SMU | Dedman School of Law

SMU Law Review

Volume 9
Issue 2 *Survey of Southwestern Law for 1954*

Article 5

January 1955

Conflict of Laws

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CONFLICT OF LAWS

THE conflict of laws decisions in the Southwest during 1954 involved both jurisdictional and choice of law questions. While the latter were more numerous, the former resulted in more controversial holdings in the area of jurisdiction of courts over foreign corporations.

I. JURISDICTION OF COURTS

JURISDICTION OVER FOREIGN CORPORATIONS

Two cases raised the issue of whether a foreign corporation which had some contact with the state of the forum, but was not qualified to do regular business there, was subject to the jurisdiction of the courts of that state. In *Johnson v. El Dorado Creosoting Co.*[1] the defendant, an Arkansas corporation, was engaged in the creosoting business almost exclusively in Arkansas. However, at times truckers were hired in Arkansas to go into Louisiana to haul poles back to the Arkansas plant. While driving on such a mission, plaintiff's decedent was killed in a highway accident. Plaintiff sued in Louisiana for workmen's compensation, serving the defendant through substituted process pursuant to a Louisiana statute.[2] The Louisiana Court of Appeals held that there was no jurisdiction over the defendant, pointing out that while the defendant had been engaged in several such tree cutting and hauling activities at the time of the accident, all activities in Louisiana had ceased by the time suit was instituted. However, the court said that it was only necessary that defendant be doing business in Louisiana at the time of the accident to sustain jurisdiction, and that it was holding that defendant, by owning timber in the state and having it removed to Arkansas, was not sufficiently doing business at that time to make it amenable to process.

While the fact that El Dorado's operations in Louisiana were in the course of its business and were somewhat regular over a period of time might raise some doubts as to the court's holding,

[1] .....La. App....., 71 So. 2d 613 (1954).
[2] L.S.A.—R.S. 13:3471 (5) (d) (1950).

the question is further complicated by the contemporaneous decision of the Oklahoma Supreme Court in *S. Howes Co. v. W. P. Milling Co.*[3] In that case the defendant, again a foreign corporation not qualified to do business in Oklahoma, had received an order from an independent broker in Oklahoma for a machine defendant manufactured which the plaintiff desired to buy. The sale was consummated through the broker. The machine proved faulty, and the plaintiff, an Oklahoma corporation, brought suit in Oklahoma for breach of warranty. Again service was made on the Secretary of State pursuant to an Oklahoma statute,[4] and the only question before the court on appeal was that of jurisdiction over the defendant. The court, in a 5 to 4 decision, held that the defendant was sufficiently doing business in Oklahoma to sustain the court's jurisdiction. So far as it appears from the opinion, the single transaction involved was the defendant's only business activity in Oklahoma. Nevertheless the court, heavily relying on the liberal trend it discerned in *International Shoe Co. v. State of Washington*,[5] emphasized that the test of doing business was "qualitative" and not "purely mechanical or quantitative,"*i.e.*, the essential nature of defendant's activity, as the majority saw it, was that of "doing business" and therefore the court had jurisdiction regardless of the fact that this was defendant's only transaction in Oklahoma. The dissenting members of the court sharply disagreed with the holding that such minimal activity amounted to "doing business," and pointed out that, not only was there no regular pattern of activity here, but also that in this transaction defendant had not even had its own salesman in Oklahoma but had concluded the sale by mail through an independent broker.

These two holdings are difficult to harmonize and serve chiefly to point up the unsettled state of the law on the question of the jurisdiction of the courts of a state over foreign corporations which have not consented to such jurisdiction and are engaged in a minimum of activities there.[6] The idea expressed by Chief Jus-

[3] ..... Okla. ....., 277 P. 2d 655 (1954).
[4] 18 O. S. secs. 1.17, 472 (1951).
[5] 362 U. S. 310, 161 A.L.R. 1057 (1945).
[6] See 1 BEALE, A TREATISE ON THE CONFLICT OF LAWS, secs. 89.1—89.3 (1935).

tice Taney in his famous dictum[7] is necessarily a thing of the past, but to what extent, under what circumstances and on what theory does a state acquire jurisdiction over a foreign corporation? Where the corporation qualifies to carry on local business, the state may require appointment of an agent for service[8] or provide that by qualifying for business the corporation consents to service of the type in the above cases.[9] This is based on the doctrine of the consent of the corporation. But where the corporation has not entered the state to the extent of qualifying to carry on local business, the problem becomes more difficult. The question seemingly turns on the facts of the particular case as to whether the corporation's activities are such that the exercise of jurisdiction by the state as to causes of action arising from such activity will not violate due process or unduly burden interstate commerce.[10] The leading recent decision by the United States Supreme Court on this was given in *International Shoe Co. v. State of Washington.* In that case the court described the test of doing business as "qualitative" and not "mechanical or quantitative," as referred to by the Oklahoma court above, and seemed to synthesize the idea of doing business with the doing of an act. But the court also emphasized the systematic and continuous character of the corporation's activities — an element which was noticeably absent in the Oklahoma case. A comparison of the facts of *International Shoe Co. v. State of Washington* with those of *S. Howes Co. v. W. P. Milling Co.* would indicate that the Oklahoma court went to the extreme in sustaining jurisdiction in the latter case. Conversely, it would seem that in the light of the Supreme Court's holding, the Louisiana court was rather conservative in holding that it had no jurisdiction over the defendant in *Johnson v. El*

[7] "... a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created... It must dwell in the place of its creation, and cannot migrate to another sovereignty." Bank of Augusta v. Earle, 13 Pet. 519, 588 (U. S. 1839).

[8] Lafayette Ins. Co. v. French, 18 How. 404 (U. S. 1855); S. Clair v. Cox, 106 U. S. 350 (1882).

[9] See Davis v. Farmer's Cooperative Equity Co., 262 U. S. 312 (1923), where constitutional limitations on this doctrine are discussed. *Cf.* International Harvester Co. v. Commonwealth of Kentucky, 234 U. S. 579 (1914).

[10] Old Wayne Mut. Life Ass'n. v. McDonough, 204 U. S. 8 (1907); Simon v. Southern Ry. Co., 236 U. S. 115 (1915). But see Missouri, K. & T. R. v. Reynolds, 255 U. S. 565 (1921); Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N.E. 915 (1917).

Dorado Creosoting Co., although this case can be distinguished by the fact that the corporation's activities were not in the nature of commercial transactions.

THE EXERCISE OF JURISDICTION — FORUM NON-CONVENIENS

A related but essentially different question was brought before the Oklahoma Supreme Court in *St. Louis-San Francisco Ry. Co. v. Superior Court*,[11] when it was asked to declare whether or not the Oklahoma law of conflict of laws included the doctrine of forum non conveniens. This doctrine, that where neither the plaintiff, the defendant nor the cause of action is related to the forum, the case will not be heard there, has been adhered to by only a few courts[12] and expressly rejected by some others.[13] However, in recent cases the United States Supreme Court has approved the exercise of the doctrine by federal courts.[14]

In the case before the Oklahoma court three suits had been filed in the Superior Court by employees of defendant who were residents of Kansas and Missouri for damages resulting from injuries sustained in Missouri. The defendant was a Missouri corporation. The claims and jurisdiction were based on the Federal Employer's Liability Act.[15] The defendant maintained that because of the severe inconvenience to it in trying the case in Oklahoma, the court should in its discretion dismiss the suit on the doctrine of forum non conveniens. The Superior Court believed it had no such discretion and refused to dismiss. The Supreme Court of Oklahoma sustained the corporation, and thereby established that Oklahoma adheres to the doctrine. The court's description of the doctrine as being discretionary and depending on the

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[11] .....Okla....., 276 P. 2d 773 (1954).

[12] Heine v. New York Life Ins. Co., 45 F. 2d 426 (D. Ore. 1930), affirmed in 50 F. 2d 382 (9th Cir. 1931); Collard v. Beach, 81 App. Div. 582, 81 N.Y.S. 619 (1st Dep't. 1903).

[13] H. Rouw Co. v. Railway Express Agency, 154 S.W. 2d 143 (Tex. Civ. App. 1941) *error ref.*, noted in 20 TEXAS L. REV. 609 (1942). See RESTATEMENT, CONFLICT OF LAWS secs. 192-202 (1934).

[14] Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947); Koster v. Lumberman's Mut. Casualty Co., 330 U. S. 518 (1947); Williams v. Green Bay & Western R. Co., 326 U. S. 549 (1946). The doctrine has been codified for federal courts in 28 U. S. C. §§ 1404-1406 (1952).

[15] 35 STAT. 65, 66, as amended, 45 U. S. C. secs. 51-60 (1952).

particular circumstances of the case, as well as its application of the doctrine in this case, was in accord with the basic principles of forum non conveniens.[16]

II. WORKMEN'S COMPENSATION

Where a person is employed in one state but is injured in another, does he have a valid workmen's compensation claim in the state of the injury or the state of hiring or both? All three aspects of this problem were presented to the courts in the Southwest in the past year. The source of many recent decisions over the nation, this question has usually been answered in the affirmative as to all three possibilities. It has been held that the claim can be made in the state of hiring on the theory that the parties tacitly include in the employment contract the terms of the local act unless they express a contrary intention.[17] Also it has been held that the state where the injury occurs has sufficient interest to justify its exercise of police powers through its compensation act.[18] And it has been held that the claimant who has recovered in the state of the injury may also recover in the state of hiring, provided that the amount first recovered should be credited to the second recovery.[19]

The second question decided by the court in *Johnson v. El Dorado Creosoting Co.* was whether or not claim could be maintained under the Louisiana Act. Plaintiff's decedent, a resident

[16] See Price v. Atchison, T. & S. F. Ry., 42 Cal. 2d 577, 268 P. 2d 457 (1954); Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U. S. 1 (1950); Chambers v. Baltimore & Ohio R. R., 207 U. S. 142 (1907); Douglas v. New York, N. H. & H. R. Co., 279 U. S. 377 (1928); on which the court relied in holding that the fact that the claim and the jurisdiction were based on a Federal statute did not prevent the state court from exercising its discretion by dismissing on the grounds of forum non conveniens.

[17] Matter of Post v. Burger, 216 N. Y. 544, 111 N.W. 351 (1916); 2 BEALE, *op. cit. supra* note 6, sec. 398.2. *Cf.* Alaska Packer's Ass'n v. Industrial Acc. Comm'n. of Cal., 294 U. S. 532 (1935). As to extra hazardous occupations see Cameron v. Ellis Construction Co., 252 N. Y. 394, 169 N. E. 622 (1930); 16 VA. L. REV. 701 (1930).

[18] State *ex rel.* Weaver v. Missouri Workmen's Compensation Comm'n., 339 Mo. 150, 95 S.W. 2d 641 (1936); Beck v. Davis, 175 Okla. 623, 54 P. 2d 371 (1936); McKesson-Fuller-Morrison Co. v. Industrial Comm'n., 212 Wis. 507, 250 N.W. 396 (1933). *But cf.* Bradford Electric Light Co. v. Clapper, 286 U. S. 145 (1932); RESTATEMENT, CONFLICT OF LAWS secs. 339, 400 (1948 Supp.).

[19] McLaughlin's Case, 274 Mass. 217, 174 N.E. 338 (1931); Hughey v. Ware, 34 N. M. 29, 276 Pac. 27 (1929); Interstate Power Co. v. Industrial Comm'n., 203 Wis. 466, 234 N.W. 889 (1931). *Cf.* Magnolia Petroleum Co. v. Hunt, 320 U. S. 430 (1943), as to awards which are regarded as conclusive. See STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 217-222 (2d ed. 1951).

of Arkansas, had been hired in Arkansas by defendant, an Arkansas corporation, but was killed in a highway accident while hauling poles in Louisiana. The Louisiana court said that although its decision on the first question made it unnecessary, it would go on to hold that the fact that the accident occurred in Louisiana alone was sufficient to bring the compensation claim under the Louisiana Act. In this the court was in line with the decisions above.[20]

The converse aspect of the question was presented to the New Mexico Supreme Court in *Franklin v. Geo. P. Livermore, Inc.*[21] Plaintiff, a resident of Hobbs, New Mexico, was hired there by a representative of the defendant to work on oil drilling rigs 15 miles away in Texas. While doing this work, plaintiff continued to live in Hobbs. In the course of his employment plaintiff was injured, for which defendant's insurance carrier voluntarily made payments pursuant to the provisions of the Texas Act for 15 weeks. Here plaintiff brought suit for compensation under the New Mexico Act. The issue of crediting defendant with the amount voluntarily paid under the Texas Act was disposed of by an agreement between the parties, and the only question before the court was whether plaintff could maintain his claim in New Mexico. The court construed the employment as temporary, since it had not lasted more than six months, and held that therefore plaintiff was covered by the extraterritorial provision of the New Mexico Act.[22] The court also held that in order to maintain the claim, it was not necessary that plaintiff had ever worked for defendant in New Mexico, but that it was sufficient that the contract of employment had been made there. It would seem that the court was quite correct in so holding, since the basis of sustaining the claim under the Act of the state of hiring is that the parties included the Act in their contract. Thus it is the making of the employment contract rather than entering into its performance that supports the claim.[23]

[20] See note 18 *supra*. However some courts have been restrictive on this view; Finkley v. Eugene Saenger Tailoring Shop, 100 Ind. App. 549, 196 N.E. 536 (1935); Freeman v. Higgins, 123 Neb. 73, 242 N.W. 271 (1932).

[21] .....N. M....., 270 P. 2d 983 (1954).

[22] N. M. S. COMP. sec. 57-933 (1941).

[23] See GOODRICH, CONFLICT OF LAWS sec. 100 (3rd ed. 1949) for a discussion of this theory.

III. CONTRACTS

INTERPRETATION

The third and last question decided by the Louisiana court in *Johnson v. El Dorado Creosoting Co.* dealt with the interpretation of the contract between El Dorado and its compensation insurance carrier. This policy had been written and issued in Arkansas and was to cover injuries to all of El Dorado's employees as required by Arkansas statute.[24] Under the Arkansas Act plaintiff's decedent would be classified as an independent contractor rather than an employee and thus unable to recover, but under the Act of Louisiana, where the claim was made, plaintiff's decedent would be covered. The court held that the insurance contract should be interpreted by the Arkansas statute and thus would not cover the present claim which would not be valid by that Act. The court said that it would not be justified in construing the contract to cover any claim that might be made against El Dorado, where such claims would be invalid in Arkansas.

Since the problem of which law should govern the interpretation of a contract is basically one of determining expressed intention rather than one of validity,[25] it would seem that the court was justified in reaching the result it did. El Dorado operated almost exclusively in Arkansas, and its employees, including plaintiff's decedent, were residents of Arkansas. The Arkansas Act was the only one mentioned in the contract. Thus it would seem that the parties probably intended their language to have the legal effect it would have under the Arkansas law.[26] However, this would have produced a curious result had the court held that it had jurisdiction over El Dorado. In that event plaintiff's claim would have succeeded as to El Dorado, but the insurance carrier would not be liable on its contract, and it would seem that the primary intent of the parties in making the contract was that El Dorado should be insured against all compensation claims arising in the course of its business.

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[24] ARK. STATS. see 81-1338 (1947).

[25] GOODRICH, *op. cit. supra* note 23, sec. 112.

[26] *Cf.* Hurt v. Pennsylvania Threshermen's & Farmers' Mut. Casualty Ins. Co., 175 Md. 403, 2 A. 2d 402 (1938); Salkind v. Pennsylvania Threshermen's & Farmers' Mut. Casualty Ins. Co., 335 Pa. 326, 6 A. 2d 301 (1939).

ESSENTIAL VALIDITY

The question of which law should govern the essential validity of a contract is one of the most confused and unsettled in the field of conflict of laws. The courts have varied between applying the law of the place of contracting, the law of the place of performance, and the law intended by the parties to govern, and shortcomings have been found in each approach.[27]

Twice in the past year the question of the validity of a contract was presented to federal courts sitting in the Southwest. In both cases federal jurisdiction was based on diversity of citizenship, and the court in each instance properly applied the law of conflict of laws of the state where it was sitting under the rule of *Erie R. R. Co. v. Tompkins.*[28]

In *General Beverages Inc. v. Rogers*[29] plaintiff, a Tennessee corporation, sued on a note executed and payable in Alabama. The note was void under Alabama law because of an illegal consideration, but apparently plaintiff was hoping that the federal court sitting in Oklahoma would hold it valid under Oklahoma law. The Court of Appeals, in applying the Alabama law, was unquestionably correct, since the place of performance and the place of contracting were the same in this case. Although it was not necessary for decision in this case, the court said that apparently the prevailing rule in Okahoma is that the law of the place of performance always governs the validity of a contract. After considerable uncertainty in the earlier Oklahoma cases which indicated that the lex loci contractu might govern,[30] it seems to be well established now that Oklahoma adheres to the rule that the law of the place of performance should govern.[31] Clearly the law of the

[27] 2 BEALE, *op. cit. supra* note 6, secs. 332.1-332.5.

[28] 304 U. S. 64 (1938). *Cf.* Klaxon Co. v. Stentor Electric Mfg. Co. Inc., 313 U. S. 487 (1941).

[29] 216 F. 2d 413 (10th Cir. 1954).

[30] Steward v. Commonwealth Nat. Bank, 290 Okla. 754, 119 Pac. 216 (1911); Klien v. Keller, 42 Okla. 592, 141 Pac. 1117 (1914); Fist v. La Batte, 69 Okla. 224, 171 Pac. 1120 (1918); Missouri F. & C. Co. v. Scott, 72 Okla. 59, 178 Pac. 122 (1918). *Cf.* Western U. T. Co. v. Pratt, 18 Okla. 274, 89 Pac. 237 (1907); Atchison, T. & S. F. R. R. v. Smith, 38 Okla. 157, 132 Pac. 494 (1913).

[31] Security Trust Co. v. Gleichman, 50 Okla. 441, 150 Pac. 908 (1915); Denison v. Phipps, 87 Okla. 299, 211 Pac. 83 (1922); Sheehan Pipe Line Co. v. State Industrial Comm'n., 151 Okla. 272, 3 P. 2d 199 (1931); Collins v. Holland, 169 Okla. 10, 34 P. 2d 587 (1934).

forum would never govern, and it is surprising that this contention was seriously presented to the Court of Appeals.

A similar contention, equally surprising, was made in *Miller v. American Ins. Co.*[32] Suit was instituted in the federal court in Arkansas on a fire insurance policy written and issued in Texas to plaintiff, a Texas citizen. The policy contained a provision for aribtration before suit which was valid under Texas law but void under an Arkansas statute. Plaintiff had not complied with this provision, but had brought suit immediately upon loss. The court dismissed the suit as premature because of this non-compliance and said that Arkansas conflict of laws rules rather than the Arkansas statute applied, and by these rules validity of the provision was governed by Texas law. The court pointed out that a party cannot escape such a provision, which is valid by the laws where it was made and to be performed, merely by bringing suit in a forum where such a clause would not be valid had it been made there.

The court went on to say that the fact of the Arkansas statute did not manifest a sufficiently strong public policy in Arkansas against arbitration clauses to prevent the application of the Texas law. It is clear that a strong policy of the forum can prevent application of foreign law, but that this must be more than simply policy of the internal law of a state as evidenced by a statute is also fairly certain.[33] It has even been urged that the rule of public policy should seldom if ever be applied among sister states in the United States.[34] This is more readily seen once it is understood that the court, in looking to foreign law, is not giving that law any extraterritorial effect, but rather is applying the law of conflict of laws of the forum itself.[35]

IV. Testamentary Dispositions of Land

A special aspect of the problem of which law should govern the disposition by will of an interest in land where the domicile

[32] 124 F. Supp. 160 (W. D. Ark. 1954).

[33] Herrick v. Minneapolis & St. L. Ry., 31 Minn. 11, 16 N.W. 413 (1883). *Cf.* Sullivan v. German Nat. Bank, 18 Colo. App. 99, 79 Pac. 162 (1902). *See* Loucks v. Standard Oil, 224 N. Y. 99, 111, 120 N.E. 198, 202 (1918).

[34] Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 Yale L. J. 656, 662 (1928).

[35] Goodrich, *op. cit. supra* note 23, sec. 8.

of the testator is in one state and the situs of the land in another was presented to the Texas Court of Civil Appeals in *Houston v. Colonial Trust Co.*[36] Testator, a domiciliary of Pennsylvania, left his entire estate, including some oil interests in Texas land, in trust, half the income being payable to his wife for life or until her remarriage. In the Pennsylvania probate proceedings the wife elected to renounce the will and claim her dower rights. In the present suit the wife claims a vested interest in the Texas property because it was purchased during coverture with the husband's earnings which would have been community property had they lived in Texas. The court rejected this contention and pointed out that the status of the earnings was governed by Pennsylvania law by which they are exclusively the property of the husband. Then the court said that bringing the husband's property across state lines and changing its form does not change the character of its ownership. Although marital rights in land are generally determined by the law of the situs of the land, the particular instance where earnings of the husband in a common law state are used to purchase land in a community property state appears to be a well settled exception.[37]

In beginning the present suit the wife had expressed her desire to elect to take under the will as to the Texas property in the event that her first claim should be denied. Due to its first holding the court was then presented with the question of whether the wife's renunciation of the will in Pennsylvania was binding on her in Texas as to interests in Texas land. The court said that this appeared to be a question of first impression in Texas,[38] but that the majority of holdings in other jurisdictions was to the effect that the first election was binding. Although indicating that it would follow the majority, the court avoided actually deciding the point by holding that since the wife's attempted election in Texas had been expressly conditioned on the outcome of her first contention, it was not sufficiently unequivocal to amount to a valid election.

[36] 266 S.W. 2d 231 (Tex. Civ. App. 1954) *error ref, n.r.e.*, noted in 33 TEX. L. REV. 120 (1954).

[37] Brookman v. Durkee, 46 Wash. 578, 90 Pac. 914 (1907); *in re* Burrow's Estate, 136 Cal. 113, 68 Pac. 488 (1902); Ellington v. Harris, 127 Ga. 85, 56 S.E. 134 (1906); Blethen v. Bonner, 30 Tex. Civ. App. 585, 71 S.W. 290 (1902); Clark v. Thayer, 98 Tex. 142, 81 S.W. 1274 (1904).

[38] No Texas decisions on this point have been found.

The rule in the majority of states is that an election made in one place is binding elsewhere, whether it is an election to renounce or to take under a will,[39] provided that the formal requisites of both places are complied with.[40] Once the election is found to be binding, the rights thus acquired as to land are determined by the law of the situs.[41] These rules are based generally on estoppel by election, and it would seem that the indication of the court in the present case is entirely harmonious with them.

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[39] Colvin v. Hutchison, 338 Mo. 576, 92 S.W. 2d 667 (1936); Mettler v. Warner, 98 Neb. 111, 152 N.W. 327 (1915); Martin v. Battey, 87 Kan. 582, 125 Pac. 88 (1912); Mechling v. McAllister, 135 Minn. 358, 160 N.W. 1016 (1917). *Contra*, Brinkerhoff v. Huntley, 223 Ill. App. 591 (1921).

[40] Apperson v. Bloton, 29 Ark. 418 (1874); Bish v. Bish, 181 Md. 621, 31 A. 2d 348 (1943); McGinnis v. Chambers, 156 Tenn. 404, 1 S.W. 2d 1015 (1928); *In re* Owsley's Estate, 122 Minn. 190, 142 N.W. 129 (1913); Bolton v. Barnett, 131 Miss. 802, 95 So. 72 (1923).

[41] Colvin v. Hutchison, 338 Mo. 576, 92 S.W. 2d 667 (1936); Singleton v. St. Louis Union Trust Co., 191 S.W. 2d 143 (Tex. Civ. App. 1945) *error ref., n.r.e.*