COMMENTS

JURISDICTION TO APPOINT AN ADMINISTRATOR TO SUE FOR WRONGFUL DEATH

A recent case decided by the Appellate Court of Indiana raises the question of jurisdiction to appoint a personal representative for the purpose of bringing an action for wrongful death of decedent.[1] In this case a petition was filed for the removal of the administrator and the cancellation of letters of administration. Decedent had been a resident of Illinois. While traveling in Indiana he was killed by alleged negligence of petitioner. The decedent had property in his possession in Indiana at his death consisting of twenty-five dollars in cash and a leather grip containing various articles of clothing, etc. It was held (1) that the claim for damages for the death of a non-resident by wrongful act of a person in Indiana will not support the appointment of a local ancillary administrator; (2) but that the existence of the personal property of the decedent in Indiana at the time of his death will support local ancillary administration. It may be added that when decedent died the personal property in his possession in Indiana was sent to the widow in Illinois. After the appoint of the local administrator the property was returned to him.

The two propositions decided in this case demand rather close scrutiny and require some explanation. Two problems are always present where it is sought to appoint a local ancillary administrator for any purpose. In the first place there is the Conflict of Laws problem, that is to determine whether or not the local state has jurisdiction, as a state, in the common law sense of the word jurisdiction, to appoint an administrator. In other words, this means in the instant case, did Indiana have jurisdiction to appoint an ancillary administrator which would be recognized by courts in other states? In the second place there is the problem of whether or not the law of the ancillary state authorizes its probate court to appoint a local administrator under the circumstances of the case. This means in the instant case, did the local statute law of Indiana authorize the probate

[1] *Mercer v. Dobbyn*, 173 N. E. 338 (Ind. App. 1930).

court to appoint a local administrator under the circumstances of the case, that will be recognized by other courts as valid? So far as the Conflict of Laws aspect of the case is concerned, the authority is somewhat indirect. Conclusions must, for the most part, be formulated from cases in which power has actually been exercised. When a practice in the states is carried on without challenge by other states, it is some substantial authority that there is common law jurisdiction. When other states do not challenge the exercise of power, they thereby recognize such power. At the same time such cases illustrate the local municipal law in the various states concerned. Thus the cases that will be subsequently cited constitute direct authority as to the local law and indirect authority as to the Conflict of Law aspect of the point.

The statute of Indiana, like the statute of nearly every other state in the Union, authorizes the appointment of ancillary administrator in the county in which the intestate has left assets.[2] The recent case has decided that personal property of slight value which decedent had with him at the time will satisfy the statute. There is ample authority to sustain this point. Thus a non-resident who has items of the value of four or five dollars has been held to leave an estate which will authorize administration.[3] One case even held that an estate of $1.50 was sufficient.[4] The fact that this property was only temporarily in the state is immaterial. Although the state may not have jurisdiction in the common law sense to tax such property,[5] it may nevertheless administer it,[6] although in many cases it will not do so but will recognize the power of the domicile of the decedent to administer such property.[7] The fact that the property is removed from the state immediately after decedent's death will not deprive the state of power to appoint an administrator either as a matter of Conflict of Laws or as a matter of local law.[8] Thus the fact that

---

[2] Burns' Ind. Stat. 1926, Sec. 3066.

[3] *Missouri Pacific R. R. v. Bradley*, 51 Nebr. 596, 71 N. W. 283 (1897).

[4] *Cox v. Kansas City Ry. Co.*, 86 Kans. 298, 120 Pac. 553 (1912). See also *Turner v. Campbell*, 124 Mo. App. 133, 101 S. W. 119 (1907); *Barlass v. Barlass*, 143 Wis. 497, 128 N. W. 58 (1910).

[5] *Estate of McCahill*, 171 Cal. 482, 153 Pac. 930 (inheritance tax).

[6] *Turner v. Campbell*, 124 Mo. App. 133, 101 S. W. 119 (1907); *Wells v. Miller*, 45 Ill. 382 (1867).

[7] See Story, *Conflict of Laws* (8th Ed.), pp. 737-738.

[8] *Anderson v. Louisville & N. R. R.*, 128 Tenn. 244, 159 S. W. 1086 (1913); *Embry v. Miller*, 1 A. K. Marsh (Ky.) 300 (1818).

the personal property in the Mercer case was returned to the administrator is entirely immaterial.

If the personal property had not been in Indiana at the time of decedent's death here but had subsequently been sent into the state there could be local ancillary administration. A large number of cases are authority for the fact that a state may and will appoint an administrator for chattels which come into the state after the death of decedent.[9] If, however, they are brought or sent into the state by a foreign administrator a local representative will not be appointed or if he is already appointed he will have no authority to interfere with the property.[10] It has even been held that if a debtor of the decedent comes into the state after the decedent's death a local administrator may be appointed to collect the claim.[11]

Thus the court seems on perfectly safe grounds in refusing to revoke the letters in the case in question. However, the decision does not seem so sound in so far as it denies jurisdiction to appoint an administrator solely for the purpose of suing for the wrongful death of the decedent. It seems perfectly obvious that there was no necessity whatever for local administration upon the tangible personal property which the decedent left in Indiana. Apparently there were no debts owed by decedent to Indiana creditors. The chattels and money had been returned to his domicile. The only reason for a local representative was to facilitate the prosecution of the wrongful death claim. Where appointment is necessary or convenient for such purposes it ought not to depend upon the existence of a small amount of practically worthless property. To permit local administration when a few dollars are found on decedent at his death and to deny it if he is out of the state when he dies and thus leaves no property whatever in the state, is unnecessarily technical, highly inconvenient and extremely unsound. Furthermore, it is uncalled for. While there are a couple of Indiana cases upon which the court in the present case relies, the rule has been repudiated by a large number of more modern decisions in courts of many states. In fact a number of these cases have gone much farther

---

[9] *Matter of Hughes*, 95 N. Y. 55; *Miller v. Jones*, 26 Ala. 247 (1855); *Collins v. Bankhead*, 1 Strob. (S. C.) 25; *Neal v. Boykin*, 137 Ga. 400, 64 S. E. 480. Contra, *Meyers v. Ferris*, 109 So. 209 (Fla.).

[10] *Hill v. Barton*, 194 Mo. App. 325, 188 S. W. 1105; *Crescent City Ice Co. v. Stafford*, Fed. Cas. No. 3387.

[11] *Stearns v. Wright*, 51 N. H. 600; *Saunders v. Weston*, 74 Me. 85.

than it were necessary for the Indiana court to go in the Mercer case.

The difficulty which the court experienced was in regarding the claim for wrongful death as "assets" of decedent in Indiana. In so far as the claim for wrongful death is a chose in action, there would seem to be no objection to regarding it as an asset in Indiana inasmuch as the debtor is domiciled in Indiana. Courts have uniformly regarded debts as assets at the domicile of the debtor for purposes of administration.[12] Logically, no doubt, the claim for wrongful death does not represent a chose in action which decedent owned before his death. The wrongful death statute creates a new cause of action and, under the ordinary Lord Campbell's Act, is not a mere survival of a right which the decedent owned. However, such a claim inures to the benefit of the widow or widower and children or next of kin and is "to be distributed in the same manner as personal property of the deceased."[13] Thus for practical purposes the right is valuable property of the estate and there is no reason in law or in common sense why it should not be so regarded. The action under most statutes must be brought by the personal representative. No one else except the person designated in the statute may enforce the claim.[14] Thus if the widow is designated to sue, an administrator cannot sue;[15] conversely if the administrator is designated, the widow cannot sue.[16] Since at common law a personal representative in one state cannot sue outside the state of his appointment,[17] a foreign administrator must procure ancillary letters before suit can be brought, unless he be regarded as a trustee of a special fund who does not sue as administrator at all,[18] as to which there is some modern authority of great weight.

Accordingly, the modern tendency is clearly to permit the appointment of and suit by a local ancillary administrator at the place where the injury was inflicted, even though there are no

---

[12] *Emery v. Hildreth*, 2 Gray (Mass.) 228 (1854); *Miller v. Hoover*, 121 Mo. App. 568, 97 S. W. 210 (1906); *Murphy v. Creighton*, 45 Iowa (1876).

[13] Burns, 4426, Sec. 292.

[14] American Law Institute Restatement of Conflict of Laws, sec. 431.

[15] *Brown v. Sunby Creek Co.*, 165 Fed. 504 (1908).

[16] *Usher v. West Jersey R. R.*, 126 Pa. 206, 17 Atl. 597 (1889).

[17] *Tourton v. Flower*, 3 P. Wms. 369; *Johnson v. Powers*, 139 U. S. 156, 35 L. Ed. 112.

[18] *Conner v. N. Y., N. H., etc. R. R.*, 28 R. I. 560, 28 Atl. 560. See Goodrich, *Conflict of Laws*, p. 210.

other assets in the state. This is the weight of authority.[19] Such jurisdiction will be recognized as valid in other states.[20]

Likewise an administrator has been appointed at the domicile of decedent where there are no other assets in the state.[21] But there are a number of recent cases which have gone still farther and have permitted the appointment of a local ancillary administrator when the injury occurred in another state. Thus, a state may appoint an administrator solely for the purpose of bringing suit for wrongful death when decedent was domiciled outside the state and when the injury occurred outside the state, the only condition being that the defendant is subject to suit in the state where administration is sought.[22]

It would seem perfectly clear that from the Conflict of Laws point of view, Indiana has jurisdiction to appoint a local ancillary administrator solely for the purpose of bringing an action against an Indiana defendant. From the point of view of the local statutory law it would appear that the Indiana statute is identical with statutes in many other states that permit local administration under such circumstances. In fact a local statute which was not mentioned in the Mercer case would seem to suggest this result. Sec. 3240 Burns' 1926 provides for the filing of an administrator's report "whenever an administrator is appointed for the sole purpose of collecting damages for personal injury resulting in the death of any decedent and the only assets coming into the possession of said administrator is money so collected." This statute does not indicate in any way that an administrator may be appointed "for the sole purpose of collecting damages, etc.," only when decedent was domiciled within the state. The statute recognizes the validity of administration when there is no estate except the claim for wrongful death. It seems an unnecessary implication to limit such administration to

---

[19] *Sharp v Cinn., etc., R. R.*, 133 Tenn. 1, 179 S. W. 375 (1915); *Hutchins v. St. Paul, etc., R. R.*, 44 Minn. 5, 46 N. W 79 (1890); *Re Mayo's Estate*, 60 S C. 401, 38 S. E. 634 (1901). See Am. Cas. 1917 C, 1217, collecting many cases.

[20] *McCarron v. New York Cent. R. R.*, 239 Mass. 64, 131 N. E. 478 (1921).

[21] *Mo. Pac. v. Lewis*, 24 Nebr. 848, 40 N. W. 401 (1888).

[22] *In Re Lowhans's Estate*, 30 Utah 436, 85 Pac. 445; *State v. Probate Court*, 149 Minn. 464, 184 N. W. 43; *Howard v. Nashville, etc., R. R.*, 133 Tenn. 19, 179 S. W. 380.

[23] *Re Stone's Estate*, 145 N. W. 903 (Iowa). *Contra, Illinois Cent. R. R. v. Cragin*, 71 Ill. 177.

local residents in view of the obvious trend of modern decision and the important considerations of convenience and expediency. It is respectfully submitted that the decision in the Mercer case is not to be commended in so far as it denies to local probate courts authority to appoint a representative solely to bring an action for the wrongful death of a non-resident against a defendant who is subject to the jurisdiction of Indiana courts.

FOWLER VINCENT HARPER.