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CONFLICT OF LAWS-DEATH BY WRONGFUL ACT-RECOVERY UNDER FOREIGN STATUTE

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CONFLICT OF LAWS—DEATH BY WRONGFUL ACT—RECOVERY UNDER FOREIGN STATUTE—*A* was killed in an automobile accident occurring in Illinois. Alleging that defendant wrongfully caused *A*'s death, *A*'s administrator sought recovery in Wisconsin, basing his claim on the Illinois death act.[1] The trial court granted defendant's motion for summary judgment. *Held*, affirmed, two justices dissenting. The Wisconsin death act allows recovery of damages for wrongful death "provided, that such action shall be brought for a death caused in this state."[2] It follows that maintenance of an action for a death caused in a sister state is against the public policy of Wisconsin. *Hughes v. Fetter*, 257 Wis. 35, 42 N.W. (2d) 452 (1950).

It is generally held that a tort action may be maintained in any state where the wrongdoer is amenable to process, and that the creation and extent of his liability is governed by the law of the place where the alleged tort was committed.[3] Because there was no common law civil action for wrongful death, the courts were at first hesitant to apply this rule to statutory wrongful death actions;[4]

[1] Ill. Ann. Stat. (Smith-Hurd, 1936) c. 70, §1.

[2] Wis. Stat. (1949) §331.03.

[3] GOODRICH, CONFLICT OF LAWS, 3d ed., §92 (1949); 15 C.J.S., Conflict of Laws §4; 11 AM. JUR., Conflict of Laws §§180, 182.

[4] Kahl v. Memphis & Charleston Ry. Co., 95 Ala. 337, 10 S. 661 (1891); Marshall v. Wabash Ry. Co., (C.C. Ohio 1891) 46 F. 269; Anderson v. Milwaukee & St. Paul Ry. Co., 37 Wis. 321 (1875); Woodard v. Michigan Southern & Northern Indiana Ry. Co., 10 Ohio St. 121 (1859). The early cases were quick to hold the foreign statutes penal in character and thus not enforceable. Adams v. Fitchburg Ry. Co., 67 Vt. 76, 30 A. 687 (1894); O'Reilly v. New York & New England Ry. Co., 16 R.I. 388, 17 A. 906 (1884); Richardson v. New York Central Ry. Co., 98 Mass. 85 (1867).

but today, with the adoption of some kind of death act in every state, the overwhelming weight of authority permits recovery in actions based on foreign death statutes unless contrary to the public policy of the state where suit is brought.[5] In fact, however, this public policy exception has been limited almost exclusively to cases where there is a substantial difference between the foreign statute and the statute of the forum,[6] and there is respectable authority for the view that dissimilarities between the two statutes are immaterial.[7] The proviso found in the Wisconsin death act[8] has remained unchanged since the statute was first enacted in 1857.[9] Yet, the history of wrongful death actions brought in Wisconsin has been much the same as in other states. At first, actions based on foreign statutes were not allowed;[10] but from 1904 until the day the principal case was decided,

[5] GOODRICH, CONFLICT OF LAWS, 3d ed., §103 (1949); 2 BEALE, CONFLICT OF LAWS §378.3 (1937); CONFLICT OF LAWS RESTATEMENT §392; Dennick v. Central Ry. Co., 103 U.S. 11, 26 L.Ed. 439 (1880). Although the Supreme Court has not settled the point, it has been assumed by most courts, and expressly stated by others, that this result is not required by the full faith and credit clause of the Federal Constitution. State v. District Court, Hennepin County, 140 Minn. 494, 168 N.W. 589 (1918); Dougherty v. American McKenna Process Co., 255 Ill. 369, 99 N.E. 619 (1912). In McCoubrey v. Pure Oil Co., 179 Okla. 344, 66 P. (2d) 57 (1937), the Oklahoma court denied recovery on the ground that there was great doubt as to the construction of the Texas statute, and whether the decisions of that state entirely settled the question of plaintiff's right of recovery.

[6] For a complete collection of cases, and a discussion of which dissimilarities are enough to deny recovery, see 77 A.L.R. 1311 (1932). The writers are practically unanimous in the view that the use of public policy to bar recovery in such actions should be extremely limited, some intimating that there are no interstate policy differences important enough to bar actions based on foreign statutes. See Nussbaum, "Public Policy and the Political Crisis in the Conflict of Laws," 49 YALE L.J. 1027 (1940); Rose, "Foreign Enforcement of Actions for Wrongful Death," 33 MICH. L. REV. 545 (1935); Nutting, "Suggested Limitations of the Public Policy Doctrine," 19 MINN. L. REV. 196 (1935); Goodrich, "Public Policy in the Law of Conflicts," 36 W.VA L.Q. 156 (1930).

[7] Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918); Richardson v. Pacific Power & Light Co., 11 Wash. (2d) 288, 118 P. (2d) 985 (1941); Rose v. Phillips Packing Co., (D.C. Md. 1937) 21 F. Supp. 485; Herrick v. Minneapolis & St. Louis Ry. Co., 31 Minn. 11, 16 N.W. 413 (1883); affd., in 127 U.S. 210, 8 S.Ct. 1176 (1888).

[8] See note 2 supra. For many years, the Illinois death act provided that "no action shall be brought or prosecuted in this state to recover damages for a death occurring outside this state." Ill. Rev. Stat. (Cahill, 1933) c. 70, §2. This statute was construed as a legislative denial of the jurisdiction of the Illinois courts unless death occurred, or was caused, in Illinois. Carroll v. Rogers, 330 Ill. App. 114, 70 N.E. (2d) 218 (1946); Wall v. Chesapeake & Ohio Ry. Co., 290 Ill. 227, 125 N.E. 20 (1919); Crane v. Chicago & Western Indiana Ry. Co., 233 Ill. 259, 84 N.E. 222 (1908). In Kenney v. Supreme Lodge, 252 U.S. 411, 40 S.Ct. 371 (1920), it was held that Illinois courts are required by the full faith and credit clause of the Federal Constitution to take jurisdiction of a suit brought on a judgment recovered in Alabama under the Alabama death act. To the effect that the Federal Constitution does not permit the Illinois statute to deprive federal courts sitting in that state of jurisdiction, see Davidson v. Gardner, (7th Cir. 1949) 172 F. (2d) 188; Stephenson v. Grand Trunk Western Ry. Co., (7th Cir. 1940) 110 F. (2d) 401. However, in 1935, this prohibition was limited to cases where service of process could be had in the state where death occurred. Ill. Ann. Stat. (Smith-Hurd, 1936) c. 70, §2. In view of the construction of the original statute, the phrase "where death occurred" will no doubt be held to include the state where death was caused when the question arises. See supra this note. Wisconsin and Illinois appear to be the only states with any such proviso in their statutes.

[9] Wis. Laws (1857) c. 71, §1.

[10] Anderson v. Milwaukee & St. Paul Ry. Co., supra note 4.

the Wisconsin court consistently adhered to the general rule without even a suggestion that it violated the public policy of that state.[11] Moreover, it seems extremely doubtful that the Wisconsin legislature intended the proviso to be interpreted as closing the doors of its courts to such actions,[12] especially since the construction adopted in the principal case is not necessary to give meaning to the proviso. In the only case heretofore construing this clause, the court held that the object and effect of the proviso was to allow recovery in actions brought under the Wisconsin statute in "cases where death was *caused* by acts committed or occurring within the state, *without regard to whether the death occurred within or without it.*"[13] The natural consequence of the decision in the principal case in many situations will be to immunize Wisconsin residents from civil liability for deaths caused by them in other states as long as they remain within the protective custody of Wisconsin's borders,[14] a result that is not only in conflict with the law of every other state, but which is obviously unconscionable in view of our present-day concepts of justice and common decency. It is submitted that this decision was reached without a thoughtful consideration of either the true public policy of the Wisconsin statute, or the public policy set forth in decisions of the courts of Wisconsin and all other states.[15] However, since the principal case has been appealed to the Supreme Court of the United States on grounds that the full faith and credit clause of the Federal Constitution requires the Wisconsin court to take jurisdiction, the injustice of this decision may thus be rectified.[16]

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[11] Bain v. Northern Pacific Ry. Co., 120 Wis. 412, 98 N.W. 241 (1904); White v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 147 Wis. 141, 133 N.W. 148 (1911); Anderson v. Miller Scrap Iron Co., 176 Wis. 521, 182 N.W. 852 (1922); Sheehan v. Lewis, 218 Wis. 588, 260 N.W. 633 (1935) (death was caused in Illinois, but the court rejected defendant's contention that because Illinois does not permit suit for a death caused outside the state, plaintiff should be barred by reciprocity); Switzer v. Weiner, 230 Wis. 599, 284 N.W. 509 (1939).

[12] Forty-six years of legislative acquiescence would seem to indicate agreement with the construction heretofore given the statute.

[13] Rudiger v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 94 Wis. 191 at 195, 68 N.W. 661 (1896) (italics added). And, in Sheehan v. Lewis, supra note 11, after quoting the absolute version of the Illinois statute, the court said at page 593, "Wisconsin has no such statute."

[14] Sweet v. Givner, (D.C. Ill. 1934) 5 F. Supp. 739. To the effect that this was probably the reason for the revision of the Illinois statute, see 25 CHI.-KENT L. REV. 338 (1947). Because most states have statutes providing for constructive service on non-resident defendants in actions arising out of automobile accidents occurring in the state, this result will not be as harsh in those cases. See annotations on these statutes in: 82 A.L.R. 768 (1933); 96 A.L.R. 594 (1935); 125 A.L.R. 457 (1940).

[15] "Its [i.e., public policy's] very facility is its most unfortunate trait. In its somewhat cavalier dismissal of foreign law, it dispenses with the necessity for close analysis, for an affirmative appraisal of the situation upon which judgment must be passed." Cavers, "A Critique of the Choice of Law Problem," 47 HARV. L. REV. 173 at 184 (1933).

[16] See note 5 supra. The appeal was scheduled to be heard in the early part of March and is docketed as No. 355. See 19 LAW WEEK 3125, 3205.