Vanderbilt Law Review

Volume 8
Issue 5 *Issue 5 - August 1955*

Article 4

8-1955

Conflict of Laws -- 1955 Tennessee Survey

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CONFLICT OF LAWS—1955 TENNESSEE SURVEY

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1. *Jurisdiction of Courts*

When a cause of action is transitory in nature the plaintiff may sue on it in any state where he can obtain personal jurisdiction over the defendant. And when personal jurisdiction is not available, he can often, by process of garnishment or attachment, obtain jurisdiction *quasi in rem* and proceed with the trial of the issue.[1] The judgment so obtained is not binding on the defendant *in personam* but it may bind the defendant's property or the debt to him from a third party. In *Hobbs v. Lewis*[2] a plaintiff sought to make use of garnishment for this purpose. He claimed certain sums were due him from the United Mine Workers of America Welfare and Retirement Fund, and brought garnishment proceedings against the Tennessee Products & Chemical Corporation to attach $3,500 owed by it to the Fund.

The trustees of the Fund made a special appearance and attacked the jurisdiction of the court by pleas in abatement. The pleas were sustained by the court below and the bill dismissed; the Supreme Court affirmed. The trustees of the Fund all resided in Washington, D.C. and kept all of the properties and records there. This was regarded as sufficient to locate the administration of the trust there, and the question of whether plaintiff was entitled to be treated as a beneficiary of the trust was held to be a problem of administration of the trust. The problem therefore was whether the Tennessee courts had jurisdiction to determine matters of administration. Citing several authorities the Court held that the situs of the administration of the trust is the proper forum for suits of this nature. The authorities seem not entirely in agreement as to whether jurisdiction is completely lacking in other courts or whether they should decline to exercise it under the doctrine of *forum non conveniens*. The language in the *Hobbs* opinion appears to favor the first view, but the actual holding is sustained under either view.[3]

Actions involving status are not transitory and normally must be brought in the domicile of at least one of the parties. Thus, in *Moore v. Moore*,[4] an Arkansas court was held to have jurisdiction to grant a divorce when the parties were domiciled there. In *State* ex rel. *Sprague v. Bucher*,[5] a habeas corpus proceeding to obtain custody of a

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1. See, *e.g.*, Harris v. Balk, 198 U.S. 215 (1905).
2. 270 S.W.2d 352 (Tenn. 1954).
3. In addition to the authorities cited in the case, see LAND, TRUSTS IN THE CONFLICT OF LAWS § 41 (1940).
4. 273 S.W.2d 148 (Tenn. 1954).
5. 270 S.W.2d 565 (Tenn. App. W.S. 1953).

child was brought by the mother in Tennessee, the domicile of the father. Both parents and the child were present and the court entertained the action and changed the custody, though Tennessee was not the domicile of the child or the mother,[6] without giving consideration to the mooted question of whether the domicile of the child is necessary for this purpose.[7]

2. *Foreign Judgments*

Under the Federal Constitution judgments of a sister state are entitled to full faith and credit. In *Moore v. Moore*,[8] an Arkansas divorce decree was urged as *res judicata* to an action in Tennessee for divorce. A defense of fraud in obtaining the Arkansas decree was held to be unavailable for procedural reasons,[9] but a "defense" of collusion in obtaining the divorce was considered. The Supreme Court held that the fact that the divorce action was filed in pursuance of an agreement between the parties is not sufficient to indicate collusion, especially since the agreement was exhibited to the Court. In reaching this conclusion it said it was unable to find any Tennessee cases in point and it therefore relied on statements in legal encyclopedias.[10] But it would appear that the first search should have been to see if there were any Arkansas cases in point. If the Arkansas cases treated the decree as final and conclusive, then Tennessee would apparently be required to give the same effect to it, no matter what the Tennessee decisions were regarding a domestic decree.[11] It seems fairly certain, however, that Arkansas would agree with the holding that collusion was not a basis for attacking this decree, and the outcome of the case is therefore proper.[12]

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6. The child had previously been awarded to the mother by a valid Illinois court decree. The child's domicile was therefore the same as his mother's. Hers was the same as that of her present husband, and his domicile was held to remain in Illinois, though as a soldier he was stationed in Panama and though the wife had been residing in Texas. 270 S.W.2d at 569.

7. See 8 VAND. L. REV. 635 (1955).

8. 273 S.W.2d 148 (Tenn. 1954).

9. In her petition plaintiff had alleged fraud in obtaining her signature to the divorce papers. Defendant's plea set up the Arkansas decree, offering to make profert of the record in that case. Plaintiff then demanded oyer of the record, which "then became a part of the plea to the same extent as though alleged therein." Instead of disputing the truth of the plea, plaintiff "set the plea down for argument as to its sufficiency, thus making an issue of law." This made the allegation of fraud in the petition unavailable to her. 273 S.W.2d 148, 149 (1954).

10. 17 AM. JUR., *Divorce and Separation* § 187 (1938). The Court also cites 27 C.J.S., *Divorce* § 65 (1941).

11. The leading case involving fraud is Levin v. Gladstein, 142 N.C. 482, 55 S.E. 371 (1906). The same rule would seem to follow regarding deception of the court by collusion.

12. In Oberstein v. Oberstein, 217 Ark. 80, 228 S.W.2d 615 (1950), the Arkansas court cited the same two encyclopedia sections relied upon by the Tennessee court, but made no ruling on the issue involved in the instant case. See this case for treatment of a petition to have a divorce decree set aside on the ground of collusion; there was also lack of jurisdiction.

In *State* ex rel. *Sprague v. Bucher*[13] an Illinois decree of custody of a child was modified by the Tennessee court. The court quoted an earlier decision to the effect that "where the custody of a child has been established by the decree of a foreign Court, the Courts of Tennessee will interfere to upset the effect of that foreign decree only when it is manifest that there has been such a change in the circumstances, condition and situation of the parties as makes it necessary on account of the welfare of the child, that the Tennessee Courts should interfere."[14] This position does not violate the full faith and credit clause.[15]

3. *Torts*

The usual Conflict of Laws rule regarding tort liability is that it is governed by the law of the place of injury. This is recognized as a matter of course in several cases during the Survey period.[16] When no statutes or decisions in point are discovered for the *lex loci,* the usual procedure is to assume that the common law applies and that it is the same as the *lex fori.*[17]

The existence of an action for wrongful death and the attributes of the action are determined by the law of the place of injury. This is exemplified in *Gogan v. Jones,*[18] where an automobile accident occurred in Tennessee killing a resident of New York. The Tennessee wrongful death statute determined the beneficiaries of the action. Though the father had no status for bringing the action as the administrator appointed in New York, he was allowed to amend the summons to substitute himself and the mother as parents and next of kin and therefore the statutory beneficiaries. The court adopted the liberal rule that this may be done even after the one-year statute of limitations has run, on the ground that there was no new cause of action and the amendment did not change "the identity of any of the persons for whom the summons sought a recovery."

An interesting question is raised in *Franklin v. Wills.*[19] An automo-

13. 270 S.W.2d 565 (Tenn. App. W.S. 1953).

14. *Id.* at 570, quoting from Cecil v. State *ex rel.* Cecil, 192 Tenn. 74, 77, 237 S.W.2d 558, 560 (1951).

15. See New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).

The effect of a foreign probate decree is considered in Robertson v. Robertson, 270 S.W.2d 641 (Tenn. 1954). For more complete treatment of the case see the subsection on Wills and Administration, *infra.*

16. Hamilton v. Peoples, 274 S.W.2d 630 (Tenn. App. E.S. 1954) (Florida guest statute applies because automobile collision took place there); McMahan v. McMahan, 276 S.W.2d 738 (Tenn. App. E.S. 1954) (Ohio guest statute applies because car left road there); Illinois Cent. R.R. v. Perkins, 79 So.2d 459 (Miss. 1955) (Tennessee Railroad Precautions Statute applies because grade-crossing collision took place there).

17. This was the procedure in Hamilton v. Peoples, 274 S.W.2d 630 (Tenn. App. E.S. 1954), where no Florida authority was found on the question of whether negligence is imputed between the parties to a joint enterprise in an action among themselves, and the Court therefore laid down the Tennessee rule on the issue.

18. 273 S.W.2d 700 (Tenn. 1954).

19. 217 F.2d 899 (6th Cir. 1954), 23 TENN. L. REV. 1056 (1955).

bile accident occurred in North Carolina, killing the husband and injuring the wife. The wife brought an action for negligence against the husband's estate in the United States District Court of Tennessee. Under North Carolina law one spouse can sue the other for personal injuries; under Tennessee law she cannot. Which controls? The cases which have discussed the question have generally regarded it as depending on whether the rule is one of substance or procedure. A study of the cases indicates that they may be explained by recognizing that the rule involves elements of both substance and procedure. If the *lex loci* declines to create a cause of action there is none;[20] if the *lex fori* declines to entertain the action on procedural grounds or on grounds of public policy, it is dismissed.[21] When both *lex loci* and *lex fori* permit the action it may be maintained.[22] There is a growing trend today to modify the rule that one spouse cannot sue another. The position of the court in the instant case that the action could be maintained because Tennessee should have no strong policy against entertaining it when it arises in another state is a commendable one. There is some doubt, however, whether the Tennessee courts would have taken the same position in view of established precedents.[23]

4. *Wills and Administration*

In *Ragsdale v. Hill*[24] a decedent domiciled in Davidson County with his property apparently all located there, died at the Veterans Hospital at Biloxi, Mississippi, after having executed a will there. It had been read by the testator, declared by him to be his will and signed by him in the presence of two witnesses, but they had not subscribed their signatures. For this reason the Davidson County Judge refused to allow probate. Clearly Tennessee law governed as to the validity of the will under the conflict-of-law rules that the law of the domicile governs as to a will of personal property and the law of the situs governs as to a will of real property. But a statute in Tennessee provided that a will executed in another state according to the law of that

20. *E.g.*, Gray v. Gray, 87 N.H. 82, 174 Atl. 508, 94 A.L.R. 1404 (1934); see also Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931).

21. *E.g.*, Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597, 108 A.L.R. 1120 (1936).

22. *E.g.*, Bourestom v. Bourestom, 231 Wis. 666, 285 N.W. 426 (1939). This case and Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941), contradict the contention of some authorities that the rule to be applied is that of the domicile of the parties. See Overton, *Analysis in Conflict of Laws: The Problem of Classification*, 21 TENN. L. REV. 600, 606-07 (1951). There is no indication as to the domicile of the parties in the *Franklin* case, though it was probably Tennessee.

23. The Tennessee courts have held steadfastly to the rule of no recovery and have failed to make any exception to it when opportunity arose. See, *e.g.*, Wilson v. Barton, 153 Tenn. 250, 283 S.W. 71 (1925) (suit against husband's estate); Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263 (1932) (suit against husband's principal—marriage after the accident); *cf.* Graham v. Miller, 182 Tenn. 434, 187 S.W.2d 622 (1945) (parent and child).

24. 269 S.W.2d 911 (Tenn. App. M.S. 1954).

state should be valid in Tennessee.[25] The Court of Appeals therefore held that the validity of the will might be determined by the law of Mississippi and construed that law as requiring only that two witnesses attest the will, not that they subscribe it. This reasoning sustained the validity of the will.[26]

In *Robertson v. Robertson*,[27] the decedent had died seven years previously in Maryland, where she was domiciled. The will had been probated there and never contested or questioned. The executor than probated it in Davidson County, where the testatrix had real property. This petition then sought to contest the probate for lack of capacity of the testatrix. The Supreme Court held: "Under our statutes a will probated in another state may be recorded in any county of this State, where the testator owned property, and when so recorded is given the force and effect of the original; and that probate proceedings of the foreign state are proceedings in rem and conclusive to all persons having an interest under the foreign will."[28] The Court added that petitioner had been "guilty of laches in attempting to institute the contest."

Under the common law the foreign probate would not have had this conclusive effect. Several Tennessee cases had held that a probate decree in the testator's domicile is conclusive as to property located there and all personal property, but is not conclusive in another state as to real property located there.[29] But the Uniform Probate Act[30] has been held to change the common-law rule and to sustain the result set out by the court in the *Robertson* case.[31]

The rule that a foreign administrator has no standing in a local court is exemplified in *Gogan v. Jones*.[32] He may in appropriate cases qualify and be appointed as a local administrator, but his position in court would then be by virtue of that appointment.

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25. TENN. CODE ANN. § 8098.7 (Williams Supp. 1952).

26. The validity of a bequest is not determined by the law of the domicile of the legatee. See Hamilton Nat. Bank v. Touriansky, 271 S.W.2d 1 (Tenn. 1954), where testator left three-fourths of his property to relatives in Russia. The Supreme Court held that though it might not be possible to find them now, the provision in the will that they should receive the property if they could be located within five years should be enforced, and that the property could not now be given to the contingent beneficiaries.

27. 270 S.W.2d 641 (Tenn. 1954).

28. *Id.* at 642, citing Woodfin v. Union Planters Nat. Bank & Trust Co., 174 Tenn. 367, 125 S.W.2d 487 (1939).

29. The leading case is Kirkland v. Calhoun, 147 Tenn. 388, 248 S.W. 302 (1923). See also GOODRICH, CONFLICT OF LAWS 526-28 (3d ed. 1949).

30. TENN. CODE ANN. §§ 8113 *et seq.* (Williams 1934).

31. See Epperson v. Buck Investment Co., 176 Tenn. 358, 141 S.W.2d 887 (1940). This is made even clearer by the subsequent adoption of the Uniform Wills Act, providing that a will executed outside the state in accordance with the law of the domicile or of the place of execution is valid in this state. TENN. CODE ANN. § 8098.7 (Williams Supp. 1952).

32. 273 S.W.2d 700 (Tenn. 1954).