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CONFLICT OF LAWS

by

*W. Frank Newton**

CONFLICT of laws involves three major areas: judicial jurisdiction, choice of law, and judgments.[1] During this survey period Texas case law indicates that judicial jurisdiction is in a state of flux, that choice of law remains unchanged, and that there is a great deal of activity, if not change, in the area of judgments.

I. JURISDICTION

A. *Subject Matter Jurisdiction*

Voluntary Self-Restraint. Perhaps the most interesting case raising the issue of subject matter jurisdiction is *Hunt v. Coastal States Gas Producing Co.*[2] Nelson Bunker Hunt discovered and produced oil pursuant to an exploration and production concession from Libya. When Libya subsequently nationalized the oil field, Hunt published notices in newspapers throughout the world claiming that Libya's conduct was in violation of international law,[3] and threatened to bring suit against anyone coming into possession of the disputed oil. Undeterred by these notices, Coastal States Gas Producing Company and Coastal States Marketing, Inc., hereinafter collectively referred to as "Coastal States," entered into a contract with the Libyan oil company to purchase oil from the "Hunt" field. The parties consummated the contract, and Hunt thereupon filed suit against Coastal States for conversion of the oil. Since the defendant's possession of the oil would not constitute conversion if Libya had good title to that oil, the case turned on the validity of Libya's expropriation. This question depended on whether the act of state doctrine,[4] which prevents the courts of one sovereign from inquiring into the acts of another, prohibited the

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1. *See generally* R. LEFLAR, AMERICAN CONFLICTS LAW §§ 2-8 (3d ed. 1977).

2. 570 S.W.2d 503 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ filed).

3. *See generally* Lowenfeld, *Reflections on Expropriation and the Future of Investment in the Americas*, 7 INT'L LAW. 116 (1973); Whiteman, 8 DIG. INT'L L. 1020 (1967). Both discuss expropriation in international law.

4. The act of state doctrine may be summarized as follows:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

Texas court from examining the Libyan expropriation. Although the doctrine was judicially created,[5] the Supreme Court has said that it has "Constitutional underpinnings."[6] Limitations on the doctrine have been accepted, however, and Hunt claimed that all of the major limitations were applicable in his suit.

First, Hunt urged the so-called *Bernstein* exception. The Second Circuit in 1954 held that the basic purpose of the act of state doctrine is to avoid impairing the President's conduct of foreign affairs.[7] Thus, given this purpose, the President could clearly authorize a suit if he felt it would not impair the conduct of foreign affairs.[8] The court in *Hunt*, however, properly concluded that the *Bernstein* exception is no longer valid.[9] Thus the court did not consider whether statements issued by the State Department declaring that the nationalization violated international law were sufficient to show a waiver of the President's sole right to conduct foreign affairs.

In his second argument Hunt asserted that the activity of the Libyan Government related to a commercial and not a governmental undertaking, a distinction drawn by Mr. Justice White in *Alfred Dunhill of London, Inc. v. Republic of Cuba*.[10] The act of state doctrine is clearly applicable to acts that governments are traditionally expected to perform (jure imperii), but its application to activities of the government that normally would be undertaken by the private sector (jure gestionis) is questionable. Mr. Justice White would apply the act of state doctrine only to jure imperii acts. This analysis is troublesome, however, because perceptions are changing throughout the world as to the proper roles that governments and private industries should undertake. The distinction between acts jure imperii and jure gestionis has been applied in cases involving the doctrine of sovereign immunity,[11] but as Mr. Justice Marshall correctly pointed out in his dissent in *Dunhill*, "the doctrines of sovereign immunity and act of state . . . differ fundamentally in their focus and in their operation. Sovereign immunity accords a defendant exemption from suit by virtue of its status. By contrast, the act of state doctrine exempts no one from the process of the

5. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

6. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). The constitutional doctrine referred to by the court is the reluctance of the federal judiciary to entertain political questions for fear of infringing upon the domain of the executive branch. Baker v. Carr, 369 U.S. 186 (1962).

7. Bernstein v. N.V. Nederlandsche-Amerikaansche, Etc., 210 F.2d 375 (2d Cir. 1954).

8. *Id.* at 375-76.

9. 570 S.W.2d at 507. In First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), Justices Brennan, Stewart, Marshall, and Blackmun rejected the *Bernstein* exception because the validity of a foreign act of state is a "political question not cognizable in our courts." *Id.* at 787-88. Mr. Justice Powell also disapproved of the *Bernstein* exception since he "would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction." *Id.* at 773.

10. 425 U.S. 682 (1976).

11. The State Department announced a shift in United States policy toward applying sovereign immunity only to jure imperii actions in the "Tate Letter," issued on May 19, 1952. 26 DEP'T STATE BULL. 984 (1952).

court."[12] The court in *Hunt* correctly noted that *Dunhill's* commercial act limitation on the act of state doctrine was not adopted by a majority of the Supreme Court. In any event, the court held that the act of nationalizing an oil concession is clearly a governmental and not a commercial act.

Hunt also argued that the Hickenlooper amendment[13] required that the court disregard the act of state doctrine. If the act of state doctrine does have constitutional underpinnings, the validity of the amendment is clearly in doubt. It is, therefore, not surprising that the courts have read this law quite narrowly to avoid raising difficult constitutional issues.[14] These narrow interpretations have established three elements that must be present before the Hickenlooper amendment will be applied. First, the expropriated property must come within the territorial jurisdiction of the United States. Secondly, the act of the expropriating state must be in violation of international law. Thirdly, the asserted claim must be a claim of title or other right to property.[15] The court found it necessary to consider only the third of these conjunctive requirements. Hunt's claim arose from the concession agreement with Libya. The court held that under Texas conflict of laws, Libyan substantive law should govern the interpretation of this agreement, as Libya was both the place of the contract's execution and the place of performance.[16] Since under Libyan law the concession agreement granted a mere contract right rather than a property right, the Hickenlooper amendment did not apply.

Finally, Hunt argued that the act of state doctrine does not apply when the individual and the expropriating state execute an agreement enunciating controlling legal principles. Hunt based this argument on the following language from *Banco Nacional de Cuba v. Sabbatino*:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of the suit, *in the absence of a treaty or other unambiguous agreement regarding controlling legal principles*, even if the complaint alleges that the taking violates customary international law.[17]

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12. 425 U.S. at 725. Justices Brennan, Stewart, and Blackmun joined in Mr. Justice Marshall's dissent.

13. This amendment, which is also known as the Sabbatino amendment, provides:
> [N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law . . . .

22 U.S.C. § 2370(e)(2) (1976).

14. Occidental of Umm Al Qaywayn, Inc. v. Cities Serv. Oil Co., 396 F. Supp. 461, 471 (W.D. La. 1975); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 112 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); United Mexican States v. Ashley, 556 S.W.2d 784, 786-87 (Tex. 1977).

15. 570 S.W.2d at 508.

16. *Id.* A question was raised as to whether Hunt and Libya contractually had chosen a particular law to govern. *See* notes 157-60 *infra* and accompanying text.

17. 376 U.S. 398, 428 (1964) (emphasis added).

The court of appeals professed an inability to determine what "type" of unambiguous agreement the opinion referred to,[18] and in any event concluded that the language was inapplicable because "Libya did not expropriate property (the oil) from Hunt."[19] Since Hunt was unable to fit his case within any of the established exceptions to the act of state doctrine, the court affirmed the trial court's grant of summary judgment in favor of Coastal States.

The court in *Hunt* did a good job of applying the act of state doctrine as it currently stands, but the four issues raised in that case deserve a more comprehensive treatment. Since currently there is no pervasive view at the Supreme Court level, the lower courts will be forced to develop guidelines for this doctrine of judicial self-restraint. Perhaps in a case similar to *Hunt* the decision will turn on the fact that no state is directly involved. In *Hunt* the action was a conversion suit between private entities, both of whom were clearly subject to the jurisdiction of courts within the United States. Any effect on foreign affairs was at best indirect. If, however, Libya is immune from successful suit, it is questionable whether the normal rules of conversion would apply. It does not seem proper for Coastal States to be held liable when Libya would not be. While the dictates of reason might indicate that in suits between American oil companies no great injustice is likely to result from refusing to apply the act of state doctrine, the possibility of unbridled parochialism, which generates exposure to the double edged sword of reciprocity, offers a telling argument against limiting application of the doctrine to suits against foreign states.[20]

The expansionist propensity of Texas oil companies made it predictable that the principles of judicial self-restraint embodied in the act of state doctrine would find expression in Texas courts. Perhaps it was equally predictable that Texans would mourn the passing of "their" property ownership in the United States of Mexico. A Mr. C.J. Brannan had owned two ranches in Mexico, both of which had been expropriated by the Mexican Government.[21] Brannan sought compensation by attaching pre-Colum-

18. The language in question is not difficult to understand. It says that if there exists a treaty, or perhaps an executive agreement, that sets forth controlling legal principles, then the court should adjudicate alleged violations of the pact and apply the principles contained therein. The essential elements would be (1) that the sovereign states have agreed to "controlling legal principles" that the court can determine and apply, and (2) that there is an express or implied acceptance of the propriety of having applications of the rule determined in the courts of one of the states. Only a treaty or its equivalent in international law would come within this exception to the act of state doctrine. As a result, Hunt's assertion that the concession agreement was the type of "unambiguous agreement" referred to was not well-founded.

19. 570 S.W.2d at 510. "Libyan Law Number 42 did expropriate the physical assets of Hunt but Libya never relinquished its ownership of the oil, and consequently cannot have expropriated it from Hunt." *Id.*

20. Numerous commodities, including oil, move through many different ownerships in international trade. Failure to allow invocation of the act of state doctrine by a remote owner in a suit by the original owner could have an unsettling effect on international commerce.

21. *See* sources cited in note 3 *supra* for a general discussion of expropriation under international law.

bian artifacts that were owned by the United States of Mexico but were temporarily within the State of Texas. Mexico filed a motion to dismiss, urging a lack of jurisdiction, but the motion was denied. Mexico then sought a writ of mandamus from the Texas Supreme Court in *United Mexican States v. Ashley*.[22]

The Texas Supreme Court held that the doctrine of sovereign immunity barred Brannan's suit against Mexico. Brannan argued that the trial court had jurisdiction to consider the case because sovereign immunity had to be established by the facts at trial, but the supreme court declared that the doctrine precluded any exercise of jurisdiction.[23] The court noted that "[s]overeign immunity has been modified and . . . that restrictive sovereign immunity is now the law in the United States."[24] The court also noted that "[t]he doctrine of restrictive sovereign immunity denies immunity to sovereigns when the suit arises out of a purely commercial capacity."[25] The court correctly concluded, however, that the expropriation of lands is not a commercial activity.

Mexico also asserted that the act of state doctrine barred the suit. As might be expected, Brannan argued that the trial court should ignore the act of state doctrine due to the Hickenlooper amendment.[26] The Texas Supreme Court properly noted that "[c]ourts have narrowly construed the Amendment and have held it to be inapplicable in situations where property is expropriated by a foreign sovereign, and neither the expropriated property nor its proceeds are in the United States."[27] Since in the case at bar neither the property nor its proceeds were in the United States, the statute was held inapplicable.

The results of the *Hunt* and *Ashley* cases are valid. A sovereign state's conduct within its own territory should be condemned only by commercial reality or on the basis of an international agreement.

Constitutional Restraints on Advisory Opinions. Article 5, section 8 of the Texas Constitution[28] prohibits state courts from rendering advisory opinions. Although the Texas Legislature has empowered state courts to issue declaratory judgments,[29] the legislature cannot enlarge the courts' constitutional jurisdiction. Hence, Texas courts may render declaratory judgments only when there is a true justiciable controversy.[30] A question often

22. 556 S.W.2d 784 (Tex. 1977).

23. The court in *Ashley* accurately stated the effect of the doctrine: sovereign immunity completely bars the mandatory subjection of one sovereign to the courts of another. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). There is a significant distinction between immunity from jurisdiction and the immunity of certain property from execution, and the doctrine of sovereign immunity embraces the former concept.

24. 556 S.W.2d at 785-86; *see* notes 10-12 *supra* and accompanying text.

25. 556 S.W.2d at 786.

26. 22 U.S.C. § 2370(e)(2) (1976); *see* notes 13-16 *supra* and accompanying text.

27. 556 S.W.2d at 786.

28. TEX. CONST. art. V, § 8.

29. TEX. REV. CIV. STAT. ANN. art. 2524 —1 (Vernon 1965).

30. California Prod., Inc. v. Puretex Lemon Juice, Inc., 160 Tex. 586, 588-89, 334 S.W.2d 780, 781 (1960).

arises as to whether a declaratory action involves a true justiciable controversy, or whether it is an unconstitutional attempt to obtain a judicial determination of a hypothetical question, a contingent question, or a question not essential to the resolution of a justiciable controversy.

This issue arose once again in the case of *National Savings Insurance Co. v. Gaskins*.[31] An insect exterminator sprayed an apartment complex, and a daughter of one of the tenants was allegedly injured by substances used in the extermination. The tenant sued the extermination company. The extermination company held a National Savings Insurance Company policy that was in effect at the time of the alleged injury. National, however, pled noncoverage because the insured had failed to give timely notice, and sought a declaratory judgment that it had no duty to defend the insured. Plaintiffs in the suit pending against the insured were made defendants. The tenants sought to have themselves removed as parties, arguing that "since they were not parties to the insurance contract and did not care who, if anyone, defended the insured, they had no interest adverse to National, therefore no justiciable controversy existed."[32]

National relied on *Maryland Casualty Co. v. Pacific Coal & Oil Co.*,[33] a case in which the Supreme Court held that a similar fact situation involved a justiciable controversy. National argued that the test used by the United States Supreme Court "is virtually identical to the one followed in Texas."[34] The Fort Worth court of civil appeals held that regardless of whether the tests were the same, *Firemen's Insurance Co. v. Burch*[35] was the controlling precedent. In that case the Texas Supreme Court held that the determination of a casualty insurer's duty to pay a judgment that might be granted against its insured would be hypothetical before such a judgment was actually granted. Thus, the court held that in the instant case no justiciable controversy existed.

National next contended that by the terms of the Declaratory Judgment Act[36] the tenant-plaintiffs were necessary parties because they had an interest that would be affected by the declaration. The interest alleged was that of collecting any judgment received in their suit against the exterminators. National further argued that if the tenants were not joined, a determination in the declaratory judgment suit that National was not given timely notice would not bind the tenants in a suit against National to collect on a judgment obtained by the tenants against the insured. National sought to distinguish the *Burch* case by arguing that the issue of timely notice involves a past event, not a hypothetical question. The court inter-

31. 572 S.W.2d 573 (Tex. Civ. App.—Fort Worth 1978, no writ).
32. *Id.* at 574.
33. 312 U.S. 270 (1941).
34. 572 S.W.2d at 575.
35. 442 S.W.2d 331 (Tex. 1968).
36. TEX. REV. CIV. STAT. ANN. art. 2524—1, § 11 (Vernon 1965) provides: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

preted the *Burch* case broadly and the Declaratory Judgment Act narrowly in holding that no justiciable controversy existed.

The Fort Worth court of civil appeals also disallowed the argument that by a statement made in their summary judgment affidavits, the tenant-plaintiffs had judicially admitted an interest in the controversy in question.[37] The court held that no judicial admission existed because the statement was not clear and unequivocal, and in any event, admissions alone cannot create a justiciable controversy.

The Fort Worth court followed earlier dictates of the Texas Supreme Court as to the meaning of the Texas constitutional ban on advisory opinions. This traditional view forces a very narrow interpretation of the Declaratory Judgment Act, which often causes harsh results.[38]

The Proper Invocation of a Court's Subject Matter Jurisdiction. One of the basic axioms of subject matter jurisdiction is that a court has only such power as is granted it by either constitution or statute. If a court exceeds its delegated power, any judgment that it renders is void. The subject matter jurisdiction of a particular court often depends on the amount in controversy in the suit in question.[39] In *Byke v. City of Corpus Christi*[40] the court held that a plaintiff's original petition must contain a specific allegation as to the amount in controversy in order to properly invoke the subject matter jurisdiction of the district court.

The Bykes filed a class action suit against the city of Corpus Christi for wrongful retention of advance tax payments. They petitioned for the recovery of money, but failed to allege a specific sum. The trial court granted the city of Corpus Christi's motion for summary judgment. That trial court judgment was reversed and remanded on the ground that the plaintiffs had failed to invoke the jurisdiction of the district court because they had neglected to allege an amount in controversy.[41] The district court then entered judgment for dismissal.

Thereafter the plaintiffs amended their petition to claim damages in excess of "$500.00 when the amount of damages are aggregated and computed pursuant to Article 1906a."[42] When the trial court again dismissed the suit for lack of subject matter jurisdiction, the plaintiffs appealed. The majority of the civil appeals court concluded that if the original petition did not allege jurisdictional facts, then the trial court had no jurisdiction,

37. The alleged admission was based on the following statement: "In fact, it would seem to me to be to my advantage in my lawsuit pending in the 17th Judicial District Court if there be no attorneys representing Mr. Grace and Mr. Temple at all." 572 S.W.2d at 576.

38. For an additional case dealing with the Texas Declaratory Judgment Act, see Stop 'n Go Mkts., Inc. v. Executive Security Syss., Inc. of America, 556 S.W.2d 836 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

39. TEX. CONST. art. V, § 8, for example, limits the subject matter jurisdiction of district courts to cases involving at least $500.

40. 569 S.W.2d 927 (Tex. Civ. App.—Corpus Christi 1978, no writ).

41. Byke v. City of Corpus Christi, 541 S.W.2d 661 (Tex. Civ. App.—Corpus Christi 1976, no writ).

42. 569 S.W.2d at 929.

and the plaintiffs could not cure this jurisdictional defect by merely amending their pleadings.

The court further held that as a general proposition, the *original* petition is critical to the establishment of jurisdiction at the trial court level.[43] As a result, article 1906a, which provides that claims may be aggregated for jurisdictional purposes,[44] was held to apply only to the original petition.

Chief Justice Nye filed a dissenting opinion in which he cogently argued that the use of the term "originally" in article 1906a should be interpreted liberally to carry out the legislature's intent.[45] In keeping with this approach, Chief Justice Nye suggested that the word "originally" was used to distinguish the jurisdiction of the trial court from that of the appellate court, rather than to distinguish between original and amended petitions. Today there is no reason to adhere to strict pleading requirements unless they serve a functional purpose, and no such purpose is served by the majority's narrow interpretation of article 1906a. As Chief Justice Nye noted:

> An original petition may be amended many times (see Rule 63), and may now be amended without leave of the court as a matter of right when filed seven days or more before trial. It is the last amended and/or supplemental petition on which the parties go to trial. It does not make sense that the Legislature was going into the rule-making process by prohibiting a party from amending his original petition so as to join other claims and other parties in order that the aggregate amount would give the trial court jurisdiction.[46]

An objective reading of the general statute clearly supports Chief Justice Nye's view.

Federal Constitutional Limits on the Exercise of Subject Matter Jurisdiction. Courts have been far more lenient when evaluating a state's exercise of legislative jurisdiction, or the power of a state to pass a law that affects nonlocals,[47] than they have been when reviewing an attempted exercise of personal jurisdiction. The current form of the test for legislative jurisdiction is found in *National Geographic Society v. California Board of Equalization*.[48] In that case the United States Supreme Court had to determine whether the Society's activities at its California offices provided a sufficient nexus between the Society and the state to support the state's imposition of a use-tax-collection liability. The tax was imposed on every

43. *Id.* at 930 (citing Richardson v. First Nat'l Life Ins. Co., 419 S.W.2d 836 (Tex. 1967), and 21 C.J.S. *Courts* § 34 (1940)).

44. TEX. REV. CIV. STAT. ANN. art. 1906a (Vernon 1964). The statute provides: "Where two or more persons *originally* and properly join in one suit, the suit for jurisdictional purposes shall be treated as if one party were suing for the aggregate amount of all their claims added together . . . ." *Id.* (emphasis added).

45. Legislative intent can be inferred from the fact that art. 1906a was enacted for the express purpose of overruling Long v. City of Wichita Falls, 142 Tex. 202, 176 S.W.2d 936 (1944), in which the court refused to allow aggregation of monetary claims for jurisdictional purposes.

46. 569 S.W.2d at 934-35.

47. For a discussion of legislative jurisdiction in general, see R. LEFLAR, *supra* note 1, §§ 55-62.

48. 430 U.S. 551 (1977).

retailer who engaged in business in California and sold goods for consumption in that state. The Society maintained two offices in California to solicit advertising for its magazine, but performed no activities in California that were related to its mail order business of selling maps, atlases, globes, and books.

The Supreme Court held that the imposition of use-tax-collection liability on the Society did not violate due process, but the Court refused to adopt the "slightest presence" test that had been applied by the California Supreme Court.[49] Instead, the Court held that the Society's activities "adequately establish[ed] a relationship or nexus"[50] between it and California. The Supreme Court rejected the arguments of the Society that there must exist a nexus or relationship not only between the seller and the taxing state, but also between the specific activity of the seller within the state and the activity sought to be taxed.[51] Thus, at least in the limited circumstances involved here, due process may be satisfied by nexus activities that are unrelated to the act of legislative jurisdiction.[52]

Of course, it is well established by *Perkins v. Benguet Consolidated Mining Co.*[53] that *personal* jurisdiction may be constitutionally based on activities unrelated to the cause of action if those unrelated activities are numerous and pervasive. If a defendant is so connected by activity to a given jurisdiction that the defendant could be considered to be "domiciled" there, then it is not offensive to traditional notions of fair play and substantial justice to sue the defendant in that jurisdiction, regardless of where the cause of action arose; it is always fair to sue a defendant in his own backyard. Unless the contacts with a particular jurisdiction are substantial enough to warrant the application of the generally affiliating circumstances rule, however, the affiliating acts must relate to the cause of action.

This distinction seems to have been overlooked in the case of *Navarro v. Sedco, Inc.*,[54] which will be discussed in detail in subsequent sections of this Article.[55] The error in *Navarro* was predicated on the Fifth Circuit's decision in *Wilkerson v. Fortuna Corp.*[56] In that case the court stated: "If a 'minimum connection' is all that need be shown to exert the state's power to tax, *a fortiori*, a non-resident may be required to defend an action in state court even though the suit bears no relation to the activities deemed

49. *Id.* at 556.
50. *Id.*
51. As the Supreme Court noted, this basis would not support a direct tax upon the conduct of a foreign individual, but stated: "However fatal to a direct tax a 'showing that particular transactions are dissociated from the local business . . . .' . . . such dissociation does not bar the imposition of the use-tax-collection duty." *Id.* at 560 (citations omitted).
52. *Id.* at 562 (Blackmun, J., concurring).
53. 342 U.S. 437, 444-47 (1952).
54. 449 F. Supp. 1355 (S.D. Tex. 1978).
55. *See* notes 81-87 & 123-27 *infra* and accompanying text.
56. 554 F.2d 745 (5th Cir.), *cert. denied*, 434 U.S. 939 (1977), *noted in* Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 32 Sw. L.J. 387 (1978).

necessary and sufficient to constitute minimum contacts."[57] The Fifth Circuit has failed to distinguish between legislative and personal jurisdiction. This, coupled with a misplaced reliance on generally affiliating connection cases,[58] has led, and undoubtedly will continue to lead, to highly suspect results.[59]

B. *Jurisdiction of the Person*

Once a court establishes that it has subject matter jurisdiction over a particular cause of action, it must then determine whether it has personal jurisdiction over the defendant. The proper exercise of personal jurisdiction requires that the procedures provided by statute or applicable rule be properly followed and that such procedures be constitutional.[60]

Satisfaction of Procedural Requirements for the Exercise of Personal Jurisdiction. Traditionally, the exercise of personal jurisdiction was tied to territorial concepts.[61] In the area of in personam suits various conceptual means gradually were developed to ameliorate the harshness of a purely territorial basis for the exercise of jurisdiction.[62] Eventually it became appropriate to consider authorizing the exercise of jurisdiction in new ways.[63] In Texas the primary basis for the exercise of jurisdiction over nonresidents is article 2031b,[64] which authorizes courts to exercise personal jurisdiction over persons who are "doing business" in the state. Initially the statute was sufficient to authorize the exercise of jurisdiction to the constitutional limits. As views of constitutional limitations on the exercise of jurisdiction over nonresident defendants changed, however, a question arose as to the scope of personal jurisdiction sanctioned by article 2031b.

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57. 554 F.2d at 750 (citing its previous ruling in Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973)).

58. For a good general discussion of the proper analysis of general versus specifically affiliating cases, see Cornelison v. Chaney, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976).

59. *See* notes 123-27 *infra* and accompanying text.

60. This constitutional question has two aspects. First, the defendant must have sufficient contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, 326 U.S. 310 (1945). Secondly, the means of notifying the defendants of the lawsuit must amount to

> notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must be of such a nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citations omitted).

61. *See* Pennoyer v. Neff, 95 U.S. 714, 723 (1877).

62. *See* Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (implied consent to jurisdiction and service of process found in receipt of business license); Hess v. Pawloski, 274 U.S. 352 (1927) (operation of motor vehicle on state highways indicated implied consent to jurisdiction and service of process); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1856) (receipt of business license from state indicated implied consent to jurisdiction and service of process).

63. *See generally* Wilson, *In Personam Jurisdiction Over Non-Residents: An Invitation and a Proposal*, 9 BAYLOR L. REV. 363 (1957).

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

This was critical since the constitutional question is reached only after it is first determined that the statutory provision purports to grant jurisdiction. Numerous decisions grappled with the precise meaning of article 2031b and various problems surfaced.[65] Even if article 2031b reaches to the maximum limits permitted by due process,[66] there are cases that simply fall outside any reasonable interpretation of "doing business."[67] Article 2031b thus became too narrow to guarantee absolutely that a court could focus on the constitutional limitations of due process rather than engage in "technical and abstruse attempts to consistently define 'doing business.' "[68] Furthermore, there are strict rules of pleading and proof applicable to suits brought under 2031b that cannot be avoided.[69]

Given these problems, it was predictable that new enabling provisions would be enacted to insure that the only limitation on the exercise of personal jurisdiction over nonresidents would be constitutional. These provisions either could be aimed at solving specific problems or could be generally worded so as to authorize the exercise of personal jurisdiction in all cases subject only to constitutional limits. Texas has recently adopted both varieties. The Texas Family Code, for instance, now has enabling provisions aimed at specific problems,[70] and rule 108 of the Texas Rules of Civil Procedure[71] is a general authorization.

In *U-Anchor* the supreme court laid the foundation for an expanded use of rule 108 by defining the rule's purpose as being "to permit acquisition of in personam jurisdiction to the constitutional limits."[72] This proposal for avoiding the problems of interpreting the scope of article 2031b and of

65. *See* Thomas, *supra* note 56, at 388-89; Comment, *The Texas Long-Arm Statute, Article 2031b: A New Process is Due*, 30 SW. L.J. 747, 751-60 (1976), and cases therein.

66. U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978), held that art. 2031b was to be so construed.

67. *See, e.g.*, Taylor v. Texas Dep't of Pub. Welfare, 549 S.W.2d 422 (Tex. Civ. App.—Fort Worth 1977, no writ) (fathering an illegitimate child in Texas was not within the terms of art. 2031b; therefore, alleged father was not subject to paternity suit in Texas).

68. U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).

69. Whitney v. L & L Realty Corp., 500 S.W.2d 94, 95-96 (Tex. 1973); McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965); Gourmet, Inc. v. Hurley, 552 S.W.2d 509, 511-13 (Tex. Civ. App.—Dallas 1977, no writ).

70. TEX. FAM. CODE ANN. §§ 3.26, 11.051 (Vernon Supp. 1978-79). *See generally* Sampson, *Long-Arm Jurisdiction Marries the Texas Family Code*, 38 TEX. B.J. 1023 (1975); Sampson, *Jurisdiction in Divorce and Conservatorship Suits*, 8 TEX. TECH L. REV. 159 (1976).

71. Rule 108 provides in part: "[A] nonresident of the State [served with] notice . . . of the institution of the suit . . . the same as prescribed for citation to a resident defendant . . . shall be required to appear and answer . . . to the full extent that he may be required to appear and answer under the Constitution of the United States . . . ." TEX. R. CIV. P. 108.

Professor Hans Baade argues that the judicial expansion of extraterritorial jurisdiction to the maximum constitutional limits unconstitutionally derogates from the legislative prerogative, which has thus far been exercised only in the carefully restricted language of such statutes as art. 2031b and TEX. FAM. CODE ANN. §§ 3.26 & 11.051 (Vernon Supp. 1978-79). *Letters to the Editor*, 38 TEX. B.J. 988 (1975). Rule 108, however, may also be read as a mere enabling provision for existing long-arm statutes. Sampson, *Jurisdiction in Divorce and Conservatorship Suits*, 8 TEX. TECH L. REV. 159, 216-18 (1976).

72. U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 n.1 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).

complying with its attendant strict rules of pleading and proof by using rule 108 went awry in *Alpha Guard, Inc. v. Callahan Chemical Co.*[73] The Austin court of civil appeals held that the plaintiff had not invoked the jurisdiction of the district court by merely pleading that the corporate, out-of-state defendant did business in Texas, had no registered agent in Texas, and thus could be served through the Texas secretary of state pursuant to article 8.09(B) of the Texas Business Corporation Act[74] and rule 108. The court found that the district court was without jurisdiction because substituted service was not made in accordance with the provisions of article 2031b, but the decision is not well-founded. At least in the portion of the pleading set forth in the judgment,[75] the plaintiff did *not* invoke article 2031b. The proper issue, therefore, was whether the requirements of article 8.09(B)[76] and rule 108 were satisfied; article 2031b never should have surfaced in the court's discussion. Although it will take some time, eventually the courts of this state should be willing to assert jurisdiction over nonresidents on some basis other than article 2031b.[77]

Extension of authority for the assertion of personal jurisdiction by state courts in Texas also extends the personal jurisdiction of federal courts sitting in Texas. If a federal court exercises jurisdiction over a nonresident defendant in a diversity case, then the extent of the jurisdiction, subject to the constitutional limits, is determined by the law of the state in which the court sits.[78] If a federal court exercises jurisdiction in cases arising under the Constitution, laws, or treaties of the United States, and a basis for exercising personal jurisdiction is fixed by the provision in question, then it is followed, and no limitations or lack of authorization under state law applies.[79] In cases arising under the Constitution, laws, or treaties of the United States where the basis for exercising personal jurisdiction is not fixed therein, rule 4 of the federal rules provides for "borrowing" state statutes.[80]

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73. 568 S.W.2d 448 (Tex. Civ. App.—Austin 1978, no writ).

74. TEX. BUS. CORP. ACT ANN. art. 8.09 (B) (Vernon 1956).

75. This portion is introduced by the court with the words "respondent pleaded," indicating that this was all of the pleading relevant to the issue presented. 568 S.W.2d at 448.

76. Article 8.09(B) deals with the change of registered office or registered agent of a foreign corporation and does not seem applicable in this case. Probably the plaintiff meant to invoke art. 8.10(B), which provides in part:

> Whenever a foreign corporation authorized to transact business in this State shall fail to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, or whenever the certificate of authority of a foreign corporation shall be revoked, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be served.

TEX. BUS. CORP. ACT ANN. art. 8.10(B) (Vernon 1956).

77. *See* Fox v. Fox, 559 S.W.2d 407, 409 (Tex. Civ. App.—Austin 1977, no writ), in which art. 2031b was characterized as "the Texas general long-arm statute," and the court stated that although the facts did not support its application, "Rule 108 may be construed as a long-arm statute by which personal jurisdiction may be obtained."

78. Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974).

79. Black v. Acme Mkts., Inc., 564 F.2d 681, 684 (5th Cir. 1977).

80. FED. R. CIV. P. 4.

In *Navarro v. Sedco, Inc.*[81] the court considered the proper scope to be accorded to rule 4's borrowing provisions. In *Navarro* the personal representatives of several Spanish citizens who were killed in a helicopter crash, which occurred while they were working on a drilling rig operating off the coast of West Africa, brought suit under the Jones Act[82] and the Death on the High Seas Act.[83] The plaintiffs sought to base personal jurisdiction on rule 4(d)(7), which provides for service "in the manner prescribed by the law of the state in which the district court is held." The plaintiffs urged that the term "manner" implied that rule 4(d)(7) incorporated only the method of service of process provided under state law, which would not include state law limitations on the circumstances under which personal jurisidiction could be asserted. Hence, the plaintiffs claimed that the exercise of personal jurisdiction under rule 4(d)(7) is subject only to constitutional limitations and compliance with article 2031b is unnecessary.[84] The court, however, held that rule 4(d)(7) applied only to service of process within the territorial limits of the state in which the district court sits and that authority for service of process outside of the state is contained in rule 4(e). Because the defendants were not served within Texas, the plaintiff had to meet the requirements of rule 4(e), which provides that service may be made "*under the circumstances* and in the manner prescribed" by the applicable statute or order.[85] The court interpreted the phrase "under the circumstances" as requiring that the plaintiff bring himself under the applicable state law, in this case article 2031b.[86] Thus, in *Navarro* the plaintiffs had to prove that the defendant was amenable to process under article 2031b, and that assertion of article 2031b complied with due process. The court held that since the scope of article 2031b is limited only by the due process clause, which has never been interpreted as requiring in all cases that the plaintiff's cause of action arise directly from defendant's contacts with the forum, article 2031b does not require that the cause of the action arise directly out of the defendant's contacts with Texas. As the assertion of jurisdiction did not offend due process,[87] the jurisdiction of the court was upheld.

The Constitutional Question. International Shoe's interpretation of due process as requiring that "traditional notions of fair play and substantial justice" be satisfied before a court could exercise jurisdiction over a non-

81. 449 F. Supp. 1355 (S.D. Tex. 1978).
82. *Id.* at 1357.
83. *Id.*
84. *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1114-1115 (1969).
85. FED. R. CIV. P. 4(e) (emphasis added).
86. 449 F. Supp. at 1358 n.1. In a very similar case, Edwards v. Gulf Miss. Marine Corp., 449 F. Supp. 1363, 1367 n.1 (S.D. Tex. 1978), the court held that it did not have to reach this question because art. 2031b was fully satisfied under the facts in that case.
87. *See* text accompanying notes 123-27 *infra* for a discussion of the court's reasoning on the due process issue.

resident was understood to be difficult to apply.[88] *Shaffer v. Heitner's*[89] extension of this standard to in rem and quasi in rem suits as well as to in personam suits had two results: first, the test, with all of its difficulties, now applies across the board; and secondly, the nature of pleading and proof necessary in in rem and quasi in rem causes has changed. Prior to *Shaffer* no showing of the relationship among the defendant, the forum, and the litigation was necessary in those suits because the territoriality concept of *Pennoyer v. Neff*[90] provided for the mutually exclusive sovereignty of the states. As a result of the *Shaffer* decision, however, the type of showing necessary to demonstrate the satisfaction of traditional notions of fair play and substantial justice must now be made; that is, minimum contacts must be established. As Mr. Justice Marshall's majority opinion in *Shaffer* carefully points out, application of a uniform test for exercise of jurisdiction over nonresidents

> does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State.[91]

In Texas, where the jurisdictional facts must be pleaded and proved,[92] this adds a new requirement for in rem and quasi in rem suits. In many cases, as noted by Mr. Justice Marshall, the satisfaction of constitutional requirements will not be difficult.[93] Failure of pleading and proof, however, can be fatal.

The Supreme Court considered the permissible reach of a court over a nonresident defendant in an in personam suit in *Kulko v. Superior Court*.[94] In that case the California Supreme Court concluded that jurisdiction by a California court over a father domiciled in New York in an action for child support was proper because first, he actively and fully consented to

88. *See* the opinion of Mr. Justice Black in International Shoe Co. v. Washington, 326 U.S. 310, 322 (1945).

89. 443 U.S. 186 (1977).

90. 95 U.S. 714 (1878).

91. 443 U.S. at 207-08.

92. Whitney v. L & L Realty Corp., 500 S.W.2d 94 (Tex. 1973); McKanna v. Edgar, 388 S.W.2d 927 (Tex. 1965); Gourmet, Inc. v. Hurley, 552 S.W.2d 509 (Tex. Civ. App.—Dallas 1977, no writ).

93. *But see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 60, Comments c & d (1971) [hereinafter cited as RESTATEMENT (SECOND)]; Note, *The Power of a State to Affect Title in a Chattel Atypically Removed to It*, 47 COLUM. L. REV. 767 (1947).

94. 436 U.S. 84 (1978).

his daughter living in California for the school year and sent her there for that purpose, and secondly, he benefitted financially from his daughter's presence in California for nine months of the year. The Supreme Court found the first ground constitutionally infirm and the second factually inaccurate and therefore held that the attempted exercise of jurisdiction was unconstitutional.

The major survey case attempting to apply *Shaffer* and *Kulko* is *Great Western United Corp. v. Kidwell*.[95] Great Western, a Texas corporation, intended to issue a tender offer in an attempt to take over a publicly owned Washington corporation with principal executive offices and over fifty percent of its assets located in Idaho. Great Western complied with applicable provisions of the federal provisions regulating takeovers[96] and initially tried to comply with Idaho law.[97] When difficulties in compliance with the Idaho law arose, Great Western filed suit in Texas challenging the Idaho law as unconstitutional on the grounds that it was pre-empted by the Securities Exchange Act of 1934 and created an unconstitutional burden on interstate commerce. The jurisdictional question presented was whether due process permits a court in Texas to exercise jurisdiction over an Idaho official charged by Idaho law with preventing a Texas based corporation from proceeding with a takeover of an Idaho based corporation.

The problem has two aspects: first, the statutory authority for acquiring such jurisdiction must be established; and secondly, the exercise of that authority must be consistent with constitutional requirements. In addressing the question of statutory authority in Texas, the Fifth Circuit has tended either to read the language of article 2031b[98] very broadly, or simply to ignore that language and focus on the Texas Supreme Court's statement that article 2031b is intended to reach to the constitutional limits.[99] As another commentator has noted,[100] the latter approach ignores the requirement in article 2031b that the tort be committed in whole or in part within the state.[101] In *Great Western* the court followed the former course and concluded that article 2031b authorized the exercise of jurisdiction.

The court then considered the constitutional issue of whether the effects caused in Texas by actions taken in Idaho were sufficient to satisfy the minimum contacts requirement. Fortunately, in answering this question the Fifth Circuit did not rely on *National Geographic* nor did it improperly cite *Perkins*.[102] The generality of the minimum contacts test causes differ-

95. 577 F.2d 1256 (5th Cir. 1978).
96. Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d)-(e) (1976) (Williams Act).
97. *See* 577 F.2d at 1263 for applicable provisions of the Idaho law.
98. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).
99. U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).
100. Thomas, *supra* note 56, at 393-96.
101. Rule 108 would probably provide a sounder basis for reaching the constitutional issue. *See* notes 61-77 *supra* and accompanying text.
102. National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); *see* notes 47-54 *supra* and accompanying text.

ences of opinion, however, even when the proper precedents are relied on.

> Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. . . . We recognize that this determination is one in which few answers will be written "in black and white. The greys are dominant and even among them the shades are innumerable."[103]

Judge Wisdom, writing for the court, found that the minimum contacts test was met under the facts of this case. Relying on cases previously decided by the Fifth Circuit, Judge Wisdom stated that contacts need not arise from actual physical activity in the forum state; rather, activities in other forums that had foreseeable effects in the forum state would suffice. The court argued that the facts of the instant case were analogous to those in *McGee v. International Life Insurance Co.*,[104] which held that sufficient minimum contacts were established when an out-of-state insurer sent an insurance contract to a resident of the state asserting jurisdiction. Although the court acknowledged that contacts by the plaintiff, here Great Western's initial voluntary filing in Idaho, cannot produce minimum contacts, it urged that the language in *Hanson v. Denckla*[105] requiring the defendant to purposefully avail himself of the privilege of conducting activities within the state should not be read too literally.[106] Instead, the thrust should be that unilateral action by the plaintiff alone is not enough. Even if the requirement of *Hanson v. Denckla*[107] were to be applied literally, however, Judge Wisdom believed that it would be satisfied in this case. Judge Wisdom found that Idaho intended the effects of its tender offer regulations to be felt in Texas, and that by expecting Texas to honor criminal judgments and to help insure that violators in Texas go to trial in Idaho, Idaho purposefully conducted activities in Texas. Since Idaho had "[d]eliberately cast [its] regulatory net across the United States,"[108] it did not offend traditional notions of justice and fair play to require an Idaho official to travel out of state to defend a constitutional challenge brought by a participant in a non-Idaho transaction. The opinion carefully pointed out that jurisdiction was not grounded on the "practical effect" of the Idaho statute in Texas, but rather on the attempted regulation of Great Western's Texas based business activities.[109]

Judge Godbold dissented on the ground that the court could not constitutionally assert jurisdiction under the facts of this case. Although he held that the tripartite relationship among the defendant, the forum, and the

103. Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (citations omitted).
104. 355 U.S 220 (1957).
105. 357 U.S. 235, 253 (1958).
106. 577 F.2d at 1268 (citing Judge Goldberg's argument in Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 496 (5th Cir. 1974)). The *Hanson* requirement was reasserted in Kulko v. Superior Court, 436 U.S. 84, 93-94 (1978).
107. 357 U.S. 235 (1958).
108. 577 F.2d at 1269.
109. *Id.*

litigation was central to the due process inquiry,[110] he placed primary emphasis on the defendant's contacts with the forum state. Unlike the majority, Judge Godbold concluded that the requirement that the defendant purposefully avail himself of the benefits and protection of the forum state's laws cannot merely mean that the plaintiff's unilateral activity is insufficient to support personal jurisdiction over the defendant. "Rather it embodies the idea that it is in part the defendant's enjoyment of the benefits and protection of a state's laws that makes it fair to require the defendant to appear in the state's courts."[111] The dissent found no such purposeful enjoyment of protection. Idaho's expectation that Texas officials would honor criminal judgments obtained under the takeover law was of no benefit because a valid criminal judgment depends on the state's establishing personal jurisdiction over the defendants; once this is established, help by Texas would be unnecessary. Judge Godbold viewed the other alleged benefits as too attenuated and speculative to create a basis for jurisdiction. Further, while the nature of the defendant's acts had an impact in Texas, the cause of action arose neither from the defendant's causing physical injury in the state nor from his conducting commercial transactions in the state. Judge Godbold, therefore, believed that the nature and quality of the defendant's contacts with Texas would not support jurisdiction.[112]

Having concluded that the defendant's contacts with the forum, the most important aspect of the tripartite relationship among the defendant, the forum, and the litigation, was not sufficient to support jurisdiction, Judge Godbold proceeded to analyze the interests of the forum. Texas' interest in redressing tortious conduct or breaches of contracts committed in whole or in part in the state was not involved here. In Judge Godbold's view, the forum's only interest was in allowing its residents to use Texas courts to sue nonresidents, a very weak interest at best.

Finally, Judge Godbold was troubled by the possible ramifications of what he called the "majority's effects test."[113] He noted that California's strict requirements for automobile pollution devices have an immense and foreseeable impact on General Motors and queried whether that meant that General Motors could sue California regulators in Michigan.

The major issue presented in *Kidwell* was a close one. The majority was probably correct in concluding that physical acts within a state are not necessary in order for an assertion of jurisdiction to be constitutional. Nevertheless, the requirement of *Hanson v. Denckla*[114] that there be a pur-

110. *See* Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

111. 577 F.2d at 1288-89.

112. Judge Godbold distinguished the case at hand from the cases relied on by the majority, Hitt v. Nissan Motor Co., 399 F. Supp. 838 (S.D. Fla. 1975), *vacated on other grounds*, 552 F.2d 1088 (5th Cir. 1977), and Maricopa County v. American Petrofina, Inc., 322 F. Supp. 467 (N.D. Cal. 1971), in both of which price fixing was found to have an impact on the forum state, on the grounds that this action bore little resemblance to a damages action sounding in tort. 577 F.2d at 1290 n.6.

113. 577 F.2d at 1291.

114. 357 U.S. 235 (1958).

poseful availing of the benefits and protections of the forum state's laws must be met. Here, due to both the lack of any such purposeful conduct and the paucity of legitimate forum state concerns, the dissent reached the better conclusion.

Assertion of Jurisdiction. During the survey period there were many other cases dealing with the assertion of jurisdiction. The most important of these will be briefly noted under the general heading of tort, contract, and family law.

Tort. Bass v. Metzger[115] was precipitated by an unhappy and complicated business arrangement. One of the disgruntled business participants signed a theft complaint, which was later dismissed. The defendant in the aborted criminal case then filed a malicious prosecution suit in which an issue arose concerning jurisdiction over a nonresident defendant. The court held that a party who merely signed checks drawn on a Texas bank account did not have sufficient contacts with Texas to be constitutionally subjected to suit in that state. The drawer of the checks was a nonresident corporate official of a company that had previously been exonerated by jury findings of any liability. Based on the authority of *U-Anchor Advertising, Inc. v. Burt*,[116] the court upheld the special appearance by the corporate official, who had been sued individually.

In *Walker v. Newgent*[117] the Fifth Circuit considered whether a United States citizen who was injured in an automobile accident in Germany could sue General Motors and Opel in Texas on the basis of negligence, strict liability, and breach of express and implied warranties. The automobile in question was manufactured for use in, sold in, and used exclusively in Germany. Opel transacted no business in Texas.

The plaintiff predicated in personam jurisdiction on article 2031b.[118] The court found that

> Opel, a German corporation, has neither assets, office, agents, nor employees in Texas . . . . [and] even though Opel sold cars to Buick Motor Division of GM, the car in question was a model which was not manufactured for export and in fact was sold second-hand in Germany; further, regarding those cars which were sold for export, title passed in Germany, and no contracts for sale were entered into or to be performed in the State of Texas.[119]

Furthermore, no tort was committed either in whole or in part in Texas since the automobile was designed and manufactured in Germany and the accident occurred in Germany.

Nevertheless, the jurisdiction alleged could have been established if the relationship between General Motors, which does business in Texas, and Opel, a subsidiary corporation, had been one which would allow imputa-

115. 569 S.W.2d 917 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).
116. 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).
117. 583 F.2d 163 (5th Cir. 1978).
118. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).
119. 583 F.2d at 166.

tion of parent activities to the subsidiary.[120] The record, however, was found to be devoid of facts supporting a prima facie case of an agency relationship.

The final question to be considered was whether the foreseeable effects test articulated in *Great Western United Corp. v. Kidwell*[121] was applicable. The court stated that Opel's activities in Germany did not have foreseeable effects in Texas, "especially since the automobile in question was not manufactured for export and was sold only domestically."[122] The court also relied on the holding in *Great Western* that there must be some activity by the defendant in Texas and not simply unilateral activity in that state by the plaintiff. Since it appeared that the action was brought in Texas solely because the plaintiff had become a Texas resident, the court affirmed the district court's dismissal for lack of personal jurisdiction.

The final two tort cases to be treated were decided by Judge Singleton of the Southern District of Texas. In *Navarro v. Sedco, Inc.*[123] the personal representatives of several Spanish nationals who were killed in a helicopter crash off the coast of West Africa brought suit against the Canadian corporation that owned and operated the helicopter involved. The court concluded that jurisdiction would lie based on the defendant's continuous purchases of goods and services in Texas and its leasing of a helicopter from a Texas company. The court found that a cause of action need not arise directly out of the defendant's contacts with the forum state in order to uphold jurisdiction. In so doing the court improperly relied upon *Perkins* and *National Geographic*.[124] The court concluded that requiring the Canadian corporation to defend the suit in Texas would not cause it such inconvenience or hardship as to amount to a denial of due process.

The court's cavalier admission that "the State of Texas has no particular interest in providing a forum for non-resident plaintiffs suing non-resident defendants on a cause of action to which Texas law will not apply"[125] does little to help bring its assertion of jurisdiction within the tripartite test of *Shaffer* and *Kulko*.[126] The court seems to have disregarded the message of *Shaffer* that there are still restrictions on a court's assertion of personal jurisdiction.

Edwards v. Gulf Mississippi Marine Corp.[127] involved a suit brought by the United States and foreign citizens arising out of the sinking of a vessel

120. *See* Reul v. Sahara Hotel, 372 F. Supp. 995 (S.D. Tex. 1974), and cases cited therein. *See also* Gentry v. Credit Plan Corp., 528 S.W.2d 571 (Tex. 1975) (holding that a suit against a subsidiary stopped the running of the statute of limitations against its parent).

121. 577 F.2d 1256 (5th Cir. 1978); *see* notes 95-113 *supra* and accompanying text.

122. 583 F.2d at 168.

123. 449 F. Supp. 1355 (S.D. Tex. 1978).

124. There was an insufficient showing of generally affiliating circumstances to apply the reasoning of Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), and National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977), concerned legislative, not personal, jurisdiction. *See* notes 47-59 *supra* and accompanying text.

125. 449 F. Supp. at 1363.

126. *See* notes 88-94 *supra* and accompanying text. Note that *Kulko* had not been handed down at the time *Navarro* was decided.

127. 449 F. Supp. 1363 (S.D. Tex. 1978).

approximately twenty-five miles off the coast of Iran. Relying heavily on the rationale in *Navarro*, the court upheld jurisdiction over the nonresident corporate defendants. These two decisions demonstrate the injustices that are possible if in a non-*Perkins* situation the act furnishing the jurisdictional basis need not be related to the cause of action.

Contract. In *Diversified Resources Corp. v. Geodynamics Oil & Gas, Inc.*[128] a Texas based corporation sued an Illinois based corporation for failure to abide by the terms of a settlement entered into in a suit filed in a Texas federal court. The settlement required the Illinois based corporation to pay cash in Texas and to execute an installment promissory note payable in Texas. Upon partial failure of payment, the Texas based corporation filed suit in a Texas district court and the Illinois based corporation entered an unsuccessful special appearance.

On appeal the court upheld the district court's exercise of jurisdiction. The court distinguished *U-Anchor Advertising, Inc. v. Burt*[129] because in this case there was more than a naked agreement to pay in Texas for services performed out of state. Entering into a settlement of a lawsuit on file in a Texas federal court and agreeing that payment was to be made in Texas amounted to purposeful conduct that invoked the benefits and protection of Texas law.

Personal jurisdiction was again in issue in a suit to enforce a settlement agreement in *Dow Chemical Co. v. Napp-Grecco Co.*[130] Upon the destruction of a liquified natural gas storage facility in New York, numerous personal injury and wrongful death actions were filed by individuals in New York against the Texas corporations that owned the facility. The Texas corporations then filed suit in Texas against the Dow Chemical Company, which in turn filed a third party action against a nonresident corporation. The Texas corporations entered into a settlement agreement with the third party nonresident corporation whereby the third party agreed to provide the Texas corporations with documents, evidence, and witnesses under its control. The question then became whether the performance of these settlement terms constituted conduct sufficient to subject the third party nonresident corporation to a Texas court's jurisdiction.

The court concluded that entering into and executing the agreement did not amount to a purposeful act or transaction in Texas. The underlying basis for all the suits occurred in New York, the nonresident did not initiate the filing of any suit in Texas, there was neither the expectation nor the necessity of invoking the benefits and protections of Texas law, and the agreement was solicited, negotiated, and consummated in New York. Thus, under the authority of *Hanson v. Denkla*[131] and *U-Anchor*, the court could find no basis for subjecting the defendant to suit in Texas.

128. 558 S.W.2d 97 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).
129. 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).
130. 565 S.W.2d 383 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).
131. 357 U.S. 235 (1958).

A suit on an alleged contract to pay for architectural services and for the supervision of the construction of a synagogue in Maine came before the Fifth Circuit in *Barnstone v. Congregation Am Echad.*[132] The Congregation Am Echad invited Barnstone, an architect with residence and principal place of business in Houston, Texas, to make a presentation in order to be considered for the architectural commission. The commission was ultimately awarded to Barnstone, and the project was commenced. All plans, sketches, models, and drawings were prepared in Houston. In addition, the congregation directed some correspondence to Barnstone in Houston. Most of the other contacts, however, were in Maine,[133] and the congregation had no connections with Texas that were unrelated to this transaction.

No conclusion was reached as to whether there was an executed formal contract because the court decided that, in any event, it was the place of performance, rather than that of execution, consummation, or delivery, that should govern the determination of jurisdiction.[134] In a dictum the court also said that the choice of law provision in the alleged contract would have no effect on the jurisdictional question.

Without admitting that article 2031b was satisfied, the court nonetheless turned to the constitutional issue,[135] and after careful consideration, concluded that jurisdiction did not lie. The legal analysis relied almost exclusively on *Hanson v. Denckla*[136] and *O'Brien v. Lanpar Co.*,[137] emphasizing the necessity of purposeful activity within Texas and the invocation of the benefits and protection of Texas' laws. This analysis was, of course, somewhat different from that employed by the majority of the Fifth Circuit in *Great Western.*[138]

Family Law. During the previous survey period the primary case involving long-arm jurisdiction under the Texas Family Code was *Zeisler v. Zeisler*,[139] in which jurisdiction was asserted under section 11.051 of the

132. 574 F.2d 286 (5th Cir. 1978) (Morgan, Clark & Tjoflat, JJ.).

133. Barnstone had to procure a Maine license in order to be able to supervise the construction of the synagogue, and all meetings, presentations, and supervision of construction took place in Maine.

134. 574 F.2d at 288-89 (citing Arthur, Ross & Peters v. Housing, Inc., 508 F.2d 562 (5th Cir. 1975); Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847 (5th Cir. 1966)).

135. Many courts will interpret a jurisdictional statute as authorizing the assertion of jurisdiction only after first determining that the exercise of jurisdiction does not offend due process. *See, e.g.*, notes 123-27 *supra* and accompanying text. If an assertion of jurisdiction would be unconstitutional, these courts will find that statutory authorization is lacking. The questions of authorization and constitutionality are not necessarily coterminous, however, depending on the scope of the jurisdictional statute involved. In California the two questions are identical, as the California statute provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973). TEX. R. CIV. P. 108 is to the same effect, *see* note 71 *supra*, but art. 2031b is not so broadly worded. *See* notes 64-69 *supra* and accompanying text.

136. 357 U.S. 235 (1958).

137. 399 S.W.2d 340 (Tex. 1966).

138. *See* text accompanying notes 95-113 *supra* for a discussion of *Great Western.*

139. 553 S.W.2d 927 (Tex. Civ. App.—Dallas 1977, writ dism'd); *see* Thomas, *supra* note 56, at 396-98, for a discussion of *Zeisler.*

Code.[140] During the present survey period this section was again a source of controversy, this time in the case of *Corliss v. Smith*.[141]

Plaintiff Dan Corliss and defendant Vivian Corliss Smith were married in Massachusetts in 1962. In 1965 they moved to Dallas, Texas, where their two children were born. In 1972 the parties were divorced in Dallas County and the defendant was given custody of the children. The defendant remarried, moved to Nebraska, and established her permanent domicile there. From 1972 until the time of suit, the defendant and her children had not been physically present in Texas. Plaintiff filed suit in Texas in December 1976, seeking divided custody.[142] Jurisdiction was asserted under section 11.051 of the Texas Family Code, which provides:

> [I]n a suit affecting the parent-child relationship, the court may exercise personal jurisdiction over a person of whom service of citation is required . . . although the person is not a resident or domiciliary of this state, if:
>
> (1) the child was conceived in this state and the person on whom service is required is a parent or an alleged or probable father of the child;
>
> . . . .
>
> (3) the person on whom service is required has resided with the child in this state; or
>
> (4) notwithstanding Subdivisions (1), (2), or (3) above, there is any basis consistent with the constitutions of this state or the United States for the exercise of personal jurisdiction.[143]

By the terms of the statute, jurisdiction can now be exercised when either fact situation (1) or (3) is established; (4) is a catchall that provides an additional jurisdictional base.

In the present action options (1) and (3) both conferred statutory authorization for the exercise of jurisdiction under the facts of this case. In addition, however, it must be established that these facts are sufficient to satisfy traditional notions of fair play and substantial justice. The court first noted that extraterritorial jurisdiction over the person has been more expansive in the context of contract and tort cases than in domestic relations litigation because the full faith and credit clause is more narrowly interpreted in this latter class of cases. With this principle to guide it, the court proceeded with its analysis.

Since the primary concern of any custody determination is the children's best interests, the court properly focused on the issue of which forum would be most likely to produce a proper determination of this ultimate

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140. TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1978-79).

141. 560 S.W.2d 166 (Tex. Civ. App.—Tyler 1977, no writ).

142. Although the petition was couched in terms of a possessory conservatorship, the court held that the pleadings amounted to a request for divided custody due to the extent of the visitation privileges requested. *Id.* at 170.

143. TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1978-79). For a general discussion of the long-arm provisions of the Family Code, see Sampson, *supra* note 71; Comment, *The Jurisdiction of Texas Courts in Interstate Child Custody Disputes: A Functional Approach*, 54 TEXAS L. REV. 1008 (1976). Both texts were relied on in this decision. 560 S.W.2d at 171 n.1.

issue. Ordinarily, the domiciliary state of the children is in the best position to make this determination because the parties likely to know about the children and their living conditions are their neighbors, teachers, doctors, and ministers, all of whom are most available at the forum where the children are domiciled. Such witnesses are subject to subpoena power in the forum of the children's domicile, but may not be elsewhere. Indeed, in this case a Texas court would have no such power over important nonresident witnesses. Under this analysis, Texas had little interest in asserting jurisdiction, at least as compared to Nebraska.

In addition, the passage of time attenuated the defendant's contacts with Texas. The court relied on a six-month limitation on jurisdiction in an intrastate context found within the Family Code,[144] and concluded that a presumption arises that a Texas court is neither a convenient nor a competent forum in a case in which the children have been gone from Texas for more than six months. Due to the absence of sufficient proof to overcome this presumption, the court properly concluded that jurisdiction could not be constitutionally asserted.

II. CHOICE OF LAW

A. *Tort*

Prior to 1975 the Texas Supreme Court interpreted article 4678[145] as mandating the application of the law of the place of the consummation of the tort in all wrongful death cases.[146] In 1975 article 4678 was amended[147] to enable Texas courts to develop choice of law principles to govern these tort cases. Thus far, however, no cases have arisen to which revised article 4678 would apply.

In *Cass v. Estate of McFarland*[148] the court refused to apply the amendment retroactively and held that the unamended version of the article was applicable. In that case the surviving wife, child, and parents of Armando Cass-Ruiz brought a wrongful death suit in Texas. Cass-Ruiz was killed when the airplane on which he was a passenger crashed in the Republic of Mexico. The flight had originated in the State of New Mexico. The defendants obtained a dismissal of the suit on the grounds that only the law of Mexico could give rise to a cause of action, and since Mexico's laws were so unlike Texas' laws, a Mexican court should decide the case.[149]

144. TEX. FAM. CODE ANN. § 11.06 (Vernon 1975).

145. 1917 Tex. Gen. Laws ch. 156, at 365 (TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon 1952)).

146. Click v. Thuron Indus., Inc., 475 S.W.2d 715 (Tex. 1972); Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968).

147. *See* Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 30 SW. L.J. 268, 292 (1976).

148. 564 S.W.2d 107 (Tex. Civ. App.—El Paso 1978, no writ).

149. The court cited Carter v. Tillery, 257 S.W.2d 465 (Tex. Civ. App.—Amarillo 1953, writ ref'd n.r.e.), in support of this proposition. It is to be hoped that a wooden application of this doctrine will disappear when Texas courts have an opportunity to apply amended art. 4678.

If amended article 4678 had been applicable, the dismissal might have been avoided because the article now permits recovery for the death of citizens of Texas or the United States[150] caused by the wrongful act, neglect, or default of another in any foreign state "for which a right to maintain an action . . . is given by the statute or law of such foreign State or country *or of this State*."[151] Although the amended statute does not mandate a choice of Texas law, it makes such a choice permissible and, therefore, would defeat the basis of the dismissal.

The court, however, refused to give the amendment retroactive effect in the absence of clear contrary legislative intent.[152] If a statute deals with procedural or remedial matters rather than matters of substance, a court would be more willing to give the statute a retroactive effect. Since the amendment to article 4678 deals with the "positive law of duties and rights which give rise to a cause of action,"[153] however, it is a substantive provision, and consequently it was not allowed to have such an effect.[154]

B. *Contract*

The variety of choice of law rules available in the context of contract cases involving multi-state contacts has led Professor Leflar to say that "[n]o area in the law of conflict of laws was more confused in its development than that concerning the general validity of contracts. The confusion is by no means ended."[155] Indeed, the *Restatement Second* itself invites consideration of multiple and potentially conflicting elements without indicating any priorities.[156] This wealth of possibilities makes it unlikely that contract cases involving choice of law will raise any new questions. Nonetheless, several interesting issues were considered in this area during the survey period.

Because of the difficulty in predicting the outcome of a choice of law problem in a contract case, the preferred approach is to agree to a governing law in the contract itself.[157] Even this approach, however, may fail

150. The plaintiffs in this case were residents of New York and Arizona and presumably citizens of the United States.

151. TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon Supp. 1978-79) (emphasis added).

152. 564 S.W.2d at 110. *See also* Brooks v. Texas Employers Ins. Ass'n, 358 S.W.2d 412 (Tex. Civ. App.—Houston [1st Dist.] 1962, writ ref'd n.r.e.).

153. Petroleum Cas. Co. v. Canales, 499 S.W.2d 734, 737 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

154. *Accord*, Penry v. Wm. Bart, Inc., 415 F. Supp. 126 (E.D. Tex. 1976); Gutierrez v. Collins, 570 S.W.2d 101 (Tex. Civ. App.—El Paso 1978, no writ).

155. R. LEFLAR, *supra* note 1, § 144, at 295.

156. *See generally* RESTATEMENT (SECOND), *supra* note 93, §§ 6, 188. *See also* Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279 (1972).

There apparently exists some confusion as to whether Texas has adopted the most significant relations doctrine, as set out by the *Restatement (Second) of Conflict of Laws*. Some federal cases indicate that Texas courts have in fact adopted this approach. *See, e.g.*, Lipschutz v. Gordon Jewelry Corp., 373 F. Supp. 375 (S.D. Tex. 1974). This conclusion is uncertain, however, and has been the subject of some criticism. Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 29 SW. L.J. 244, 256-59 (1975).

157. *See generally* RESTATEMENT (SECOND), *supra* note 93, § 187.

to insure the desired result. An example of this is found in *Hunt v. Coastal States Gas Producing Co.*[158] Hunt had entered into a concession agreement with Libya for the purpose of oil exploration and development. Hunt discovered an oil field, which was subsequently expropriated by the Libyan Government. Plaintiff Hunt challenged the expropriation, arguing that international rather than Libyan law governed the dispute due to a choice of law provision in the concession agreement. The clause in question read:

> This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of International Law and in the absence of such common principles, then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.[159]

The court concluded that the quoted clause dealt solely with arbitration and did not address the nature of rights granted or acquired under the contract. Since under Libyan law Libya had never relinquished rights to the oil, there was no appropriation, and the act of state doctrine precluded further judicial inquiry into Libya's actions.[160]

Disputes also can arise as to the meaning of choice of law provisions in contracts between individuals, as is demonstrated by *Black v. Kidder, Peabody & Co.*[161] The plaintiff opened a margin account with a brokerage firm and as part of that transaction executed a customer's agreement, which provided that its terms and enforcement would be governed by the laws of New York. The plaintiff subsequently filed suit alleging that the brokerage firm had charged a usurious rate of interest under Texas law.[162]

Plaintiff sought to avoid the choice of New York law as provided for in the customer's agreement by arguing that the choice of law provision did not apply to interest rates charged because a subsequent paragraph in the customer's agreement provided for interest to be charged in accordance with the terms of a separate credit agreement. The court reviewed the paragraphs in question and concluded that the choice of law provision was not limited in scope or application, but constituted an unambiguous stipulation of the parties that the stock transactions that were made pursuant to the agreement would be governed by the laws of New York.[163] Since the interest rates charged were not illegal under New York law, the court affirmed the trial court's judgment in favor of the defendant.

C. *Statute*

In some instances in which contractual disputes involving contacts with

158. 570 S.W.2d 503 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ granted).
159. *Id.* at 509.
160. *See* notes 4-19 *supra* and accompanying text.
161. 559 S.W.2d 669 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).
162. *See generally* R. LEFLAR, *supra* note 1, § 152 (discussing usurious contracts).
163. The court cited City of Pinehurst v. Spooner Addition Water Co., 432 S.W.2d 515 (Tex. 1968); Harris County v. Howard, 494 S.W.2d 250 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.) (holding parties bound by provision limiting liability in an unambiguous contract).

more than one state arise the choice of law is provided by statute. Perhaps the best known such provision, section 1-105 of the Uniform Commercial Code,[164] was involved in a rather unique way in *Calloway v. Manion*.[165] As Judge Thornberry aptly put it, the "suit concerns a horse trade gone lame."[166] Plaintiff traded Red Rose Ray, a gelding, to defendant for Our Candy Barett, a mare. The horse trade took place at the home of the defendant in Springfield, Illinois. Plaintiff was from Texas and returned there with the mare. After the trade, the mare proved to be suffering from an incipient ovary condition that caused her to kick repeatedly, thus injuring her hock. Plaintiff sued in Texas, seeking rescission and monetary damages.

After noting that the court sitting in a diversity case must apply the choice of law rules of the state in which it sits,[167] the court turned its attention to the parties' stipulation that their transaction was to be controlled by the Uniform Commercial Code as enacted in Texas. Article 1.105[168] provides that parties may choose the law of any state bearing a reasonable relation to the transaction.[169] The law chosen in *Calloway* bore a reasonable relationship to the transaction, but as the court noted, this section of the Code refers to pre-dispute agreements. Nonetheless, the court applied the law of Texas in accordance with the parties' stipulation.

III. JUDGMENTS

The cases in this section deal with questions concerning the finality of judgments, the effect of judgments, and whether particular judgments can be attacked directly or collaterally either in Texas or in some other state. There were many judgment cases during the survey period, most of which followed established rules. Several of the illustrative and more interesting cases will be treated briefly.

A. *Full Faith and Credit: Divorce Decrees and Property Divisions*

In *Gerhardt v. Welsch*[170] a divorced wife brought suit against her former husband for a partition of his military retirement benefits. Plaintiff and defendant had been divorced in the State of Washington. The divorce decree had adopted and approved a property settlement agreement executed by the parties, but neither the agreement nor the decree mentioned the military retirement benefits.

Since the Washington divorce decree was final, it was entitled to full faith and credit in Texas,[171] which meant that the Texas court had to give

164. U.C.C. § 1-105.
165. 572 F.2d 1033 (5th Cir. 1978).
166. *Id.* at 1035.
167. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).
168. TEX. BUS. & COM. CODE ANN. § 1.105 (Tex. UCC) (Vernon 1968).
169. Section 1.105 contains additional restrictions that are not applicable under the facts of this case.
170. 568 S.W.2d 873 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).
171. U.S. CONST. art. IV, § 1.

the decree the same effect it would have had in Washington.[172] Hence, the court had to look to Washington law to determine the decree's effect.[173] The Texas court therefore was tasked with a role not unlike that of a federal court sitting in a diversity case. In performing its role, the court determined that (1) under Washington law the husband's unaccrued pension right was community property at the time of the divorce, (2) under Washington law parties to a divorce action become tenants in common of community property that is not disposed of by the divorce decree, and (3) the plaintiff was entitled to a partition upon a proper showing of the extent of the property in question.

The resolution of this issue led to a different result for the divorced wife in *Elmer v. Elmer*.[174] A Kansas court had granted a divorce, but the decree had not mentioned the military retirement benefits that were the subject of the suit. After conceding that the wife would be entitled to a one-half interest in benefits under Texas law,[175] the court correctly applied the law of Kansas, under which the wife was estopped from filing suit to recover property that could have been recovered in the divorce action itself.[176]

B. *Full Faith and Credit: Default Judgment Cases*

The cases in this subsection deal with two necessary prerequisites to a finding that a judgment is entitled to full faith and credit: first, the court rendering the decree must have jurisdiction; and secondly, the judgment must be final.

The first of these questions was raised in *Shelby International, Inc. v. Wiener*.[177] Shelby, a California corporation with a warehouse and salesmen in Texas, was in the business of selling custom automobile wheels. Wiener was successfully solicited in Texas as a Shelby customer, and custom wheels were shipped to him in Texas from locations in both Texas and California. Since there was no agreed place of payment, payment also was made both in California and in Texas. Although Wiener had used Shelby's WATS line to telephone orders to California, he had never been to California on matters related to the transactions in question.

Shelby sued Wiener in Los Angeles.[178] Wiener was cited, but did not appear. Default judgment was rendered for Shelby, who then sought enforcement of his judgment in Texas under the full faith and credit doctrine. The issue was whether the California court had jurisdiction. If a rendering court lacks jurisdiction, its decree is not entitled to full faith and

172. *See* Durfee v. Duke, 375 U.S. 106 (1963).
173. *See* Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1874).
174. 567 S.W.2d 18 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).
175. The court cited Busby v. Busby, 457 S.W.2d 551 (Tex. 1970), in support of this proposition.
176. Mitchell v. Mitchell, 171 Kan. 390, 233 P.2d 517 (1951).
177. 563 S.W.2d 324 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).
178. The suit was brought pursuant to CAL. CIV. PROC. CODE § 410.10 (West 1977).

credit.[179] If the defendant actually appears in the action, however, he is bound by the judgment, including its determination as to jurisdiction.[180] If, however, as here, the default judgment is taken against a nonappearing nonresident, the nonresident often will "relitigate" the constitutionality of the rendering court's jurisdiction when the plaintiff seeks to enforce his judgment.[181] Wiener followed that procedure in this case, and the court, after a review of authority, concluded that the California court had no jurisdiction over him, and thus denied recovery.

The second issue that is frequently raised in default judgment cases concerns the finality of the judgment, a question that was considered by the court in *Williams v. Washington*.[182] Williams was sued by the State of Washington in a Washington court under the Washington Consumer Protection Act.[183] Williams did not appear and suffered a default judgment. The judgment provided for the recovery of civil penalties and attorney's fees, and also granted an injunction. Enforcement of that judgment was sought in Texas.

The Washington judgment provided that "*[j]urisdiction is retained* for the purpose of enabling either party to this judgment and decree to apply to the court at any time for the enforcement of compliance therewith, the punishment of violations thereof, or *modification* . . . thereof."[184] Since full faith and credit is not required when a decree is subject to modification and, therefore, is not final,[185] the question was whether the quoted language reserved a power of modification that rendered the decree nonfinal.

First, it was argued that retention of jurisdiction by a court to modify injunctive relief does not normally affect the finality of the decree. Although the court agreed with this general rule,[186] after review of the decree as a whole the court concluded that the jurisdictional retention applied to all relief granted; thus, the judgment did not fall under the "injunction" exception to finality.

Second, it was argued that the judgment was final under the laws of Washington, the rendering state. Notwithstanding the apparent retention of jurisdiction on its face, Washington argued that affirmance on appeal had "finalized" the judgment. The court reviewed the available Washington law and concluded that affirmance of the judgment on appeal only effectuated it; the judgment was not finalized by the affirmance.

Third, it was argued that "under Washington law, an appellate court is presumed to determine its jurisdiction before it decides the merits of the

179. *See* Williams v. North Carolina, 325 U.S. 226 (1945). *See also* R. LEFLAR, *supra* note 1, § 19.

180. R. LEFLAR, *supra* note 1, §§ 30, 79.

181. Of course, by staying home and simply suffering a default judgment in the foreign state the party loses his right to a trial on the merits of the cause of action.

182. 566 S.W.2d 54 (Tex. Civ. App.—Dallas 1978, writ granted).

183. WASH. REV. CODE § 19.86 (1978).

184. 566 S.W.2d at 55 (emphasis added by Texas court).

185. *See* Sistare v. Sistare, 218 U.S. 1 (1910).

186. The court cited Stovall v. Banks, 77 U.S. (10 Wall.) 583 (1870), and City of Tyler v. St. Louis Sw. Ry., 405 S.W.2d 330 (Tex. 1966), in support of this proposition.

appeal. According to this argument, [the court] should presume that the Washington appellate courts held this judgment to be final before they rendered their judgments."[187] The court correctly rejected this argument, noting that it incorrectly equates finality for purposes of amenability to appeal with finality for purposes of full faith and credit. "Finality for the purpose of Full Faith and Credit is not determined by whether the judgment is final for appellate purposes; rather the question under Full Faith and Credit is whether the judgment is subject to *modification* under the law of the rendering state."[188]

Finally, Washington argued that even if the judgment in question was not final, and, therefore, not entitled to full faith and credit, it should still be enforced on the basis of comity between the states. The court rejected the comity doctrine in this case because judgments entered by a Texas court cannot be enforced by execution unless all parties and claims involved in the litigation have been disposed of,[189] and the court refused to accord greater dignity to a foreign judgment. Having rejected each of the arguments advanced by the plaintiffs, the court denied enforcement of the Washington judgment.

Perhaps the court should have given greater consideration to the plaintiff's finality argument, but since the record on appeal does not disclose the entire decree, it is difficult to judge. In any event, the comity argument seems to be strong in this case. Comity is founded on mutual interest, conscience, and the moral necessity to do justice in order that justice may be done in return.[190] In light of the fact that the Texas Legislature has expressed an interest in consumer protection,[191] conscience and the moral necessity of doing justice could have easily called for the use of the comity doctrine under the facts of this case.

C. *Full Faith and Credit: Statutory Variation*

Although the full faith and credit clause requires only that final judgments be given the same effect in the forum state as they would have in the rendering state, state statutes may provide that foreign judgments be given even greater effect. In *Strobel v. Thurman*[192] the much litigated section 14.10 of the Texas Family Code[193] was held to grant a foreign judgment

187. 566 S.W.2d at 56.

188. *Id.* The court cited Sistare v. Sistare, 218 U.S. 1 (1910); Hicks v. Hefner, 210 Kan. 79, 499 P.2d 1147, 1151 (1972); Robertson v. Cason, 203 So.2d 742, 745 (La. App. 1967).

189. *See* Trigg v. Royal Indem. Co., 468 S.W.2d 468 (Tex. Civ. App.—Austin 1971, no writ); McMillan v. McMillan, 67 S.W.2d 342 (Tex. Civ. App.—Dallas 1933, no writ).

190. *See* Nowell v. Nowell, 408 S.W.2d 550 (Tex. Civ. App.—Dallas 1966, writ dism'd), *cert. denied*, 389 U.S. 847 (1967).

191. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1978-79).

192. 565 S.W.2d 238 (Tex. 1978).

193. TEX. FAM. CODE ANN. § 14.10 (Vernon 1975); *see* Trader v. Dear, 565 S.W.2d 233 (Tex. 1978) (§ 14.10 overruled old law which permitted a habeas corpus proceeding to be used to relitigate issue of child custody); Saucier v. Pena, 559 S.W.2d 654 (Tex. 1977) (court had power to issue a writ of habeas corpus to compel delivery of child to parent entitled to immediate possession); Lamphere v. Chrisman, 554 S.W.2d 935 (Tex. 1977) (parent entitled to issuance of writ immediately upon showing right to custody under existing court order);

more effect than it had in the rendering state. Walter and Joan Stroble were divorced in Indiana, and the court granted custody of their child to Mrs. Strobel. The child lived with his mother in Massachusetts, and Mr. Strobel moved to Texas. Immediately after his son arrived for a visit, Mr. Strobel filed suit in the district court of Travis County, seeking to modify the Indiana custody decree.

Mrs. Strobel then filed an application for writ of habeas corpus in the district court of Travis County. The district court denied Mrs. Strobel's application, citing the best interest of the child. Normally, the only question would have been whether or not the district court's denial of the application somehow failed to give full faith and credit to the Indiana divorce decree. Under section 14.10, however, proof of an outstanding valid order compels the court hearing the application for habeas corpus to respect both the prior order and the continuing jurisdiction of the court that rendered it. This is true even though under its own law the foreign court does not have continuing jurisdiction. Thus, the Texas Supreme Court held that the district court should have respected the "continuing" jurisdiction of the Indiana court and granted the writ.

McElreath v. Stewart, 545 S.W.2d 955 (Tex. 1977) (habeas corpus proceeding should be used to determine matters concerning immediate welfare of child); Standley v. Stewart, 539 S.W.2d 882 (Tex. 1976) (court lacked authority to treat habeas corpus hearing as one to modify prior custody order). *See also* Smith, *Commentary on Title Two, Texas Family Code*, 5 TEX. TECH L. REV. 389, 435-36 (1974); Comment, *Child Custody Modification and the Family Code*, 27 BAYLOR L. REV. 725 (1976).