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Wrongful Death—Liability of Personal Representative For Costs

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S.E. 654 (1912). The court in the *Swope* case seems to have applied the venerable maxim, *cessante ratione legis cessat ipsa lex* (with the reason of law ceasing, the law itself ceases). Did the reason for the law cease in the principal case?

Here, any recovery by the administrator would go to the defendant's wife. It has been long the policy of this state and of the common law to prohibit tort actions between spouses. To allow such actions for personal injuries would, it is claimed, impair and disturb the tranquility of marital felicity. *Poling v. Poling*, 116 W. Va. 187, 179 S.E. 604 (1935). The same rule was the basis for preventing an unemancipated child from suing his parent for injury caused by the parent's negligence. *Securo v. Securo*, 101 W. Va. 1, 156 S.E. 750 (1931).

In *Fetty v. Carroll*, 118 W. Va. 401, 190 S.E. 683 (1937), the court held that the death act is for the exclusive benefit of the decedent's next of kin, and while the decedent's administrator alone may sue, his relation to any recovery is not that of decedent's representative, but that of trustee for the next of kin. "The action is founded on mere justice and conscience, is in the nature of a bill in equity, and consequently, is subject to any defense which in equity and good conscience would preclude a recovery." As was explained in that case, the administrator has the right of action only for the benefit of the distributees and any defense good against them should be good against him. It is left to the reader to determine whether the fact that the sole beneficiary was the wife of defendant would be a defense in equity and good conscience.

The existence of beneficiaries is a requisite to the right to sue under the death statute, and any release or compromise by the beneficiaries, prior to the action, bars any recovery by the administrator. In view of this and the holding in *B. & O.R.R. Co. v. Evans*, 188 Fed. 6 (3d Cir. 1911), where the court, in interpreting the West Virginia statute, said the administrator was a mere formal party suing on behalf of the real parties in interest, the court in the instant case appears to be permitting the wife to do indirectly that which she is precluded by public policy from doing directly; this being in essence an action by the wife against her husband.

J. L. A.

WRONGFUL DEATH—LIABILITY OF PERSONAL REPRESENTATIVE FOR COSTS.—*D*, administrator, brought separate actions for the wrongful death of his two decedents, under W. VA. CODE c. 55, art. 7, §§ 5, 6

(Michie, 1949), against *P. B. & O.R.R.*; and, on appeal, the cases having been consolidated, judgments in his favor by the lower court were reversed and costs awarded to *P*, to be paid out of the estates' fund in the hands of *D*. See *Daugherty v. B. & O.R.R.*, 64 S.E.2d 231 (W. Va. 1951). Upon execution by the sheriff no property was found, the estates having been distributed by *D* as administrator; *P* now sues *D* to recover damages for breach of his administrator's bond in failing to pay the above costs, the question being whether there was in fact such a breach. *Held*, on appeal, that there was no breach of the bond, that *D*, "as personal representative, and the property belonging to the respective estates are not liable for costs incurred by the administrator in the actions for their allegedly wrongful deaths," *D* being liable only in his personal capacity. *State ex rel. B. & O.R.R. v. Daugherty*, 77 S.E.2d 338 (W. Va. 1953)

Thompson v. Mann, 65 W. Va. 648, 64 S.E. 920 (1909), is the leading case on this problem in West Virginia, being principally relied on in the present decision, wherein the court cited many cases as holding that contracts made by the administrator or executor after the decedent's death are personal, although made in the interest of the estate, and that the estate cannot be charged for them. See *Hall v. McGregor*, 65 W. Va. 74, 64 S.E. 736 (1909); *Daingerfield v. Smith*, 82 Va. 81, 1 S.E. 599 (1887); *Fitzhugh v. Fitzhugh*, 11 Grat. 300 (Va. 1854). West Virginia subsequently reaffirmed this position. *Thurmond v. Coal Co.*, 85 W. Va. 501, 102 S.E. 221 (1920); *Bank of Gauley v. Osenton*, 92 W. Va. 1, 114 S.E. 435 (1922).

Also cited in the present case is *Thompson & Lively v. Mann*, 53 W. Va. 432, 44 S.E. 246 (1903), companion case of *Thompson v. Mann*, *supra*, in which Mann, administrator, was held only personally liable for court costs since the judgment was against him individually; but the court there indicated that had the judgment been against the estate as well as Mann such would have been valid. This same rule is similarly indicated in *State v. Hudkins*, 34 W. Va. 370, 12 S.E. 495 (1890); and it is significant to note that the trial court in the instant case awarded costs against funds of the estate in the possession of the administrator. The court in *Thompson v. Mann*, *supra*, distinguished *Thompson v. Nowlin*, 51 W. Va. 346, 41 S.E. 178 (1902) and *Crim v. England*, 46 W. Va. 480, 33 S.E. 310 (1899), where, in both instances, the court ordered payment out of the assets of the estate (as above), by pointing out that in neither case had there been a settlement of the administra-

tion accounts or an allowance made to the administrator for counsel fees, as had taken place in *Thompson v. Vann, supra*. The court seems to be contradicting itself, in one breath saying that the administrator is only personally liable, and, in the next, that the estate may be charged. However, the court further holds in *Thompson v. Mann, supra*, and intimates in the present case, that the administrator would have the right of reimbursement for such expenses paid personally; and, perhaps, all the above cases in conjunction merely indicate that, where there has been no settlement of accounts or allowance made, the court may avoid circuitry of actions and order payment directly from the assets of the estate in the hands of the administrator.

In both *Thompson v. Mann, supra*, and in the present case there was a settlement of accounts; but the cases differ in that Mann was allowed \$950 in the settlement proceedings for attorney's fees, whereas no allowance appears to have been made for such to Daugherty at all. Both cases hold that the surety on the administrator's bond is not liable for the latter's personal obligations, and Daugherty is in the peculiar position of being personally liable, with no allowance or estate remaining out of which to reimburse himself. Under our statute, the proceeds of a suit for wrongful death do not become a part of the estate, subject to the claims of creditors, but are distributed directly to the next of kin; and the court may have justified its holding on the ground that, in view of the above, the estate (creditors) should not be charged with the costs of such a suit if unsuccessful. There are authorities which sustain the opposite view that an executor or administrator may bind the estate for reasonable attorney's fees, etc., necessary in preserving or otherwise benefiting it. See *Marx v. McMorrان*, 136 Mich. 406, 49 N.W. 396 (1904), and *Jackson v. Leech*, 113 Mich. 391, 71 N.W. 846 (1897), in which cases the Michigan court so held, its statute providing for the same manner of distribution of the proceeds as the West Virginia statute. Clearly, the West Virginia rule places the administrator in a precarious position when he sues for his decedent's wrongful death, particularly if strictly followed. The contrary view seems fairer to all the parties concerned.

G. D. H. S.