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CONFLICT OF LAWS—1957 TENNESSEE SURVEY

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JURISDICTION OF COURTS

Martin v. Martin[1] involved a bill in equity by a wife to set aside a divorce decree as fraudulently obtained by the husband. The parties had been domiciled in Pennsylvania. While in Tennessee as a member of the armed forces the husband obtained the divorce in the state. He was subsequently transferred outside the United States. Complainant's bill to set the decree aside for fraud was sustained by the chancellor, defendant being served by publication. Defendant then made a special appearance to contest the jurisdiction of the court and appealed from an adverse ruling.

The Supreme Court held that there was jurisdiction, declaring that the husband "brought the marriage status into the State of Tennessee, and thereafter remained beyond the jurisdiction, so unless the State of Tennessee had jurisdiction to correct the wrong, the appellee would be without remedy."[2]

The result seems clearly correct. Though domicile of one of the parties is regarded as necessary for jurisdiction to grant a divorce,[3] the United States Supreme Court has also held that when the respondent enters an appearance the decision as to jurisdiction is binding on the parties.[4] When this is added to the holding in *Adam v. Saenger*[5] that a person who brings suit in a state is thereby subject to personal jurisdiction of the court in a cross action,[6] there should be little difficulty in agreeing that the chancery court in the *Martin* case had jurisdiction to set the divorce decree aside for fraud.[7]

In *Acuff v. Service Welding & Machine Co.*,[8] defendants sent a trailer truck from Louisville, Kentucky, to Knoxville, Tennessee, loaded with petroleum tanks. Plaintiff sued for injuries sustained

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1. 292 S.W.2d 9 (Tenn. 1956).
2. *Id.* at 10.
3. Williams v. North Carolina, 317 U. S. 287, 143 A.L.R. 1273 (1942).
4. Sherrer v. Sherrer, 334 U.S. 343, 1 A.L.R.2d 1355 (1948); Cook v. Cook, 342 U.S. 126 (1951).
5. 303 U.S. 59 (1938).
6. "The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff." *Id.* at 67-68.
7. The fact that the divorce decree was granted by the law court and the bill to set it aside was sustained by the chancery court should not affect the issue of jurisdiction.
8. 141 F. Supp. 294 (E.D. Tenn. 1956).

while unloading the truck, claiming that it was improperly loaded. Service on defendants was had on the secretary of state, and the court sustained a motion to dismiss for lack of personal jurisdiction.

It is now generally recognized that doing an act within a state is sufficient to give jurisdiction over a person in a suit arising out of that act,[9] and Tennessee would probably have been able to exercise personal jurisdiction over the defendant here without personal service. The court found, however, that the state had not established a procedure for exercising jurisdiction by constructive service under the facts involved. Under the corporation statutes, the sending of a single vehicle within the state does not amount to "doing business."[10] And the "nonresident motorist statute"[11] was construed as requiring "that the injury sustained or the accident which occurred must have had some causal relation to traffic upon a highway or upon premises accessible to users of the highway."[12]

Pyle v. Bituminous Casualty Corp.[13] involved an interesting problem of personal jurisdiction and the nonresident motorist statute. Plaintiffs were injured in an automobile collision in Tennessee. One car was from Kentucky, driven by Dishman and owned by Johnson. Plaintiffs brought suit against both, alleging that Dishman was in Tennessee on his own business and on the business of Johnson as an agent. Service was had under the nonresident motorist statute, but neither defendant appeared to defend and judgments were entered against them. Executions being issued with returns of *nulla bona,* the present action is brought against Johnson's insurance company, which was duly notified of all proceedings.

Defendant company filed a special plea that Johnson, while temporarily away from Kentucky, had left the car in the possession of one Brown, that the latter had loaned it to Dishman for a trip between points in Kentucky and that Johnson had no relationship with Dishman. When defendant sought to introduce evidence to this effect, the trial court excluded it on the ground that Johnson's liability had been established in the earlier suit and could not now be collaterally attacked. Judgment therefore went against the defendant, and the court of appeals affirmed.

The original judgment was held to be binding on Johnson for two reasons. First, the declaration alleged that Dishman was her agent and when she "failed to appear and defend after constructive and

9. GOODRICH, CONFLICT OF LAWS § 73 (3d ed. 1949).
10. TENN. CODE ANN. §§ 20-220, 48-918 (1956).
11. *Id.* § 20-224.
12. 141 F. Supp. at 295. The court cites Ellis v. Georgia Marble Co., 191 Tenn. 299, 232 S.W.2d 45 (1950) as sustaining the holding that improper packing causing injury on unloading does not come within terms of the statute.
13. 299 S.W.2d 665 (Tenn. App. M.S. (1956).

actual notice of said suit, we are of the opinion that the judgments of the plaintiffs therein, after the expiration of 30 days from rendition thereof, unappealed from, became binding and conclusive on her."[14] Secondly, the statute speaks of "any owner, chauffeur or operator"[15] of the automobile involved, and Johnson was admittedly the owner. The judgment being binding on Johnson, it was held to be binding also on her insurance company in the present suit.

Both of the reasons given for holding the original judgment "binding and conclusive" on Johnson seem too broad. Suppose that Dishman had stolen the car from Johnson in Kentucky and had the accident in Tennessee. Should the mere fact that the plaintiff's declaration alleged that Dishman was her agent require her to appear to deny the allegation when she had done nothing to subject herself to judicial jurisdiction in Tennessee? Similarly, should her ownership of the car be sufficient to give jurisdiction? If there is no jurisdiction over the defendant, the service of notice outside the state will not give validity to the judgment.[16] It would seem that the Tennessee court would have no jurisdiction and that its attempt to exercise it would be a violation of due process of law.[17] A collateral attack is allowable to show lack of jurisdiction.[18]

It may be that under the facts of the *Pyle* case itself there was sufficient basis for jurisdiction. If Johnson left the car with Brown, giving him authority to lend it to Dishman, there are holdings suggesting that Tennessee might have legislative jurisdiction to impose liability on Johnson, and the same facts might well have given judicial jurisdiction.[19]

McCormick v. Brown[20] involved an action for damage to property caused by blasting. Both the property damage and the act causing the injury took place in Georgia, and defendant's plea in abatement was sustained. It is the majority rule that an action of trespass to real property is local and will not be entertained in another state. But this limitation or jurisdiction is a voluntary one and an increasing number of courts decline to impose it on themselves.[21]

Several acts passed during the year make changes in the statutes providing for constructive process. Thus the statute requiring foreign insurance companies to appoint the Commissioner of Insurance and Banking as agent for service of process has been amended to provide

14. *Id.* at 669.
15. TENN. CODE ANN. § 20-224 (1956).
16. Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917).
17. See Pennoyer v. Neff, 95 U.S. 714 (1878).
18. GOODRICH, CONFLICT OF LAWS 187 (3d ed. 1949).
19. Young v. Masci, 289 U.S. 253, 88 A.L.R. 170 (1933); *cf.* Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934).
20. 297 S.W.2d 91 (Tenn. 1956).
21. See GOODRICH, CONFLICT OF LAWS 270-71 (3d ed. 1949).

that they shall appoint both the commissioner "and his chief deputy."[22] The nonresident motorist statute has been amended so that the term nonresident now "includes any person who though a resident of this state or who was the owner or operator of a motor vehicle properly registered and licensed under the laws of this state when the motor vehicle accident or injury occurred, has been absent from the state of Tennessee for at least thirty days next preceding the day or which process shall be lodged with the Secretary of State."[23] Another statute provides for constructive service of process in annulment actions as in divorce actions.[24] A fourth act amends residence requirement in a divorce action so that only one year instead of two years' residence of the petitioner is required when the acts complained of were committed out of the state or the petitioner resided out of the state at the time.[25]

DOMESTIC RELATIONS

Stephenson v. Stephenson[26] raised the question of what law governs the validity of a marriage. The wife had been divorced from a former husband in Alabama, the divorce decree forbidding her to marry again.[27] She later moved to Tennessee. She and the present husband went to Georgia where they married and then returned to Tennessee. There was no evidence that they went to Georgia to evade the law of any other state. The court held that the second marriage was valid since the Alabama restriction was not binding on the wife. This is in accordance with general law. The Alabama restriction would have been binding on the wife only if she had been still domiciled there and had gone to Georgia to evade the restriction and then returned to Alabama,[28] and not all states would enforce it even then.

Evans v. Young[29] involved a slave marriage and the question of legitimacy. The court correctly held that when a child had been legitimated at the domicile of himself and his parents his status of legitimacy would be recognized when he came to Tennessee but that when he died domiciled in Tennessee leaving property here the Tennessee statutes of descent and distribution would apply.[30] The judges differed as to the proper interpretation of the Tennessee statutes[31] but were in

22. Tenn. Pub. Acts 1957, c. 8, TENN. CODE ANN. § 56-303 (3) (Supp. 1957), amending TENN. CODE ANN. § 56-308 (1956).
23. Tenn. Pub. Acts 1957, c. 61, TENN. CODE ANN. § 20-224 (Supp. 1957).
24. Tenn. Pub. Acts 1957, c. 100, TENN. CODE ANN. § 36-834 (Supp. 1957).
25. Tenn. Pub. Acts 1957, c. 274, TENN. CODE ANN. § 36-803 (Supp. 1957).
26. 298 S.W.2d 36 (Tenn. App. E.S. 1956).
27. There was an attack on the validity of the Alabama divorce decree, but the Tennessee court held that on the basis of Alabama law the decree could not be held void on collateral attack.
28. See Pennegar v. State, 87 Tenn. 244, 10 S.W. 305, 2 L.R.A. 703 (1889).
29. 299 S.W.2d 218 (Tenn. 1957).
30. See generally GOODRICH, CONFLICT OF LAWS c. 11 (3d ed. 1949).
31. The question was whether TENN. CODE ANN. §§ 31-302 to -303 (1956), in-

agreement as to the applicable rule of conflict of laws.

Substance and Procedure

Burden of Proof: In *Gordon Transports v. Bailey*,[32] an action was brought under the Illinois wrongful death statute for an accident which happened there. The court of appeals reversed a judgment entered upon a jury verdict for the plaintiff on the ground that plaintiff had made no allegation of lack of contributory negligence and had failed to meet the burden of showing freedom from contributory negligence on the part of the deceased as required under Illinois law. While matters of pleading and burdens of proof are usually treated as procedural and to be governed by the law of the forum, the court held that the Illinois law in this case involved substance as well and thus should be held to apply. Many courts would have applied the *lex fori* in this case, but there is substantial authority to sustain the holding and there is much to be said for applying the foreign law whenever it is likely to affect the outcome of the litigation and the local system will not be unduly inconvenienced.[33]

Proof of Foreign Law: The *Gordon Transports* case also involved the question of proof of the Illinois law. Under the Uniform Judicial Notice of Foreign Law Act,[34] the Tennessee court took judicial notice of the Illinois law, statutory or common law. Defendant's failure to plead the foreign law, when he was required to plead specially, might have prevented his being able to rely on it as a defense. But here the action was on the Illinois wrongful death statute and lack of contributory negligence is one of the elements necessary for recovery. Under the Illinois law the declaration would have been demurrable for failure to allege this requirement. It was therefore not a matter of defense.

Limitation of Actions: Three curiously overlapping cases involve the statute of limitations. In *Hixon v. Highsmith*,[35] and *Sigler v. Youngblood Truck Lines*,[36] the court held that the local statute of limitations is not tolled when the defendant is out of the state if binding service could be had on him through the Secretary of State.

The Tennessee "borrowing statute" was raised in the *Sigler* case and in *Fowler v. Herman*.[37] This statute provides that if the statute of another state in which the case of action accrued has run while the

volving a child of a slave marriage and permitting collateral kindred to inherit from him as if he were a white person, would apply to a person whose parents were not domiciled in Tennessee at the time. The majority held that they did apply.

32. 294 S.W.2d 313 (Tenn. App. W.S. 1956).

33. See Morgan, *Choice of Law Governing Proof*, 58 Harv. L. Rev. 153 (1944).

34. Tenn. Code Ann. § 24-607 (1956).

35. 147 F. Supp. 801 (E.D. Tenn. 1957).

36. 149 F. Supp. 61 (E.D. Tenn. 1957).

37. 292 S.W.2d 11 (Tenn. 1956).

defendant was a resident thereof, "the bar is equally effective in this state."[38] It was said not to be applicable in *Sigler* because the defendant was not resident in Kentucky (where the action accrued) for the period required.[39] It was not applied in *Fowler* to permit "borrowing" the Alabama statute[40] because the plaintiff had procured a summons to be issued in Tennessee two days before the Tennessee one-year limitation period had run. The summons was returned unexecuted, and plaintiff took a nonsuit and filed his suit again within one year as permitted by the Tennessee statutes.[41] The Supreme Court held that the suing out of the summons, rather than the execution, was the commencement of an action and concluded: "Plaintiff elected to bring his suit in Tennessee, he brought it within the one year and kept it alive by refiling his suit in Tennessee, so that expiration of the one year in Alabama was immaterial and irrelevant and had no effect upon the plaintiff's rights which he had preserved in Tennessee."[42]

In the *Hixon* case (the first of the three cases discussed herein) the plaintiff had similarly procured a summons which was returned unexecuted and then had obtained *plures* summons which was served within a year thereafter, but the federal court in this case held that the local statute of limitations had run because service could have been obtained under the nonresident motorist statute and that it was not tolled by the unserved summons. No reference was made to the statute giving an additional year for recommencement of the action.[43]

The recommencement statute was involved also in the *Sigler* case, in a somewhat backhanded fashion. There, suit had been brought in North Carolina; but when service was not obtained, the plaintiff took a nonsuit. The North Carolina statute, like the Tennessee statute, permitted refiling of the suit within a year. The suit in Tennessee was brought within one year after the North Carolina nonsuit, but the

38. TENN. CODE ANN. § 28-114 (1956).

39. Since the Tennessee statute was held to have run in this case, this part of the opinion may be regarded as dictum.

40. The accident in this case happened in Alabama. Defendant was not resident there but could have been sued there by service under the Alabama nonresident motorist statute. He therefore contended that the action had been barred after one year in Alabama and that under Tennessee and Alabama authority his availability for suit there was "in effect" the same as residence under the borrowing statute.

41. TENN. CODE ANN. §§ 28-105 to -106 (1956).

42. 292 S.W.2d at 12.

43. Tabor v. Mason Dixon Lines, Inc., 196 Tenn. 198, 264 S.W.2d 821 (1953) was cited in the *Hixon* case. This case had held that Tenn. Code Ann. § 28-105 (1956), permitting alias process or recommencing the action within one year from the date of failure to execute the original summons did not have the effect of modifying § 20-224 so as to extend the time during which the Secretary of State had agency to accept service of process beyond the period designated therein (one year from the date of the accident). But in the *Hixon* case personal service was obtained, and the question was as to the effect of TENN. CODE ANN. § 28-105 (1956) on § 28-304 (the one-year statute of limitations for bringing a personal injury action). The *Fowler* case would indicate that these two sections are to be construed together.

court held that the North Carolina statutes were procedural in nature and therefore had no application in Tennessee when the latter was the foreign state. It added that the Tennessee statute must be construed as applying only to a nonsuit to an action within the State of Tennessee.