Vanderbilt Law Review

Volume 13
Issue 4 *Issue 4 - October 1960*

Article 10

10-1960

Conflict of Laws -- 1960 Tennessee Survey

Elvin E. Overton

CONFLICT OF LAWS — 1960 TENNESSEE SURVEY

ELVIN E. OVERTON*

INTRODUCTION

A well known text book on Conflict of Laws concludes its opening section with the sentence, "In brief, a Conflict of Laws problem arises whenever a foreign element gets into a legal question."[1] If this definition is accepted, there were about twenty cases of Conflicts of Laws decided during the survey period, in the sense that foreign elements were shown to exist in the facts which appeared. In another sense there were other cases in which it must be suspected that substantial "other state" contacts existed, but in which no express mention appears of such facts. On the other hand, there were only four cases in which the approach was what might be called a typical Conflict of Laws approach.

I. JURISDICTION OF COURTS

A. Foreign Judgments

In the area of Jurisdiction of Courts, the most dramatic problems were involved in cases that suggested rather than dealt with the problems. In *Keene v. Wilkerson*[2] the plaintiff sought to recover in Tennessee on a Virginia judgment rendered against Floyd W. Wilkerson of Martel, Tennessee. The proceeding in Virginia was instituted under the Virginia non-resident automobile drivers statute, and the Secretary of State was served. The Secretary mailed by registered

*Professor of Law, University of Tennessee College of Law.

1. GOODRICH, CONFLICT OF LAWS 3 (3d ed., 1949).
2. 325 S.W.2d 286 (Tenn. App. E.S. 1959).

mail the required papers to Floyd W. Wilkerson, Martel, Tennessee. There were two Floyd W. Wilkersons in Martel involved in the case. The father, Floyd *Wilson* Wilkerson, testified that he received the letters and enclosures but thought that it was something connected with another son, M. L. Wilkerson, and that he filed it in a drawer without telling anyone until after the commencement of the present suit to collect upon the Virginia judgment. The son, Floyd *Woodrow* Wilkerson, testified that he knew nothing of the Virginia proceeding until after the instant suit was instituted. The son filed an answer attacking the Virginia judgment as void for lack of notice and process.

The father testified that when the sheriff appeared to serve process in the instant case, he told the sheriff that the process must have been intended for his son, Floyd, and that he, the father, had never been in Virginia, and that the sheriff left without serving the summons. This testimony was excluded by the lower court as an attempt to contradict a sheriff's return showing service, since the return showed service upon Floyd Wilkerson. The son testified that the process was served upon him.

The decision was simply that the father could testify that he was not served, and that his son was served instead. This seems ultimately sound, since the combined testimony of the father and son did not contradict the return. It is clear that until more testimony is introduced it is not knowable who should be the real defendant in the case, and which of the two Floyd Wilkersons is bound by the Virginia judgment, if any.

The court did not deal with the son's objection to the Virginia judgment. Thus, no answer was given to the question of whether a mail notification sent by registered mail must in fact be received. It has been held that mailing is sufficient without actual receipt,[3] though return receipts are usually required by the statutes.[4] The court did not deal with the possibility that the father was an adult at the home of the son, which would be relevant under many substituted service statutes. There was no occasion to discuss the possibility that the father might be estopped, since his receipt of a notice that he said he knew was not for him might well have led to damage to the plaintiff who proceeded upon the basis that proper mail notice had been received by the intended defendant.

B. Local Attachment Rule—Alimony

A case involved the local attachment rule, when a non-resident wife attempted to use an attachment proceeding against a non-resident

3. Benson v. Benson, 291 S.W.2d 27 (Ky. 1956).
4. BLUME AND JOINER, JURISDICTION AND JUDGMENTS 379 (1952).

husband to collect alimony. In *Pierce v. Pierce*[5] the wife had received a separate maintenance decree in Illinois providing for support payments for child, but none for herself since the defendant husband had no property in Illinois and no job. The plaintiff sought "alimony or separate maintenance *in solido*". She attached real estate in Tennessee belonging to the defendant. The court simply held that under the Tennessee attachment statute[6] attachment is not available, when plaintiff and defendant are residents of the same state, unless the plaintiff swears that the property has been removed to the state to evade the process of law in the state of their domicile or residence. Attention might be directed to other code sections, dispensing with personal service when the defendant is a non-resident of the state,[7] and authorizing the court to exercise in rem power by its decrees.[8] Since personal service cannot be dispensed with except on the basis of in rem power, it would appear that the equity court is authorized to proceed on an in rem basis whenever the defendant is a non-resident.[9] It is hoped that the case does not completely prevent any in rem proceedings between citizens of another state simply because the land has not been removed to Tennessee. The court further said that there was no basis of equitable attachment because there was no evidence that the property was about to be sold to an innocent purchaser, or removed beyond the jurisdiction of the court.

Three cases involved facts that might have raised jurisdiction questions but which were not so treated.[10]

---

5. 325 S.W.2d 253 (Tenn. 1959).

6. TENN. CODE ANN. § 23-609 (1956).

7. TENN. CODE ANN. § 21-212 (1956).

8. TENN. CODE ANN. § 21-1203 ffw (1956).

9. This would seem to be available since the section dispensing with personal service expressly includes other bases of proceedings in addition to those situations in which "judicial and other attachments will lie, under the provisions of this Code, against the property of the defendant." TENN. CODE ANN. § 21-212 (6) (1956).

10. Hill v. Hill, 326 S.W.2d 851 (Tenn. App. W.S. 1959) was a proceeding by husband to set aside a divorce on the ground of fraud, since in her bill the wife had fraudulently alleged that she did not know the address of the defendant, a non-resident. The evidence showed that the husband knew of the intended proceedings and was subsequently in the city in which the proceedings were instituted, and had waited more than a year to make his attack. The apparent basis was estoppel or laches.

Birdsell v. State, 330 S.W.2d 1 (Tenn. 1959) was a criminal charge of contributing to the delinquency of a minor. The relationship began in another state. The court makes it clear that the defendant was punished only for acts "within the jurisdiction of the Criminal Court of Shelby County" rather than for acts in other states or other counties in Tennessee.

Baber v. Baber, 330 S.W.2d 307 (Tenn. 1959) suggests an intriguing case. The question was treated simply as a question of whether an admission in Tennessee of adultery in another state was grounds for divorce as cruel and inhuman treatment. The wife had followed her husband to a motel in Tennessee from Maryland. Which of the parties had been or became residents of Tennessee was not disclosed.

II. FOREIGN JUDGMENTS

Three cases involved in some fashion a sister state judgment. However, nothing was made to turn upon this fact in these cases.[11]

III. ACCESS TO COURTS

Shoenterprise Corp. v. Butler[12] involved the right of a foreign corporation to recover in Tennessee when it had not been domesticated in accordance with the Tennessee statutes.[13] A Missouri corporation was in the business of lending money to retail shoe stores selling shoes manufactured by a Delaware corporation. The application for the loan was sent to Missouri, the necessary papers were returned to Tennessee for execution, the papers were then sent to Missouri and the formal acceptance was made in Missouri. The court held that the corporation was not doing business in Tennessee within the meaning of the statute, since this was an interstate not an intrastate business, and since the contract would be a Missouri contract and not a Tennessee contract. As a decision that the Tennessee statute does not mean to apply to such contracts it is unassailable. However, the implication that if it had been an intrastate contract that the contract would be so illegal as not to permit the plaintiff to recover upon it is not so clearly sound.[14]

A case involving the right of a wife to sue her husband's employer

11. Keene v. Wilkerson, *supra* note 2 and accompanying text, was a suit on a Virginia judgment. The only question discussed was whether the defendant could show that in the Tennessee proceedings, not he, but his son of the same name, was served.

Pierce v. Pierce, *supra* note 5 and accompanying text, was an attempt to collect alimony or support, when there had been a separation decree in another state. The only question discussed was the availability of attachment by a non-resident against a non-resident, both residents in the same state.

Cumbo v. State, 326 S.W.2d 454 (Tenn. 1959), involving a conviction of being a habitual criminal, dealt with a North Carolina conviction. Variations between the records in North Carolina and the Tennessee indictment relating to the name of the defendant, and the names of the victims were held to be non-fatal.

12. 329 S.W.2d 361 (Tenn. App. M.S. 1959). See Gilreath, *Bills and Notes—1960 Tennessee Survey*, 13 VAND. L. REV. 997 (1960).

13. TENN. CODE ANN. §§ 48-901 to -908 (1956).

14. The penalty section of the Code provides for a penalty of from $100 to $500 for each offense. Each day is a separate violation. TENN. CODE ANN. § 48-908 (1956). The normal rule that when a penalty is provided by statute, the courts should not add to them would seem applicable. It is obvious that the additional penalty may be all out of proportion to the statutory one. Attention is invited to the fact that in other fields, such as the recovery by an unlicensed dealer, the legislature has provided that the contract should not for that reason be unenforceable. TENN. CODE ANN. § 67-4015 (1956). This amendment was made in 1937. Tenn. Public Acts 1937, ch. 108, art. III, § 14. Even as late as 1949, the court held that such unlicensed contractors could not recover. Bush Building Co. v. Manchester, 189 Tenn. 203, 225 S.W.2d 31 (1949). The only modern case in Tennessee adhering to the implied rule of the principal case is believed to be United Artists Corp. v. Board of Censors, 189 Tenn. 397, 225 S.W.2d 550 (1949).

for injuries inflicted upon the wife by the husband was treated as a choice of law problem and not as access to courts.[15] A case involving a host and guest in a Virginia accident was also treated as a choice of law problem.[16]

IV. Choice of Law

A. Status

Three cases were decided during the period that might be considered to involve questions of choice of law and status, although in none of the cases was this approach made.

Baber v. Baber[17] might support the rule that the grounds for divorce are controlled by the forum. The domicile of the husband and wife was not mentioned, but it did appear that the wife followed her husband from Maryland to a motel in Tennessee. In Tennessee she acknowledged previous acts of adultery in another state. The court held that this acknowledgment did not amount to cruel and inhuman treatment under the Tennessee law. The court did not, apparently, consider the rule that grounds for divorce recognized by the forum do not have to be grounds in accordance with the law of the state in which committed, nor in accordance with the law of the domicile at the time committed.[18] Accordingly, if it be assumed that one or more of the parties was domiciled in Tennessee, the case more nearly would support the rule sometimes applied that the forum will require that the act of misconduct take place in the domiciliary state, or that it be a grounds for divorce in the former domicile if the conduct took place while they were domiciled elsewhere.[19]

The other two cases do not decide any question of conflicts involving choice of law.[20]

---

15. Lucas v. Phillips, 326 S.W.2d 905 (Tenn. 1957). It is to be noted that the case is reported along with Prince v. Prince, 326 S.W.2d 908 (Tenn. 1959). This adhered to the rule that a wife could not sue her husband for tort committed in Tennessee, and said that the *Lucas* case did not discuss public policy. Therefore, it was said that the *Lucas* case was not controlling on Tennessee policy. See also § IV D. & note 29 *infra*.

16. Fellows v. Sexton, 327 S.W.2d 391 (Tenn. App. E.S. 1959). See note 31 *infra* and accompanying text.

17. 330 S.W.2d 307 (Tenn. 1959). See note 10 *supra*.

18. Goodrich, *op. cit. supra*, note 1, § 128.

19. *Id.* nn. 32 & 33.

20. Pierce v. Pierce, *supra* note 5 and accompanying text, might have raised questions of law controlling support or alimony, or of ability to get alimony or support separately from the initial separation proceedings, but the only issue discussed was availability of the attachment proceedings.

Hill v. Hill, *supra* note 10, was discussed as involving a husband's right to attack a Tennessee divorce on the ground of fraud. Since the husband contended that his marriage in Mississippi was void because he had a lawful wife at the time of the marriage he objected to his wife securing a divorce. The court merely said that under the Tennessee law entering a second marriage in violation of a previous marriage still subsisting was a ground for absolute divorce. Tenn. Code Ann. § 36-801 (2) (1956).

B. Property

One case squarely presented the question of the recognition of a lien on personal property acquired in a sister state. *Boyd v. Interstate Acceptance Corp.*[21] involved condemnation and confiscation of a car for hauling liquor in Tennessee. The statute specifically recognizes that claimants to the property may make a claim but that the claim shall not be allowed unless the claimant shows that he had no reason to believe that the property would be used in violation of the liquor laws, and that he had made inquiry of law enforcement agencies at the place where the other person lived and had acquired his interest.[22] Tennessee residents had purchased the car on credit in Kentucky. The notes had been acquired by a Kentucky finance company. The court held that the validity of the lien or claim was controlled by Kentucky law, and found that Kentucky law did not require any such inquiry or investigation. Justice Tomlinson dissented. He objected to the statement that the "case must be determined by the law of the State of Kentucky." He felt that the rule would result in easy violation since prospective haulers would simply go to other states and buy cars on credit.

Of course, it is supposed that the majority recognized that the "must" arose from Tennessee law, and not from any limitation upon the power of Tennessee to confiscate all interest in cars so used.[23] It should be noted that the finance company which acquired in Tennessee the notes on a similar sale in Tennessee lost its claim in a case decided a few weeks later.[24]

The only question concerning the case is whether a case involving an ordinary descent and distribution problem is controlling authority for such specialized questions.

One case which might have involved a conflict of law problem was

21. 326 S.W.2d 911 (Tenn. 1959).
22. TENN. CODE ANN. § 57-623 (1956).
23. The court said that Sloan v. Jones, 192 Tenn. 400, 241 S.W.2d 506 (1951) was controlling. This case dealt with the question of whether a bank deposit in a Tennessee bank in the name of the husband and wife was joint property by the entireties or individual property. The parties had been domiciled in Tennessee at the time of the deposit, but were domiciled in Alabama at the time of death. The court said that in choosing between the law of the domicile at the time of death, and the law of the place "where the property is" and in which the contract was made, it would choose the law of the place where the contract was made. The court said that Dye v. McCanless, 185 Tenn. 18, 202 S.W.2d 657 (1947) and Evans v. Pearson, 193 Tenn. 528, 246 S.W.2d 964 (1952) were not controlling. In the *Dye* case, the court refused to limit the liquor statute to intended distribution in Tennessee, since this would allow evasion under a feigned intent to transport to other states. A Mississippi cab on its way from Illinois to Mississippi was confiscated. In the *Evans* case the hauler had a permit but had not complied with all the provisions of the statute. He was, he said, on his way from Cairo, Illinois, to Georgia. The car was confiscated.
24. Boyd v. General Motors Acceptance Corp., 330 S.W.2d 13 (Tenn. 1959).

not treated as such in construing a will.[25]

C. Contracts

In the only case directly dealing with the validity of a contract the court found that a contract was a Missouri contract, but did not definitely choose between the law of place of making or performance or law intended by the parties. *Shoenterprise Corp. v. Butler.*[26] A note was "accepted" in Missouri as a result of applications sent from Tennessee, and papers executed in Tennessee by the borrower. The lender had no office or agent in Tennessee. The court simply said that it was a Missouri contract. It cited cases holding that such transactions of "lending money in this state" do not constitute intrastate business under the Tennessee statutes. If the transaction was interstate business, it was not controlled by the Tennessee statute whether it was a Tennessee or a Missouri contract. The case does not offer much help in the confusion in Tennessee in choosing between the law of the place of making, of performance, or place intended by the parties.

The other case that may be considered a ruling on the choice of law in contract cases is not clearly a ruling.[27] Another case which might have involved a conflict of laws point in the construction of a contract was not so treated.[28]

D. Torts

The cases in this field represent the largest number of all the conflict of laws cases decided during the period surveyed.

---

25. Burdick v. Gilpin, 325 S.W.2d 547 (Tenn. 1959). The testator had formerly lived in Tennessee. He became a "resident" of New York. He executed the will there. He died while he resided there. Some of the claimants are apparently Tennessee citizens, others are clearly not. The question was the meaning of the word "issue" and the question of the application of the "Class Rule Doctrine." There was a trust. No mention of the possibility of interpreting in accordance with the law of the domicile of the testator, nor of dealing with the question as one of administration of estates was made. The authorities cited were Tennessee cases. The case may stand for the proposition that interpretation of wills of realty are made in accordance with the law of the situs.

26. 329 S.W.2d 361 (Tenn. App. M.S. 1959). See also notes 12-14 *supra* and accompanying text.

27. Boyd v. Interstate Acceptance Corporation, *supra* note 21. This may be a case applying the law of the situs to the transfer of a chattel. It may be a case applying the law of the place of contracting to the validity of a chattel interest.

28. Central National Ins. Co. v. Horne, 326 S.W.2d 141 (Tenn. App. M.S. 1959). In this case an insurance company sued the insured for breach of the "cooperation clause" in an automobile insurance policy. The problem was one of construing and interpreting the clause. The accident arose in Kentucky. The insured at the time was a resident of Kentucky. He had since moved to Tennessee. The suit in which he did not cooperate was in Kentucky, after the defendant had moved to Tennessee. The insurance company was probably a Nebraska corporation. It was the Central National Ins. Co. of Omaha. There was no mention of any conflict of laws possibility.

Lucas v. Phillips[29] involved the right of a wife to recover against her husband's employer for injuries received as a consequence of her husband's negligent driving in Arkansas on the defendant's business, while the wife was a passenger in the defendant's truck. The court held that the right of the wife to sue was controlled by the law of Arkansas. The court found that since the husband was willful and wanton, that Arkansas would permit a wife to sue her husband. A later case[30] said that the case did not weaken the policy in Tennessee against a wife suing her husband for an injury in Tennessee.

Fellows v. Sexton[31] involved the right of a guest to recover against a host for a Virginia automobile accident. The court said that whether the host was liable was determined by the law of Virginia, and that under Virginia law the conduct did not in and of itself establish gross negligence.

Two cases which might have been deemed to involve problems of choice of law were not so treated.[32]

V. PROCEDURE

The only case which involved a clear cut problem of choice between the characterization substance or procedure, made the characterization procedure without any mention of the fact.[33]

29. 326 S.W.2d 905 (Tenn. 1957). See note 15 *supra.*

30. Prince v. Prince, 326 S.W.2d 908 (Tenn. 1959).

31. 327 S.W.2d 391 (Tenn. App. E.S. 1959). See note 16 *supra.*

32. Morton v. Morton Aviation Co., 325 S.W.2d 524 (Tenn. 1959) involved what may be deemed to be a procedural question. The plaintiff sued a student for damages done to an airplane in Arkansas. The defendant was a student, in the plaintiff school of flying, who was on a cross country flight. The court used a Tennessee statute relating to prima facie proof of fault in a bailment situation as permitting an inference from a statutory presumption, and said that the inference had probative value. No mention was made of any conflict of laws problem. The case may conceivably stand for the proposition that in torts presumptions of the forum are applied irrespective of where the tort arose. It is hoped that it does not so stand. See note 33 *infra.*

Gluck Bros., Inc. v. Turner, 330 S.W.2d 311 (Tenn. 1959) involved a proceeding under the workmen's compensation law. The question was whether the deceased was an employee of the defendant. The deceased was a former employee of the defendant, and had employed a truck owner to deliver a truck load of furniture to North Carolina. The truck owner secured authority from the defendant to bring back a load of plywood from North Carolina. The defendant gave the truck driver an authorization addressed to bearer which authorized the plywood company in North Carolina to deliver the plywood to the driver of the truck. The driver was the deceased, who was killed in North Carolina. The court decided that the decedent was not an employee of the defendant, but was an agent of the truck owner. There was no mention of the possibility of North Carolina law applying either on grounds of master and servant, interpretation of contract, or workmen's compensation.

33. Morton v. Martin Aviation Company, *supra* note 32. The statutory presumption in bailments was held applicable to an action for damage to the bailed chattel, an airplane, damaged in Arkansas on a cross country flight from Memphis to Little Rock and return.