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Conflict of Laws--1959 Tennessee Survey

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CONFLICT OF LAWS—1959 TENNESSEE SURVEY

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I. JURISDICTION OF COURTS

There have been several developments during the year regarding jurisdiction over nonresidents.

In 1947 the legislature passed a statute requiring "any unincorporated association or organization, whether resident or nonresident," which was doing or desiring to do business in the state to appoint an agent for the service of process and providing that in case of failure to appoint the agent, service might be had on the Secretary of State.[1] The constitutionality of this act, as applied to foreign associations has since been upheld.[2] A current amendment to the section has added the words "including non-resident partnerships" at the end of the phrase in quotation marks above.[3]

Noseworthy v. Robinson[4] involves a problem of construction of the nonresident motorist statute.[5] This section provides for service on the Secretary of State and provides that his "agency . . . to accept service of process shall continue for a period of one (1) year from the date of any accident . . . ." Obviously, this language does not require that the notice to the motorist from the Secretary of State reach him during this period. In the *Noseworthy* case the process had been served on the secretary within the period but it had contained an erroneous address for the defendant motorist, so that the mailed process was returned unclaimed. Plaintiff then obtained an alias summons with the correct address and it was properly delivered; this was after the statutory period. The supreme court held that the erroneous address did not invalidate the first summons and that the

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1. TENN. CODE ANN. § 20-223 (1956).
2. McDaniel v. Textile Workers, 36 Tenn. App. 236, 254 S.W.2d 1 (M.S. 1952), 6 VAND. L. REV. 783 (1953).
3. TENN. CODE ANN. § 20-223 (Supp. 1959).
4. 315 S.W.2d 259 (Tenn. 1958).
5. TENN. CODE ANN. § 20-224 (1956).

statute of limitations should not be held to have run. Significance should be attached to the fact that the correct address was promptly supplied and the notice promptly delivered.

Another construction problem was involved in *Cox v. Fidelity-Phenix Fire Ins. Co.*[6] This involved the code provision authorizing service on the Commissioner of Insurance in a suit against a foreign insurance company.[7] The suit was on a policy of property insurance on a building located in Kentucky. Plaintiffs, residents of Tennessee, asked a local insurance company to write the policy; but it, being unable to write insurance in Kentucky, arranged for a Kentucky agent to write the policy with the defendant company. The defendant had qualified to do business in Tennessee, and service was obtained on the Commissioner of Insurance. The code section provides that such service may be had "in any action or proceeding . . . from any cause of action arising in Tennessee . . . ." The court decided that the cause of action for wind and storm damage to the Kentucky building did not arise in Tennessee within the meaning of the statutory language. It was influenced by the fact that the current language was adopted in 1953 and was regarded as more restrictive than the earlier phrase, "growing out of such business."[8] The actual holding should be confined to a ruling on construction of the words of the statute, and despite some of the possible implications in the opinion it would be misleading to treat the case as indicating that jurisdiction could not constitutionally have been obtained under the facts of the case.[9]

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6. 313 S.W.2d 429 (Tenn. 1958).

7. TENN. CODE ANN. § 56-321 (1956).

8. The earlier phrase was found in Tenn. Pub. Acts 1947, ch. 119, § 6. The amendment was made in Tenn. Pub. Acts 1953, ch. 136. By a typographical error, this is referred to in the opinion as "Public Acts of 1958." 313 S.W.2d at 430.

Doing of business is defined as "the doing in this state by such company of any act whatsoever, whether interstate or intrastate in nature, including the soliciting, making, or delivering of insurance contracts in Tennessee, by agent, mail or otherwise." TENN. CODE ANN. § 56-319 (4) (1956).

9. There are two bases on which jurisdiction might perhaps be based. First, the facts of the instant case may come under the principle of McGee v. International Life Ins. Co., 355 U.S. 220 (1957), 11 VAND. L. REV. 1437 (1958), that the mailing of an insurance policy into a state and the receipt of premiums constitutes such a substantial connection with the state as to subject the insurer to jurisdiction. *Cf.* Schutt v. Commercial Travelers Mut. Acc. Ass'n of America, 229 F.2d 158 (2d Cir. 1956), construing the earlier Tennessee code provisions and applying them to an even more tenuous situation. Second, even if the cause of action is regarded as having no connection with the state, if the defendant was doing extensive business within Tennessee and had an agent for service of process and the plaintiff was domiciled there it might be found under the principle of balancing the conveniences as laid down in Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), that the action could be maintained, based on service on the agent. The *Perkins* case has substantially modified the earlier approach set out in Simon v. Southern Ry., 236 U.S. 115 (1915), which is quoted extensively and relied on in the instant case.

II. FOREIGN JUDGMENTS

In *Burden v. Burden*,[10] the court declined to give full faith and credit to a custody decree of an Ohio court. The parties had lived together in Ohio, but the husband had ordered the wife "to get out" and return to Tennessee with the children. He subsequently sued for divorce in Ohio, and the wife answered. A reconciliation followed, and the wife understood that the divorce proceeding was dropped. The husband persisted in it, however, and obtained the divorce and a decree awarding custody of the children to him. The equity court in Tennessee enjoined the husband from maintaining a habeas corpus proceeding predicated on the Ohio decree and itself awarded the children to the mother. The court of appeals affirmed, holding that the Ohio decree was not binding because: (1) the children were domiciled in Tennessee when the divorce proceeding was instituted and (2) the wife was subjected to constructive fraud since she had no notice of the hearing and was not accorded due process.

The extent to which custody decrees are subject to the full faith and credit clause is not entirely clear.[11] There would appear little doubt, however, that the Tennessee courts would not be bound by the clause here, where Tennessee was the domicile of both wife and children, none of whom were heard in the Ohio proceeding. If on no other ground, the Tennessee court could have contended that its holding was based on current facts, presented with all parties present, and warranting a modification of the Ohio decree.[12]

In *Robertson v. Robertson*,[13] the Tennessee Supreme Court had construed the Tennessee sections on probate of foreign wills[14] as providing that when a will has been probated in another state, that proceeding is "in rem and conclusive to all persons having an interest under the foreign will"—even as to real property located in this state. An act passed by the legislature has now amended one of these sections, so as to provide: "Provided, however, that a contest of such will upon the issue devisavit vel non shall be allowed as to a devise of realty lying in this state, but as to devises of personalty, the foreign probate of such will shall be conclusive."[15] This provision should have no effect on another code provision to the effect that a will "executed outside this state in a manner prescribed by the law of the place of its execution or by the law of the testator's domicile at the time of its ex-

10. 313 S.W.2d 566 (Tenn. App. E.S. 1957).
11. See May v. Anderson, 345 U.S. 528 (1953).
12. See New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).
13. 197 Tenn. 218, 270 S.W.2d 641 (1954).
14. TENN. CODE ANN. §§ 32-501 to -516 (1956). This was the UNIFORM PROBATE OF FOREIGN WILLS ACT.
15. TENN. CODE ANN. § 32-602 (Supp. 1959), *amending* TENN. CODE ANN. § 32-502 (1956).

ecution, shall have the same force and effect" as if executed according to Tennessee law.[16] A question still remaining under the new provision is how far the principle of res judicata should apply to persons who had actually participated in the foreign probate proceeding and might be bound individually on the basis of collateral estoppel.[17]

III. Choice of Law

1. Marriage.—Troxel v. Jones[18] involves a common law marriage. It was a wrongful death action brought by plaintiff for the death of Henry Troxel, whom she claimed to be her husband. The two had commenced living together as husband and wife in Nashville and were domiciled there for several months. They then moved to Michigan, where they continued to hold themselves out as husband and wife. While Tennessee does not recognize a common law marriage as such, a marriage of this nature is valid in Michigan.[19] Michigan law was held to create a valid marriage between the parties, which would be recognized in Tennessee. There was a complicating feature, however. At the time the cohabitation began, plaintiff was married to one Hutchson and had not been divorced from him. Defendant showed that plaintiff had not obtained a divorce in Davidson County, Tennessee, and the lower court held on this ground that there could be no valid marriage to Troxel. The supreme court reversed on the ground that defendants had failed to meet the burden of proving that Hutchson, who had been domiciled in Florida, had not obtained a divorce there. "The presumption is that she was divorced from the prior marriage and the later one was valid . . . . The presumption of validity of the later marriage is said to be one of the strongest presumptions known to the law."[20]

16. Tenn. Code Ann. § 32-107 (1956).

17. See generally Hopkins, *The Extraterritorial Effect of Probate Decrees,* 53 Yale L. J. 221 (1944).

The effect of a foreign probate decree was also raised in Troxel v. Jones, 322 S.W.2d 251 (Tenn. App. M.S. 1958), where the decree was relied upon to establish the status of the plaintiff in the current wrongful death action as the widow of the decedent. The court found it unnecessary to pass on the issue.

18. 322 S.W.2d 251 (Tenn. App. M.S. 1958).

19. "[W]here parties engage upon a contract of marriage, which is void because one has a living lawful spouse, which is unknown to one or both, uninterrupted cohabitation and reputation after removal of the impediment will produce a valid common-law marriage, although the fact of the impediment or of its removal may not have been known to either." Grammas v. Kettle, 306 Mich. 308, 311, 10 N.W.2d 895, 896 (1943) (quoting from earlier cases).

20. 322 S.W.2d at 257. The court apparently treats this presumption as a matter of proof, to be governed by Tennessee law. It could be argued that it is a part of the Michigan substantive law in determining whether the second marriage was valid or not. But the result would probably have been the same.

2. *Partnerships.*—In *Spencer Kellogg & Sons v. Lobban*[21] defendant Lobban, a broker located in Memphis, had negotiated a contract for the sale from the plaintiff company, of Buffalo, N. Y., to the Red River Cotton Oil Co., a Louisiana partnership of ten carloads of soybean oil. The contract was signed by the plaintiff in Buffalo and sent to Alexandria, Louisiana, where it was signed by the Red River Co. Plaintiff now sues the defendant on the contract in Tennessee—contending that defendant was actually a partner in the Louisiana company and therefore liable on its obligations. The defense was that the action could not be maintained against the defendant without joining the partnership as a defendant. Under Louisiana law, a partnership is a separate legal entity similar to a corporation in other states, and liability must be established against the partnership in order for any liability to exist against an individual partner.

The lower court held that the requirement that the partnership be joined as a defendant was substantive rather than procedural, so that the Louisiana rule applied. The supreme court agreed with the result, which seems to be clearly correct. The Louisiana rule concerns not simply the question of parties to an action, but the matter of the existence of liability, since the obligation of an individual partner is not primary and does not come into being "until the debt is established contradictorily with the partnership."[22]

3. *Torts.*—*Glover v. Glover*[23] involves the problem of intrafamilial tort immunities. A nineteen-year-old son sued his parents for injuries received in an automobile accident which occurred in Alabama. Though the suit was in Tennessee, the court of appeals held that Alabama law controlled as to whether the action could be maintained. There was no Alabama law directly in point, and the court decided to follow the majority rule, under which no immunity exists when the son has been emancipated. The question of emancipation was held to be one of fact for the jury.[24]

This question of immunity can be characterized in three ways—as a matter of procedure, as a matter of tort law or as a matter of family law. Since the parties were domiciled in Alabama,[25] Tennessee

21. 315 S.W.2d 514 (Tenn. 1958).

22. Rheuark v. Terminal Mud & Chem. Co., 213 La. 732, 35 So.2d 592, 594 (1948). The question of what law should apply if the Louisiana partnership went into another state and transacted business there does not appear to be raised in this case. The final acceptance of the contract took place in Louisiana and the delivery was apparently to occur there too.

23. 319 S.W.2d 238 (Tenn. App. M.S. 1958).

24. There were two bases urged: (1) the son had enlisted in the Army with the parents' consent; (2) the father had earlier contracted with the son for farming work of his own.

25. This was not disclosed in the opinion, but was information supplied by attorneys in the case.

law would apply only if the issue was regarded as one of procedure, or if there was a strong local public policy against allowing the suit. There was no Tennessee authority directly in point*, and the court's statement that Alabama law should apply because the accident happened there announces the majority rule.

Two other cases decided during the year may present choice of law problems, though the opinions make no reference to them and the facts are not clear.[26]

**But see* Lucas v. Phillips, 326 S.W.2d 905 (Tenn. 1957) which, though decided in 1957, was not published until October 6, 1959. The court in *Glover* made no reference to the *Lucas* case.

26. Tennessee Packers, Inc. v. Tennessee Cent. Ry., 319 S.W.2d 502 (Tenn. App. M.S. 1958), involving, among others, a negligence count against carriers for losing tallow in a trip from Clarksville to Ohio. The tallow apparently leaked out of a tank car just after it had crossed the Tennessee line into Kentucky. This is not perfectly clear, and the issue is not treated. It would probably have made no difference in the result.

Patterson v. Anderson Motor Co., 319 S.W.2d 492 (Tenn. App. W.S. 1958), involves an action on a contract for the sale of an automobile agency in Olive Branch, Mississippi. The contract was apparently executed in Memphis but was to be performed in Mississippi. The court applied the parol evidence rule of Tennessee without reference to the law of Mississippi. Two conflicts questions might thus have been raised. Is the parol evidence rule a matter of procedure or substance? If the latter, is it controlled by the law of the place of making or the place of performance?