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Conflict of Laws

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PART II: PROCEDURAL LAW

CONFLICT OF LAWS

by

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I. JURISDICTION AND JUDGMENTS

Long-Arm Statute (Contract Cases). During the twelve-month period covered by this *Survey*, a spate of cases were before the courts in which jurisdiction was sought over non-resident defendants under article 2031b, the Texas long-arm statute. In *N.K. Parrish, Inc. v. Schrimscher*[1] and *Cohn-Daniel Corp. v. Corporacion De La Fonda, Inc.*[2] jurisdiction was sustained. In *Omniplan, Inc. v. New America Development Corp.*[3] and in *Arthur, Ross & Peters v. Housing Inc.*[4] jurisdiction was denied. The courts in the latter two cases determined that contacts with Texas were too minimal to confer judicial jurisdiction over the defendants.

N.K. Parrish, Inc. v. Schrimscher[5] concerned a grain contract made between plaintiff, a Texas grain dealer, and defendant, a New Mexico grain producer. Telephone negotiations commenced by defendant in New Mexico to plaintiff in Texas resulted in a contract for delivery by defendant of grain to Albuquerque, New Mexico. Payment to defendant was to be made by drafts drawn on plaintiff's bank in Texas. Express wording in the contract made it performable at Lubbock, Texas. Alleging default for failure to deliver the required amount of grain, plaintiff sued the defendant in Texas for breach of contract. The defendant entered a special appearance under Texas Rule of Civil Procedure 120a challenging the court's jurisdiction. The trial court sustained the challenge and dismissed the suit for lack of sufficient contacts with Texas to accord defendant due process of law under the Constitution of the United States. The court of civil appeals reversed and sustained jurisdiction over the defendant. After determining that the requirements of article 2031b had been met because a contract had been entered into by mail "with a resident of Texas to be performed in whole or in part by either party in this State . . . ,"[6] the appellate court entered into an inquiry as to whether constitutional due process had been met.

The defendant had contended that the facts did not warrant an exercise of jurisdiction over him, a non-resident, under the three-tiered test of the Texas Supreme Court in *O'Brien v. Lanpar Co.*[7] There the supreme court said:

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1. 516 S.W.2d 956 (Tex. Civ. App.—Amarillo 1974, no writ).
2. 514 S.W.2d 338 (Tex. Civ. App.—Eastland 1974, no writ).
3. 523 S.W.2d 301 (Tex. Civ. App.—Waco 1975, no writ).
4. 508 F.2d 562 (5th Cir. 1975).
5. 516 S.W.2d 956 (Tex. Civ. App.—Amarillo 1974, no writ).
6. TEX. REV. CIV. STAT. ANN. art. 2031b, § 4 (1964).
7. 399 S.W.2d 340 (Tex. 1966).

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the foreign state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded to the respective parties, and the basic equities of the situation.[8]

Disagreeing with the defendant, the court found that the jurisdictional elements of *O'Brien* had been met. Even though defendant had not performed actual physical acts in Texas, he had entered into a transaction which had a substantial connection with the state. The transaction had been initiated by the defendant's New Mexico telephone conversation to Texas which had resulted in a contract entered into by mail with the plaintiff. By signing the contract and delivering it in Texas the defendant could foresee the possibility of a need to invoke the benefits and protection of the Texas law to test the contract obligations. Moreover, since the contract was by its terms performable in Texas, Texas law would probably be relevant to the decision of the case. Finally, the court noted that it would be just as inconvenient to require the plaintiff to sue in New Mexico as it would be to require the defendant to sue in Texas. Furthermore, no hardship or inequity had been shown to result if defendant was required to litigate in Texas. The elements of *O'Brien* were met, as were the traditional notions of fair play and substantial justice requirements of *International Shoe Co. v. Washington.*[9]

In *Cohn-Daniel Corp. v. Corporacion De La Fonda, Inc.*[10] the court had before it a suit by a Texas corporation against a New Mexico corporation to recover for services rendered under a contract whereby the plaintiff was to supervise an air-conditioning modification of a hotel owned by the defendant in New Mexico. The contract negotiations were initiated in Dallas by the defendant. Afterward, officers of the New Mexico corporation visited Dallas to discuss the air-conditioning project and the terms of the contract. Further negotiations were carried on by mail and telephone between the parties in their respective states. The agreement was prepared by the New Mexico corporation, mailed to Dallas, and executed there by the Texas corporation. It was then mailed to New Mexico where it was executed by the New Mexico corporation. On these facts the trial court found a lack of jurisdiction in Texas and sustained the non-resident's special appearance. The court of civil appeals reversed and remanded, finding that article 2031b was satisfied because the contract was made by mail with a resident of Texas to be partially performed in Texas. Such performance in Texas consisted of both a general coordination of the project in Dallas, and provision for certain payments to be made under the contract in Dallas. The court also pointed

8. *Id.* at 342.
9. 326 U.S. 310 (1945).
10. 514 S.W.2d 338 (Tex. Civ. App.—Eastland 1974, no writ).

out that the New Mexico defendant had acted purposefully in Texas by choosing to do business with a Texas corporation. Moreover, the court determined that it was not unfair or unreasonable to make the New Mexico corporation defend in Texas. Support for this conclusion was based upon a Fifth Circuit case, *Product Promotions, Inc. v. Cousteau.*[11] In that case emphasis was placed on the rational nexus between the suit and the state of the forum. Such nexus was found to exist there because the plaintiff was a Texan, the contract was made in Texas, and Texas law would be relevant to the outcome of the suit. This reasoning was not as strong in *Cohn* because the contract was made in New Mexico, although it was executed by the plaintiff in Texas.

Language of *Product Promotions* was also quoted pertaining to the inconvenience to the defendant by forcing it to defend in Texas. This was offset by the hardship which would result if the plaintiff were forced to bring suit in New Mexico. Furthermore, no inequities were demonstrated which would impose undue hardship on the defendant by requiring it to defend in Texas.

A dissenting opinion recognized that the contract was "finalized" in New Mexico. It was upon this fact that the cause of action was founded. Does this dissent mean to convey the impression that if the cause of action does not arise from an act in Texas it thus fails to meet one of the tests of *O'Brien*? In this connection it should be noted that *O'Brien* states that "the cause of action must arise from, *or be connected with* such act or transactions."[12] It would seem clear that the purposeful act of negotiating the contract in Texas was connected with the transaction. The dissent also argued that the contract did not require any performance in Texas. If this were true then there would be no compliance with article 2031b and jurisdiction could not be sustained. However, the majority's conclusion that certain acts of performance actually did take place in Texas seems to be more correct.

Jurisdiction over a Virginia corporation was denied in *Omniplan, Inc. v. New America Development Corp.*[13] where a Virginia corporation was sued in Texas on a sworn account for labor and materials allegedly furnished by the plaintiff to the defendant's primary contractor, who was a resident of Texas. The contractor had employed the plaintiff to perform architectural and designing services for a Virginia land development project of the defendant. Unfortunately for plaintiff's suit it was shown that the defendant simply had no contacts with Texas other than the fact that its primary contractor was a resident of the state. Finding that jurisdiction over the defendant could not be founded upon the unilateral acts or contacts with the defendant by the plaintiff, the court decided that New America could not be held subject to the jurisdiction of the State of Texas under the minimum

11. 495 F.2d 483 (5th Cir. 1974), *noted in* Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 29 SW. L.J. 244, 244-47 (1975).

12. 399 S.W.2d 340, 342 (Tex. 1966) (emphasis added). On the confusion as to the reach of the Texas long-arm statute see Thomas, *supra* note 11, at 248-49.

13. 523 S.W.2d 301 (Tex. Civ. App.—Waco 1975, no writ).

contacts rule of *International Shoe*.[14] Quarrel can hardly be had with the court's decision, for under the Supreme Court decision in *Hanson v. Denckla*[15] the defendant must purposefully do some act or consummate some transaction in the state of the forum in order for jurisdiction to be sustained.

A situation closer to the issue of sufficiency of contacts was presented by the Fifth Circuit case of *Arthur, Ross & Peters v. Housing Inc.*[16] which involved a suit by a Texas partnership against a North Carolina corporation. A breach of an agreement involving the purchase of North Carolina real estate and the formation of a limited partnership in North Carolina was alleged. Plaintiff claimed that a portion of the contract was performed in Texas because the contract provided that certain notices and return payments were to be forwarded to Texas; the negotiations for the contract were actually carried on by mail between Texas and North Carolina; the contract was sent to Texas for signing; and the first payment under the contract was mailed from Texas.

The court was of the opinion that jurisdiction under article 2031b could not be based on an initial consummation of the agreement in Texas, for by the terms of the statute, performance in whole or in part is the basis of doing business and of jurisdiction. The court held in effect that there was no performance in Texas. A mere mailing of a payment did not dispose of the issue, for this was simply a unilateral act of the plaintiff. If the contract had provided for payment and performance in Texas an opposite result would have been called for. In such an instance the defendant would have performed acts purposefully connected with the forum. Reliance could not be based on the additional fact that notices and return payments were to be mailed to plaintiff because the receipt of notices and payments by the plaintiff in Texas would not satisfy the *Hanson* rule that the defendant purposefully avail himself of benefits and protection of Texas law.

The court's opinion stressed the fact that the Texas long-arm statute, article 2031b, conferred jurisdiction in a contract situation on the basis of some performance within the state. Making the contract within the state would not suffice. This may be reading the statute too narrowly inasmuch as it contains, in section 4, a "catch-all phrase" which is rather ambiguous. The statute defines "doing business" as a tort committed in whole or in part in the state or a contract made with a Texas resident to be performed in whole or in part within the state, "without including other acts that may constitute doing business."[17] The obvious purpose of this catch-all phrase has been said to be "to expand the jurisdictional scope of the statute to constitutional limits 'without including other acts' in the specific description of acts that fall within the purview of article 2031b."[18] Thus, the execution

14. *Id.* at 306.
15. 357 U.S. 238 (1958).
16. 508 F.2d 562 (5th Cir. 1975).
17. TEX. REV. CIV. STAT. ANN. art. 2031b, § 4 (1964).
18. Thode, *In Personam Jurisdiction; Article 2031b, The Texas "Long-Arm" Jurisdiction Statute; and the Appearance To Challenge Jurisdiction in Texas and Elsewhere*, 42 TEXAS L. REV. 279, 308 (1964).

of a contract in Texas might be considered an act that could be a jurisdictional base under the statute if such act could also be said to provide sufficient minimum contacts required for fairness and reasonableness to satisfy due process requirements. If the only contact which the defendant or the transaction has with the forum state is that the forum state is the place of contracting, then there would appear to be insufficient contacts to satisfy due process. Would the other contacts with Texas result in a reasonable and fair assumption of jurisdiction? In the court's opinion, they would not. The contacts were simply too insubstantial to support jurisdiction based upon an additional, insubstantial contact of an agreement negotiated and consummated by mail.

In the *Parrish* case there was substantial performance in Texas and in the *Cohn-Daniel* case, the court stressed, in addition to some performance in Texas, the fact that the defendant's representative had actually been in Texas to negotiate. In *Product Promotions, Inc. v. Cousteau*[19] the federal court found that the forum state was the place of making the contract and also the place of substantial performance. The courts in these cases concluded that, by entering into transactions which had substantial connection with Texas, the defendants had purposefully consummated acts in the forum state and could have foreseen that consequences would occur in Texas.

The court in *Grand American Co. v. Stockstill*[20] was concerned with a challenge to the judicial jurisdiction of Texas by nonresident defendants. The challenge failed for two reasons. First, the defendants waived any jurisdictional defects by failing to follow the pleading mechanics required by rule 120a,[21] which permits a special appearance to contest jurisdiction. In this case the defendants filed an answer to the merits *before* they filed a motion for special appearance objecting to jurisdiction. Because rule 120a demands that the special appearance motion be filed prior to any other pleading, the special appearance motion was waived.[22]

Second, the court held the defendant subject to Texas jurisdiction on the basis of minimum contacts with the state under the Texas long-arm statute. A promissory note which was the basis of the cause of action had been executed in Texas and the defendants were obligated to pay the amount involved in Texas. Thus, the doing business requirement of the Texas long-arm statute was satisfied; that is to say, a contract was made ostensibly in Texas with a Texas resident to be performed in Texas.

Long-Arm Statute (Tort Cases). The court of civil appeals in *Murray v. Murray*[23] had before it a suit for conversion brought by plaintiffs in Texas. Citation upon the defendant was effected by personal service at defendant's address in Tucson, Arizona. The opinion of the court gives no clue as to the legal basis for such out-of-state service, but it would seem permissible to

19. 495 F.2d 483 (5th Cir. 1974).
20. 523 S.W.2d 422 (Tex. Civ. App.—Amarillo 1975, no writ).
21. TEX. R. CIV. P. 120a.
22. For discussion of this point see Thode, *supra* note 18, at 316.
23. 515 S.W.2d 387 (Tex. Civ. App.—Waco 1974, no writ).

assume that service rested upon Texas Rule of Civil Procedure 108, which authorizes out-of-state service where the defendant is a non-resident or is absent from Texas. The defendant entered a special appearance contesting jurisdiction. The trial court found, and the court of civil appeals agreed, that the defendant was not a Texas domiciliary, but rather a domiciliary of Arizona. Domicile within the state is a basis of in personam jurisdiction.[24] Thus, if the defendant had been domiciled in Texas, judicial jurisdiction over her would have existed and the out-of-state service at her address would no doubt have been fair notice to comport with procedural due process. Since she was not a domiciliary of Texas, in personam jurisdiction could not be sustained and service alone could not support a valid judgment in the absence of other contacts of the defendant with the forum state upon which in personam jurisdiction could be predicated.

However, the court of civil appeals found that in personam jurisdiction could be grounded upon the non-resident defendant's relations with the state. Citing *International Shoe Co. v. Washington*[25] and *O'Brien v. Lanpar*,[26] the court said that the contacts of the defendant were sufficient to satisfy due process of law.[27] The court mentioned that an airplane, one of the objects of the alleged conversion, had remained in Texas three months after the death of the defendant's husband, the owner of the airplane; that defendant had caused it to be removed from Texas; and that she herself had been personally present in Texas after the death of her husband which had occurred shortly before the airplane was removed. Although no mention was made in the court's opinion of the Texas long-arm statute, certainly the terms of the statute as well as due process were satisfied. The statute permits an exercise of jurisdiction when a tort, such as the defendant's conversion, is committed in whole or in part within the state. In addition, the statute requires that service of process must be sent to the non-resident through the secretary of state.[28] The only allusion to service by the court was a statement "that the Defendant was served with citation by personal service at the above-named address in Tucson, Arizona."[29] Such a statement can hardly be construed as constructive service through the secretary of state. Thus, it would seem that the citation of service under article 2031b was defective.

In a recent Austin court of civil appeals case, *Prine v. American Hydrocarbons, Inc.*,[30] the court ruled that in personam jurisdiction over a non-resident defendant did not exist so as to permit the court to enter a default judgment in the absence of evidence that the secretary of state had forwarded a copy of such service to the non-resident. The Supreme Court of Texas decision in *McKanna v. Edgar*[31] held that when a statutory method of

24. Milliken v. Meyer, 311 U.S. 457 (1940).
25. 326 U.S. 310 (1945).
26. 399 S.W.2d 340 (Tex. 1966).
27. 515 S.W.2d at 391.
28. TEX. REV. CIV. STAT. ANN. art. 2031b, §§ 1, 5 (1964).
29. 515 S.W.2d at 391.
30. 519 S.W.2d 520 (Tex. Civ. App.—Austin 1975, no writ).
31. 388 S.W.2d 927 (Tex. 1965).

constructive service, such as service upon the secretary of state, is relied upon, the record must affirmatively show that the method of service was strictly followed. Proof that the secretary of state forwarded the service of process is necessary for the establishment of jurisdiction. Thus, the default judgment entered by the trial court in *Prine* was reversed and remanded for a trial on the merits. Emphasis should be placed on the fact that *Prine* was an appeal by the defendant from a default judgment on the basis that the plaintiff had offered no proof of proper service under the statute. In *Murray v. Murray* the non-resident defendant appeared specially under rule 120a, attacking the judicial jurisdiction of the Texas court. Resort to special appearance under rule 120a can only be made to attack a lack of jurisdiction over person or property under the constitution (state or federal) and the applicable state statutes. One commentator has stated: "Defective service or defective process, or even an attempt to bring the defendant before the court under the wrong statute does not authorize the use of the special appearance. If the defendant attempts to make a special appearance to raise any of these contentions, then his appearance is a general one . . . ."[32]

However, other pleas may, under rule 120a, be filed in the same instrument as that containing the motion for a special appearance. Such other pleas may also be made subsequently without waiver of the special appearance. Had the defendant in *Murray* sought to attack the improper method of service, she should have done so by a motion to quash under Texas Rule of Civil Procedure 122. However, if jurisdiction over the defendant is sustained, a motion under rule 122 would be of little value to the defendant. Even if the service or citation is quashed as defective under rule 122, the defendant is deemed to have entered his appearance after the expiration of twenty days and is deemed further to have been duly served, requiring him to appear and answer. If he does not, a default judgment can be rendered against him.

Frye v. Ross Aviation, Inc.[33] was a wrongful death action brought in Texas by the decedent's widow and children and by decedent's mother who had qualified as administratrix in Randall County, Texas. The decedent was a resident of New Mexico as were his widow and children, although after suit was brought the latter moved to Texas. The crash occurred in New Mexico shortly after take-off on an intrastate flight. The defendant was an aviation company incorporated in Delaware. Its principal business was the performance of an air transportation contract with the Atomic Energy Commission made and negotiated in New Mexico. The business was conducted out of Albuquerque, New Mexico. Defendant had no office personnel, employees, or agents in Texas. It had neither solicited business in Texas nor had a permit to do business in Texas. In fact the defendant's only contact with Texas consisted of certain frequent, unscheduled flights into Texas. Under this set of facts the court held that the three-tiered test of

32. Thode, *supra* note 18, at 312.
33. 523 S.W.2d 500 (Tex. Civ. App.—Amarillo 1975, no writ).

O'Brien v. Lanpar was not met, because the cause of action did not arise out of a purposeful act or transaction in Texas, the forum state. In fact, the court said that the defendant's acts had no relation with Texas. Therefore, jurisdiction over the non-resident did not exist.

Another point of interest is the fact that the defendant also pleaded the doctrine of *forum non conveniens*.[34] Plaintiff contended that by filing a plea in abatement on the ground of *forum non conveniens*, the defendant entered a general appearance and submitted to the court's jurisdiction for all purposes. Rule 120a provides that any plea or motion may be contained in the same instrument as the special appearance or filed afterwards without waiving the special appearance. The court of civil appeals therefore concluded that the *forum non conveniens* plea to dismiss was filed expressly subject to the special appearance and the defendant had not entered a general appearance.

Unanswered was the plaintiff's contention that article 4678[35] precluded the court from exercising its discretionary power to dismiss for *forum non conveniens* and required the court to try the wrongful death case if it had jurisdiction. Under the doctrine of *forum non conveniens* courts have discretion to dismiss an action if another forum would be more convenient.[36] The question raised is whether such discretionary power extends to a wrongful death action. It was unnecessary to answer this question here because the court lacked jurisdiction. In *Allen v. Bass*,[37] an earlier court of civil appeals case, discretionary refusal to exercise jurisdiction under the Texas wrongful death statute was denied. Because of the wording of the statute, the court concluded that an absolute right was granted to maintain a wrongful death action in Texas even though the cause of action arose outside the state and the parties were not residents of Texas. The Texas statute provides for redress in Texas courts for injury or wrongful death occurring in another state to citizens of the United States or of a foreign state. It was said that the term "foreign state" embraced another state of the United States and thus citizens of other states possessed an absolute right to bring their suits in Texas. This is somewhat difficult to sustain, for the Texas statute goes on to say that the right of action "may be enforced in the courts of this State."[38] The use of the word "may" hardly seems mandatory in nature.

Long-Arm Statute (Matrimonial Relations). Fox v. Fox[39] points up the impact of *Mitchim v. Mitchim*,[40] a Supreme Court of Texas case reported in a prior *Annual Survey of Texas Law*.[41] The question raised in these cases

34. On this doctrine see Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). *See also* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 154-60 (1971). The trial court sustained jurisdiction but dismissed the case based upon this doctrine.
35. TEX. REV. CIV. STAT. ANN. art. 4678 (1952).
36. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).
37. Allen v. Bass, 47 S.W.2d 426 (Tex. Civ. App.—El Paso 1932, writ ref'd).
38. TEX. REV. CIV. STAT. ANN. art. 4678 (1952).
39. 526 S.W.2d 180 (Tex. Civ. App.—Dallas 1975, no writ).
40. 518 S.W.2d 362 (Tex. 1975).
41. Thomas, *supra* note 11, at 249-52.

was whether the long-arm statute and the minimum contacts doctrine were applicable in matrimonial relations cases, particularly those involving child custody or alimony where personal jurisdiction is necessary. Following *Mitchim*, the Dallas court of civil appeals in *Fox* answered in the affirmative.

In *Mitchim* a divorce decree was rendered by an Arizona court which also awarded to the wife alimony, attorney's fees, and court costs. Jurisdiction over the absent husband had been based upon the Arizona long-arm statute which permits suit against a non-resident defendant in instances when the defendant "has caused an event to occur in this state out of which the claim which is the subject of the complaint arose . . . ."[42] The husband, who had become a Texas domiciliary, did not appear in the Arizona proceeding. Thereafter, he attacked that part of the Arizona judgment which awarded fees, costs, and alimony, claiming the court lacked in personam jurisdiction. The validity of the divorce was not questioned. Jurisdiction over the marital status was present through the wife's domicile in the state.[43] The Supreme Court of Texas decided that sufficient contacts with Arizona were present to permit the exercise of in personam jurisdiction on the basis of *International Shoe*. Moreover, requirements of the Arizona statute were met since some or all of the events leading up to the divorce, which culminated in alimony payments, court costs, and fees, could have occurred in Arizona when the couple was domiciled there. Defendant also had other relationships with Arizona such as voting, owning a home, paying taxes, forwarding money to pay off a mortgage, and paying certain expenses for his daughter in Arizona. Plaintiff also lived in Arizona. There was some inconvenience to the defendant by forcing him to defend the suit in Arizona. However, it would have been equally inconvenient to force the wife to proceed to Texas to sue. The fairness and reasonableness requirement of due process of law appears to have been met.

Fox v. Fox[44] involved a New Jersey married couple who separated. A separation agreement was signed in New Jersey providing that the husband would pay child support and alimony, and further, that the husband would receive one-half of the proceeds from the sale of their home. Later the husband moved to Texas and two years afterwards the wife sued for divorce. Personal service upon the husband in Texas was made pursuant to New Jersey law. The husband did not appear. A divorce judgment was rendered which incorporated the terms of the separation agreement. Thereafter, the husband failed to pay alimony and the wife then filed a motion with the New Jersey court for judgment for unpaid alimony, attorney's fees, and court costs arising from the divorce action. Service was by certified mail and the return receipt was signed by the husband, who made no appearance. A default judgment was rendered.

The Dallas court of civil appeals found that proper personal service upon the husband was made pursuant to New Jersey rules, that the jurisdictional

42. ARIZ. R. CIV. P. 4(e)(2).
43. Williams v. North Carolina, 317 U.S. 287 (1942).
44. 526 S.W.2d 180 (Tex. Civ. App.—Dallas 1975, no writ).

requirements of the New Jersey long-arm statute were met, and that there were sufficient minimum contacts of the defendant-husband with New Jersey to permit a constitutional exercise of in personam jurisdiction over him. Contacts mentioned which would satisfy traditional notions of fair play were matrimonial domicile in New Jersey for many years prior to the divorce, the separation and property agreement made in New Jersey, child support payments sent to New Jersey, and plaintiff's continued domicile in New Jersey. The latter factor gave New Jersey a strong interest in providing for her support.

In these two cases, as well as in cases arising in other jurisdictions,[45] the minimum contacts doctrine has been used to support personal decrees against non-resident, non-appearing defendants. The doctrine is very suitable to such cases, for, assuming the existence of sufficient contacts, it tends to ameliorate certain hardships which arise in divorce actions by granting in personam jurisdiction over a spouse who might otherwise attempt to escape liability.

The wife in *Fox* also sought enforcement of the New Jersey judgment for alimony arrearages. The Texas court held that once jurisdiction has been obtained over a person, it continues with respect to all subsequent proceedings arising out of the original suit.[46] Since New Jersey had jurisdiction to grant alimony at the time of the divorce action, it had jurisdiction over the absent defendant in the subsequent action for arrearages provided the defendant received fair notice. Because the requisites of due process were satisfied, the Texas court of civil appeals ruled that full faith and credit should be extended to the sister state decree.

Consent to Jurisdiction. Goldman v. Pre-Fab Transit Co.[47] presented a new twist to judicial jurisdiction over a non-resident. A Texas resident and his insurer brought suit against an Illinois company for property damages resulting from a truck crash in Louisiana. The defendant was authorized to do business in Texas. On the facts the trial court sustained a special appearance under rule 120a[48] and dismissed the action. The court of civil appeals reversed and remanded, stating that the controversy was not controlled by article 2031b[49] and the minimum contacts doctrine. In the court's opinion jurisdiction was founded upon the corporation's consent to the state's jurisdiction. Consent as a basis of jurisdiction in an in personam suit has long been recognized.[50] Moreover, it has been held that when a corporation appoints an agent to receive process either voluntarily or as a requirement of obtaining a permit to do business within the state, the

45. *See, e.g.*, Mizner v. Mizner, 84 Nev. 268, 439 P.2d 679 (1968).

46. 526 S.W.2d at 184; *see* Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 26 (1971) [hereinafter cited as RESTATEMENT (SECOND)].

47. 520 S.W.2d 597 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

48. TEX. R. CIV. P. 120a.

49. TEX. REV. CIV. STAT. ANN. art. 2031b (1964).

50. RESTATEMENT (SECOND) § 32. For a fuller account of the development of this concept see Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958).

corporation consents to the judicial jurisdiction of the state.[51] The scope of that consent to jurisdiction, *i.e.*, whether it is broad enough to cover causes of action arising outside the state as well as inside the state, is dependent upon the terms of the agent's appointment and the state statute. The Supreme Court of the United States has pointed out that when an agent is appointed as required by statute then the corporation takes the risk of the judicial interpretation of the statute.[52] Texas law requires a corporation authorized to transact business in the state to appoint an agent. Article 8.10 of the Business Corporation Act[53] makes the president and vice-president of foreign corporations transacting business in Texas, as well as designated agents, agents for service of process. Additionally, article 8.10 declares that nothing limits the right of service of process upon a foreign corporation in any manner which is permitted by law. Thus the court stated that consent to jurisdiction is implied in the Texas law and its scope includes all suits whether the cause of action arises within or without the state.

Custody Decrees. Four rather common custody decree cases may be singled out for discussion in this *Survey*, although none is of major import insofar as changed legal principles are concerned. The first three cases concerned recognition of out-of-state custody decrees in Texas under the full-faith-and-credit clause of the United States Constitution.[54] It has become accepted that custody decrees are subject to full faith and credit as to the facts existing at the time the decree is granted, but not as to changed conditions occurring subsequent to the decree.[55] Even with respect to all matters existing up to the time of the rendition, the court issuing the decree must have some jurisdictional basis in order for the decree to be granted full faith and credit. Generally, the state of the child's domicile, or the state where the child or the parents are personally present before a court, are recognized as having jurisdictional power for purposes of custody awards.[56] In *Seaberg v. Brogunier*[57] and *Russell v. McMurtrey*[58] jurisdiction of the states granting the original custody decrees was not in issue. Thus, a change of custody required only a showing of materially changed conditions. In *Seaberg* a jury finding of changed conditions caused the trial judge to order a change in custody previously awarded by a Maryland court. However, the judgment was set aside and judgment *non obstante veredicto* was entered consistent with the previous Maryland judgment. The court of civil appeals affirmed, citing the Texas Family Code which does not permit a court to disregard a former custody decree issued by a court of another state unless one of two

51. Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917).
52. *Id.* at 296. *See also* R. LEFLAR, AMERICAN CONFLICT OF LAWS 62-63 (1968).
53. TEX. BUS. CORP. ACT ANN. art. 8.10 (1956 and Supp. 1975-76).
54. U.S. CONST. art. IV, § 1.
55. Kovacs v. Brewer, 356 U.S. 604 (1958); Halvey v. Halvey, 330 U.S. 610 (1947). R. LEFLAR, *supra* note 52, at 348; G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 322 (3d ed. 1963).
56. *See, e.g.*, Justice Traynor's opinion in Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739, 741-51 (1948). *See also* RESTATEMENT (SECOND) § 79.
57. 515 S.W.2d 398 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).
58. 526 S.W.2d 270 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

things are present: (1) a lack of jurisdiction over the parties, or (2) presence of the child within Texas for twelve months preceding the filing of the petition for the writ.[59] Because the Maryland court had jurisdiction over the parties and the child had not been within Texas for the prescribed period, the custody decree could not be changed. The court continued by noting that the record did not show changed circumstances in any event.

In *Russell* the parties seeking to alter a custody decree of a Colorado court failed to allege the Colorado court's lack of jurisdiction over the parties or that the child had been in Texas for a twelve-month period. Moreover, the pleadings failed to aver changed circumstances. Under these conditions the trial court had ordered the child returned to the father to whom custody had been originally granted by the Colorado decree. In affirming, the court of civil appeals stated that this was the only action the trial court could have taken under the circumstances.

Contrary to these two cases, the court of civil appeals in *Clayton v. Newton*[60] reversed a lower court judgment which had granted full faith and credit to an Oklahoma custody decree. The Oklahoma court had previously awarded custody of the children to the grandparents. In October 1974 the maternal grandparents and the children moved to Texas where they established residency. Thereafter, the father sued in the Oklahoma court to modify the custody decree and have the custody changed to him. The grandmother was not served with citation, although she was informed of the proceeding by telephone and notice was delivered to her last place of residence in Oklahoma. A default judgment was rendered in Oklahoma and custody over the children was changed to the father. The present suit arose in Texas when the father sought to obtain possession of the children in a habeas corpus proceeding in a Texas court.

The court of civil appeals first held that proper service of process on the grandmother had not been made. Because the parties neither invoked rule 184a,[61] which would have required the court to take judicial notice of Oklahoma law, nor offered proof of Oklahoma law, a presumption arose that Oklahoma law was the same as that of Texas.[62] Under the Texas Rules of Civil Procedure the method prescribed for citation must be reasonably followed. Inasmuch as the grandmother was not served in accordance with the Texas Rules of Civil Procedure, the actual notice received was insufficient to cure the defect in service of process and the judgment was not entitled to full faith and credit. Moreover, the court held that Oklahoma did not have jurisdiction over the children or grandmother because they were no longer domiciled in Oklahoma. In the absence of judicial jurisdiction the custody decree was not to be given full faith and credit.[63]

It is often recognized that a court rendering a custody decree retains jurisdiction over the case so that the decree may be changed upon a showing

59. TEX. FAM. CODE ANN. § 14.10(b) (1975).
60. 524 S.W.2d 368 (Tex. Civ. App.—Fort Worth 1975, no writ).
61. TEX. R. CIV. P. 184a.
62. *Id.; see* Thomas, *Proof of Foreign Law in Texas,* 25 SW. L.J. 554 (1971).
63. *See* note 56 *supra* and citations contained therein.

of changed conditions.[64] It is said that a continuing jurisdiction ensues as to all necessary concomitants of the case.[65] This retention of jurisdiction, of course, assumes proper notice is given of the proceeding to change custody. However, courts often refuse to recognize these modifications if the children, as here, have acquired a new domicile.[66]

Toler v. Travis County Child Welfare Unit[67] posed the issue of the jurisdiction of the juvenile court of Travis County, Texas, over a defendant who had separated from his wife and had gone to West Virginia to work. The juvenile court had terminated the father's rights as a parent, had made the child a ward of the court, and had given custody of the child to the county welfare unit to provide for the child and possibly to arrange an adoption. Apparently the father was a non-resident of Texas and would not have been subject to the jurisdiction of the state on the basis of domicile. He, therefore, could have appeared specially under rule 120a[68] to contest the jurisdiction. Moreover, he was never served with citation, a fact which, if he failed to appear in the Texas proceeding, would have rendered the judgment a nullity on the ground of lack of fair notice conforming with procedural due process. However, the father received actual notice of the proceeding and entered an appearance. He had, in fact, sought from the court a holding which would have given custody of the child to him and his wife. Under these conditions the court of civil appeals affirmed the judgment of the trial court, deciding that the father's appearance was a general one and that he had waived service of citation. The court stated the general rule by quoting from *McDonald's Texas Civil Practice*: "A general appearance is entered whenever the defendant invokes the judgment of the court in any way on any question other than that of the court's jurisdiction, without being compelled to do so by previous rulings of the court sustaining the jurisdiction."[69]

Child Support and Alimony. The problem of jurisdiction and service of process upon a non-resident in a support order case confronted the Austin court of civil appeals in *Ex parte Limoges*.[70] After service upon the husband by publication, a judgment of divorce was granted and the husband was ordered to tender a weekly sum for the support of his child. At the time of the divorce the husband was not a domiciliary of Texas, and had not received notice of the proceedings in Texas until he was served to appear in a contempt proceeding for failure to comply with the support order. When he did appear he was found guilty of contempt, fined $500, and given a six months' jail term. In a habeas corpus proceeding seeking his discharge he attacked the support judgment collaterally, claiming that it was void because the court issuing it did not have in personam jurisdiction over him. Al-

64. *See* note 55 *supra.*
65. *See* note 46 *supra.*
66. R. LEFLAR, *supra* note 52, at 587.
67. 520 S.W.2d 834 (Tex. Civ. App.—Austin 1975, no writ).
68. TEX. R. CIV. P. 120a.
69. 2 R. MCDONALD, TEXAS CIVIL PRACTICE § 9.04 (1970).
70. 526 S.W.2d 707 (Tex. Civ. App.—Austin 1975, no writ).

though the domicile of one of the parties is sufficient to confer jurisdiction to grant a valid divorce,[71] decrees for support, as money decrees against a defendant in his individual capacity, require in personam jurisdiction.[72] Constructive service by publication upon a defendant in an extreme case, such as where his location is unknown and cannot be ascertained, might comport with procedural due process if in personam jurisdiction were also present.[73] But where grounds of jurisdiction are non-existent, and even though the best method of personal service is utilized, the courts of a state do not have the power to render a personal judgment against an absent defendant, and a judgment so rendered is void and not subject to full faith and credit in other states.[74]

Worrel v. Worrel[75] also involved a support award, in the form of a foreign alimony award. The parties had made an agreement which provided for the payment of support to the wife and this agreement was made a part of a divorce decree granted by a Virginia court. The wife thereafter sued in Texas for arrearages. As noted previously, awards for alimony are generally modifiable upon a showing of changed conditions and, thus, are not considered final judgments subject to full faith and credit. In the case at hand the husband argued that until the wife converted the past due installments into a Virginia judgment for a sum certain, full faith and credit should not be given. On appeal the court of civil appeals disagreed because, in this case, the right to the alimony payments had become final and vested. Under Virginia law alimony provisions are final and absolute when a divorce decree, as here, incorporates a previous support agreement between the husband and wife. Therefore, full faith and credit was to be accorded.

Full Faith and Credit and Judicial Notice of Sister State Law. Moody v. State[76] was also concerned with the issue of whether or not a sister state judgment is final and must be accorded full faith and credit in Texas. Under the United States Constitution, as well as by federal statute, judicial proceedings must be granted the same full faith and credit in all states as they have according to law in the state rendering them.[77] Thus an Alabama judgment in the case at hand should have been accorded full faith and credit if it were a final judgment and so treated by the law of Alabama. Nevertheless, the court of appeals looked to the law of Texas to determine finality because:

> In the absence of pleading and proof that under the laws of the state from which the proceedings are taken there exists an effect different from that prevailing in Texas, the judgment will be construed according to the laws of Texas. . . . Proof of Alabama laws was not undertaken in the trial court, and on appeal the parties are in agreement that the laws of Texas control *as to finality* of the Alabama judgment.[78]

71. Williams v. North Carolina, 317 U.S. 287 (1942).
72. RESTATEMENT (SECOND) § 77. *See also* Williams v. North Carolina, 317 U.S. 287 (1942).
73. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950).
74. G. STUMBERG, *supra* note 55, at 66-69.
75. 526 S.W.2d 736 (Tex. Civ. App.—Corpus Christi 1975, no writ).
76. 520 S.W.2d 452 (Tex. Civ. App.—Austin 1975, no writ).
77. U.S. CONST. art. 4, § 1; 28 U.S.C. § 1738 (1970).
78. 520 S.W.2d at 455-56 (emphasis added).

The words "in the absence of pleading and proof" create something of a puzzle because strict pleading and proof of the law of a sister state is no longer necessary in Texas. Rule 184a[79] permits the judge upon motion of either party to take judicial notice of the law of a sister state, although the party requesting must furnish information as to what the law is so that the judge can properly comply with the motion. Pleading and proof is only required as to foreign nation law and as to sister-state law when rule 184a has not been invoked. Thus, apparently in this case neither a rule 184a motion nor pleading and proof of sister-state law was made. In such a case the applicable sister-state law, according to the great majority of Texas decisions, is presumed to be the same as that of Texas.[80]

The opinion went on to find that under Texas law the judgment would be considered final because it was final on the merits even though the Alabama court retained certain control over it for further proceedings to carry it into full effect.

Workmen's Compensation Statutes and Awards. The Texas workmen's compensation law provides that any employee hired within the State of Texas who sustains injury outside the state shall be entitled to receive compensation in accordance with the Texas law.[81] The Texas law, therefore, becomes applicable when the injury occurs within the state as well as when the injury occurs in another state provided the hiring took place in Texas. Literally speaking, the simple fact of hiring within the state, coupled with injury outside the state, should make the statute applicable. The Texas courts have not seen fit to construe "hiring within the state" literally, however, and have concluded that the real issue is whether or not the employee occupies the status of Texas employee.[82] Consequently, even though the contract for hire is made within the state, if, under its terms the employee is to go outside the state for the performance of his labor, he does not have the status of a Texas employee and cannot claim under the Texas workmen's compensation law.[83] The facts of *Renner v. Liberty Mutual Insurance Co.*[84] involved a contract which contemplated that all of plaintiff's labor would be performed for the defendant company in New Orleans, Louisiana. Thereafter, while working in New Orleans, he was injured. Inasmuch as he was employed to work exclusively outside the state, he did not acquire the status of Texas employee and the Texas workmen's compensation law did not apply. The decision in this case is fully in line with Texas authority.[85] It would seem, however, that according to the facts of the case Texas did have sufficient connection with the relationship or transaction to

79. TEX. R. CIV. P. 184a.
80. *See* Thomas, *supra* note 62.
81. TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (1967).
82. *See, e.g.*, Maryland Cas. Co. v. Spritzman, 410 S.W.2d 668 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.).
83. Hale v. Texas Employers' Ins. Ass'n, 150 Tex. 215, 239 S.W.2d 608 (1951); Hardware Mut. Cas. Co. v. Brown, 390 S.W.2d 53 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).
84. 516 S.W.2d 239 (Tex. Civ. App.—Waco 1974, no writ).
85. *See* cases cited note 83 *supra.*

make application of its law reasonable without violating due process of law. In other words, Texas would seem to have legislative jurisdiction so that it would not offend due process of law by according extraterritorial effect to its law. The contract of employment was made in Texas and the plaintiff appeared to be a domiciliary or resident of Texas. As the state of residence, Texas would have great interest in protecting the welfare of its domiciliaries and preventing them from becoming charges of the state.[86]

The stress which Texas courts have placed upon the contemplated or actual performance of the contract has been criticized.[87] Texas workmen's compensation law and its extraterritorial provision were designed to protect and benefit Texas employees on the one hand and prevent imposition of a burden on employees of other states by Texas industry. Residence of the plaintiff in Texas and location of the business in Texas should be considered the most important factors and not the place where the employment duties are to be performed. Nevertheless, as the court emphasized, it is often thought that the most vital factor for the application of a workmen's compensation act is the location of the employment, on the ground that the place where the worker spends his time on the job has the real relationship to the transaction.[88]

Nagle v. Ringling Bros. & Barnum & Bailey Combined Shows, Inc.[89] presented several interesting issues concerning workmen's compensation awards and their effects in other states. Here such an award had been granted by the California board for an injury suffered in Wisconsin. Plaintiff then sued in a federal district court in Texas. Federal jurisdiction was based upon diversity of citizenship and suit was brought on theories of tort and contract. The defendant claimed that the California workmen's compensation award was a final judgment in California, barring further relief. The court stated that it must abide by the full-faith-and-credit clause of the United States Constitution, and that the California award must be given the same effect attributed to it by California law.[90] It then went on to find that the California workmen's compensation law was exclusive of all other statutory or common law remedies. Consequently, if the award were treated as a final one in California, it must be given full faith and credit and no common law action could be maintained in Texas.[91]

After much consideration of California law the court decided that California would indeed treat the award as final so as to preclude the parties or their privies under the doctrine of res judicata from relitigating the same cause of action in another proceeding. Inasmuch as the California award was exclusive and final it was entitled to full faith and credit, barring further litigation in Texas.

86. Application of the Texas law would not appear to deny due process of law or full faith and credit to a sister state statute because Texas had important contacts and sufficient governmental interest. *See* Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).
87. 516 S.W.2d at 241. *See also* 45 TEXAS L. REV. 204 (1966).
88. *See* RESTATEMENT (SECOND) § 181.
89. 386 F. Supp. 349 (S.D. Tex. 1974).
90. *Id.* at 351.
91. *See* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943).

A contention was made that the action in California and that in Texas were not between the same parties; in the California proceeding Ringling Brothers had been dismissed and the action had proceeded against its insurer, Continental Casualty, while in Texas, suit was against Ringling Brothers. The court was not persuaded, holding that this difference in parties would not defeat the principle of res judicata because Ringling Brothers was a party in the California proceeding. In the California proceeding, Ringling Brothers was dismissed because its individual appearance was not necessary due to the fact that it was represented by its insurance carrier. Furthermore, since liability of the carrier evolved from Ringling Brothers' liability, Ringling Brothers and the carrier were in privity.

Finally, it was contended that the California award was invalid because subject matter jurisdiction did not exist. The court stated the well-known rule that although a collateral attack may be advanced based upon lack of in personam jurisdiction,[92] a collateral attack for lack of subject matter jurisdiction is not permitted unless allowed by the law of the state where the award or judgment was rendered.[93] The court then looked to California law and concluded that the subject matter jurisdiction of the California Workmen's Compensation Appeal Board was immune from attack. The defendants' motion for summary judgment was granted.

Decrees Affecting Foreign Land. Deger v. Deger[94] raised once again the problem of a forum court's judicial jurisdiction to enter a judgment or decree affecting foreign land. Here an appeal was taken from a judgment of a district court in a divorce case which divided property of the parties. Among the properties divided were lands in New Mexico. The Waco court of civil appeals bluntly stated that the trial court had no jurisdiction over foreign real estate and any judgment declaring title in those lands was a nullity. Certainly, it has long been the rule that courts of a state have no power to issue a judgment or decree directly affecting title to realty in another state.[95] There has been an exception to that rule, however, in that a non-situs court with in personam jurisdiction over the parties can affect interests in foreign realty indirectly through an exercise of its equitable power.[96] Thus, a defendant before the court can be ordered to execute a conveyance of an interest in land. The court in the present case failed to follow this rule, although in 1974 the Tyler court of civil appeals on similar facts believed it could exercise jurisdiction over the land indirectly by acting through its in personam jurisdiction over the parties.[97] In a discussion of this case in a previous survey period[98] it was noted that the court having jurisdiction over

92. Hanson v. Denckla, 357 U.S. 235 (1958); Pennoyer v. Neff, 95 U.S. 714 (1878).
93. RESTATEMENT (SECOND) § 105.
94. 526 S.W.2d 272 (Tex. Civ. App.—Waco 1975, no writ).
95. *See* Durfee v. Duke, 375 U.S. 106 (1963); Fall v. Eastin, 215 U.S. 1 (1909).
96. *See* Massie v. Watts, 10 U.S. (6 Cranch) 148 (1810); R. LEFLAR, *supra* note 52, at 428-30.
97. Estabrook v. Wise, 506 S.W.2d 248 (Tex. Civ. App.—Tyler), *writ dism'd by agr.; judgm'ts below set aside*, 519 S.W.2d 632 (Tex. 1974).
98. Thomas, *supra* note 11, at 253-54.

the parties would seem to be the most appropriate place to adjudicate, particularly in a divorce situation where marital property is to be divided.[99]

II. CHOICE OF LAW

State Law in Federal Courts. In *Erie Railroad v. Tompkins*[100] the Supreme Court foreclosed the use of a general federal common law in diversity of citizenship cases. *Erie* held that a federal court, sitting in diversity, must apply the substantive law of the state in which the federal court is sitting. This lesson appeared to have been lost upon the United States District Court for the Western District of Texas in *Kincaid Cotton Co. v. Kesey Bros.*,[101] which failed to consider Texas substantive law in a diversity case. In vacating and remanding for trial, the Fifth Circuit stated: "On the basis of the record before us we are unable to discern what the trial judge determined Texas law to be or, for that matter, whether he in fact applied Texas law, as a federal court sitting in diversity is *Erie*-bound to do."[102]

The court of appeals in a helpful spirit then went on to inform the lower court that because of a lack of Supreme Court of Texas decisions on the point in issue the district court could consider intermediate appellate decisions of Texas. The court stated that "[t]he task of ascertaining applicable state law is not always an easy one. Where the highest state court has not spoken, intermediate appellate decisions may be binding and must in any event be given appropriate consideration."[103] It was also noted that consideration should be given to the Texas Uniform Commercial Code, for its provisions were relevant to an issue in the case.

Gray v. Martindale Lumber Co.[104] brings us face to face once again with *Byrd v. Blue Ridge Electric Cooperative, Inc.*,[105] where the Supreme Court of the United States held that the *Erie* rule did not require the federal court, sitting in diversity, to apply a state law which required submission of an issue to the court rather than a jury. The Court in *Byrd*, while conceding that submission of an issue to a judge rather than a jury might be outcome determinative, found there were other countervailing considerations. The fact that the federal court system was an independent system, and that an essential characteristic of such system was the manner "in civil common-law actions, [in which] it distributes trial functions between judge and jury and under the influence—if not the command—of the Seventh Amendment assigns the decisions of disputed issues of fact to the jury . . ." are sufficient countervailing considerations to preclude the application of the state law.[106]

In the *Gray* case the court had before it the question of assumption of risk which, if true, would prevent the plaintiff recovering. The district court instructed the jury that, as a matter of law, an adequate warning to

99. *See* R. WEINTRAUB, *supra* note 34, at 305-10.
100. 304 U.S. 64 (1938).
101. 504 F.2d 976 (5th Cir. 1974).
102. *Id.* at 978.
103. *Id.*
104. 515 F.2d 1218 (5th Cir. 1975).
105. 356 U.S. 525 (1958).
106. *Id.* at 537.

plaintiff's employer or foreman would in effect be a warning to the plaintiff and would, therefore, relieve the defendant of a duty to warn. The Fifth Circuit stated that such a charge was not permissible under the seventh amendment in a federal diversity suit. Citing *Boeing Co. v. Shipman*,[107] the court declared: "It is well settled in a diversity case federal courts apply a federal rather than a state test for sufficiency of evidence to create a jury question."[108]

The most interesting conflict of laws case of this survey period was *Challoner v. Day & Zimmermann*.[109] In *Challoner* the Fifth Circuit Court of Appeals refused to follow *Erie* and its progeny by affirming a district court decision which, *inter alia*, ignored Texas choice of law rules and applied Texas substantive law of strict liability to a tort which had occurred in Cambodia resulting in the death of one plaintiff and the injury of another. Under the Texas conflict of laws rule the court was required to apply the law of place of injury,[110] in this case Cambodia, which imposes liability in tort but not strict liability.[111] Instead the court applied Texas law of strict liability. By refusing to apply the Texas conflict of laws rule both courts refused to follow *Klaxon v. Stentor Manufacturing Co.*,[112] where the Supreme Court held that a federal court in a diversity case must apply the conflict of laws rules of the state in which it is sitting. The Fifth Circuit justified its departure from the *Erie-Klaxon* doctrine upon the ground that it does not bind the federal courts to apply the law of a completely disinterested jurisdiction, thus frustrating the policies of interested jurisdictions. The court admitted that Texas, the state in which the federal court was sitting, followed the traditional place of injury rule and would apply Cambodian substantive law as to the wrongful death action and would "perhaps" apply such conflict of laws rule to the personal injury aspects of the case.[113] Nevertheless, the Fifth Circuit stated very clearly that "[h]owever controlling state law may be in diversity cases it does not extend so far as to bind a federal court to the law of a wholly disinterested jurisdiction."[114]

It is submitted that the court constructed an unusual approach to avoid application of the *Klaxon* rule. To justify its ruling the court implicitly adopted the false conflicts theory of the late Professor Brainerd Currie. Professor Currie stated that when a court is called upon to apply the law of a foreign state different from that of the forum, it should inquire into the

107. 411 F.2d 365, 368 (5th Cir. 1969).
108. 515 F.2d at 1221.
109. 512 F.2d 77 (5th Cir.), *vacated*, 46 L. Ed. 2d 3 (1975).
110. Mexican Nat'l Ry. v. Jackson, 89 Tex. 107, 33 S.W. 857 (1896).
111. 512 F.2d at 80.
112. 313 U.S. 487 (1941).
113. 512 F.2d at 81.
114. *Id.* The court relied heavily on Lester v. Aetna Life Ins. Co., 433 F.2d 884 (5th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971). In *Lester* the plaintiff sued as a beneficiary under a life insurance policy issued by the defendant in Wisconsin. The action was brought in Louisiana, the domicile of the plaintiff. The insurance company contended that the policy had been cancelled. The cancellation was effective under Wisconsin law, but ineffective under Louisiana law which required written notice prior to cancellation. The court refused to look to the Louisiana conflict of laws rule which would have applied Wisconsin law, holding instead that it "could not apply the law of a jurisdiction that had no interest in the case, no policy to protect." *Id.* at 891.

policies behind the states' respective laws and determine whether or not the states involved can reasonably possess an interest for the application of those policies. If the court determines that only one state possesses an interest in the application of its policies and other states are either disinterested or have an insignificant interest in the subject matter of the ligitation, a "false conflict" exists and the court should resolve the conflict by applying the law of the interested state.[115]

Using this interest analysis approach, the court determined that Cambodia would have no policy interest in the application of its law because Cambodian law, requiring proof of fault, was designed to protect Cambodian manufacturers and not American manufacturers. However, the states of domicile of the plaintiffs, all states of the United States, would have a policy interest in protecting their plaintiff-domiciliaries by application of the law of strict liability.

The Supreme Court of the United States vacated the judgment of the court of appeals and remanded the case for further proceedings in conformity with the opinion.[116] The Supreme Court reminded the court of appeals that *Klaxon v. Stentor* was still the controlling law. The Court went on to say:

> By parity of reasoning, the conflict of laws Rules to be applied by a federal court in Texas must conform to those prevailing in the Texas state courts. A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits. The Court of Appeals in this case should identify and follow the Texas conflicts rule. What substantive law will govern when Texas' rule is applied is a matter to be determined by the Court of Appeals.[117]

Mr. Justice Blackmun in a concurring opinion pointed out that the decision did not prohibit the court of appeals from applying Texas substantive law rather than Cambodian substantive law. Thus if the court of appeals were to find that Texas courts, following Texas choice-of-law principles, would apply Texas substantive law and not that of Cambodia, then it would be correct and proper for the federal court to apply Texas substantive law also.[118] In *Mobil Oil Corp. v. Oil Workers International Union*[119] the court was faced with the rather unique issue of whether the Texas right-to-work law applied to invalidate an agency shop clause contained in a collective bargaining contract between the employer and the union. Texas contacts with the employment relationship were predominant except that Texas was not the job situs for the employees covered by the collective bargaining contract, who, as seamen, spent eighty to ninety percent of their working time on the high seas. The district court held that Texas

115. B. CURRIE, SELECTED ESSAYS IN THE CONFLICT OF LAWS 107, 163, 180, 189, 582, 620, 726 (1963). For a short summary of Currie's position see W. REESE & M. ROSEN-
116. 46 L. Ed. 2d 3 (1975).
117. *Id.* at 5.
118. *Id.* at 6.
119. 504 F.2d 272 (5th Cir. 1974).

law was applicable. On appeal a panel of the court of appeals disagreed, holding that because the job situs was the high seas, the law of Texas or that of any other state could not be applicable.[120] Upon rehearing en banc, the court affirmed the judgment of the district court.[121]

At the outset, attention should be directed to the fact that this is not a diversity of citizenship jurisdiction case. Consequently, the rule of *Erie* does not govern. The court was not called upon to apply the law of the state in which it was sitting; rather, the case was governed by federal law under the Labor Management Relations Act of 1947.[122] The specific problem was a determination of whether Congress intended to supersede state law or to permit a state to employ its right-to-work law to an employment contract which does have major contacts with the state, albeit the job situs was the high seas.

After reviewing certain provisions of the Labor Management Relations Act, the court decided that Congress did not intend to prevent Texas from applying its right-to-work law. The language and history of the Act demonstrated that the states could continue "to apply its right to work law whenever the state has a significant interest in the process by which a union security agreement is applied."[123] Because the agency shop agreement received its application in Texas and the company had refused to apply it in Texas, Texas would have a significant interest. Indeed the court concluded that Texas had a more significant interest in applying its law than any other jurisdiction.

The court could not see how the principle of national uniformity could preclude the application of state law under the circumstances presented. National or international policy would not be furthered if Texas law were not applied. Additionally, a uniformity of law principle was thought not to be involved for Congress had permitted non-uniformity, inasmuch as the federal law would permit some states to have union shops and permit others to forbid them. Thus, no federal interest in achieving a uniform national policy was found to exist.

A strong and well-reasoned dissent took issue with the majority opinion. The dissent believed that extraterritorial effect had been given to Texas law. Although agreement prevails that the Congress had in some instances permitted the application of state laws which prohibit agency shops, nevertheless seamen have traditionally been accorded a differing status because their employment has long been regulated by special federal legislation and by maritime law. Therefore, the federal labor legislation should not and could not be interpreted reasonably so as to remove seamen from their special status. In concluding, the dissent declared:

> The result which the majority reaches in this case is somewhat impractical. The attempt of the Court, at the behest of Mobil Oil Company, to give extraterritorial effect to Texas' right-to-work laws fails both in

120. 483 F.2d 603 (5th Cir. 1973).
121. 504 F.2d 272 (5th Cir. 1974).
122. 29 U.S.C. §§ 141-88 (1973).
123. 504 F.2d at 278-79.

> soundness and in logic. Here the majority has taken an employment relationship, traditionally one in admiralty, regulated in virtually all aspects by federal maritime law, involving seamen who are wards of admiralty, and has subjected this employment to state labor laws when none of the employees works in the state. How this can be done where all of the seamen's work is aboard vessels plying the high seas, and where most (57%) do not even reside in Texas, is not explained. Under the circumstances, the majority's conclusion is neither practical nor realistic.[124]

Real Property—Characterization. Backar v. Western States Producing Co.[125] presented an interesting issue of characterization of property as realty or personalty and the determination of the law which should govern this characterization. Suit was based upon a breach of contract for failure to pay a brokerage or finder's commission upon the plaintiff's obtaining investors in Texas oil and gas leases.

The court was first called upon to determine where the contract was in fact made in order to determine which law governed the transaction. The contract was unilateral because the defendant promised to pay the plaintiff a commission only if investors were located. A unilateral contract is formed when the act requested by the promise is performed, and the place where performance is rendered constitutes the place of making of the contract. The plaintiff completed the requested performance when he located and introduced an investor to the defendant. Based on this analysis the court held that New York was the place of contracting and its law governed the dispute.

New York law required all persons engaged in *real estate* dealings to be duly licensed as a real estate broker or salesman in order to bring an action for compensation for services.[126] Because the plaintiff was not so licensed, the action would be barred under New York law if the oil and gas leases were characterized as realty. However, if the oil and gas leases were classified as personalty, then the stated New York law would not apply, for it protects only real property interests.[127] Thus, the court's attention focused on whose law should apply for purposes of characterization. Defendants claimed that the law of Texas, as the situs of the property, should control whether oil and gas leases were to be characterized as real or personal property.[128] Under Texas law oil and gas leases are real property interests and the use of Texas law to characterize the property would prevent the plaintiff's recovery.[129]

However, the court relied upon the *Restatement (Second) of Conflict of Laws* which provides for a choice-of-law rule for characterization when a legal term is given a different meaning by two states.[130] Because the court had already decided that New York law applied, the oil and gas leases were

124. *Id.* at 286.
125. 382 F. Supp. 1170 (W.D. Tex. 1974).
126. N.Y. REAL PROP. LAW § 442-d (McKinney 1968).
127. N.Y. GEN. CONSTR. LAW § 39 (McKinney 1951).
128. *See* note 131 *infra* and accompanying text.
129. Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 162, 254 S.W. 290, 292 (1923).
130. RESTATEMENT (SECOND) § 7, comment c, at 18.

said to be personalty as prescribed by New York law. The court bolstered its conclusion by a statement that the same result would occur if Texas case law decided prior to the *Restatement (Second)* were considered. *Normandie Oil Corp. v. Oil Trading Co.*,[131] a Texas civil appeals case cited by the court, held that a New York contract to pay for services performed in processing the sale of Texas oil and gas leases was valid even though the broker was not licensed in Texas or elsewhere because an oil lease under New York law was personalty.

Neither *Normandie* nor *Backar* seem to be in accord with traditional conflict of laws principles as exemplified by the *Restatement of Conflict of Laws* which provided that characterization was determined according to the law of the forum except as to questions of title to land, which were decided according to the law of the situs.[132] If an interest in land were dependent upon its classification as realty or personalty it would seem that the law of the situs, here Texas, should control. However, in *Backar* and *Normandie* an interest in land was not at issue. Instead, the controversies involved a contractual right to a commission, recoverable under New York law as the law which governs the contract only if the unlicensed broker were dealing with personalty. Because an interest in land was not really involved, the courts should, under the traditional view, have looked to the law of the forum, in this case Texas, which would characterize oil and gas leases as realty.

The federal court in *Backar* looked to the *Restatement (Second)*, the provisions of which are geared to the new most significant relationship doctrine which Texas has not yet adopted. The applicable choice of law rule would not be governed by where the contract was made, but rather the jurisdiction having the most significant relationship or interest in the issue involved would control. Simply to apply the law of a jurisdiction because it is the place of contracting will not suffice if the most significant relationship doctrine is applied. Instead, the applicable law of all states having contact with the transaction should be examined in order to see if those states have interests in the application of their law to the particular issue, and the law of the state having the most significant interest should be applied. In *Backar* it would appear that New York had no real interest in the transaction because it does not extend protection to principals engaging in transactions involving personalty. Thus no reason existed to deny compensation to the unlicensed broker when the transaction involved property defined as personalty under New York law.

On the other hand Texas classifies oil and gas leases as realty and requires real estate brokers to be licensed.[133] Texas would have an interest in protecting its domiciliaries doing business in Texas or investing in Texas oil properties against unfounded claims of unlicensed brokers. These Texas contacts and interests should have been considered by the court in using the

131. 147 S.W.2d 557, 561 (Tex. Civ. App.—Galveston 1940), *rev'd on other grounds*, 139 Tex. 402, 163 S.W.2d 179 (1942).
132. RESTATEMENT OF CONFLICT OF LAWS § 7 (1934).
133. TEX. REV. CIV. STAT. ANN. art. 6573a (Supp. 1975-76).

most significant relationship theory. In any event it seems rather unwise to mix the traditional rule and the most significant relationship theory as the court did here.

Torts. The case of *Smith v. General Motors Corp.*[134] is a case similar to *Challoner v. Day & Zimmermann, Inc.*[135] *Smith* involved a wrongful death action brought on behalf of the estate of a passenger and by the other occupants for personal injury against General Motors Corporation, the manufacturer of the automobile involved in the collision. Similarly to *Challoner*, the court was asked to apply the Texas doctrine of strict liability to an injury and death which occurred in Mexico. There would seem to have been no more contact with Mexico than there was with Cambodia in *Challoner*, and Mexico would appear to have had no more interest in the application of its law to the transaction than did Cambodia in *Challoner.*

The district court pointed out that, as to the wrongful death action, *Marmon v. Mustang Aviation, Inc.*[136] ruled out any extraterritorial effect to the Texas wrongful death statutes. Thus, Mexican law as the law of the place of the wrong must govern. As to the action for personal injury based upon the negligence of the defendant, the court said that "[t]he courts of the State of Texas have been unbending in applying the *lex loci delictus* rule in negligence cases."[137] It went on to say that, as to that part of the cause of action for personal injury based on strict liability, Texas has classified such actions as tort, and the place of injury rule should control. However, if a most significant relationship approach were followed it is clear that Texas law would govern this issue and strict liability would apply. Thus, the issue to be resolved was which choice-of-law approach Texas would follow. The court, citing *Doss v. Apache Power Co.*,[138] stated that the Fifth Circuit had already decided that the place of injury controlled. Because Mexico was the place of injury a Texas court would hold the laws of Mexico applicable to all the issues presented.

The court went on to rule, however, that because the laws of Mexico were materially different from those of Texas, the Texas courts had refused to apply those laws on the ground that they were too dissimilar to the laws of Texas.[139] Therefore, the Texas court would apply neither the Texas nor Mexican law, but would dismiss the case without prejudice to the rights of the plaintiffs to pursue their remedy in Mexico.[140]

As pointed out in *Smith, Marmon v. Mustang Aviation, Inc.*[141] held that the Texas wrongful death statute could not be applied extraterritorially. Thus, where the wrong occurred in another jurisdiction, the law of the place

134. 382 F. Supp. 766 (N.D. Tex. 1974).
135. 512 F.2d 77 (5th Cir.), *vacated*, 46 L. Ed. 2d 3 (1975), *discussed in* note 109 *supra* and accompanying text.
136. 430 S.W.2d 182 (Tex. 1968).
137. 382 F. Supp. at 768.
138. 430 F.2d 1317 (5th Cir. 1970).
139. *See* Ramirez v. Autobuses Blancos Roja, S.A. de C.V., 486 F.2d 493 (5th Cir. 1973).
140. 382 F. Supp. at 769.
141. 430 S.W.2d 182 (Tex. 1968).

of wrong or injury should control. Further, the same rule applied to a personal injury based upon negligence.

Recently enacted House Bill 974[142] amended the Texas wrongful death provisions by permitting the Texas wrongful death act to be given extraterritorial effect. It provides that Texas law can apply not only when the injury causing death occurs within the state, but also when such injury occurs outside the state. Article 4678 was amended to provide:

> [w]henever the death or personal injury . . . has been or may be caused by the wrongful act, neglect or default of another in a foreign state or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign state or country *or of this state*, such right of action may be enforced in the courts of this state . . . .[143]

The amendment indicates improvisation by the legislature. Prior to the amendment the statute limited the right to recover when the injury occurred outside Texas to actions brought *under* the law of the foreign state or country where it occurred. The amendment now permits recovery if a right of action is given by the law of the foreign state or country or Texas. Would this require the Texas courts to apply Texas law in any instance where the law of the foreign state did not provide a cause of action, or the law of the foreign state in any instance when that law granted a cause of action and Texas did not? For example, what if Texas did adopt the interest analysis approach? Would the courts be forced to apply Texas law in a case simply because Texas gave a cause of action and the foreign law did not when Texas contacts were minimal and Texas had little or no interest in the application of its law to the transaction? Alternatively, would Texas be forced to apply the foreign law when the foreign place's interests were minimal just because that jurisdiction gave a cause of action and Texas did not? Such a construction of the statute would be a dubious one. It would seem that the amendment allows Texas courts some discretion in deciding to apply Texas substantive law to injuries which occur outside the state. To guide that discretion, the choice-of-laws rules followed by the courts of Texas would be relevant. Thus, the law of the place of injury or the law of Texas if different, could be applicable. Obviously the courts of Texas are now freed from the legislative straitjacket which the Texas courts had relied upon prior to the amendment. They could adopt and apply the Texas wrongful death statute when the injury occurred outside the state if they decided that Texas should follow the most significant relationship doctrine, and if indeed Texas were the place having the most significant relationship. On the other hand, the Texas courts could determine that the most significant relationship doctrine was to be rejected, thus clinging to the traditional law of place of injury. In such an instance the foreign law would continue to apply if the foreign state were the place of injury.

142. Ch. 530, § 2, [1975] Tex. Laws 1381.
143. TEX. REV. CIV. STAT. ANN. art. 4678 (Supp. 1975-76).