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Conflict of Laws -- 1954 Tennessee Survey

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CONFLICT OF LAWS—1954 TENNESSEE SURVEY

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There are three Tennessee Supreme Court cases involving Conflict of Laws and an equal number of federal cases arising in Tennessee. One of the state cases raises constitutional questions and the United States Supreme Court may someday disagree with the Tennessee court.

Stockholders' Liability. This case is *Paper Products Co. v. Doggrell.*[1] The facts are not complicated, but a rather involved mix-up developed between the state and federal courts.

Doggrell, Konz and Whitaker were sole stockholders in an Arkansas business association entitled Forest City Wood Products, Inc., with principal office located in St. Francis County, Arkansas. Doggrell and Konz were Tennessee residents and left the management to Whitaker. The corporate charter was prepared and filed with the Secretary of State, but Whitaker failed to file it with the Clerk of the County Court of St. Francis County, as required by Arkansas statute. The organization became bankrupt and creditors sought to hold Doggrell and Konz individually liable under a decision of the Arkansas Supreme Court construing the filing statute and holding that Whitaker was personally liable.[2]

The first action brought by a creditor to impose personal liability upon Doggrell and Konz was in the Federal District Court for Western Tennessee, where a ruling was made for the plaintiff on the basis of the *Whitaker* case. Thereafter an action was brought in the Chancery Court of Shelby County and the chancellor held for the defendants on the basis of *Woods v. Wicks,*[3] an early Tennessee case holding that stockholders' liability of this type is to be treated as a penal claim, not to be enforced in Tennessee. This decision was followed in a judgment entered without opinion by the Circuit Court of Shelby County. The Federal District Court ruling was then appealed to the Federal Court of Appeals for the Sixth Circuit, where it was affirmed by the two-to-one decision of *Doggrell v. Great Southern Box Co., of Miss.*[4]

The Federal Court of Appeals held that the two Shelby County decisions, being by trial courts whose opinions were not reported, were not controlling on the federal courts under the *Erie* doctrine.[5] The court held that the claim was not penal under the test set out by the

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1. 195 Tenn. 581, 261 S.W.2d 127 (1953).
2. Whitaker v. Mitchell Mfg. Co., 219 Ark. 779, 244 S.W.2d 965 (1952).
3. 75 Tenn. 40 (1881).
4. 206 F.2d 671 (6th Cir. 1953).
5. Erie R.R. v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938). The court relied upon King v. Order of United Commercial Travelers, 333

United States Supreme Court in *Huntington v. Attrill*,[6] and it felt that the earlier decision of *Woods v. Wick* was distinguishable.

The judgment in the Shelby County Circuit Court was then appealed to the State Supreme Court and there affirmed in *Paper Products Co. v. Doggrell*,[7] on the ground that the claim was penal. The decision was adhered to on petition to rehear though the court's attention was called to the opinion in the case before the United States Court of Appeals.

Petition for rehearing was then filed before the Federal Court of Appeals, and it decided, again two to one, to grant the petition and reverse the judgment of the District Court. McAllister, J., who dissented in the first hearing, of course agreed with this result on the merits. Miller, J., who had concurred in the original opinion, did not agree on the merits but felt that the *Erie* doctrine applied. Martin, J., who had rendered the first opinion, dissented, taking the position that the problem was a constitutional one and that Tennessee was required by the full-faith-and-credit clause to enforce the Arkansas statute.[8]

On the major difference between the two courts—whether the creditors' claims against the stockholders were penal in nature—the case of *Huntington v. Attrill*[9] has consistently been recognized as the leading authority. In this case, the United States Supreme Court explained that a law which is penal in the domestic sense may well not be characterized as penal for the purpose of conflict of laws. The test in the latter situation is "whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act," whether the act is in some sense "a criminal or quasi criminal law."[10]

There seems little doubt but that the great majority of the authorities would treat the claim under the Arkansas statute as not being penal under this test.[11] Is the *Huntington* test controlling or can Ten-

U.S. 153, 68 Sup. Ct. 488, 92 L. Ed. 608 (1948), holding that the federal courts need not follow the decision of a South Carolina court of common pleas. State court rules as to conflict of laws are binding on federal courts sitting in the state. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 Sup. Ct. 1020, 85 L. Ed. 1477 (1941).

6. 146 U.S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892).

7. 195 Tenn. 581, 261 S.W.2d 127 (1953).

8. The opinions on petition to rehear are reported in Doggrell v. Southern Box Co., 208 F.2d 310 (6th Cir. 1953).

9. 146 U.S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892). Defendant, a director, had falsely signed a certificate stating that all of the capital stock had been paid in. He was held personally liable by the New York court on the basis of the New York statute, and Maryland was required to give full faith and credit to the New York judgment.

10. 146 U.S. at 673-74, 676.

11. The Arkansas court takes the position that its law simply withholds the privilege of limited liability until the incorporators have performed the acts required by the statute. See Gazette Pub. Co. v. Brady, 204 Ark. 396, 162 S.W.2d 494,496 (1942); approved in Whitaker v. Mitchell Mfg. Co., 219 Ark. 779, 244 S.W.2d 965 (1952).

This is hardly a criminal statute. The original idea must have been to

nessee adopt its own test? Maryland could not adopt its own rule in the *Huntington* case because a judgment had been obtained and it was subject to full faith and credit. This meant that the Federal Supreme Court's test of what constitutes a penal law was controlling on a state as a part of constitutional law. In the various *Doggrell* cases the action was not on a judgment but directly on the statute. In recent years, the United States Supreme Court has held that the full-faith-and credit clause sometimes applies to statutes.[12] If, as is not unlikely,[13] that Court's position should be that the Arkansas statute is entitled to full faith and credit, then the Tennessee Supreme Court was wrong in its holding and Judge Martin was correct as to the action which the Sixth Circuit should have taken. If the full-faith-and-credit clause is not applicable, then the Tennessee Court cannot be said to be wrong though it is following a minority rule, and the Sixth Circuit must adopt the same rule for a case coming from Tennessee.[14]

Statutes of Limitation: Wrongful Death Actions. In *McDaniel v. Mulvihill*,[15] an action was brought in Tennessee for a traffic accident in Mississippi resulting in death. The Supreme Court recognized and applied the general rule of conflict of laws that a right of action in tort is governed by the law of the state where the injury was incurred. The Mississippi wrongful death statute therefore applied. But the Mississippi statute of limitations was six years and the Tennessee limitation was one year. Which should control?

It is the general rule that statutes of limitation are treated as remedial rather than substantive, so that the law of the forum nor-

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protect creditors by letting them look at the county court records of the principal place of business to see if personal liability was extinguished. Whether creditors rely on these records in practice today would not seem to affect the characterization of the act. And the fact that defendant did not know the charter was not recorded seems irrelevant to the original purpose of the act or to the present explanation of the Arkansas court.

All of the law review discussions of the Tennessee Case are critical of the holding. See 23 TENN. L. REV. 434, 7 VAND. L. REV. 281, 40 VA. L. REV. 211 (1954).

12. *E. g.*, Hughes v. Fetter, 341 U.S. 609, 71 Sup. Ct. 980, 95 L. Ed. 822 (1951). (wrongful death statute); Broderick v. Rosner, 294 U.S. 629, 55 Sup. Ct. 589, 79 L. Ed. 1100 (1935) (stockholders' double liability); Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 67 Sup. Ct. 1355, 91 L. Ed. 1687 (1947) (fraternal benefit insurance). See Note, 5 VAND. L. REV. 203 (1952).

13. Several cases have involved stockholders' liability. In addition to Huntington v. Attrill, 146 U.S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892), and Broderick v. Rosner, 294 U.S. 629, 55 Sup. Ct. 589, 79 L. Ed. 1100 (1935), both cited above, see Converse v. Hamilton, 224 U.S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749 (1912).

14. The position of the Tennessee Court that enforcement of the creditors' claims is against the public policy of Tennessee is subject to the same comment. Unless the Arkansas statute is entitled to full faith and credit, Tennessee may decline to enforce the claim on the ground of public policy and the federal courts in the state must follow the same rule. Griffin v. McCoach, 313 U.S. 498, 61 Sup. Ct. 1023, 85 L. Ed. 1481 (1941).

15. 263 S.W.2d 759 (Tenn. 1953).

mally applies. But there is a well recognized exception when a right is created by statute and the life duration of this right is also set by the legislature. This usually occurs when the limitation is in the same statute, but the "same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."[16]

Most of the cases involving the exception have involved wrongful death statutes; and the plaintiff, citing the case of *Wilson v. Massengill*,[17] contended that since the Mississippi wrongful death statute created a new cause of action, the Mississippi limitation should therefore apply. The Supreme Court answered that the limitation in Mississippi was not in the wrongful death statute itself but that the time limit was "simply that imposed by the Mississippi general statute of limitations." It might have added that the particular section involved was a residuary section applying to all other actions not specifically covered.[18]

The decision is well taken, and the same result could have been reached on another basis. Even if the six-year period had been the life span of the Mississippi-created cause of action, this would have meant only that Tennessee could not have entertained an action after the life span of the cause of action had expired, not that Tennessee could not have applied its shorter statute of limitations and refused to allow the action in its courts.[19]

Statutes of Limitations: Employer's Compensation Insurance Carrier's Action Against Negligent Third Party. In *Hutto v. Benson*,[20] an employee received an injury by a fall from a scaffold while working in Texas. After recovering from the employer under the Texas Workmen's Compensation Act, he brought an action in the federal court in Tennessee against the defendant for negligently supplying defective equipment. Plaintiff, Newark Insurance Co., intervened, as the employer's insurance carrier which had paid the compensation award.

The accident had occurred more than one year before the suit in Tennessee was filed, and the primary defense was the Tennessee one-

16. Davis v. Mills, 194 U.S. 451, 454, 24 Sup. Ct. 692, 48 L. Ed. 1067 (1904).

17. 124 F.2d 666 (6th Cir. 1942). The case came from a federal district court sitting in Tennessee and held that the limitation period in the South Carolina wrongful death statute controlled.

18. MISS. CODE ANN. § 722 (1942). The wrongful death section is § 1453.

19. This is indicated by the recent case of Wells v. Simonds Abrasive Co., 345 U.S. 514, 73 Sup. Ct. 856, 97 L. Ed. 1211 (1953). See also GOODRICH, CONFLICT OF LAWS § 86 (3d ed. 1949).

20. 110 F. Supp. 355 (E.D. Tenn. 1953), *rev'd*, 212 F.2d 349 (6th Cir. 1954). The decision by the Court of Appeals was published in June of this year and is therefore outside the Survey period, but no treatment of the holding of the District Court would be adequate without including the second opinion.

year statute of limitations. Both the District Court and the Court of Appeals agreed that the matter of limitation of actions was to be treated as procedural under general principles of Conflict of Laws, so that the law of the forum (Tennessee law, under the *Erie* doctrine) would govern. The difference came in determining the nature of the cause of action to which the Tennessee statute would apply and when it would start running.[21]

The workmen's compensation statutes of both Tennessee and Texas provide that the employer (or his insurance carrier) who has paid a compensation award will have a cause of action against a third party whose negligence has injured the employee. The Federal District Court took the position that the insurance carrier's action was a subrogation to the original tort action held by the employee. It said that though the Texas decisions were to the effect that the statute of limitations would not run while the employee's compensation suit was pending, no "independent and severable" cause of action was created and it was the original cause of action to which the Tennessee statute was to be applied. The Court of Appeals, on the other hand, declared that the Texas decisions indicate that the cause of action "does not accrue until the insurer under the Workmen's Compensation Act has assumed liability for compensation or has paid such compensation."[22] The Tennessee one-year statute would not have expired if it started running from that time.

Cases differ as to whether the employer or its insurance carrier, when it has paid a compensation award, has an action at common law against a third party who has negligently injured the employee.[23] Today, however, the compensation acts of the vast majority of the states do provide for relief of this nature.[24] The language of the sections varies slightly in its details, but the statutes are clearly based upon general principles of restitution—preventing the third party, whose negligence caused the injury, from being unjustly enriched at the expense of the employer, which is vicariously liable under the Act even though it was not negligent. Two types of remedies are available. One is subrogation, sometimes called equitable assignment. Under subrogation, the employer steps into the shoes of the employee and enforces the latter's right, being entitled to all priorities which may

21. For a treatment of the Conflicts problem which would have arisen if the accident had happened in a state with one law as to rights of employer and employee against the third party and the compensation award had been made in another state with a different law, see Wade, *Joint Tortfeasors and the Conflict of Laws*, 6 VAND. L. REV. 464, 476-78 (1953).

22. 212 F.2d at 352, citing Buss v. Robison, 255 S.W.2d 339 (Tex. Civ. App. 1952).

23. For discussion, see 2 LARSON, WORKMEN'S COMPENSATION § 71.30 (1952).

24. The statutes are collected in WRIGHT, SUBROGATION UNDER WORKMEN'S COMPENSATION ACTS xii-xxxii (1948).

be involved.[25] The other is indemnity. This is an independent cause of action running to a person who "has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other."[26]

On principle it would appear that if the employer's action is based upon subrogation the statute of limitations on the original cause of action should apply, while if it is based upon indemnity a new cause of action is created and the statute of limitations should start running from the time it is created. Unless the statute clearly indicates that one of the two remedies is the only one provided for, the plaintiff should have a choice between the two.[27] A majority of the courts treat subrogation as the basis of the employer's action and hold that the employer's right is barred by the same statute which applies to the employee's tort claim. Several courts, however, hold that the statute starts running on a new cause of action.[28] Strangely, Tennessee, whose statute was worded in terms of a cause of action arising in the employer, held that the statute of limitations for the original claim would apply,[29] while Texas, whose statute is worded in terms of subrogation, may well hold that the statute runs as on a new cause of action.[30]

The decision on the problem of Conflict of Laws therefore depends upon the correct interpretation of the Texas cases concerning the nature of the cause of action which the employer's insurance carrier brings. If it is a new cause of action, then the Tennessee statute of limitations applies, but it cannot start running until the right is created by Texas law. This would mean that the Court of Appeals is right. If it is the original cause of action, with the Texas law to the effect that the running of the statute of limitations is suspended pending the outcome of the action between employer and employee under the Compensation Act, then the Tennessee statute of limitations applies, and it can start running from the time of the accident. A Texas rule tolling the statute of limitations is no more controlling on a court sitting in Tennessee than the number of years set out in the Texas

25. RESTATEMENT, RESTITUTION § 162 (1937).

26. *Id.* § 76. The difference between the two remedies as applied to this fact situation is carefully discussed in Crab Orchard Improvement Co. v. Chesapeake & O. Ry., 115 F.2d 277 (4th Cir. 1940).

27. *Cf.* Foster & G. Co. v. Knight Bros., 152 La. 596, 93 So. 913 (1922).

28. For discussion and collection of the cases, see 2 LARSON, WORKMEN'S COMPENSATION § 75.30 (1952); WRIGHT, SUBROGATION UNDER WORKMEN'S COMPENSATION ACTS 18-19 (1948).

29. J. F. Elkins Const. Co. v. Naill Bros., 168 Tenn. 165, 76 S.W.2d 326, 95 A.L.R. 1429 (1934), construing the statute applicable at that time. The present Tennessee statute speaks of subrogation and assignment and expressly provides that the employer "shall have six months after such assignment within which to commence such suit." TENN. CODE ANN. § 6865 (Williams Supp. 1952).

30. See Buss v. Robison, 255 S.W.2d 339 (Tex. Civ. App. 1952).

statute. This means that the District Court would be correct. The Texas decisions—all by intermediate courts—are quite confusing and it will take a clearer statement from the Supreme Court of the state before we can tell whether the District Court or the Court of Appeals correctly interpreted Texas law.[31]

Contribution Between Joint Tortfeasors. In *Allbright Bros. v. Hull-Dobbs Co.*,[32] a federal case arising in the Western District of Tennessee, the Court of Appeals for the Sixth Circuit correctly applied the Arkansas Joint Tortfeasor statute in a suit for contribution. Apparently both the tort and the payment by one tortfeasor had taken place there, and the court did not have to make the choice-of-law decision which would have arisen if these acts had taken place in different states.[33]

Encumbered Automobile. In *Lillard v. Yellow Mfg. Acceptance Corp.*,[34] a truck had been sold in Georgia under a conditional sales contract which was properly recorded there. The vendee took it without consent or knowledge of the vendor to Tennessee, where it was attached by a creditor of the vendee and is now in the hands of a deputy sheriff. In a replevin action by the vendor[35] it was held that the priority of a chattel mortgage or conditional sales contract "validly executed and legally registered in another State, according to the laws of that State wherein the property was and the mortgagee resided, will be recognized and enforced in this State against the claims of attaching creditors or innocent purchasers in Tennessee, unless the mortgagee has consented to the removal of the property into this State, or having knowledge of its removal here, has failed to assert rights under the mortgage within a reasonable time."[36]

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31. Buss v. Robison, 255 S.W.2d 339 (Tex. Civ. App. 1952) appears to hold that there is a new cause of action. See the equivocal language in Webster v. Isbell, 71 S.W.2d 342 (Tex. Civ. App. 1934); and Fidelity Union Cas. Co. v. Texas Power & Light Co., 35 S.W.2d 782 (Tex. Civ. App. 1931).

The Court of Appeals in the instant case seems to interpret the Texas cases as holding that the cause of action of the employee himself does not "accrue" or come into being until the employer has paid compensation or assumed liability. Surely this is not the meaning of the cases. The Texas statute expressly provides that the employee may at his option sue either the negligent third person or the employer [TEX. CIV. STAT. ANN. art. 8307, § 6a (Vernon 1941)], and there are numerous cases in which the employee sued the third party directly. Perhaps the proper explanation is that there is a new cause of action so far as the insurance carrier for the employer is concerned but simply a suspension of the statute of limitations so far as the employee is concerned. But see Texas Employers' Ins. Ass'n v. Texas & P. Ry., 129 S.W.2d 746 (Tex. Civ. App. 1939).

32. 209 F.2d 103 (6th Cir. 1953).

33. For a detailed consideration of the problems involved under such circumstances, see Wade, *Joint Tortfeasors and the Conflict of Laws*, 6 VAND. L. REV. 464, 472-78 (1953).

34. 263 S.W.2d 520 (Tenn. 1953).

35. This was the assignee of the original vendor, and the original vendee had also assigned his interest. Proper instruments had been recorded.

36. 263 S.W.2d at 523.

This is the rule followed by the great majority of states and is amply sustained by Tennessee decisions. The problems involved were given thorough treatment in last year's Survey.[37] The only thing new in this case is the specific holding that the 1951 Automobile Registration Act did not change the previous state of the law in this regard.

37. Warren, *Personal Property and Sales—1953 Tennessee Survey*, 6 VAND. L. REV. 1113, 1117-19 (1953).