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Conflict of Laws--Public Policy--Enforcing Foreign Wrongful Death Statute (Hughes v. Fetter, 71 Sup. Ct. 980 (1951))

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Halvey,[23] the Court emphatically sustained the applicability of the full faith and credit clause to foreign custody awards. It stressed the view, however, that subsequent modifications thereof by the court of the forum, based on changed conditions affecting the child's welfare, would not necessarily violate the constitutional provision.[24]

The court, in the instant case, was constrained to effectuate the Ohio decree unless changed conditions affecting the welfare of the child since the date of its rendition obviated its modification.[25] The refusal to recognize the decree of a court having *in personam* jurisdiction over the litigants, in the state of the parties' domicile, was contrary to the weight of authority.[26]

CONFLICT OF LAWS — PUBLIC POLICY — ENFORCING FOREIGN WRONGFUL DEATH STATUTE.—Decedent, a resident of Wisconsin, was fatally injured in an automobile accident in Illinois. Plaintiff administrator brought an action in Wisconsin predicated upon the Illinois wrongful death statute.[1] The complaint was dismissed on the ground that Wisconsin's own wrongful death act [2] announced a public policy against the trial of causes based on the death acts of other states. Plaintiff contended that this construction of the Wisconsin statute violated the "full faith and credit" clause of the Federal Constitution.[3] *Held*, reversed and remanded. The Supreme Court is the final arbiter, in each case, of competing public policies. Wisconsin's statutory policy must give way to national policy as expressed in the "full faith and credit" clause. *Hughes v. Fetter*, 71 Sup. Ct. 980 (1951).[4]

The mandate of the "full faith and credit" clause has felt the effect of a number of important judicial limitations. Ordinarily, a state is not required to enforce the law of a sister state if it is penal

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[23] 330 U. S. 610 (1947).

[24] Since the court rendering the original decree has the power to modify its decree on the finding of changed conditions, the court of the forum, by its modification on the same basis, would not be doing anything the original court could not do.

[25] The reason for this rule is made apparent in the light of the possible harm to the child and to the prestige of Courts of Justice resulting from any other rule.

[26] See notes 7, 8 *supra*.

[1] ILL. REV. STAT. c. 70, §§ 1, 2 (1949).

[2] This statute, textually similar to many wrongful death acts, concludes: "Provided, that such action shall be brought for a death caused in this state." WIS. STAT. § 331.03.

[3] U. S. CONST. Art IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts . . . of every other State."

[4] *Reversing* Hughes v. Fetter, 257 Wis. 35, 42 N. W. 2d 452 (1950).

in nature,[5] if it is a revenue law,[6] if adequate procedural machinery for enforcement is lacking in the forum,[7] or if the law is repugnant to the public policy of the forum.[8] There has, however, been some difficulty as to what constitutes a statute repugnant to another state's policy.[9] Many of the cases, going the whole length in favor of state policy, have proceeded on the assumption that the question is one of comity, and have ignored the application of the "full faith and credit" clause,[10] or else have summarily rejected any invocation of it.[11]

Dougherty v. American McKenna Processing Co.,[12] the first important case to seriously consider this aspect of full faith and credit, held in favor of the forum, and concluded that Illinois' own wrongful death act[13] provided the expression of public policy which enabled Illinois to refuse enforcement of a New Jersey statute. Subsequent decisions, however, have detracted from the broad ruling of the *Dougherty* case. Some have denied enforcement on the ground that

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[5] Scoville v. Canfield, 14 Johns. 338 (N. Y. 1817).

[6] "To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the power of the courts . . . . It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws." Hand, J., in Moore v. Mitchell, 30 F. 2d 600, 604 (2d Cir. 1929), *aff'd*, 281 U. S. 18 (1930); Wayne County v. American Steel Export Co., 277 App. Div. 585, 101 N. Y. S. 2d 522 (1st Dep't 1950); 25 ST. JOHN'S L. REV. 341 (1951). *But cf.* Milwaukee County v. M. E. White Co., 296 U. S. 268 (1935) (holding that an action may be maintained in a sister state on a *judgment* based on a tax claim).

[7] *See* Arizona Commercial Mining Co. v. Iron Cap Copper Co., 119 Me. 213, 110 Atl. 429, 433 (1920).

[8] Dougherty v. American McKenna Process Co., 255 Ill. 369, 99 N. E. 619 (1912); Gray v. Blight, 112 F. 2d 696 (10th Cir.), *cert. denied*, 311 U. S. 704 (1940). *Cf.* Wallan v. Rankin, 173 F. 2d 488 (9th Cir. 1949).

[9] A difference in substantive rights arising under a foreign statute will not necessarily render the statute against the public policy of the forum. Whitney v. Penrod, 149 Neb. 636, 32 N. W. 2d 131 (1948); in Loucks v. Standard Oil Co. of New York, 224 N. Y. 99, 111, 120 N. E. 198, 201 (1918), Cardozo, J., said: "Similarity of legislation has indeed this importance; its presence shows beyond question that the foreign statute does not offend the local policy. But its absence does not prove the contrary."

[10] Chambers v. B. & O. R. R., 207 U. S. 142 (1907); Union Trust Co. v. Grosman, 245 U. S. 412 (1918).

[11] "Such causes of action are enforced as a matter of comity. Neither the Full Faith and Credit Clause nor the Privileges and Immunities Clause of the Constitution requires their enforcement when contrary to state policy." State *ex rel.* Bossung v. District Court of Hennepin County, 140 Minn. 494, 168 N. W. 589 (1918).

[12] 255 Ill. 369, 99 N. E. 619 (1912).

[13] "No action shall be brought or prosecuted in this state to recover damages for a death occurring outside the state." HURD'S ILL. STAT. 1290 (1911). This section has since been amended and the absolute prohibition therein relaxed. "Provided . . . that no action shall be brought . . . in this State to recover damages for a death occurring outside of this State where a right of action . . . exists under the laws of the place where such death occurred and service of process . . . may be had upon the defendant in such place." ILL. REV. STAT. c. 70, § 2 (1937), as amended by act approved June 12, 1935.

the death statute in question was penal.[14] *Waltz v. Chesapeake & O. Ry.*[15] treated the death act of Illinois[16] as a jurisdictional limitation imposed on the Illinois courts by their legislature.[17] The foreign statute involved in that case was enforced, nevertheless, on the basis that the limitation did not apply to a federal court sitting within the forum.[18]

This trend, which prefers national to state policy, has found ready support even where the controversy has involved conflicting state statutes[19] or a wide divergence in substantive rights.[20] Justification for this subjugation of state policy has been found in the reasoning that the particular statutes sought to be enforced in the foreign forum, do not in fact offend the *basic* public policy as expressed in the *lex fori.* Thus, during the transition from discretionary enforcement to an almost mandatory recognition of foreign substantive rights, the public policy rule has been circumvented,[21] criticized,[22] disguised,[23]

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[14] Clay v. Atchison T. & S. F. Ry., 201 S. W. 907 (Tex. Civ. App. 1918), *aff'd,* 228 S. W. 1072 (1921) (statute setting $5,000 award for wrongful death by common carrier held penal and not enforceable in Texas); McLay v. Slade, 48 R. I. 357, 138 Atl. 212 (1927) (statute basing award on degree of culpability held penal). *Contra:* Loucks v. Standard Oil Co. of New York, 224 N. Y. 99, 120 N. E. 198 (1918). That case involved a Massachusetts statute which provided that the defendant ". . . shall be liable in damages in the sum of not less than $500, nor more than $10,000, to be assessed with reference to . . . culpability. . . ." Cardozo, J., said: "Penal in one sense, the statute indisputably is. The damages . . . are proportioned to the offender's guilt. . . . But the question is not whether the statute is penal in some sense. The question is whether it is penal within the rules of private international law. A statute penal in that sense is one that awards a penalty to the state, or to a member of the public, suing in the interest of the whole community to redress a public wrong. . . . The purpose must be, not reparation to one aggrieved, but vindication of the public justice. . . ." *Id.* at 102, 103, 120 N. E. at 198; *accord,* RESTATEMENT, CONFLICT OF LAWS § 611, comment *d*(4) (1934). *Cf.* Huntington v. Attrill, 146 U. S. 657, 667, 668 (1892).

[15] 65 F. Supp. 913 (N. D. Ill. 1946).

[16] ILL. REV. STAT. c. 70, § 2 (1937). See note 13 *supra.*

[17] Considering the problem on a jurisdictional basis would seem to be a begging of the question, since the *right* of the state to limit the jurisdiction of its courts in such matters is embodied in the *larger* problem of the conflict between state policy and the Full Faith and Credit Clause.

[18] Waltz v. Chesapeake & O. Ry., 65 F. Supp. 913 (N. D. Ill. 1946). The U. S. Court of Appeals for the 7th Circuit arrived at the opposite conclusion in Trust Co. of Chicago v. Penn. R. R., 183 F. 2d 640 (1950), relying on Woods v. Interstate Realty Co., 337 U. S. 535 (1949).

[19] Richardson v. Pacific Power and Light Co., 11 Wash. 2d 288, 118 P. 2d 985 (1941).

[20] See note 9 *supra.*

[21] Waltz v. Chesapeake & O. Ry., 65 F. Supp. 913 (N. D. Ill. 1946).

[22] Richardson v. Pacific Power and Light Co., 11 Wash. 2d 288, 118 P. 2d 985, 992 (1941). "There is a strong public policy favoring the enforcement of duties validly created by the law governing their creation . . . . The desirability of uniform enforcement . . . is especially strong among the States of the United States. Differences in policy among them are of minor nature, and for the most part relate to internal affairs." RESTATEMENT, CONFLICT OF LAWS § 612, comment *c* (1934).

[23] See note 14 *supra.*

and in some cases simply not applied.[24]

The principal case, on cursory examination, appears to be the final step in the *whittling* process. However, in view of the reliance placed on the particular facts involved,[25] it is submitted that this is but another judicial refusal to apply the public policy rule where there is no compelling reason to do so. As stated by the court, ". . . [Wisconsin] has no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature. . . ." [26] The soundness of this logic is patent. To prevent undue subjugation of state sovereignty to national accord, the public policy rule should be kept alive for the exceptional case that demands its application. But needless application of the rule can lead only to the subversion of justice, and, perhaps, to the abrogation of the rule itself.

CONSTITUTIONAL LAW — STATE CONTROL OF INTERSTATE COMMERCE IN NATURAL GAS.—Appellant embarked upon a program of direct sales to industrial consumers in Michigan. A contract for such was negotiated with Ford Motor Co. which already was being supplied by a Michigan public utility which in turn received its supply of natural gas from appellant. The sales were admittedly interstate commerce. The question presented was whether or not the State of Michigan could order appellant to cease and desist from making such sales and deliveries until such time as it should first have obtained a certificate of public convenience and necessity from the Michigan Public Service Commission to perform such services. *Held,* affirmed. The sales, though in interstate commerce, were essentially local in character, and, therefore, in the absence of a federal regulation, subject to state control. *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.,* 71 Sup. Ct. 777 (1951).

The permissible extent of the states' right to regulate industries and goods in interstate commerce has long been a perplexing problem. Nevertheless, certain first principles are clear. The generally accepted test was first set forth in the famed *Cooley* case.[1] There

[24] Bagley v. Small, 92 N. H. 107, 26 A. 2d 23 (1942); Richardson v. Pacific Power and Light Co., 11 Wash. 2d 288, 118 P. 2d 985 (1941).

[25] ". . . the present case is not one lacking a close relationship with the state. For not only were appellant, the decedent and the individual defendant all residents of Wisconsin when this suit was brought, but also appellant was appointed administrator and the corporate defendant was created under Wisconsin laws. . . . Wisconsin may well be the only jurisdiction in which service could be had as an original matter on the insurance company defendant." Hughes v. Fetter, 71 Sup. Ct. 980, 983 (1951).

[26] Hughes v. Fetter, *supra* note 25 at 982.

[1] Cooley v. Port Wardens of Philadelphia, 12 How. 299 (U. S. 1851).