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CONFLICT OF LAWS—1958 TENNESSEE SURVEY

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DOMICILE

The requirement of residence in the Tennessee divorce statutes[1] has been construed to mean domicile.[2] Two cases during the Survey period raise the issue of domicile in this connection. In *Bernardi v. Bernardi*[3] the question was whether a member of the armed services had acquired a domicile in the state. The complainant, stationed at Millington Naval Base in Shelby Connty, had married defendant two months after arriving. Defendant was a minor with parents domiciled in Mississippi but had lived in Memphis for over a year. The parties established a home, complainant alleging that they intended it to be their permanent home, that he expected to get a job with the Memphis Fire Department and that he had secured a permanent registration certificate for voting. The suit for divorce was on the ground of admitted adultery; it was not contested though the defendant was personally served. The court below granted the divorce and the Divorce Proctor for Shelby County appealed, claiming lack of jurisdiction.

The court of appeals affirmed. Admitting that in previous cases the holding had been that a member of the armed services had not acquired a domicile in the state when based there,[4] the court explained that they had not laid down a legal rule that domicile could not be so acquired but had simply required that there be "the clearest and most unequivocal proof." In this case the court below had found that domicile was proved, and the facts were held to justify the holding. The case illustrates a growing trend toward liberality in finding a domicile established nnder similar circumstances.[5]

The authority of the case is weakened, however, by the fact that it is an alternative holding. The court goes on to hold that even if the plaintiff was not domiciled in the state, the defendant might be found to be so domiciled. Her marriage emancipated her and let her

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1. TENN. CODE ANN. §§ 36-803-04 (1955).

2. Brown v. Brown, 150 Tenn. 89, 261 S.W. 959 (1923). See Reese and Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561 (1953).

3. 302 S.W.2d 63 (Tenn. App. W.S. 1956).

4. Tyborowski v. Tyborowski, 28 Tenn. App. 583, 192 S.W.2d 231 (M.S. 1945); Sturdavant v. Sturdavant, 28 Tenn. App. 273, 189 S.W.2d 410 (M.S. 1944).

5. Cases are collected in Annot., 21 A.L.R.2d 1163 (1952); see Note, 31 N.C. L. REV. 304 (1953). Statutes in some states now provide that residence of a service man for a required period of time is sufficient without any finding of domicile. See, *e.g.*, Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954).

establish a domicile separate from that of her parents. When she married she would normally have the same domicile as that of her husband, but under Tennessee law she could acquire a separate domicile.[6] This might be held to have been done even while the parties were living together if the only reason why the husband's domicile had not changed was his status as a member of the armed services; it was more clearly accomplished after the parties separated and the defendant continued to reside in Memphis.[7]

One minor holding in the *Bernardi* case is somewhat questionable. It appears that the complainant had brought an earlier suit which had been dismissed by the trial court without prejudice; the court had ruled otherwise on this second trial and granted the divorce. The appellate court said in this connection, "if it be assumed that such dismissal was because the court at that time conceived that it did not have jurisdiction, then we think the court was in error in so ruling. In any event, the judge had a perfect right to change his mind with reference to that ruling and, at the second trial, we think he made the correct ruling."[8] The dismissal in the first trial was not a ruling on the merits, but if it was a ruling of lack of jurisdiction it was not appealed from and should be res judicata on that issue. Of course, it would be possible to find that the facts had changed in the meantime, with the additional facts since the first trial indicating a change of domicile; but this would seem to be the only basis on which the principle of res judicata could be properly circumvented.

The case of *Greene v. Greene*[9] involved the domicile of a person transferred at his request from Wisconsin to the Veterans' Hospital in Memphis. He spent much time in the home of his cousin in Memphis, and although he was attending college in Illinois at the time of bringing the divorce action, the court had no trouble in holding that his domicile was in Tennessee on the basis of the *Bernardi* case.

Choice of Law

Contracts—First American National Bank v. Automobile Insurance Co.[10] was an action on eleven policies of fire insurance covering a warehouse located in Kentucky. Plaintiff, a Nashville bank, had loaned money to construct the warehouse and taken a mortgage which was "executed, acknowledged, delivered and recorded" in Kentucky. The insurance policies all had loss-payable clauses naming the bank as mortgagee. The insurance companies had failed to pay promptly, and the suit demanded the amount due under the policies, plus 25%

6. Younger v. Gianotti, 176 Tenn. 139, 138 S.W.2d 448, 128 A.L.R. 1413 (1940).
7. 302 S.W.2d at 68.
8. *Id.* at 69.
9. 309 S.W.2d 403 (Tenn. App. W.S. 1957).
10. 252 F.2d 62 (6th Cir. 1958).

additional liability under the Tennessee statute imposing a penalty for refusal to pay in 60 days.[11] The insurance companies admitted liability and the only question was whether the Tennessee penalty statute applied.

Both the district court and the court of appeals held for the defendants on this issue. Acknowledging that the Tennessee conflict of laws rule governed, the courts held that the insurance policies were Kentucky contracts, governed by Kentucky law. They found that "every act necessary to make each of the policies herein a complete and binding contract of insurance was performed in the State of Kentucky," and on this assumption the holding would seem to be in accord with Tennessee decisions. The additional holding in the case, that it would have been a violation of several clauses of the U. S. Constitution for Tennessee courts to apply the statute, is somewhat more doubtful.[12] Effective arguments could be made that the problem is one of performance of contract and thus controlled by Tennessee law as the place where payment was to be made under the loss-payable clause, or that it is one of damages and thus to be characterized as procedure and controlled by the law of the forum.

Torts.—In *Schenk v. Gwaltney*[13] the court followed the usual rule of choice of law in torts cases. An automobile accident having happened in Indiana, the Indiana automobile guest statute was held to apply, though the court intimated that if the accident had occurred in Tennessee where there was no such statute, the doctrine of res ipsa loquitur would have permitted a jury verdict for the plaintiffs to stand.

Limitation of Actions.—The code section tolling the running of the statute of limitations while the defendant is absent from the state was construed in *Shelton v. Breeding*[14] as follows: "We think the purpose of the quoted statute was to give the plaintiff a full year in which he might sue the defendant; that this contemplated the defendant being within the state and available for the service of process."[15] This apparently meant that all time while the defendant was out of the state must be excluded, so that when he was frequently in and out of the state the times when he was in the state must be tacked together to constitute the year.[16]

11. TENN. CODE ANN. § 56-1105 (1955).

12. The court relied on the earlier Supreme Court decisions of Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934); Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924). Later Supreme Court decisions have been much more liberal in allowing states to apply their own laws to insurance policies or actions when they had contacts with the transaction. See, *e.g.*, Watson v. Employers Liability Assur. Corp., Ltd., 348 U.S. 66 (1954); Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943).

13. 309 S.W.2d 424 (Tenn. App. W.S. 1957).

14. 310 S.W.2d 469 (Tenn. App. E.S. 1957).

15. *Id.* at 472.

16. The court explains that under the current nonresident-motorist statute,

ACTIONS QUASI IN REM

Interpleader.—In *American Nat'l. Ins. Co. v. Newland,*[17] the insurance company had issued a policy on the life of LaMoyne. The beneficiary was his sister, Myrtle, a resident of Texas, who had apparently paid the premiums until her death. Thereafter at the request of LaMoyne, the company issued new policies, making his daughter the beneficiary. On LaMoyne's death, the daughter and Texas relatives of the sister claimed the proceeds, and the company brought this interpleader action. The lower court sustained a plea in abatement by the Texas claimants on the ground that no jurisdiction was obtained over them by constructive process. The Supreme Court affirmed on the ground that the company might well be liable to both sets of claimants. On petition to rehear because the only question before the court was one of jurisdiction, the court denied the petition, saying that "it is 'only when some res of the nonresident defendant is found and impounded within the territorial limits of the state of action, and then only to the extent of such res' does the Court of action obtain jurisdiction of the defendant who is a nonresident of that state and not served with personal process."[18] This is in accordance with the position taken by the U. S. Supreme Court.[19]

TENN. CODE ANN. § 20-224 (1955), plaintiff would have been able to obtain service on the secretary of state, but the amendment to include a resident absent from the state more than 30 days took place only after this action was brought.

17. 303 S.W.2d 332 (Tenn. 1957).

18. *Id.* at 334.

19. New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916).