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Conflicts

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CONFLICTS

Administrators—Right to Sue Under Foreign Wrongful Death Statute. The court in *In re Ludwig's Estate*[1] held that an ancillary administrator could not appeal from an order of the superior court revoking letters of administration and dismissing probate proceedings. The reason for the holding is that the administrator had no appealable interest and was not a "party aggrieved" by the order.[2]

H. C. Wilson, a resident of King County, Washington, petitioned the superior court there for letters of administration. He did so by authority of a telegram purportedly from the decedent's widow, authorizing Wilson to appoint an administrator for the estate of Jasper H. Ludwig and commence suit for wrongful death against two tobacco companies. The decedent died intestate in 1952 in Nebraska while domiciled there. His widow instituted probate proceedings in Nebraska shortly after his death. After Wilson secured letters of administration, he commenced suit in the district court of the United States against the tobacco companies. The decedent had never been a resident of Washington and, with the exception of the alleged cause of action against the tobacco companies, possessed no property in Washington at the time of his death. Upon petition by the tobacco companies in superior court an order was issued revoking the letters of administration and dismissing the probate proceedings on the grounds that no property of the decedent was located within the state and that the court had no jurisdiction to appoint Wilson as administrator of the estate. The superior court found as a conclusion of law that the probate proceedings presented by the above facts should be excluded from the probate courts of Washington. It was reasoned that there is too great a possibility of abuse and confusion. Wilson appealed.

The supreme court relied on two Washington cases[3] in holding that Wilson as a removed administrator had no appealable interest. The appellant sought to distinguish both of these cases on the ground that in neither case were the probate proceedings dismissed or terminated. The plaintiff further contended that his removal would be fatal to the action instituted by him in federal court and would result in a diminution of the decedent's estate.

The most significant portion of the case revolves around dicta by

[1] 149 Wash. Dec. 307, 301 P.2d 158 (1956).
[2] Rule on Appeal 14, 34A Wn.2d 20.
[3] Cairns v. Donahey, 59 Wash. 130, 109 Pac. 334 (1910); State *ex rel.* Simeon v. Superior Court, 20 Wn.2d 88, 145 P.2d 1017 (1944).

the court in answer to plaintiff's contention that his removal would be fatal to the wrongful death action instituted in the federal court. The Washington Supreme Court stated that under wrongful death statutes like that of Nebraska[4] a domiciliary administrator may institute a wrongful death action in a foreign jurisdiction without first instituting ancillary proceedings therein.[5] The court reasoned that since the decedent's widow could bring the wrongful death action in her capacity as the domiciliary administratrix, the removal of the plaintiff would not necessarily result in a diminution of the decedent's estate. Thus the situation is not materially different than that in the earlier Washington cases[6] holding an administrator situated similar to plaintiff has no appealable interest.

The court distinguished the earlier case of *In re Yarbrough's Estate.*[7] In that case the widow of the deceased, who had died at his domicile in Oregon, came to King County and petitioned for letters of administration which were issued to her. The decedent's estate in Washington consisted solely of the cause of action for wrongful death against defendant railway company. The law of Oregon provided, "When the death of a person is caused by the wrongful act . . . of another, the personal representatives of the former may maintain an action . . . and the amount recovered shall be administered as other personal property of the deceased."[8] The letters were revoked upon petition by defendant on the grounds that the probate courts should not be vexed by litigation involving wrongful death claims arising under wrongful death statutes of other states.[9] The court in the present case said a much sounder

[4] 2A REV. STAT. OF NEB. § 30-810 (1943) which provides: (as quoted by the Washington Court) " . . . Every such action . . . shall be commenced within two years after the death of such person. It shall be brought by and in the name of his personal representatives, for the exclusive benefit of the widow or widower and next of kin . . . Provided, such amount [received in settlement, or recovered by judgment] shall not be subject to any claims against the estate of such decedent."

[5] Wiener v. Specific Pharmaceuticals, 298 N.Y. 346, 83 N.E.2d 673 (1949); RESTATEMENT, CONFLICTS § 396, comment *c* (1934); 3 BEALE, CONFLICTS § 467.6 (1935).

[6] Cases cited note 3 *supra.*

[7] 126 Wash. 85, 216 Pac. 889 (1923), *aff'd* 126 Wash. 90, 222 Pac. 902 (1924).

[8] ORE. REV. STAT. 30.020 (1955) is the current Oregon wrongful death statute. The language of the current statute is different than the statute cited in the Yarbrough case but any recovery under the current statute would, like the earlier statute, be subject to claims of creditors of the estate.

[9] The Washington Court cited Ziemer v. Crucible Steel Co. of America, 99 App. Div. 169, 90 N.Y. Supp. 962 (1904) in reaching its decision. From the language in the New York case it would appear that the reason behind the Yarbrough decision is in reality that of *forum non conveniens.* The doctrine of *forum non conveniens* estalishes the rule that if neither plaintiff, defendant, nor the cause of action is related to the forum, the action will not be heard. The doctrine has been rejected by most jurisdictions but has found approval in New York and in federal courts. Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933); GOODRICH, CONFLICTS § 11 (3d ed. 1949).

reason than public policy can be found in support of the *Yarbrough* decision. The Oregon wrongful death statute makes a recovery under that act in the nature of a general asset of the estate and subject to creditors' claims. In the *Yarbrough* case no probate proceedings had been instituted in Oregon and to allow probate proceedings in Washington would be a fraud on the Oregon creditors. On its facts the *Yarbrough* case still appears to be the law in Washington.

The recent case of *In re Waldrep's Estate,*[10] while distinguishable on its facts from the instant case and hence not controlling, reaffirms the *Yarbrough* decision when confined to its facts. The court also stated that the main basis of the decision in the *Yarbrough* case is public policy.[11] This later language would conflict with the reasoning in the instant case which upheld the *Yarbrough* decision on the nature of the wrongful death statute involved.

The principle distinction between the instant case and the *Yarbrough* case is the nature of the wrongful death statute. Under the Nebraska statute any amount recovered would not be subject to any claims against the estate of the decedent, while under the Oregon statute any recovery would be in the nature of a general asset of the estate and subject to the claims of creditors of the estate. Following the dicta of the court it appears that in suits involving a wrongful death statute similar to Nebraska's, the domiciliary administrator could maintain a suit in Washington without first obtaining ancillary letters of administration. This would be true even though neither the tort nor the death occurred in Washington. There is a remaining question unanswered by the dicta in the present case. It concerns whether or not a person could maintain an action for wrongful death in Washington under a foreign death statute like that of Nebraska's when no domiciliary administrator has been appointed.

The foregoing observations are based on dicta of the court and not holdings on the point. In analyzing these dicta the logical inference to be drawn would be that in deciding whether a suit could be maintained in Washington on a foreign wrongful death statute one must first look at the nature of the wrongful death statute. If the statute in question is in nature like the statute found in the *Yarbrough* decision and the same fact pattern exists, the *Yarbrough* decision would appear to be controlling. On the other hand, if the statute is similar in nature to the

[10] 149 Wash. Dec. 679, 306 P.2d 213 (1957).

[11] The court did not refer by name to the doctrine of *forum non conveniens* but the language indicates that the doctrine is being applied.

one in the instant case, it would appear that suit may be maintained by the domiciliary administrator. This could be done without first acquiring ancillary letters of administration in a Washington Court. To state, however, that the dicta of the court in the present case represents the Washington rule would be premature.

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CONSTITUTIONAL LAW

Construction of Statutes—Denial of Equal Protection. *In re Olsen v. Delmore*[1] involved an application for habeas corpus based on alleged illegal confinement in the state penitentiary. The petitioner had been convicted of a violation of the Washington Firearms Act.[2] In allowing the writ, the Supreme Court of Washington held the penalty provision of that Act to be unconstitutional. That provision, RCW 9.41.160, provides:

> Any violation of any [preceding provisions of this chapter] is punishable by a fine of not more than five hundred dollars or imprisonment in the county jail for not more than one year or both, or by imprisonment in the penitentiary for not less than one year nor more than ten years.

The five-to-four decision[3] is based on the conclusion that the language of the penalty provision gives "... a pretty clear indication that the legislature thereby intended to vest in prosecuting officials the discretion to charge as for either a gross misdemeanor or a felony."[4] It is apparently within constitutional limits to vest discretion in the trial judge to fix sentence.[5] By statute in Washington both the judge and the Board of Prison Terms and Paroles are granted discretion in this area.[6] It may be assumed, as the majority opinion did, that the

[1] 48 Wn.2d 545, 295 P.2d 324 (1956).

[2] RCW 9.41.010 to 9.41.160. This act is modeled after the work by the National Conference of Commissioners on Uniform State Laws. See 1930 Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings, 563-567. Eleven other jurisdictions have adopted this form, however only Washington made no change in the penalty section as suggested by the National Conference.

[3] Majority by Chief Justice Hamley with the concurrance of Judges Mallery, Schwellenbach, Donworth and Rosellini. Dissent by Judge Hill with whom Judges Finley, Weaver and Ott concurred.

[4] 48 Wn.2d at 548, 295 P.2d at 326.

[5] See *Ex parte* Rosencrantz, 297 Pac. 15, 211 Cal. 749 (1931) which justifies a placing of certain discretion in the trial judge as follows: "Since every person charged with the offense has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the statute."

[6] As to felonies the court has the power to fix the maximum term to be served under RCW 9.95.010 and the Board of Prison Terms and Paroles has the power to fix the actual duration of confinement under RCW 9.95.040.