

1957

In the Matter of the Estate of Phyllis Rosander Leigh : Brief of Respondent

Utah Supreme Court

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STATE OF UTAH

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IN THE MATTER OF THE
ESTATE OF
PHYLLIS ROSANDER
LEIGH,

Clerk, Supreme Court, Utah

Case No. 8628

Deceased.

BRIEF OF RESPONDENT
FARMERS MUTUAL AUTOMOBILE
INSURANCE COMPANY

HANSON, BALDWIN & ALLEN
Attorneys for Respondent.

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IN THE SUPREME COURT
of the
STATE OF UTAH

| | |
|--|-----------------|
| IN THE MATTER OF THE ESTATE OF PHYLLIS ROSANDER LEIGH, Deceased. | } Case No. 8628 |
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BRIEF OF RESPONDENT
FARMERS MUTUAL AUTOMOBILE
INSURANCE COMPANY

PRELIMINARY STATEMENT

This is an appeal from an order of the trial court made on December 10, 1956, vacating and setting aside an order appointing one David K. Watkiss the administrator of the estate of Phyllis Rosander Leigh, upon the grounds that the order was void because there were no assets of decedent's estate within the State of Utah. (Order in Record; pages of Record are unnumbered.)

STATEMENT OF FACTS

Respondent agrees with most of appellant's Statement of Facts but controverts the assertion that the wrecked automobile constituted an asset. (Record, Paragraph II of the Petition for Appointment of Administrator.) Also, appellant's Statement of Facts should be supplemented by the following additional facts: At the time of her death Leigh was a resident and domiciled in the State of Minnesota. She carried a policy of public liability insurance with the Farmers Mutual Automobile Insurance Company, a Wisconsin corporation, which has never qualified and is not authorized to do business in Utah. That after his appointment, suit was filed in the Third Judicial District Court against Watkiss as the administrator of the estate of Leigh by Edward Rawlinkiewicz to recover personal injury damages claimed to have been sustained by reason of the negligence of Leigh, and Watkiss, purporting to act as administrator of the estate, made demand upon respondent to defend the action, claiming it was obligated to do so under the terms of the insurance policy. That thereafter the insurance company applied to the court to have the appointment of Watkiss revoked upon the grounds set forth in this petition. (Record.)

STATEMENT OF POINTS

POINT I.

THE INSURANCE COMPANY HAD THE RIGHT TO FILE THE PETITION TO REVOKE THE APPOINTMENT OF DAVID K. WATKISS AS ADMINISTRATOR OF THE ESTATE OF PHYLLIS ROSANDER LEIGH.

POINT II.

THE CONTINGENT CLAIM AGAINST THE INSURANCE COMPANY DOES NOT CONSTITUTE AN ASSET SUBJECT TO ADMINISTRATION IN UTAH.

POINT III.

UNDER ALL THE FACTS AND CIRCUMSTANCES THE APPOINTMENT OF WATKISS SHOULD BE REVOKED.

ARGUMENT

POINT I.

THE INSURANCE COMPANY HAD THE RIGHT TO FILE THE PETITION TO REVOKE THE APPOINTMENT OF DAVID K. WATKISS AS ADMINISTRATOR OF THE ESTATE OF PHYLLIS ROSANDER LEIGH.

The first question requiring consideration is whether the insurance company has the right to file the Petition for Revocation of Letters of Administration issued to Watkiss.

Our statutes provide:

“Utah Code Annotated 1953, 75-1-8. Collateral attack prohibited: — An objection to any paper, petition, decree or order in any probate or guardianship matter, for an erroneous or defective statement or determination of any fact necessary to jurisdiction which actually existed, or for an omission to find or state

any such fact in such paper, petition, decree or order, is available only on direct application to the same court, or on appeal.”

“Utah Code Annotated 1953, 75-14-14. Any interested person has the right to be heard. Any person shall have a right to be heard by the court at any hearing on any question affecting a probate or guardianship matter in which he is interested.”

These statutes should be sufficient in support of the insurance company's right to file the petition. Petitioner is certainly an “interested party” in having determined whether at the demand of Watkiss it is obligated to defend the action, that is, whether Watkiss was properly appointed so as to entitle him to make the demand.

In the cases of *In re Tasanen*, 25 Utah 396, 71 P. 784 and *In re Lowham's Estate*, 30 Utah 436; 85 P. 445, there were petitions by the defendants to revoke the letters of administration theretofore granted by the court.

In *Bancroft Probate Practice*, Volume 2, Sec. 289, it is stated:

“Defective Appointment or Want of Jurisdiction. — To a certain extent, and whether or not the order of appointment is ‘void’ in the sense that it may be collaterally attacked, a petition to revoke letters is regarded as an alternative for an appeal from the order of appointment. Thus such a petition has been resorted to as a mode of attack upon a finding

of the court that the residence of the decedent was in the county in which letters were issued, and the attempt supported as a 'direct' attack.

As the New Mexico court observes, moreover, while the appointment of an administrator is a final judgment in the sense that it is appealable, it is in no sense a finality so far as the estate is concerned. If the court were precluded from a reinvestigation of the facts upon which letters were granted, the veriest imposter might obtain letters and, after the period for appeal has elapsed, remain securely in an office to which he has no right, with no court having power to remove him."

In the case of *Louisville v. Herb*, the court remarks:

"If he was not lawfully appointed, the petitioner has the right to show that fact, and thus defend itself from being harassed by a suit brought without authority of law, and from complications that may arise, should his letters of administration be revoked, *upon the application of someone interested in the estate of the decedent as a creditor, next of kin, or otherwise*. The right of a plaintiff to maintain an action in the capacity he sues, or to sue in a particular court or jurisdiction, may always be challenged by a defendant, although he may be liable for the wrong sought to be redressed in a suit brought in a proper court, by the proper party. This proceeding is the only manner in which the validity of letters of administration can be called into question."

POINT II.

THE CONTINGENT CLAIM AGAINST THE INSURANCE COMPANY DOES NOT CONSTITUTE AN ASSET SUBJECT TO ADMINISTRATION IN UTAH.

This question has been passed upon by a number of courts. In some states it is held that a contingent claim against an insurance company is not an asset of the insured's estate until the primary liability of the insured has been established by judgment against him. Furthermore, it is held that the situs of any such claim is at the domicile of the insured and that it has no situs in a foreign state.

In *Rogers v. Anderson* (Kan.) 190 P. 2 857, Rogers was a resident of North Carolina and never had been in Marshall County, Kansas. Edwards was a resident of Marshall County, Kansas and died from injuries sustained in a collision with a car driven by Rogers, operated within Saline County, Kansas. Rogers was killed in the war and his will probated in North Carolina. At the time of the collision, he had a policy issued by the American Indemnity Company. The probate court of Marshall County, Kansas, appointed one Crouse as administrator of the Kansas estate of Rogers. The Kansas statute provides:

“Proceedings for the probate of a will or the administration shall be had in the county of the residence of the decedent at the time of his death; if the decedent was not a resident

of this state, proceedings may be had in any county wherein he left any estate to be administered."

The opinion is very lengthy and the court discusses the question of what constitutes 'estate' and also the situs of intangible assets:

"Appellant, however, further asserts the policy, under the admitted facts, cannot constitute a present asset of the insured's estate anywhere. In support she cites our decisions holding an insurer, under the terms of this policy, is merely an indemnitor and as such can only be subjected to judgment on the policy after liability of the insured for damages has been finally determined. We have so held. A few of the cases are *Schoonover v. Clark*, 155 Kan. 835, 837, 130 P. 2 619; *Lang v. Underwriter's at Lloyd's*, 157 Kan. 314, 319, 139 P. 2 414; *Lechleitner v. Cummings*, 160 Kan. 453, 458, 163 P. 2 423, and cases therein cited. In other words, appellant states that prior to the occurrence of the condition precedent specified in the policy, the insured, if living, would have no cause of action against the insurer and a fortiori the policy does not now constitute an asset of the insured's estate left in Kansas to be administered.

"Assuming for the moment the administrator was properly appointed and assuming further that the situs of the policy was in Kansas, this question persistently intrudes — what estate did the policy contain or create for the administrator to administer in Kansas? At this time and at any time prior to judgment against the insured such adminis-

trator could not draw to the estate any asset provided by the policy. Assuming the administrator of the Edward's estate instituted an action against the administrator of Rogers' estate for the purpose of recovering damages resulting from the automobile collision, garnishment proceedings against the insurer would not lie prior to rendition of judgment or agreement of liability . . ."

After quoting other Kansas cases, the court proceeds:

"In the *Moore case*, supra, this court said:

"The principal administration to which all others are subordinate, is at the domicile of the intestate, and the universally recognized rule of law is that the succession to and distribution of personal estate is governed by the law of the place where the intestate was domiciled at the time of his death.

"The original administrator, therefore, with letters taken out at the place of the domicile, is invested with the title to all the personal property of the deceased, for the purpose of collecting the effects of the estate, paying the debts, and making distribution of the residue according to the law of the place or directions of the will, as the case may be." (Citations).

In the *Modern Woodmen case*, supra, this court stated:

"The fact that the beneficiary certificate sued on was in Douglas County was not of itself sufficient to empower the probate court

to appoint a guardian for the infants there. The instrument created a simple contract debt. The substantial property right adhered to the debt, rather than to the instrument evidencing it, and in legal estimation its situs followed the domicile of the owner. In *Moore, Admx. v. Jordan*, 36 Kan. 271, 13 P. 337, 59 Am. Rep. 550, it was held that a note and mortgage belonging to a man dying in Colorado, with the instruments in his possession there, were not assets in the hands of his widow as administratrix, appointed in Colorado, but belonged to an administrator appointed at the decedent's domicile in Illinois; and the doctrine is illustrated by numerous decisions cited in the opinion. Under the same principle, if the beneficiary certificate had its situs at the domicile of the owners in Missouri, it could not have been assets in the hands of a guardian appointed in Kansas, and hence could not have been the foundation of any order appointing such guardian.' Pages 137, 138 of 66 Kan., Page 281 of 71 P.

In the *Miller case*, supra, we find the following

'Was it the duty of the probate court to appoint an administrator on the application of a creditor of the decedent? Miller was a nonresident of Kansas, and the question is, Did he leave anything here on which to found administration? It has been held that:

'Where a person dies intestate, who was not a resident or inhabitant of the state at the time of his death, and who left no estate within the state to be administered, a probate court of the state has no jurisdiction to issue letters of administration on the estate

of such intestate, and, where letters are issued, the acts of the court in doing so are utterly null and void.' (Citations)".

See also *Olson v. Preferred Automobile Insurance Company*, (Mich.) 244 NW 178.

In *Wheat v. Fidelity and Casualty Company of New York*, (Colo.) 261 P. 2 493, the court made the same ruling as in the Kansas case, that such a contingent claim did not constitute an asset and that this was true even though the insurance company which issued the policy was doing business in the foreign state where it was claimed such contingent claim existed as an asset. In said case Wheat, driving a car going south, attempted to pass another car and collided headon with a car going north, driven by Leonard Wheat (no relation). Both Albert and Leonard were killed. Albert was a resident of Georgia and Leonard of Missouri. Plaintiffs were the surviving wife and minor daughter of Leonard Wheat. Albert carried liability insurance in defendant company. An administrator for his estate was appointed in Georgia and his only tangible asset was the damaged car which the administrator sold. Mrs. Leonard Wheat applied for letters of administration in the estate of Albert in Colorado, and the petition was denied. She then filed another petition, claiming to be a creditor of Albert, and one Delahay was appointed and Mrs. Leonard Wheat then filed

an action for damages against Delahay as administrator and he demanded of the insurance company that it defend. The insurance company then moved to vacate the order appointing Delahay on the ground of lack of jurisdiction because Albert J. Wheat was a non-resident of Colorado and left no property, real or personal, therein. The motion was denied and the insurance company secured certiorari and the District Court quashed the appointment of the administrator. On appeal, the court stated that the question for determination was:

“The trial court found that at the time of the appointment of Delahay as administrator, there was no property in Colorado, tangible or intangible, over which the county court had any jurisdiction or control. As hereinbefore stated, the wrecked automobile was the only tangible property in Colorado at the time of the accident, and when the duly appointed administrator of the estate of Albert J. Wheat in Georgia made disposition of the automobile, the purchasers took and can hold the same free from any lien of the claims of creditors, because he was the duly appointed representative of the heirs of the estate, and our statute so provides. As to the question of the indemnity policy here involved constituting an asset of the estate, we believe the following quotation from *Rogers v. Edwards*, 164 Kan. 492, 190 P. 2 857, 862, to be well reasoned and in point:

‘If the rights of the insured against the insurer, under an ordinary indemnity policy,

constitute assets of the nonresident insured's estate, prior to the establishment of liability of such estate to third persons, the situs of such assets is at the domicile of the nonresident. *The mere fact that a foreign insurance company which issued the policy is also authorized to transact business in Kansas does not change the situs of such asset*, if it be an asset prior to the establishment of the insured's liability, from the domicile of the nonresident to the state of Kansas.

'Of course, every state is, and should be, anxious to protect and convenience its own citizens so far as possible. No state is under duty to permit assets of debtors to be placed beyond the reach of its own creditors where it can legally retain such assets. But in order to retain them they must first exist here. To hold the policy in question has its situs in Kansas for purposes of administration would be contrary to the principle repeatedly enunciated in our prior decisions. In view of our firmly established and well understood doctrine, which we regard as sound, we do not desire to confuse it. A conclusion that this indemnity policy constitutes 'estate' left by the nonresident decedent to be administered in Marshall County would mean this policy constitutes 'estate' which may be administered in any county in Kansas and in any county of every other state of the union, with a similar statute, in which the insurer is authorized to transact business. We do not think the statute was intended to produce such a result.'

If this court follows the foregoing decisions, then it is apparent that in this case there are no

assets of the estate of Mrs. Leigh in Utah. However, we do not wish to withhold from the court what we have discovered with reference to the decisions of some other courts on this question and therefore call attention to cases of other jurisdictions which hold that such a contingent claim which, according to some authorities, has its situs only at the domicile of the creditor may, under certain circumstances, also constitute an asset where the debtor resides. In other words, these cases hold that the situs of the claim is not only at the insured's domicile but where the claim may be enforced. It is so held in Illinois under a statute which expressly provides that choses in action are located where the debtor resides, *Furst against Brady*, (Ill.) 31 NE2 606. However, in the case at bar the insurance company, if considered to be a debtor before judgment against the insured, does not reside in Utah.

Also the following cases hold that such a contingent claim is an asset in a foreign state: *Robinson v. John Dana's Estate*, (N. Hampshire) 174 Atl. 772; *Gordon v. Shea*, (Mass.) 14 NE2 105; *In re Vilas Estate*, (Ore.) 110 P. 2 940.

But in each of these cases the insurance company against which the claim was or was to be asserted, was doing business in the state where the administrator of the insured's estate was appointed.

As stated in the Robinson-Dana case:

“For the purpose of ownership, the creditor’s domicile is generally regarded determinative of the fictional locality of the debt. But since enforcement may be only where the debtor or his property is found, the debt must be owned by the creditor there as well as owed by the debtor. While as to ownership, “debts can have no locality separate from the parties to whom they are due” (*Cleveland, etc. Co. v. Pennsylvania*, 15 Wall. 300, 320, 21 L. ed. 179), in respect to enforcement, “It is useless to say that a chose in action follows the person of the creditor when the matter in hand is the enforcement of payment by a suit at law.” 11 Harv. Law Rev. 101. “For the purpose of collection a debt is always ambulatory, and accompanies the person of a debtor.” 5 RCL 931.”

In *Gordon v. Shea* the appointment of the administrator was approved because the insurance company against which the contingent claim existed was authorized to do business in Massachusetts, and in the *Vilas Estate* case it was held:

“Executors and administrators. Where insured under automobile liability policy, who was resident of Washington was killed in automobile collision in Oregon, in which occupant of other automobile was injured, *and insurer under policy was at time of accident and ever since such time authorized to do business in Oregon*, liability of insurer on policy was an “asset” of deceased motorist’s estate within meaning of statute, warranting appointment of administrator in Oregon, so that an action could be brought on claim of liability arising out of accident.”

If this court follows the decisions of the courts in Colorado, Kansas and Michigan it will hold that the contingent claim against the Farmers Mutual Automobile Insurance Company is not an asset in Utah; first because its situs is in Minnesota, the domicile of Mrs. Leigh, and second because it cannot be an asset until after judgment against the insured.

If the court follows the New Hampshire, Massachusetts, and Oregon cases it will likewise hold that the contingent claim does not constitute an asset in Utah of Mrs. Leigh's estate because the insurance company is not doing business in Utah and therefore the claim cannot be enforced in Utah, the courts having no jurisdiction over said company.

Let us now consider the last question to be determined.

POINT III.

UNDER ALL THE FACTS AND CIRCUMSTANCES THE APPOINTMENT OF WATKISS SHOULD BE REVOKED.

Assuming that there are no assets of Mrs. Leigh in Utah, did the court have jurisdiction to appoint Watkiss as administrator? If it had jurisdiction did it abuse its discretion in making the appointment? Our statute, *Utah Code Annotated 1953*, Sec. 75-1-2 provides:

“Where wills proved, and letters granted. — Wills must be proved and letters testamentary or of administration granted:

(1) If the decedent was a resident of the state, in the county in which he had his residence at the time of his death.

(2) If the decedent was a nonresident of the state: first, in the county in which he may have died leaving estate therein; second, in any county in which any part of the estate may be, the decedent not having left estate in the county in which he died, or having died without the state.

(3) In all other cases, in the county where application for letters is first made.”

In *Re Tasanen's Estate*, 25 Utah 396, 71 Pac. 984, the facts were that Tasanen, an employee in Wyoming of the Diamond Coal and Coke Company, met his death in Wyoming. The Coal and Coke Company was also doing business in Utah. An administrator of Tasanen's estate was appointed in Utah on the basis of the cause of action existing against the coal company. It will be noted that the claim was not a contingent one as in the case we are considering but was one of direct liability, and furthermore it was one enforceable in Utah because the coal and coke company was doing business in Utah. In sustaining the lower court's refusal to set aside the appointment of the Utah administrator, the court stated that there was a conflict of authority on the question whether a claim for death was an

asset and it preferred the view that it was, but the court held it was not required to follow either view because under the last paragraph of *Utah Code Annotated 1953*, Section 75-1-2:

“In all other cases, in the county where application for letters is first made”,

it was immaterial whether or not there were any assets that:

“If there should be nothing which the administrator could legally do it could harm nobody. If there should be something which the administrator ought to do, then the appointment would be necessary”.

There is implicit in this statement the conclusion that if there should be nothing the administrator could legally do, his appointment would be unnecessary. Furthermore, it was unnecessary for the court to decide that an administrator might be appointed if there were no assets because in the *Tasanen* case there was an asset, to wit: A direct liability of the coal and coke company, a transitory right which, having origin in Wyoming, could be sued on in Utah where defendant was doing business. It invoked the principle as laid down in *Utah Savings and Trust Company v. Diamond Coal and Coke Company*, 26 Utah 299, 73 P. 524, to wit:

“*Nature of Action—Enforcement—Suit in Different State—Transitory*: — The right of action for wrongful death provided by Re-

vised Statutes Wyoming 1887, section 2364a, and the following section, is not limited in its enforcement to a trustee for the persons entitled to damages recovered therein, appointed in that state, but the right of action is transitory in its nature, and may be maintained in the courts of another State having jurisdiction of such matters, and having acquired jurisdiction of the parties.”

The holding of the court in the Tasanen case that an administrator may be appointed even though there are no assets is purely dictum.

Coming back to the question of the appointment of Watkiss and again assuming that there are no assets of Mrs. Leigh's estate in Utah, we call attention to authorities which hold that the court is without jurisdiction to appoint an administrator if there are no assets within the court's jurisdiction. As state In re Dickerson's Estate, (Nev.) 268 P. 769 it is said:

“In California, under probate provisions similar to ours, it is well settled that the ownership of property by the decedent is essential to the granting of letters of administration of his estate (Citations). Such also is the weight of authority generally. But the citation of authority from other jurisdictions is without any useful purpose.

It is clearly within the expression of our statutes that an estate is essential to a grant of letters. The proofs adduced at the hearing

showed no estate, legal or equitable, belonging to the estate sought to be administered. Consequently there was nothing for the court to act upon.”

See also *Olson v. Insurance Company*, (Mich.) 244 NW 178; *Wheat v. Fidelity and Casualty Company of New York*, (Colo.) 261 P. 2 493.

However, even if technically the court has jurisdiction and it is so held in some jurisdictions, nevertheless it would not be abuse of discretion of the court to refuse to make such an appointment. In *re Carter's Estate*, (Okla.) 240 P. 727 as stated by the court:

“It is clearly shown by the evidence that the estate of the deceased, subject to the claims of his creditors, amounted to nothing, and the great weight of authority is to effect that, where there is no other sufficient reason for the appointment of an administrator, except to take charge and administer the assets of an estate, and there are no assets, then in that event the refusal of the court to appoint an administrator is within the discretion of the court. And in this case we hold that the court did not abuse its discretion in refusing to appoint an administrator.”

If there should be a judgment against Watkiss it would be worthless.

In *Bancrofts Probate Practice*, Vol. 2, Sec. 465 it is said:

“There is no *personal liability* of an ex-

ecutor or administrator as the result of judgments entered against him in his representative capacity”.

Our statute, Section 75-9-15 provides:

“Judgment against personal representatives — Effect: — A judgment rendered against an executor or administrator upon any claim for money against the estate of his testator or intestate only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge; and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due. A certified transcript of the original docket of the judgment must be filed among the papers of the estate in court. No execution shall issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment.”

In *Munton v. Bekins*, (Cal.) 49 P. 2 338 the court affirms what our statute declares:

“The judgment is upon a claim against the estate and while such a judgment, when it becomes final, conclusively establishes the validity of the claim for the amount of the judgment, yet the judgment takes on the status merely of an allowed claim”.

This statute of ours which fixes the status of the judgment as an “allowed claim” really makes it a judgment against assets if there are any assets.

In other words, as there is no personal liability of the administrator, the judgment is one in rem.

Now, there being no assets in Utah, the contingent claim against the insurance company having no situs in Utah, and no primary liability of the insured having been established and such contingent claim being in any event unenforceable in Utah, any judgment Rawlinkiewicz might obtain would be worthless. Why should petitioner be obliged to incur the expense of defending an action against Watkiss? We can only assume that Ridgeway's counsel believes that such a judgment, though not enforceable in Utah, would be entitled to full faith and credit under the United States Constitution and could be sued on in a state where jurisdiction over the insurance company can be obtained. This is a vain hope. In the first place it could not possibly be res adjudicata because: (a) The judgment of the Utah court has not the effect of any ordinary judgment of the District Court for it has only the status of an allowed claim to be satisfied out of Utah assets, if any. (b) The Utah judgment against the Utah administrator would not even be evidence against the insurance company, an entirely different party defendant, in a foreign state. (c) The causes of action — that is, the cause of action against Leigh's administrator in Utah and a so-called cause of action upon such a judgment

against the insurance company would be different, and any such Utah judgment (if it can be called a judgment) would not even be evidence in an action against the insurance company in another state. (d) Being merely a judgment in rem, such a judgment would have no extra-territorial effect.

A judgment in rem has no extra-territorial effect or efficiency beyond the state or jurisdiction of the court which renders it. (31 Am. Jur. 104.)

A judgment against an administrator in one state affords no basis for an action against an administrator of the estate of the same decedent in another state (*Braithwaite v. Harvey*, (Mont.) 36 P. 38), and this is true even though the causes of action were identically the same. (*Ingersoll v. Coram*, 127 F. 418.)

See note to 3 ALR 64.

If such a judgment could not afford a basis for an action against an administrator of the same decedent in another state it certainly could not form the basis of an action against any third party in such other state.

Finally, we inquire, why should Watkiss be permitted to remain in office as administrator when there are no Utah assets for him to administer; when if he obtains a judgment in Utah it can neither be satisfied here nor form the basis for an action in

another state against the insurance company. The trial court had a right, and we respectfully urge that it had the duty, to terminate a proceeding which is without foundation in fact or law. This is one case where the court is authorized by statute to act.

Utah Code Annotated, 1953, Section 75-6-1 provides:

“Grounds for: The court may at any time suspend any administrator, executor or guardian; and may, upon citation, revoke the letters of any administrator upon petition of a competent person having a prior right thereto who had no opportunity to apply, or of any administrator of the estate of a supposed intestate whose will was subsequently found and admitted to probate, or of any executor, administrator or guardian for neglect, mismanagement, waste, embezzlement, incompetency or incapacity, or because of his conviction of an infamous crime, or for any other reason deemed sufficient by the court.”

Appellant's brief consists mostly of a discussion of matters which do not relate to the question here involved. Counsel cites the Utah Survival Statute giving a right of action for injury or death against estate of a legal wrongdoer. He cites the rule relating to the appointment of guardians for infants and incompetent persons and refers to the statute concerning service upon the Secretary of State in an action against a nonresident motorist. All these are extraneous matters. He argues that by

accepting a premium the insurance company under its policy, is obligated to defend a cause of action arising out of the negligence of Mrs. Leigh in any State in the United States, including, of course, the State of Utah, but he seemingly does not understand the position of the insurance company's objection, which is, as previously stated, that since the insurance company cannot be subjected to the jurisdiction of the Utah courts because it is not doing business in Utah, it would be unjust to compel it to incur the expense of defending the case brought against Watkiss when nothing whatever of benefit to the plaintiff would, or could be accomplished by such action. Suppose the insurance company should assume the defense of Watkiss and suppose the plaintiff should secure a judgment, how could the plaintiff be benefited? The judgment would merely be against Utah assets of the Leigh estate, and payable out of such assets in the ordinary course of administration. (Sec. 75-9-15, *Utah Code Annotated*; *Smith v. Hanson*, 34 Ut. 171, 96 P. 1087.) In *Newton v. Tracy Loan and Trust Co.*, 88 Ut. 547, 40 P. 2d 204, it is said:

“Under the provisions of 102-9-15, R. S. Utah 1933, a judgment rendered against an executor or administrator upon a claim for money against the estate represented by such executor or administrator established the claim in the same manner as if it had been regularly allowed. The statute then further

provides that the judgment must be that the executor or administrator pay in due course of administration, the amount ascertained to be due. Further proceedings are then specifically provided for the collection and payment of the claim. The judgment herein is a judgment against the executor in its official capacity only and could be paid only as provided by the statute. As was said by the court in the case of *United States Fidelity & Guaranty Co. v. Bletcher*, 64 Ut. 49, 228 P. 188, after quoting section 7659, Comp. Laws Utah 1917, now 102-9-15, R. S. Utah 1933, supra:

“The statute thus, in specific terms, determines the legal effect of the judgment against an estate, and it further determines that the allowance of a claim is in legal effect precisely the same as a judgment; namely, that in either case the only fact that is established is the amount of the claim and that it must be paid in due course of administration. And, in order to prevent all complications, the statute further provides that no execution can be issued on the judgment, that it creates no lien upon any property and that the judgment does not give a preference to any creditor.”

A judgment against Watkiss would not only be useless and ineffectual in Utah, it would be useless as a basis for an action in another State. Such a judgment is not against the administrator personally, but only against assets in his hands. It affords no basis for an action against the insurance company in another state because it has no extra-territorial effect being merely a judgment in rem. (31

Am. Jr. 103-4; 34 C.J. 1174). It would not be entitled to full faith and credit under the United States Constitution.

What would be the use of taking the time of the court and causing the insurance company the great expense of a trial under such conditions? It is undisputed that there are no assets other than the claim against the insurance company and as that contingent claim is not enforceable in Utah, it is not an asset in Utah and there are no assets out of which such judgment could be paid. The cases heretofore cited are to the effect that a contingent claim against an insurance company is an asset in a state foreign to the residence of the insured and the only cases cited to the contrary are those which hold that it is an asset in a foreign state, only if the insurance company is doing business in such foreign state. The contingent claim being no asset in Utah, why permit the appointment of an administrator to stand when he has no assets to administer and why make it necessary for the insurance company to defend him when the plaintiff could get nothing by its judgment in Utah or make any claim against the insurance company by virtue of such judgment either in Utah or any other state?

CONCLUSION

1. The court appointed Watkiss administrator only on the theory that the contingent claim against the insurance company is an asset in Utah of the Leigh estate (see petition for appointment of administrator in Record.) We believe it is not such an asset.

2. As any judgment obtained by Watkiss would merely occupy the status of an allowed claim against the Leigh estate in Utah and payable out of Utah assets in the regular course of administration and as there can be no resort to the insurance company to satisfy the judgment and as there is no other property out of which that judgment could be satisfied, it was error to appoint Watkiss because there was nothing for him to do.

3. The appointment of Watkiss was a useless proceeding and the court under *Utah Code Annotated, 1953*, Sec. 75-6-1, had authority to revoke his letter. This the court should do when, if judgment goes in his favor, plaintiff can gain nothing. The insurance company should not be put to the expense of defending a case which, in any event, would result only in a worthless judgment.

It is respectfully submitted that this Court should affirm the order of the trial court revoking

the appointment of David K. Watkiss as the Administrator of the Estate of Phyllis Rosander Leigh.

Respectfully submitted,

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