its decision primarily on the *in rem* and *in personam* argument presented earlier. The courts in all subsequent decisions have sustained the statutes.[40] In *Leighton v. Roper*,[41] the leading New York decision, the statute was upheld as a reasonable extension of the state's police power.

By relying on the police power the courts are implicitly extending

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[35] Hess v. Pawloski, 274 U.S. 352 (1927); The United States Supreme Court, recognizing the states' interest in the enforcement of regulations reasonably calculated to promote care on the part of those who use its highways upheld the constitutionalty of a statute subjecting non-resident motorists to service of process in the state.

[36] Buttson v. Arnold, 4 F.R.D. 492 (D.C. Pa. 1945); Brogan v. Macklin, 126 Conn. 92, 9 A.2d 499 (1939); Young v. Potter Title & Trust Co., 114 N.J.L. 561, 178 Atl. 177 (1935); Dowling v. Winter, 208 N.C. 521, 181 S.E. 751 (1935); Harris v. Owens, 142 Ohio St. 379, 52 N.E.2d 522 (1943).

[37] Rogers v. Edwards, 164 Kan. 492, 190 P.2d 857 (1948); Riggs v. Schneider's Ex'r, 279 Ky. 361, 130 S.W.2d 816 (1939); Downing v. Schwenck, 138 Neb. 395, 293 N.W. 278 (1940); State *ex rel.* Ledin v. Davison, 216 Wis. 216, 256 N.W. 718 (1934).

[38] OHIO REV. CODE § 2703.20; Note, 28 CHI.-KENT L. REV. 347 (1950).

[39] *Supra* note 6; Stimson, *Conflict of Laws: When Does a Court Have Jurisdiction,* 45 A.B.A.J. 569, 572 (1959).

[40] Feinsinger v. Bard, 195 F.2d 45 (7th Cir. 1952); Plopa v. Supre, 327 Mich. 660, 42 N.W.2d 777 (1950); Leighton v. Roper, 300 N.Y. 434, 91 N.E.2d 876 (1950); Tarczynski v. Chicago R.R., 261 Wis. 144, 52 N.W.2d 396 (1952).

[41] 300 N.Y. 434, 91 N.E.2d 876 (1950).

judicial jurisdiction by looking to the connection the defendant and the cause of action have with the forum. The defendant's death as well as the fact that the administrator or executor is the formal party defendant are treated as fortuitous facts. The only contacts of the defendant with the forum that are considered relevant are those that have a proximate relation to the cause of action.

SYNTHESIS

Have the non-resident statutes become the wedge which determines the future contraction of the foreign executors' immunity to suit? Should not the contacts of the decedent with the forum state where the cause of action arose always be relevant in determining whether or not a court should exercise jurisdiction? Would making judicial jurisdiction co-extensive with legislative jurisdiction be too great a burden on the administration of decedents' estates?[42] Should not the fact that the decedent was domiciled in a different jurisdiction be a fortuitous fact? If legislative jurisdiction exists, should not the foreign executor's appearance in the forum state silence the due process argument?

These problems were met by the New Jersey Supreme Court in the recent decision of *Farone v. Habel*.[43] In an unamious opinion the court held the lower court should have entertained the suit. The original transaction giving rise to the plaintiff's cause of action arose in New Jersey. The executor was served while he was in New Jersey aiding in the supervision of a diner for the benefit of the estate. In its opinion the court stated:[44]

> The reasons advanced in support of the broad immunity generally afforded to foreign representatives have properly been questioned (citations omitted); the immunity has oftentimes unjustly compelled residents to seek relief in distant places even when the foreign representatives could be served personally within the State's borders and their fiduciary activities within the State exceeded by far the minimum jurisdictional contacts which may be said to be necessary to satisfy due process requirements and firmly imbedded concepts of fair play and substantial justice (citations omitted). In any event, New Jersey's statutes now clearly embody wide legislative authorization for the naming of foreign fiduciaries as defendants in New Jersey actions; *our judicial function is to effectuate this statutory authorization within the controlling constitutional limitations, both state and federal.* (emphasis added.)

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[42] The phrase "legislative jurisdiction" in this article is intended to designate the state whose substantive law would be referred to in a conflict of laws situation.

[43] *Supra* note 34.

[44] 22 N.J. 66, 69, 123 A.2d 506, 509 (1957).

In *Jacobs v. Rothstein*[45] the constitutionality of the same statutes were again drawn into question in a false representation suit arising out of the sale of land. The plaintiffs were New Jersey residents, buying New Jersey land from the decedent who at the time of the sale was a New Jersey resident. The decedent became domiciled in New York before his death and the letters of appointment were to a New York attorney who resided in New Jersey. In following the *Farone* decision and sustaining the lower court's assertion of jurisdiction the court set out a two step analysis by which courts should determine whether foreign executors and administrators should be amenable to suit in the forum.[46] First, are the connections between the parties and the controversy so close to the forum that, upon considerations of comity and convenience, jurisdiction should be taken? And two, has the foreign executor had such close contact with the forum that the minimum jurisdictional contacts necessary to satisfy due process have been met?

Conclusion

The common law rule of absolute immunity of foreign executors and administrators has little more than its age to support it. In determining the power of a state to invoke its jurisdiction, recognition should be given to the substantial interests connecting the decedent with that state. The isolated factor of his place of domicil at the time of his death only takes into consideration the speed with which an estate can be closed. "The main object to be attained [in estate administration] is the prompt, fair and convenient handling of an estate for the benefit of *all* of those concerned therein."[47] Highly realistic considerations such as the protection of citizens in other states is a small price to pay for the additional impediments to the closing of an estate.

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[45] 23 N.J. 641, 130 A.2d 384 (1957).

[46] *Id.* at 385.

[47] Restatement, Conflict of Laws, ch. 1, topic 1, introductory note (1934).