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CONFLICT OF LAWS—EXTRATERRITORIAL EFFECT OF STATUTE MAKING INSURANCE COMPANY DIRECTLY LIABLE FOR INSURED’S TORT

The case of Lieberthal v. Glens Falls Indemnity Co.*, recently decided by the Supreme Court of Michigan, raises some questions as to certain phases of the Conflict of Laws. In that case, the plaintiff, a resident of the state of Michigan, brought suit against the defendant insurance company as sole defendant in the Michigan courts. Plaintiff contended that he was injured in an automobile accident in the city of Waukesha, Wisconsin, that occurred through the negligence of a cab company in whose cab he was riding. The cab company carried motor liability insurance in the Glens Falls Indemnity Company of Glen Falls, New York, which company also carries on its business in the state of Michigan and Wisconsin. An indemnity policy had been issued to the alleged tort feasor in Wisconsin which by virtue of section 85.93 of Wisconsin Statutes creates a direct liability on the part of the insurance company to the party injured through the negligence of the insured named in the policy.† The plaintiff sought to recover his damages by virtue of this policy and the Wisconsin statute which created a direct liability to him on the part of the defendant insurance company. The supreme court of Michigan, in upholding the trial court’s order to dismiss, held that in as much as Michigan statute specifically prohibits the joining of an insurance company as a party defendant in such a suit,‡ the Wisconsin statute upon which rests the plaintiff’s right to sue the insurance company as sole defendant is contrary to the public policy of the state of Michigan and will not be recognized or enforced in the courts of Michigan. Not deciding the controversy between the plaintiff and the defendant as to whether the Wisconsin law is procedural or substantive in character, the court declared the right existed in the state of Michigan to refuse to enforce such law of a foreign state regardless of it being substantive or procedural in nature.

The ground upon which the Michigan court based its decision is no doubt sound when considered in the light of the principles of the Conflict of Laws. A tort committed in another state creates a

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*24 N. W. 2d 547 (1946).
†Wis. Stat. (1945), 85.93 ACCIDENT INSURANCE, LIABILITY OF INSURER. "Any bond or policy of insurance covering liability to others by reason of the operation of a motor vehicle shall be deemed and construed to contain the following conditions: That the insurer shall be liable to the persons entitled to recover for the death of any person, or for injury to person or property, irrespective of whether such liability be in praesenti or contingent and to become fixed or certain by final judgment against the insured, when caused by the negligent operation, maintenance, use or defective construction of the vehicle described therein, such liability not to exceed the amount named in said bond or policy."
right of action that may be sued upon in a different state unless public policy of the state of the forum forbids. This is no doubt the rule which is most generally accepted in the United States. However, in those jurisdictions wherein the common law prevails the above rule is not generally accepted, as for example in England wherein the tort committed in the foreign jurisdiction must likewise be a tort under the English law. However, as is pointed out in Loucks v. Standard Oil Co., some states have attempted a compromise between the rule generally accepted by the American states and the rule as limited by the laws of England. The courts of such jurisdictions have gone even further than the Michigan court and the courts of the majority of American jurisdictions in placing public policy as a bar to the enforcement of such a right and yet fall short of the English extremity. These states require that there be between the law of the foreign jurisdiction wherein the tort was commi

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23 Comp. Laws 1929, sec. 12460, Stat. Ann. sec. 24.296 “In such original action such insurance company or other insurer, shall not be made, or joined as a party defendant, nor shall any reference whatever be made to such an insurance company, or other insurer, or to the question of carrying of such insurance during the course of trial.”


of one of these qualifications as a reason for denying relief in the
state of the forum is in effect then the controlling decision as to
whether an extraterritorially created right will be enforced. While
recognizing the existence of such a right, the court need not enforce
it if it determines that one or the other, or all, of the qualifications
argue against its enforcement.

“There is grave danger, however, that the constant repetition
of such phrases (that a substantive right is transitory and fol-
lows the person wherever he may be) may induce the belief
that the application of the foreign law is imposed upon the
courts of the forum from without, when in truth the forum
acts in perfect independence according to its own notions of
what is right and proper.” 9

So also to the same effect, that the enforcing of a substantive right
created by a foreign jurisdiction rests, within proper limits, within
the discretion of the state wherein such right is attempted to be
enforced:

“A right having been created by the appropriate law, the
recognition of its existence should follow everywhere . . .
Though a foreign right must be recognized as existing, it
does not follow that it will be given any legal force . . . The
general principle is, that when a right has once been created
by the proper law it will be enforced everywhere, even where
it could not originally have been created upon the same facts.
And this is true, even if the right is against a citizen of the
state in which it is enforced.

But since the enforcement comes through the domestic law,
that law may refuse to give any effect to the right; and though
enforcement will not be denied merely because the creation of
the right is opposed to the domestic law, it will always be
denied where there would be anything illegal in the enforce-
ment itself. The law will not cause its own harm. Thus the enforce-
ment will be denied where the right was created abroad in
evulsion or fraud of the domestic law, or where it is injurious
or of bad example or against the public policy or against
morality . . .” 9

When a law of a foreign jurisdiction is enforced in the state of
the forum it must be remembered that it is not enforced because
of the existence of the foreign statute which does not extend ex
proprio vigore beyond the state which enacted it, but because that
right which was vested elsewhere legitimately belongs to the plain-
tiff and belongs to him wherever he might be.

“In all these cases the matter must, it seems, be determined
theoretically by the law governing the transaction, i.e., the

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8 “The Theory of Qualifications and the Conflict of Laws,” 20 Columbia Law
Review 247 at P. 279.
9 Beale, Summary, Sec. 43, 48, 49.
law of the place where the parties act in making their agree-
ment. If by the law their acts have no legal efficacy, then no
other state can give them greater effect. If by the law of that
state their acts created a binding obligation upon the parties,
then the parties who have acted under that law must be bound
by it..."

While the subject matter under consideration in the article of which
the above quotation is a part was the question as to what law governs
the validity of a contract, (the intent of the parties; the law of the
place of the performance of the contract; or the law of the place
of the making of the contract) it does not appear to be an un-
warranted application to apply the reasoning which supports the
latter rule mentioned in support of the theory that a liability to a
third party beneficiary created by the law of the place of the making
of the contract should be enforced outside the jurisdiction wherein
the contract was entered into. That a plaintiff's right to sue an
insurance company as sole defendant under a liability policy is a
right vested against a third party within the terms of the contract
itself by virtue of sec. 85.93 of the Wisconsin statute is supported
by our own Wisconsin court. "It must be noted that the terms and
conditions of Sec. 85.93 Stats. are a part of the insurance policy
with like effect as though printed in the policy..." Whether this
right is a substantive one or one of procedure is a problem which we
shall not discuss here but which has been considered in both the
states of Michigan and Wisconsin.2

In the Lieberthal case3 the dissent recognizes the right of dis-
cretion in the forum state to refuse to enforce a contract made in
and legal in another state if the performance thereof in the jurisdic-
tion of the forum would be contrary to the law of the latter. However,
the dissenting justice maintains that where a substantive right is
vested elsewhere the state of the forum is bound to enforce it where
such action is not so violently repugnant to its public policy as to
effect its interests as a sovereign state. The dissenting chief justice
then, while in agreement with the majority opinion upon the prin-
ciple that the state of the forum controls the application of the law
of the foreign jurisdiction, parts with the majority on the issue as to
whether the prohibition of the Michigan statutes, relating to the
joining of an insurance company as a defendant, constitutes a legis-

11 Kujawa v. American Indemnity Co., 245 Wis. 361, 14 N.W. 2d 31, 151 A.L.R.
1113 (1944).
12 Oertel v. Fidelity & C. Co., 214 Wis. 681, 251 N.W. 465 (1934); Clayton v.
right arising elsewhere on the basis of its contravening the public policy of the state of Michigan. In view of the statutory provision\(^{14}\) and the numerous state decisions\(^{15}\) which have deplored the inserting of an insurance company's interest in the trial of a negligence case, the majority opinion appears to have decided the question of public policy on reasonable grounds and in accordance with the general principles enunciated in Re Estate Jacob Rahn:

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... which expression (public policy) must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation...''\(^{16}\)
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The question as to whether uniformity in judicial administration between the various American states based on comity should be of greater consideration in suits involving rights arising out of laws of one state but sued upon in another than should adherence to the rules of Conflict of Laws is a question which is open for wide discussion. A pertinent point is made by Beale when he says:\(^{17}\)

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These considerations would seem to indicate that the application of the rule (that public policy can be a bar to a suit based upon a right arising in another jurisdiction) of this section should be extremely limited. This is especially true as between the states of the United States, for not only is there little or no variation in the fundamental policies of their respective laws, but here, even more than elsewhere, a uniform enforcement of right is greatly desirable.''
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\(^{17}\) Beale, Summary, Sec. 612.1 at P. 1651.