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Weston Wardell Jr.

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CIVIL PROCEDURE AND EVIDENCE

Forum—Non-Resident Parties

In *Taylor v. Interstate Motor Freight System*,¹ plaintiff, a resident of Pennsylvania, brought an action for the wrongful death of her husband in an Ohio accident involving two tractor trailers. The decedent's truck was owned by a New York corporation having an office in Buffalo and whose compensation carrier was an out of state corporation, while the defendant truck owner was a Michigan corporation qualified to do business in New York.²

Special Term denied defendant's motion to dismiss the action finding special circumstances which warranted exercise of discretion in favor of assuming jurisdiction. The Appellate Division³ reversed on the ground that Special Term exceeded its discretion.⁴ The Court of Appeals reversed, stating that the entertaining of tort suits between non-residents is discretionary but that there is no express prohibition against such suits.⁵ The Court added that where there are special circumstances they should be given adequate consideration before a decision is reached regarding dismissal.⁶

One of the special circumstances to be considered in this kind of case was the fact that the decedent reported to and was paid by a New York corporation; his widow and nine children receive benefits under the New York Workmen's Compensation Law. The state normally has a definite interest in the payment of these benefits. Under the Workmen's Compensation Law the widow may, within six months after award of compensation sue the negligent defendant and attempt to recover for the wrongful death⁷ or if she does not desire to sue, the claim is assigned to the state or insurance carrier liable for the compensation.⁸ In either

1. 309 N. Y. 633, 132 N. E. 2d 878 (1956).

2. N. Y. GENERAL CORPORATION LAW §210.

3. 285 App. Div. 1010, 139 N.Y.S. 2 131 (4th Dep't 1955).

4. *De La Bouillierie v. De Vienne* 300 N. Y. 60, 89 N.E. 2d 15 (1949); *Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N.Y. 152, 160, 139 N.E. 223 (1923).

5. *Bata v. Bata*, 304 N.Y. 51, 56, 105 N.E. 2d 623, 626 (1952).

6. The Appellate Division on remand, exercised its discretion and granted defendant's motion to dismiss, 1 App. Div. 2d 933, 150 N.Y.S. 2d 84 (4th Dep't 1956).

7. N. Y. WORKMEN'S COMPENSATION LAW §29 (1) . . . If such injured employee, or in case of death, his dependents, take or intend to take compensation, and medical benefits in the case of an employee under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation . . .

8. N. Y. WORKMEN'S COMPENSATION LAW §29 (2) If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefore by subdivision one, such failure shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to . . . insurance carrier liable for payment of such compensation. (In the instant case the state had only an administrative interest because the funds were not paid by the state but by an out of state compensation carrier.)

case the state would benefit from the collection of damages and state funds expended would be repaid.

Further, when this action was originally brought the Statute of Limitations in Pennsylvania had expired. The widow then had a choice of forum in three states: New York,⁹ Ohio¹⁰ and Michigan.¹¹ The plaintiff chose to sue in New York, which assumed jurisdiction; but by the time of remand to the Appellate Division the Ohio and Michigan Statutes of Limitations had run. The Appellate Division's subsequent dismissal¹² left plaintiff without a forum and precluded her from bringing any further action.

While the subsequent exercise of discretion by the Appellate Division may seem harsh because of the plaintiff's present lack of forum, it cannot be said that the Appellate Division abused its discretion in view of the fact that the state's interest, in the instant case, and under its particular facts, was administrative only.

Municipal Corporations—Notice of Claim

Where it is a condition precedent to the bringing of a tort action against a municipality that a prior notice of claim be made, such notice must be given within 90 days after the claim arises.¹³ However, where the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a timely notice, the court in its discretion may grant leave to serve the notice of claim within a reasonable time after the expiration of the 90 day period if application is made within one year after the claim arises.¹⁴

Leave to file a late notice has been granted where claimant's affidavit disclosed a physical and mental incapacity during the statutory period;¹⁵ but when claimant's papers do not show that application was within a reasonable time after the

9. N. Y. DECEDENT ESTATE LAW §130 . . . Administrator duly appointed in this state, . . . of a decedent who has left him . . . surviving a wife or next of kin, may maintain an action to recover damages for . . . neglect . . . by which the decedent's death was caused, against a . . . corporation which, would have been liable to an action in favor of decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after decedent's death.

10. OHIO GENERAL CODE §10509 - 167.

11. MICHIGAN STATUTES ANNOTATED §27.711; *Summar v. Besser Mfg. Co.*, 310 Mich. 347, 17 N.W. 2d 209 (1945).

12. See Note 6 *supra*.

13. N. Y. GENERAL MUNICIPAL LAW §50(E)(1).

14. *Id.*, §50(E)(5).

15. *Sullivan v. City of Watervliet*, 282 App. Div. 1097, 126 N.Y.S. 2d 438 (3rd Dep't 1953).