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Administration of Estates--Foreign Administrator--Right to Sue in West Virginia

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ture inflicted by the deceased tortfeasor. The report of the committee was actuated by correspondents who could not understand why relief should be granted when a husband or father was killed, and yet relief not be granted in cases where, because of injuries sustained, his existence would be an added liability, irrespective of whether the deceased wrongdoer left an abundant estate. Another question asked was why recovery against the estate of the wrongdoer would be more burdensome on his family than satisfaction against his estate of a judgment secured before his death.

The difficulty of finding an adequate answer to these queries leads one to believe that the omission was one of inadvertence rather than intention on the part of the legislature. The recurrence of the result reached in this case is undesirable and should be avoided by an express statutory provision changing the existing law.

L. E. T., II.

ADMINISTRATION OF ESTATES — FOREIGN ADMINISTRATOR — RIGHT TO SUE IN WEST VIRGINIA. — *P*, a citizen of Indiana and administrator of *X*, sued *D*, a citizen of West Virginia, to recover for the death of *X* resulting from wrongful acts committed by *D* in West Virginia. *Held*, that an administrator appointed in Indiana cannot maintain an action in West Virginia. *Rybolt v. Jarrett*.¹

The court's conclusion was based upon a West Virginia statute, restrictive in nature, providing that "Notwithstanding any other provision of law, no person not a resident of this State shall be appointed *or act* as executor, administrator, curator, guardian, or committee . . ." ² The application of this statute achieves the same result as the general common law rule that, in the absence of a statute permitting it, a personal representative may sue only in the state of his appointment.³

In a majority of the jurisdictions, however, a foreign representative is frequently permitted to sue by comity when the citizens

¹ 112 F. (2d) 642 (C. C. A. 4th, 1940).

² W. VA. CODE (Michie, 1937) c. 44, art. 5, § 3. (Italics supplied.) See also a recent case, *Monfils v. Hazlewood*, 10 S. E. (2d) 673 (N. C. 1940), in which a similar restrictive statute, N. C. CODE (Michie, 1939) c. 1, art. 3, § 8, was construed as precluding the foreign administrator from suing in a wrongful death case.

³ RESTATEMENT, CONFLICT OF LAWS (1934) § 507; *id.* W. VA. ANNOT. (1937) § 507. This section collects the West Virginia cases in accord with the general common law rule and concludes also that "there is no statute in West Virginia permitting a foreign administrator to sue."

of the *locus delicti* would not thereby be adversely affected.⁴ The protagonists of this liberal view contend that the reason for the common law rule⁵ ceases to exist where, as in the instant case⁶, a personal representative suing under a wrongful death statute acts not as an ordinary administrator, but rather as a statutory trustee for the beneficiaries, since here the proceeds of recovery could never go to satisfy the creditors of the decedent.⁷

Considering the West Virginia restrictive statute in the light of the liberal majority view, its result is, perhaps, undesirable. The decision, however, is not only sound, but refreshing in that the court recognized its proper sphere of authority by leaving any remedial action in this regard to the proper forum, the legislature.

L. R. M.

EASEMENTS — LOCATION WHEN NOT DEFINITELY DESCRIBED. —

The grantor conveyed one-half acre of land, in the midst of his farm, to *P* for burial purposes with a "convenient right of way" and specified its distance between two fixed terminals, but he did not definitely describe or locate its course. Later *D* acquired possession of the grantor's farm. *P* used a convenient course without

⁴ In fact, in actual practice, permission to sue has apparently become the rule rather than the exception. *Popp v. Cincinnati, H. & D. Ry.*, 96 Fed. 465 (C. C. S. D. Ohio 1899) (construing Ohio statutes); *Provost v. International Giant Safety Coaster Co.*, 152 App. Div. 83, 136 N. Y. S. 654 (1912); *Florida C. & P. Ry. v. Sullivan*, 120 Fed. 799 (C. C. A. 5th, 1903) (construing Florida statutes); *St. Louis Southwestern Ry. v. Graham*, 83 Ark. 61, 102 S. W. 700 (1907).

⁵ The common law rule is founded on the policy of the courts of each state to protect resident creditors of the decedent against the withdrawal into another state of assets upon which they may rely for payment. *Ghilain v. Couture*, 84 N. H. 48, 146 Atl. 395, 65 A. L. R. 553 (1929); *Connor v. New York, N. H. & H. Ry.*, 28 R. I. 560, 68 Atl. 481 (1908).

⁶ This was an action brought under the West Virginia wrongful death statute providing for an action by the personal representative of the deceased, and that the proceeds of recovery are to be distributed to the decedent's beneficiaries in the manner and proportion prescribed for the distribution of the personal estate of one dying intestate. W. VA. CODE (Michie, 1937) c. 55, art. 7, §§ 5, 6.

⁷ "The reason that the rule in question [that an administrator may only sue in the state of his appointment] cannot possibly apply here is that, by the express terms of the West Virginia wrongful death statute, no creditor of the decedent as such has the slightest interest in or right to the recovery sought by the plaintiff at bar. The foreign administrator here sues to recover a fund which is not to be administered, but is merely to be distributed. When a reason for a rule fails, the rule ceases to apply." *Pearson v. Norfolk & W. Ry.*, 286 Fed. 429 (D. C. Va. 1923) (construing West Virginia statutes); *Connor v. New York, N. H. & H. Ry.*, 28 R. I. 560, 68 Atl. 481 (1908); *Boulden v. Pennsylvania R. R.*, 205 Pa. 264, 54 Atl. 906 (1903); *Kansas Pacific Ry. v. Cutter*, 16 Kan. 568 (1876).