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CONFLICT OF LAWS-WRONGFUL DEATH-SUIT BY FOREIGN ADMINISTRATION

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CONFLICT OF LAWS — WRONGFUL DEATH — SUIT BY FOREIGN ADMINISTRATOR—Plaintiff, an administrator appointed by an Illinois probate court, brought suit in Michigan under the Indiana death act[1] to recover for the wrongful death of decedent which resulted from an accident occurring in Indiana. The trial court sustained defendant's motion to dismiss on the ground that plaintiff had no standing to sue in a Michigan court. *Held,* reversed. The rule barring actions brought by foreign administrators does not apply to suits brought under the usual type of wrongful death act. *Howard v. Pulver,* (Mich. 1951) 45 N.W. (2d) 530.

It is well settled that, absent statute, an administrator or executor cannot sue in his representative capacity in a state other than that of his appointment without first obtaining ancillary letters.[2] In theory this rule is supported by the fact that the appointing court, from which the personal representative derives his authority, has no jurisdiction over the assets of a decedent in a foreign state;[3] but the underlying, and probably sole,[4] reason for adherence to the rule is the desire of the courts to conserve the decedent's assets for the benefit of local creditors.[5] Where the administrator sues for the benefit of decedent's estate so that creditors do have an interest in the funds recovered, there would seem to be, at least, some merit in giving the forum control over him by requiring ancillary

[1] "When the death of one is caused by the wrongful act or omission of another, the action shall be commenced by the personal representative of the decedent within two (2) years, and the damages . . . shall inure to the exclusive benefit of the widow or widower, as the case may be, and to the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased." Ind. Stat. Ann. (Burns, 1946 Replacement) §2-404.

[2] GOODRICH, CONFLICT OF LAWS, 3d ed., §185 (1949); STUMBERG, CONFLICT OF LAWS, 2d ed., 443 (1951). For a collection of statutes permitting such actions under certain circumstances see 50 COL. L. REV. 518 at 519, n. 3 (1950).

[3] 21 AM. JUR., Executors and Administrators §860 (1939).

[4] Ghilain v. Couture, 84 N.H. 48, 146 A. 395 (1929).

[5] Boulden v. Pennsylvania Ry. Co., 205 Pa. 264, 54 A. 906 (1903); Dematteï v. Missouri-Kansas-Texas Ry. Co., 345 Mo. 1136, 139 S.W. (2d) 504 (1940); Wiener v. Specific Pharmaceuticals, Inc., 298 N.Y. 346, 83 N.E. (2d) 673 (1949); GOODRICH, CONFLICT OF LAWS, 3d ed., §104 (1949); STUMBERG, CONFLICT OF LAWS, 2d ed., 194 (1951).

letters or the appointment of a local representative.[6] However, where suit is brought under the usual wrongful death act, both the theory and the reason for the rule collapse. The typical wrongful death act gives decedent's creditors no interest whatsoever in the fund recovered.[7] Instead, recovery is sought for the exclusive benefit of certain specified persons;[8] the administrator derives his authority, not from the appointing court, but rather from the statute;[9] and suit is brought by the administrator as statutory trustee for the designated beneficiaries and not as a representative of the decedent's estate.[10] While a few courts still feel obliged to require local qualification before suit may be brought,[11] the great majority of courts, now joined by the Michigan court,[12] have recognized the hollowness of giving effect to a rule when the reason therefor has ceased to exist.[13] Moreover, by permitting a foreign administrator to sue on the strength of his original letters, the possibility that the cause of action may be barred al-

[6] Rose, "Foreign Enforcement of Actions for Wrongful Death," 33 MICH. L. REV. 545 (1935); 48 MICH. L. REV. 520 (1950). But even here the rule has disadvantages, "for it makes more difficult, cumbersome, and expensive the closing up of affairs of a man whose interests were scattered across state lines. Where the estate is not a large one, the burden is especially great." GOODRICH, CONFLICT OF LAWS, 3d ed., §186 (1949).

[7] The Indiana statute is typical in this respect. See note 1 supra.

[8] Boulden v. Pennsylvania Ry. Co., 205 Pa. 264, 54 A. 906 (1903); Connor v. New York, New Haven & Hartford Ry. Co., 28 R.I. 560, 68 A. 481 (1908); Ghilan v. Couture, supra note 4.

[9] Pearson v. Norfolk & W. Ry. Co., (D.C. Va. 1923) 286 F. 429; Henkel v. Hood, 49 N.M. 45, 156 P. (2d) 790 (1945); Wiener v. Specific Pharmaceuticals, Inc., supra note 5. See 12 GA. B.J. 501 (1950).

[10] Knight v. Moline, East Moline & Watertown Ry. Co., 160 Iowa 160, 140 N.W. 839 (1913); Kerr v. Basham, 62 S.D. 301, 252 N.W. 853 (1934); Demattei v. Missouri-Kansas-Texas Ry. Co., 345 Mo. 1136, 139 S.W. (2d) 504 (1940).

[11] The Princess Sophia, (D.C. Wash. 1929) 35 F. (2d) 736; Vassill's Admr. v. Scarsella, 292 Ky. 153, 166 S.W. (2d) 64 (1942) (Apparently suit would have been allowed had plaintiff given bond with a resident surety as required by statute); Boutillier v. Wesinger, 322 Mass. 495, 78 N.E. (2d) 195 (1948) (But plaintiff's capacity to sue was upheld because of defendant's failure to file a timely objection); *Accord:* CONFLICT OF LAWS RESTATEMENT §396 (1934). A West Virginia statute expressly prohibits suits brought by foreign personal representatives. See Rybolt v. Jarrett, (4th Cir. 1940) 112 F. (2d) 642. And the North Carolina court has interpreted its own wrongful death act as requiring suit to be brought by a personal representative appointed in that state. Hall v. Southern Ry. Co., 149 N.C. 108, 62 S.E. 899 (1908); Monfils v. Hazelwood, 218 N.C. 215, 10 S.E. (2d) 673 (1940), cert. den. 312 U.S. 684, 61 S.Ct. 612 (1941).

[12] A federal district court, sitting in Michigan, had already permitted suit by a foreign administrator. Sivering v. Lee, (D.C. Mich. 1950) 90 F. Supp. 659.

[13] Gulf, M. & N. Ry. Co. v. Wood, 164 Miss. 765, 146 S. 298 (1933); Cooper v. American Airlines, Inc., (2d Cir. 1945) 149 F. (2d) 355; La May v. Maddox, (D.C. Va. 1946) 68 F. Supp. 25; Wallan v. Rankin, (9th Cir. 1949) 173 F. (2d) 488; Janes v. Sackman Bros. Co., (2d Cir. 1949) 177 F. (2d) 928. See also cases cited notes 8-10 supra. Similarly, foreign administrators are usually permitted to sue under the Federal Employers' Liability Act. La Salle Nat. Bank v. Pennsylvania Ry. Co., (D.C. Ill. 1948) 8 F.R.D. 316; Scott v. New York, C. & St. L. Ry. Co., (7th Cir. 1947) 159 F. (2d) 618; Briggs v. Pennsylvania Ry. Co., (2d Cir. 1946) 153 F. (2d) 841. *Contra:* Brown v. Boston & Maine Ry., 283 Mass. 192, 186 N.E. 59 (1933).

together by the short statutes of limitations usually involved in wrongful death actions[14] or by an inability to obtain ancillary letters[15] is substantially lessened.

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[14] Generally, the period within which wrongful death actions must be brought is one or two years. Should it take longer than this to learn that the foreign administrator lacks capacity to sue, it will then be too late to substitute an administrator appointed at the forum. Such was the result in Hall v. Southern Ry. Co., 149 N.C. 108, 62 S.E. 899 (1908).

[15] See Connor v. New York, New Haven & Hartford Ry. Co., 28 R.I. 560, 68 A. 481 (1908); Southern Ry. Co. v. Moore, 158 S.C. 446, 155 S.E. 740 (1930); Chicago, Indianapolis & Louisville Ry. Co. v. Hemstock, 102 Ind. App. 654, 4 N.E. (2d) 677 (1936).