UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 30 | Number 2 Article 12

2-1-1952

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near the scene and a piece of metal corresponding to that missing from his car is found at the scene[16] this has been held sufficient to link defendant to the vehicle as the driver.

Thus, the evidence of identification in the instant case seems *at least* as strong as was present in those cases. For, in addition to identification of the automobile, the defendant admitted that he was the only person driving his car on the night in question. If no one but the defendant drove the car on the night in question, then the conclusion is inescapable that he was driving it when it was observed by the officers. While it is true that defendant's admission was coupled with a denial that he was at the place in question the State can offer such distinct and severable parts of the statement as tend to establish its own position[17] and the jury may believe the whole or any part thereof.[18] Thus, in *State v. King*,[19] such an admission, coupled with a similar denial, was held to be sufficient to identify the defendant as being the driver of the automobile.

The evidence offered in the principal case seems to have been sufficient for the court to have affirmed the trial court in overruling the defendant's motion of non suit.[20]

HURSHELL H. KEENER.

Executors and Administrators—Status of Back Pay Owed Deceased Military Personnel

Title 10 of The United States Code, Section 868,[1] provides in part:

"In the settlement of the accounts of deceased officers or enlisted persons of the Army, where no demand is presented by a

[16] State v. Durham, 201 N. C. 724, 161 S. E. 398 (1931). See Note, 99 A. L. R. 799 (1935).

Merely being seen near the scene is not sufficient to identify defendant as the driver at the scene. State v. Ray, 229 N. C. 40, 47 S. E. 2d (1948) (defendant, near scene of accident, driving truck which bore scratches and paint smears).

[17] State v. Corpening, 157 N. C. 621, 73 S. E. 2d 214 (1911). But the defendant is entitled to bring out those parts which tend to discharge him as well as those which tend to charge him. State v. Watts, 224 N. C. 771, 32 S. E. 2d 348 (1944).

[18] STANSBURY, NORTH CAROLINA EVIDENCE §181 (1946).

[19] 219 N. C. 667, 14 S. E. 2d 803 (1941). Marks led from the scene of the accident to the defendant's damaged automobile. The defendant's admission that no one else had driven his car on the night in question was held sufficient to identify defendant as the driver of the vehicle, even though neither defendant nor his vehicle were seen at or near the accident.

[20] The apparent conflict between the instant case and prior decisions on this point could be reconciled by a statute creating a presumption that the owner of an automobile is the driver. Such a presumption could be created by expanding N. C. GEN. STAT. §20-71.1 (Supp. 1951), which creates such a presumption in certain types of civil actions (see note 12 *supra*), to include violations of the motor vehicle law. Such a statute undoubtedly has objectionable features (*e.g.*, shifting the burden of proof in a criminal action) which should be considered before any changes are adopted. The legislature must weigh these objections against the need for efficient law enforcement before determining the future policy of the State.

[1] 34 STAT. 1094 (1906), as amended, 10 U. S. C. §868 (1946).

duly appointed legal representative of the estate, the accounting officer may allow the amount found due to the decedent's widow, widower, or legal heirs in the following order of precedence: First, to the widow or widower; Second, etc. . . ."

In a recent federal case,[2] the plaintiff, mother of a deceased soldier to whom the Government owed arrears in pay, was the sole beneficiary under his will and was named as executrix. She had notified the General Accounting Office that as soon as she could legally qualify, she would claim the amount due the decedent; and requested that the money not be paid to anyone until she had been appointed executrix; particularly, she requested that no money be paid to the deceased's estranged wife. Nevertheless, before the mother could legally qualify as executrix, the money was paid to the widow. The plaintiff brought this suit against the Government, and the question before the court was whether the liability of the Government had been discharged under Section 868.

The court held that the mother did not, and could not, under the Iowa law occupy the status of a "duly appointed legal representative of the estate" at the time the request was made and at the time payment was made; therefore, she had no capacity to claim or receive the money owed the decedent, and the Government was discharged of liability for the debt by payment to the widow.

Although Section 868 does not mention whether or not the money paid under its provisions are a part of the estate, the court, in rejecting the plaintiff's contention that the relation back of letters testamentary or of administration should apply, said that the funds are not a part of the estate except as Congress allowed them to become such; and that the funds were allowed to be a part of the estate only if a duly appointed representative claimed the funds before they had been paid out.[3]

If the full implication of this portion of the decision were carried out, it would mean that unless the executor or administrator could legally qualify and file claim before the funds were paid out, he would have no claim against anyone for the amount allowed and could not secure these funds for the purposes of administration.

The Ohio Court of Common Pleas,[4] however, in a suit by an executrix against a widow who had received pay under the same statute, held that the pay due the decedent was contractual in its nature; that it

[2] Keown v. United States, 191 F. 2d 438 (8th Cir. 1951).

[3] "But the difficulty in the present situation with this argument is that the funds involved did not constitute a part of the decedent's estate for the purpose of administration, except as Congress had allowed them to become such, and Congress did not allow them to become a part of the decedent's estate for the purposes of administration from the fact of his death, but only from the fact that a duly appointed representative existed and had made demand before the money had been otherwise paid out." *Id.* at 441-442.

[4] Scammon v. Scammon, 90 N. E. 2d 617 (Ohio C. P. 1950).

constituted a part of the estate; and that the payment was received by the wife in trust for the estate. The court stated that this section of the code was not determinative of the right to take as between adverse claimants; and compared it to the facility of payment clauses in insurance policies.[5] This decision seems to be in harmony with the Congressional intent and purpose.[6]

A Tennessee decision[7] held that a similar debt was a contractual obligation of the Government, not a gratuity; that it was a vested right and thus was a part of the estate; and that the father of the decedent could not maintain an action against the executor of the estate for the funds received.

In both the Ohio case and the Tennessee case, the courts met the issue squarely and decided that payments made under the provisions of this statute were a part of the estate of the decedent, and as such correctly go to the executor or administrator. It has also been held that retroactive pay raises,[8] debts due decedent by an employer,[9] debts due from relatives,[10] or due on account,[11] right to unpaid minimum compensation,[12] right to reimbursement under special acts,[13] and generally, all debts, rights, and choses in action, vest as assets in the administrator, whose duty it is to collect them.[14] Thus, it seems, in spite of the statement to the contrary in the principal case, that the money due the decedent could constitute an asset of the estate.

Even though the Government's liability has been discharged, if the money received by the widow is a part of the estate, the executrix might then attempt to recover from the widow; and, as was done in the Ohio case, the court could apply the principle used in controversies arising under the facility of payment clauses of insurance policies[15] and allow the executrix to recover from the widow.[16]

Since the object of the federal statute in question is to eliminate the necessity of legal proceedings in settling accounts of deceased personnel,

[5] For the purpose of facility of payment clauses, see Rhode v. Metropolitan Life Ins. Co., 233 Mo. App. 865, 111 S. W. 2d 1006 (1937) and Uptegrove v. Metropolitan Life Ins. Co., 145 Neb. 51, 15 N. W. 2d 220 (1944). See also cases gathered in Note 166 A. L. R. 15 (1947).

[6] U. S. CODE CONGRESSIONAL SERVICE p. 1323 (1944).

[7] Campbell v. Oliphant, 185 Tenn. 415, 206 S. W. 2d 406 (1947).

[8] Joslyn v. Joslyn, 117 Mich. 442, 75 N. W. 930 (1898).

[9] Hawkins v. McCalla, 95 Ga. 192, 22 S. E. 141 (1894).

[10] Penland v. Wells, 201 N. C. 173, 199 S. E. 423 (1931).

[11] Mayo v. Dawson, 160 N. C. 76, 76 S. E. 241 (1912).

[12] Fletcher v. Grinnel Bros., 64 F. Supp. 778 (E. D. Mich. 1943).

[13] Briggs v. Walker, 171 U. S. 466 (1898).

[14] Howe v. Mohl, 168 Kan. 445, 214 P. 2d 298 (1950); Sullivan v. Doyle, 67 A. 2d 246 (Md. 1949).

[15] Lutostanski v. Lutostanski, 120 Conn. 471, 181 Atl. 533 (1935); Smith v. Massie, Inc., 93 Ind. App. 582, 179 N. E. 20 (1931). *Contra, In re* Pierug's Estate, 196 Misc. 1062, 94 N. Y. S. 2d 66 (1950).

[16] See cases collected in Note, 75 A. L. R. 1435 (1931) for rights of adverse claimants of proceeds of policies paid under facility of payment clause.

and thus relieve their families from added expense and trouble, it seems that some modification of this statute is to be desired. Such a modification should probably be in the nature of a prohibition against paying such disputed claims before the legal representative can qualify and claim the funds, particularly when the Government has notice of the dispute.

BERNARD CROWELL.

FELA Suits in Inconvenient State Courts—the Mayfield Case

The venue section of the Federal Employers' Liability Act[1] gives a plaintiff a wide choice in the selection of a forum,[2] but this privilege has been abused[3] to the extent that a huge interstate commerce in actions brought under the FELA has developed through the efforts of certain law firms in several metropolitan centers.[4]

Since 1910[5] the FELA has expressly provided that a suit may be brought in a state court, or in a United States district court, (1) in the district of the residence of the defendant, or (2) in the district where the cause of action arose, or (3) in any district in which the defendant shall be doing business at the time.[6]

Efforts by some railroads to avoid being sued in forums inconvenient to them, by the use of injunctions, were unsuccessful. The United States Supreme Court, in *Baltimore & Ohio R. R. v. Kepner,*[7] held that a state court could not restrain a resident from continuing the prosecution of a suit under the FELA in a distant *federal district court,* or interfere with the privileges of federal venue.[8] The following year,

[1] 35 STAT. 65 (1908), as amended, 45 U. S. C. §§51-59 (1946).
[2] 35 STAT. 66 (1908), as amended, 45 U. S. C. §56 (1946).
[3] "The open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself." Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 507 (1947).
[4] Winters, *Interstate Commerce in Damage Suits,* 29 JOUR. AM. JUD. SOC. 135 (1946). The chief centers are New York, Chicago, Baltimore, St. Louis, Minneapolis and Los Angeles. Many of these cases are brought from great distances, some from California to Chicago. See Winters *supra* at 137, and Note, 25 N. C. L. REV. 379 (1947).
[5] The original FELA, adopted in 1908, made no provision for venue. Following Mondou v. New York, N. H. & H. R. R., 82 Conn. 373, 73 Atl. 762 (1909), holding that courts of Connecticut did not have jurisdiction to entertain an action based on the FELA, Congress amended the Act in 1910 to provide that "the jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states. . . ." 36 STAT. 291, as amended, 45 U. S. C. §56 (1946). The United States Supreme Court later commented that "the amendment, as appears by its language, instead of granting jurisdiction to the state courts, presupposes that they already possessed it." Mondou v. New York, N. H. & H. R. R., 223 U. S. 1, 56 (1912).
[6] See note 2 *supra.*
[7] 314 U. S. 44 (1941).
[8] The injunction could not be used "for the benefit of the carrier or the national transportation system, on the ground of cost, inconvenience or harassment." Balti-