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Elliott E. Cheatham

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CONFLICT OF LAWS—1961 TENNESSEE SURVEY

ELLIOTT E. CHEATHAM*

I. JURISDICTION OF COURTS

1. *Non-Resident Motorists*
2. *Watercraft*

II. TORTS

III. SUPPORT

IV. ADOPTION

V. STATE SEIZURE OF INTANGIBLES

I. JURISDICTION OF COURTS

1. *Non-Resident Motorists*.—The statute subjecting non-residents to suit in Tennessee for injuries inflicted within the state has been extended by interpretation to non-resident parents who join in their minor child's application for a driver's license. In *Leggett v. Crossnoe*¹ the parents of a minor under eighteen years joined with the minor in his application for a driver's license, as required by Tennessee Code Annotated section 54-704. The minor, driving a car owned by a third person, ran down and killed a child on a Tennessee highway. The child's administrator brought an action for the death against the minor, the owner of the car, and the parents of the minor who were residents of Kentucky. The administrator had process served on the parents in Kentucky through the Secretary of State of Tennessee as provided by the non-resident motorists statute. The parents pleaded in abatement that their joinder in the application for their son's driver's license did not bring them within the Tennessee statute on service of process on non-residents, so the original process, and "alias" process served on them within Tennessee, were void. The non-resident motorists statute, Tennessee Code Annotated section 20-2244, provides that "any nonresident . . . who shall . . . procure the use of a motor vehicle licensed under the laws of this state . . . to operate such vehicle on highway or highways within the state" shall be subject to suit under the statute. The supreme court, speaking through Justice Tomlinson, held the parents were subject to suit and to service of process.² Justice Tomlinson relied on the precise

*Professor of Law, Vanderbilt University; former President, Association of American Law Schools; co-editor, Cheatham, Goodrich, Griswold and Reese, *Cases and Materials on Conflict of Laws* (4th ed. 1957).

1. 336 S.W.2d 1 (Tenn. 1960).

2. Though subject to service of process the parents were held not liable for the accident, as the son had given the proof of financial responsibility called for by TENN. CODE ANN. § 59-704 (Supp. 1961).

words of the statute, "who shall . . . procure the use of a motor vehicle." He relied strongly also on "the purpose of the non-resident service of process statute," stressing that the statute "was intended to better afford in Tennessee Courts the enforcement of civil remedies to injured parties against non-residents who might be liable under Tennessee law for those injuries."

2. *Watercraft*.—The principle of the non-resident motorists statutes has been applied to watercraft by a statute³ entitled "Operation of watercraft in state as appointment of agent for process":

The operation, navigation or maintenance by a nonresident or non-residents of a boat, ship, barge or other watercraft in the state, either in person or through others, . . . shall be deemed thereby to constitute an appointment . . . of the secretary of state . . . to be the true and lawful agent . . . for service of process . . . in any suit, action or proceeding against such nonresident or nonresidents growing out of any accident or injury in which such nonresident or nonresidents may be involved while, either in person or through others, operating, navigating or maintaining a boat, ship, barge or other watercraft in the state . . .

The note to the code section indicates that six other states have similar statutes. The new legislation touches one of the most vexed areas in American law, navigable waters and the adjustment of federal admiralty jurisdiction with state jurisdiction. The statute does not assume to make Tennessee substantive law apply to the accident or injury. It deals only with the subjection of the non-resident to suit in the courts of Tennessee.

II. TORTS

In two cases the court of appeals dealt with out-of-state accidents. The principal question was whether the law of the place of the occurrence should be used, or the law of Tennessee since it was the state of the forum.

In *Capital Airlines v. Barger*,⁴ an airplane had crashed in Michigan killing all persons in it. The Tennessee administratrix of a passenger sued for his death under the wrongful death statute of Michigan, alleging negligence of the defendant airline in several particulars. The evidence did not reveal the cause of the accident. The evidence did show that the plane while circling the field at which it was about to land suddenly nosed down at a sharp angle and crashed. The plaintiff recovered a verdict of \$110,000 at a second trial. The defendant appealed on several grounds including insufficiency of the

3. TENN. CODE ANN. §§ 20-231 to -234 (Supp. 1961).

4. 341 S.W.2d 579 (Tenn. App. E.S. 1960).

evidence and excessiveness of recovery. The court, through Judge Hamilton, upheld the plaintiff's contention that the doctrine of *res ipsa loquitur* applied and affirmed the finding of liability of the defendant. Dealing with the law of Tennessee on the subject, the court rejected Tennessee decisions of 1935 and 1943 to the effect that the doctrine of *res ipsa loquitur* does not apply to airplane crashes. The court reasoned that those decisions were reached in the "adolescent stages" of air transportation. It announced as the law of the state that "the principles governing liability of other common carriers should now be equally applicable to transport airplanes operating as such." In considering the conflict of laws question—whether the law of Tennessee or the law of another state should be used—the Court quoted a learned opinion by Judge (now Justice) Felts on the nature of *res ipsa loquitur* as a principle of circumstantial evidence. It held the law of the forum should be used because the doctrine of *res ipsa loquitur* has been recognized in Tennessee as a rule of evidence, and the controlling conflict of laws principle is that questions of evidence are governed by the law of the forum. The measure of recovery, however, was held to be governed by the law of the state of Michigan, the statutes and decisions of which were considered. According to these statutes and decisions, the lack of a loving relationship between the passenger and his surviving wife was relevant to the amount of the recovery, and the exclusion of evidence on this point by the trial judge was found to be erroneous. Instead of ordering a new trial for the error, the court of appeals directed a remittitur of \$12,500 conditional on acceptance by the plaintiff; this the court felt would do substantial justice and avoid a third trial. Interest on the amount of the verdict was computed under Tennessee law, running from the date of the judgment overruling the motion for a new trial.

*Camurati v. Sutton*⁵ involved an unusual accident arising from a Ford's fear of a Cadillac. On a two lane highway in Mississippi a few miles south of the Tennessee line, a Ford car going south and a Cadillac going north approached a bridge together. The Ford, veering too far to its right from the center of the road, struck the bridge abutment on its side of the bridge and was demolished. The Cadillac swerved when its brakes were applied but never struck the Ford. The owner and occupants of the Ford sued the driver and the owner of the Cadillac for personal injuries and destruction of the car. The ground of the action was that the Cadillac was in the wrong lane as the cars approached the bridge and the Ford veered to the right and struck the bridge abutment to prevent what otherwise would have been a headon collision. The plaintiff relied on and proved the

5. 342 S.W.2d 732 (Tenn. App. W.S. 1960).

Mississippi statutes which embody the comparative negligence principle as well as the direction that "all questions of negligence and contributory negligence shall be for the jury to determine." The jury gave a verdict for the plaintiffs. On appeal the defendants urged that there was no evidence to support the verdict. At the trial the plaintiffs stated that the Cadillac was in the wrong lane as it approached the bridge; the driver of the Cadillac and a companion stated the opposite. A state highway patrolman testified from notes made at the scene before the cars were moved that skid marks showed the Cadillac was in its proper lane as the cars approached the bridge. The court of appeals, in an opinion by Judge Avery, held the physical facts testified to by the patrolman made the oral testimony for the plaintiffs of no value, and it reversed the trial court and gave judgment for the defendant. The court of appeals assumed that as Mississippi was the place of the occurrence, the Mississippi law of comparative negligence should govern. On the role of the judge and the jury it found that Mississippi as well as Tennessee law would call for a reversal where "there is no legal doubt as to the conclusions to be drawn from the whole evidence upon the issues." But in determining that the physical facts testified to by the patrolman overrode the oral testimony of the plaintiffs and in considering what amounts to "material evidence" supporting the plaintiffs' claim, the court relied wholly on Tennessee authorities.

The conflict of laws rule indicating the matters on which the forum should use its local law employs the confusing pair of terms, substance and procedure: matters of procedure are governed by the law of the forum, matters of substance are governed by the law governing the occurrence. The same pair of terms, substance-procedure, is used to mark numerous different distinctions in the law. It is all too easy to cite cases that call a matter substance or procedure for one of these purposes as controlling for a wholly different purpose.⁶ The two Tennessee cases here discussed involve the conflict of laws distinction in the perplexing matters of *res ipsa loquitur* and the sufficiency of evidence. The guides to decision, of course, are the policies of conflict of laws relevant to the particular conflict of laws question presented. The best discussion of the matter is a closely analytical article by Professor Morgan on "Choice of Law Governing Proof."⁷

6. A most discerning treatment of the subject is in Cook, "*Substance and Procedure in the Conflict of Laws*," 42 *YALE L.J.* 333 (1933), reprinted in COOK, *THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS* ch. VI (1942). The author points out eight different legal problems in which "this distinction [between substance and procedure] is drawn for a number of different purposes, each involving its own social, economic, or political problem."

7. 58 *HARV. L. REV.* 153 (1944).

After considering carefully the policies in conflict of laws Professor Morgan states his conclusion:⁸

It is time to abandon both the notion and the expression that matters of procedure are governed by the law of the forum. It should be frankly stated that (1) the law of the locus is to be applied to all matters of substance except where its application will violate the public policy of the forum; and (2) the law of the locus is to be applied to all such matters of procedure as are likely to have a material influence upon the outcome of litigation except where (a) its application will violate the public policy of the forum or (b) weighty practical considerations demand the application of the law of the forum.

In both Tennessee cases discussed the court assumed that the substantive law used would be that of the place of the occurrence, and most American decisions so hold. In recent years a few courts have come to hold that particular aspects of the plaintiff's cause of action should be governed by a different law. So it has been held that in intra-family accidents the privilege of one member of a family to sue another member should be governed by the law of the family domicile.⁹ In a dictum the majority of the Court of Appeals of New York stated that the law of the place of an airplane crash, Massachusetts, should not be used to limit narrowly the amount of recovery in a death action.¹⁰ Instead, the court applied the law of New York, which was the place of the decedent's domicile and the place where the ticket was bought and the flight commenced, as well as the forum. In stating this view the opinion ostensibly relied on the old principles that matters of procedure are governed by the law of the forum and that a state will not apply a foreign law that is contrary to its strong public policy. The real ground for the dictum, however, seems to be the emerging conflict of laws principle that the elements of a tort should be governed by the law of the state with which the occurrence has the most significant relationship for the particular matter in issue.¹¹

III. SUPPORT

In *Thomas v. Thomas*¹² a woman had been granted a divorce in Tennessee and custody of the children of the marriage, with a decree of support for the children against the father but with it a right of visitation in the father. The wife remarried and moved to Texas

8. *Id.* at 195.

9. *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955).

10. *Kilberg v. Northeast Airlines Inc.*, 9 N.Y.2d 34 (1961).

11. This is the direction in which the conflict of laws as to contracts is moving. See RESTATEMENT (SECOND), CONFLICT OF LAWS § 332ff (Tent. Draft No. 6, 1960); UNIFORM COMMERCIAL CODE § 1-105.

12. 335 S.W.2d 827 (Tenn. 1960).

with her second husband. The father claimed he was relieved of his obligation under the decree to support the children as the mother's move to Texas deprived him of his visitation privileges. The supreme court unanimously held the obligation of support under the decree continued. Chief Justice Prewitt stated that the first husband could not "force the mother to leave her second husband and return to Tennessee" with the children by a threat of being relieved of his duty to support them.

IV. ADOPTION

One case involved the choice of law governing an adopted child's right of inheritance; another concerned the jurisdictional elements for adoption in this state.

In *Delamotte v. Delamotte*¹³ a child had been adopted in Missouri. After the death of the adoptive father the child sought in Tennessee to take by intestacy the estate of that father's sister. The local law of Missouri gives to an adopted child the same legal position as a natural child with the right to inherit from a brother or sister of the adopting parent. The Tennessee adoption statute, Tennessee Code Annotated section 36-126, gives no such right. The supreme court held that the law of Tennessee should be applied and the adopted child took nothing. The decision is in accord with the great weight of authority that inheritance rights of an adopted child are determined by the law governing succession to the property of the decedent, and not by the law of the state of adoption.

The other adoption case, *In re Van Huss' Petition*,¹⁴ decided by a sharply divided court, is an unfortunate one. A man in the United States Navy married a woman who had a child by a former marriage, and he filed a petition to adopt the child. The natural father had never provided for the child and the department of public welfare recommended the adoption as being in the best interest of the child. With the petitioner a lifelong resident of Tennessee and with all the parties residing in the state, it appeared to be a perfectly clear case.¹⁵ The trial judge raised the jurisdictional point, however, that as the petitioner's service in the Navy had taken him out of the state for

13. 340 S.W.2d 894 (Tenn. 1960).

14. 338 S.W.2d 588 (Tenn. 1960).

15. The attorney for the petitioner, Mr. George H. Lockett of Harriman, in answer to the writer's inquiry, stated: "One of the unfortunate things that occurs when a situation like this develops is that a lay person who is not a student of the law is never able to understand how nor why they should be deprived of exercising this law when the court finds that everything favors the matter that they petition for but yet dismisses the case because of wording of a statute. The trial judge attempted to explain to them why he was having to do this and I also went to great length to explain it to them but I still feel they never completely understood the matter."

part of the time, he did not meet what the judge believed to be a requirement of unbroken physical presence for the preceding year. The applicable adoption statute, Tennessee Code Annotated section 36-105, as amended in 1959, states:

[T]he petitioner shall have lived, maintained a home *and* been physically present in Tennessee . . . for one (1) year next preceding the filing of the petition without regard to petitioner's legal residence. (Emphasis added.)

The majority of the supreme court upheld the decision below and denied the petition for adoption. The division in the court rested on a difference in the method used in construing statutes. The language of the 1959 statute is unusual. The majority of the court stated they could not "perceive the reason" for the language; yet though the purpose could not be perceived the language was clear, and under the plain meaning rule the court must hold the statute required unbroken presence of the petitioner for the whole preceding year. Chief Justice Prewitt dissented in an opinion in which Justice Felts joined. The dissenting justices looked to the purpose of the statute and, finding the purpose was to broaden, not to narrow, the scope of permissible adoption, they found the statute satisfied.

It seems that the minority are right. Statutes, like other writings, are frequently couched in language that is not ideal. The legislature is entitled to have the help of the courts in carrying out the legislative purpose and to make good sense out of obscure language, as could be done here by construing "and" as "or," a form of interpretation frequently employed in ordinary speech. The Supreme Court of Tennessee has repeatedly applied this general principle of interpretation, as the dissenting opinion points out in this case, and as the whole court did in the first case discussed in this note.¹⁶ In 1961 the General Assembly again amended the statute by substituting "or" for "and" and modifying the language so that Tennessee Code Annotated section 36-105 now reads:

[T]he petitioner or petitioners shall have lived or maintained a regular place of abode in Tennessee, or on federal territory within the boundaries of Tennessee for one (1) year next preceding the filing of the petition without regard to the petitioner's legal residence.

The statute contains as well a further provision in aid of a petitioner in military service.

16. *Leggett v. Crossnoe*, *supra* note 1. The same point was made in a recent article by an outstanding English judge, the Master of the Rolls, in a quotation from another court: "A great Scottish judge of modern times, Lord Dunedin, has said: 'A statute is designed to be workable, and the interpretation thereof by a Court should be to cure that object, unless crucial omission or clear direction makes that end unattainable.'" Lord Evershed, *The Judicial Process in Twentieth Century England*, 61 COLUM. L. REV. 761, 769 (1961).

Despite the statutory change the *Van Huss* decision is a continuing threat. During the two years the 1959 statute was on the books there were doubtless a considerable number of adoptions by adopting parents who, on business or for pleasure, went outside of Tennessee during the year preceding the filing of the petition. Are these adoptions subject to collateral attack for lack of jurisdiction, say by a collateral relative of a deceased adopting parent who seeks to take the property of the dead man by inheritance as against the adopted child? It is the writer's impression, fortified by the opinion of Professor Paul Sanders, that this injustice would fail, because the statute as interpreted by the majority is unconstitutional. To take a parallel situation, suppose a state statute granted the privilege to make a will or to inherit, to legitimate or to adopt a child, but expressly denied the privilege to any person who left the state within the preceding year. Such a curtain hampering persons from leaving the state for any reason, good or bad, would surely be struck down, as *Crandall v. Nevada*¹⁷ indicates. That case involved a tax of one dollar levied by the state of Nevada in 1865 upon every person leaving the state by a common carrier. The Supreme Court of the United States unanimously struck down the tax. Two of the justices stated that the tax was a burden on interstate commerce. The majority went on the broader ground that the tax was inconsistent with the nature of our government. "The people of these United States constitute one nation," said Justice Miller, and quoting from an earlier opinion he continued: "We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption as freely as in our own States."¹⁸ We would scarcely be a people or a nation if through the imposition of a minor tax, or through the forfeiture of a major property or personal right as in the *Van Huss* case, a state could hamper the freedom of movement of its citizens from state to state. The *Crandall* case was decided before the ratification of the fourteenth amendment. Today this sort of discrimination, with no reason behind it that any of the justices in the *Van Huss* case could perceive, would not meet the test of the due process and equal protection clause of the United States Constitution. There is an added reason for the unconstitutionality of the result in the *Van Huss* case itself. It imposed a burden on a member of the armed forces performing his national military duties,¹⁹ a ground of unconstitutionality intimated in the *Crandall* case.

17. 73 U.S. (6 Wall.) 35 (1867).

18. 73 U.S. (6 Wall.) at 49.

19. In the brief of counsel for the petitioner the point was explicitly made that the petitioner "was only out of the state because of his service in the

V. STATE SEIZURE OF INTANGIBLES

The Tennessee Unclaimed Funds Act for Life Insurance Companies, Act of 1961, chapter 325, directs "any life insurance company doing business" in the state to report and turn over to the Commissioner all moneys owing by the life insurance company under an insurance contract "where the last known address, according to the records of such company, of the person entitled to such funds is within the State of Tennessee." The statute provides methods of relief for insurance claimants who may later turn up, and it does not extend to a "amounts which have been paid to another jurisdiction prior to the effective date of this Act." Seizures of this sort have been widely directed by the states at unclaimed bank and telegraph company deposits, corporate shares and dividends, and life insurance claims as here. The contacts employed by the state as the basis for jurisdiction to seize have varied widely. The Supreme Court of the United States has upheld the seizure in numerous situations when the contest was between the seizing state and the holder of the funds. It has never faced the problem where different states, each with substantial contacts, sought to seize the same fund. As Justice Jackson put it in a dissenting opinion:²⁰ "While we may evade it for a time, the competition and conflict between states for 'escheats' will force us to some lawyerlike definition of state power over this subject."

United States Navy and had been aboard ship and could not establish a residence anywhere else."

20. Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541 (1948).