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A SHORT EXCURSION INTO THE FIELD OF CONFLICT OF LAWS IN WISCONSIN

By CLIFTON WILLIAMS*

IT IS quite unusual for the writer of an article for a LAW REVIEW to admit in the first paragraph that the article is a piece of mental gymnastics, or that the product is intended for entertainment purposes. The admission here does not go quite that far, but the writer does desire to state in the opening paragraph that there is no great reform being advocated here, the article merely contains a suggestion.

In the case of the *Northwestern Mutual Life Insurance Company vs. Adams*, 155 Wis. 335, at page 337, Chief Justice Winslow said, "That field of law which goes by the name of the conflict of laws is one of the most thorny and difficult fields to traverse. It is full of conflicting decisions, refined reasoning, and unsatisfactory results."

The American Law Institute has progressed very well with its restatement of the general principles applicable to the subject referred to in the above quotation, but up to the present time that restatement has not found its way into the body of law evidenced by decisions; but it is not the purpose of this article to show how the restatement conflicts with various Wisconsin decisions, although there is plenty of conflict. One of the purposes of this article is to attempt to demonstrate that the quotation from Chief Justice Winslow is true when applied to the decisions of our own Supreme Court, and then to predict that the remedy lies in some form of codification. As far as the decisions of our own Supreme Court are concerned, we have several sharp conflicts within the field of conflicts of laws, and it is one of the primary purposes of this article to point out a few of these internal conflicts.

An illustration of what may be done by statutory codification is demonstrated by referring to section 328.01 of the statutes, which reads as follows: "The courts of this state shall take judicial notice of the statutes of the United States, and of the courts and territories thereof." Prior to 1921, much of our difficulty in this field of conflict of laws was due to the fact that the courts of this state could not take judicial notice of the statutes of other states and territories. Of course, this new statute has no effect upon a case involving only common law principles, and it is only cited here as an illustration of what can be accomplished by codification.

It will possibly be a surprise to some readers to find that a tort was not fully transitory into Wisconsin until the case of *Bain vs.*

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Northern Pacific Ry. Co., 120 Wis. 412, overruled the case of *Anderson vs. M.&St.P. Ry. Co.*, 37 Wis. 321,—especially in cases where the forum had not provided a remedy for similar torts which had occurred in the jurisdiction of the forum, although the recovery clearly would not be against public policy at the forum. It seems a bit startling now to discover that for years Wisconsin had not permitted a remedy for a tort which had occurred in another state if a similar tort was without a remedy in Wisconsin due to assumption of risk or some defensive proposition; but it is a fact that *Anderson vs. the Ry. Co.* stood as the law during the publication of almost one hundred volumes of reports in Wisconsin, in fact from 1875 to 1904. The doctrine of *lex loci delicti* was ignored in the *Anderson* case to the extent that it was not even mentioned. The error in that case is typified by the following sentence: "The action here is a personal action, for personal injury, governed by the *lex fori*," and the matter is then completely brushed aside with the following sentence: "This is almost too familiar a principle for discussion or authority." At that time (1875), the "familiar principle" was already the other way,—There were many cases in other jurisdictions which pointed out that the law of the forum when applied to a tort transitory in character, would be applied to nothing but the manner of enforcement; and that the question as to whether or not there was a cause of action was to be determined by the law of the place of the tort,—*lex loci delicti* and not *lex fori*. As pointed out above, this was cleared up in Wisconsin in 1904; but that seems to be a late date.

There are still some decisions to be found in the volumes of Wisconsin Reports which are as clearly out of line with the weight of authority as was the case of *Anderson vs. Ry. Co.*, 37 Wis. 321, which is mentioned above.

For instance, let us look at the case of *D. Canale and Co. vs. Pauly Cheese Co.*, 155 Wis. 541, (it is interesting to note that this case is in the same volume and a little over a hundred pages back of the quotation from Chief Justice Winslow above). The facts are simple. The parties met in Tennessee and orally contracted that the defendant was to sell the plaintiff a quantity of cheese at a stipulated price, free on board cars at Manitowoc, Wisconsin. The amount involved exceeded the permissible oral contract limit in the Wisconsin Statute of Frauds. It was understood that the contract would be reduced to writing, but it never was so reduced. The price of cheese went up. Defendant refused to perform. Plaintiff sued for \$1,250.00, being the increase in the price. The lower court, applying the universal rule, held that the place of the contract was Wisconsin, because the parties contemplated performance in Wisconsin, and dismissed the complaint with costs.

There was a reversal because under the Tennessee Statute of Frauds, the contract was enforceable and the decision is put squarely on the proposition that the parties must have intended a valid contract, although the court points out that the parties contemplated a written contract. In other words, we here meet a new doctrine in the field of conflict of laws to the effect that the presumption of validity will move the contract from the designated place of performance to the place where the parties happened to be at the time of contracting, or to the place of the destination of the shipment in a shipment which was clearly provided to me F. O. B. at a point in Wisconsin. Not a single case is cited in support of this new doctrine of presumption of validity, and several Wisconsin cases were apparently overlooked. Up to that time, the rule that the contract was to be construed in accordance with the agreed place of performance was deep-seated in the law of foreign countries, as well as most other states, and many Wisconsin cases had held contract *void* under that doctrine. It is submitted that if the presumption of validity is to be given weight, then a somewhat complicated subject is to be rendered more complex. Instead of applying rules, are we to go out looking for a state where the contract will be valid?

We will briefly discuss a well known Wisconsin case which was not very old at the time the opinion in *Canale and Co. vs. Pauly Cheese Co.*, 155 Wis. 541, was written, but not mentioned in the opinion. That case is *Brown vs. Gates*, 120 Wis. 349. In that case the laws of four states were involved, and if the presumption of validity is to prevail, there was a fine opportunity to go from one of the four states to the other until a place could be found where the contract was valid, and then determine that it was to be construed as of that state. The defendant in that case lived in Wisconsin. He met the plaintiff, who lived in Massachusetts, in New York, and entered into a deal for some land in Florida. Two notes, each for \$5,000.00, were delivered on Sunday in New York, payable to the plaintiff in Massachusetts. It is not necessary to mention that there was a confirmation on Monday in New York. The case turned on the Sunday law of Massachusetts. Selecting Massachusetts as the place of payment was held to be the place of agreed performance, thus locating the contract. It must be remembered that it was a general rule at common law that the actual place of the making of a contract was to control unless there was a clear designation of another place as the place of performance. A presumption of validity would have said that these notes were to be construed according to the law of New York where they were made; or it could even have applied the *lex rei sitae* (of Florida). But the Massachusetts law was applied as the law of the place of agreed per-

formance and the notes were held void in Wisconsin. There certainly is nothing left to the rules built up and known as *lex loci contractus*, and certainly there is nothing left to *lex loci solutionis* if this doctrine of presumption of validity is to be followed.

The next case that will be examined is the case of the *State Bank of West Pullman vs. Pease*, 153 Wis. 9. This case is typical of a line of cases in Wisconsin where our court assumed that our statutes of limitations operate upon the remedy only. This assumption started in the English courts a great many years ago with reference to the statute of frauds, but it will be found that the English statute of frauds does not say that the contract shall be void, but says, "no action shall be brought, etc." There is, of course, a reason for saying that kind of a statute operates only upon the remedy. An examination of our Wisconsin statute of limitations, however, does not reveal any such language. There is nothing in our statute of limitations upon which to found any contention that our statute of limitations has any extra-territorial effect, or was ever intended to apply to a set of facts brought in from another state as a transitory cause of action *ex contractu*. The unsoundness of the application of a local statute of limitations to a transitory cause of action is revealed when we assume that contracts are brought in from two different states, first from Illinois where the limitation is ten years, and then from some other state where the limitation is, we will say, five years. If we apply our six year statute we have cut off four years of vitality of the transitory action coming from Illinois, but the same token we have added one year to the cause of action coming from the other state. The case of *State Bank of West Pullman vs. Pease*, 153 Wis. 9, did the very thing suggested above,—i.e., it cut off four years of the vitality of an Illinois promissory note. The note was not only made in Illinois, but it was made payable in Illinois at a time when the defendant had his residence in Illinois. The case of *Brown vs. Gates*, above, and many other Wisconsin cases will show that the designated place of payment clearly made this an Illinois contract. No one has suggested that our statute of limitations is a public policy proposition. In other words, it is not against public policy in Wisconsin for a note to be good for more than six years. The case of *Drover's Bank vs. Tichenor*, 156 Wis. 251, can be used to show that in dealing with the statute of frauds we look to the *lex loci contractus*. There certainly is more public policy in the statute of frauds than there is in the statute of limitations. We have shown above that in the case of *D. Canale and Co. vs. Pauly Cheese Co.*, 155 Wis. 541, our court was so eager to avoid the Wisconsin statute of frauds that it used the presumption of validity to pick out Tennessee as the place of the verbal contract although the contract specifically provided that performance was to be in Wisconsin. Well,

then,—why be equally eager to apply the *lex fori* to a note not payable in Wisconsin and cut off four years of its legitimate life? One thing is certain and that is that all three of the last mentioned cases cannot be good law. It would be a very simple matter for a codification to clear up this local conflict within the field of conflict of laws.

The marriage status of parties is a very troublesome subject within the field of conflict of laws. Our Wisconsin evasion statute is much in advance of laws of other states and has received the due credit in the various discussions in the meetings of the Commissioners on Uniform Laws where there has been a continued attempt made to turn out a uniform law on marriage and divorce; but there are two Wisconsin cases on marriage which may be used at this point. Although the cases are much alike, the results are opposite. This reference is to *Hall vs. Industrial Commission*, 165 Wis. 364, and *Owen vs. Owen*, 178 Wis. 609. In the Hall case the laws of Wisconsin, Illinois and Indiana are involved. In the Owen case the laws of Wisconsin, Michigan and Illinois are involved. In both cases an Illinois divorce was involved prior to the marriage which came into question in Wisconsin in each case. In the Hall case the parties went from Illinois into Indiana and married within the year prohibited by the Illinois statute. In the Owen case, the parties went from Illinois to Michigan and married within the year prohibited by the same Illinois statute. In both cases the parties then came to Wisconsin where the marriage was questioned. In the Hall case it came into question in a defense to the widows' claim for workmen's compensation, and in the Owen case it came into question because the husband sought an annulment of the marriage. In the Hall case it was held that the Indiana marriage was void, and in the Owen case it was held that the Michigan marriage was valid. In the Owen case it is stated that the Illinois statute was a penal statute and had no effect in Michigan; but the very same statute was involved in the Hall case. In the Hall case, 165 Wis. at p.370, the court says it is taking an unsupported step in the right direction. The Owen case is thirteen volumes later. Did we step back?

It seems necessary to add to section 245.04 and kindred sections of our statute in order to go further with our codification and attempt to prescribe definitely just what marriages shall be void and what marriages shall be valid in Wisconsin where parties did not in fact leave the state to get a divorce or to be married as an evasion of our laws, but subsequently came into the state where the marriage status or divorce rights of the parties became involved.

The finished product of the American Law Institute on the Restatement of The Law in this field is about to be turned out. Wisconsin has an opportunity to again be a leader in progressive legisla-

tion by taking this restatement and drawing up a simple codification of the principles involved in the field of conflict of laws,—in this way taking what might easily be the first step in showing how the Restatement of the Law is to become woven into the legal fabric of this country.

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