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# Conflict of Laws

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# CONFLICT OF LAWS

*by*

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CONFLICT of laws involves primarily the areas of judicial jurisdiction, choice of law, and judgments. During this survey period Texas case law reflects a continuing state of flux as to judicial jurisdiction, a major but expected choice of law development, and much activity with little substantive change in the judgments' area.

## I. JURISDICTION

### A. *Subject Matter Jurisdiction*

*Voluntary Self-Restraint.* "The Act of State Doctrine is a judicially created doctrine of restraint,"[1] said the Supreme Court of Texas in upholding a court of civil appeals decision in *Hunt v. Coastal States Gas Producing Co.*[2] Nelson Bunker Hunt discovered and produced oil in Libya pursuant to a Libyan exploration and exploitation concession. Subsequently, Libya nationalized all Hunt's oil interests covered by the concession agreement; Hunt published notice worldwide of its claimed interests in Libyan oil (based on the characterization of Libya's conduct as being in violation of international law) and threatened suit against any purchasers of the oil. Coastal States bought Libyan oil, which prompted Hunt to bring suit.

The majority of the Texas Supreme Court concluded that the act of state doctrine prevented an exercise of jurisdiction by the district court of Texas of Hunt's claim unless the case "comes within the exception to the Act of State Doctrine created by the Hickenlooper Amendment."[3] According to the majority, recovery predicated upon the Hickenlooper Amendment[4] must involve a claim of title or other right to property. After reviewing Hunt's concession agreement, it was concluded that Hunt obtained only a

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1. Hunt v. Coastal States Gas Producing Co., 583 S.W.2d 322, 324 (Tex. 1979).

2. 570 S.W.2d 503 (Tex. Civ. App.—Houston [14th Dist.] 1978), *aff'd*, 583 S.W.2d 322 (Tex. 1979). *See* Newton, *Conflict of Laws, Annual Survey of Texas Law*, 33 SW. L.J. 425, 425-28 (1979).

3. 583 S.W.2d at 324.

4. *See id.* at 324-25. Originally the title the "Hickenlooper Amendment" was applied to § 2370(e) of the Foreign Assistance Act of 1962, Pub. L. No. 87-565, pt. III, § 301(d), 76 Stat. 260. In 1964 after the Supreme Court decision in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), § 2370(e) was amended by the Foreign Assistance Act of 1964, § 2370(e), Pub. L. No. 88-633, pt. III, § 301(d)-(g), 78 Stat. 1013. This provision, as currently enacted, 22 U.S.C. § 2370(e)(2) (1976), is often referred to as the Sabbatino Amendment or as the Hickenlooper Amendment.

contractual right.[5] Thus, Hunt was denied recovery.

The dissent believed that the Hickenlooper Amendment was applicable and that jurisdiction should be exercised as to Hunt's claim.[6] After a brief review of the development and current status of the act of state doctrine, the dissent noted that "[t]he Hickenlooper Amendment was enacted in reaction to *Sabbatino* and was meant to overrule, in part, that decision."[7] The question then became one of whether, under the facts of this case, the *Sabbatino*[8] case or the Hickenlooper Amendment applied. According to the dissent, a court must determine the merits of a controversy if

> (1) any party makes a claim of title or other right to property based upon or traced through a confiscation or taking, (2) the President has not filed with the court a suggestion that the application of the act of state doctrine is required by the foreign policy interests of the United States, and (3) that taking was by a foreign state in violation of the principles of international law.[9]

In the majority view the Hickenlooper Amendment is triggered only if Hunt has a property right in oil, not a contractual right. The dissent, however, found that both the language of the statute and its legislative history indicate that the facts of this case fall squarely within "a claim of title or other right to property."[10] Thus, after determining that the remainder of the test was also satisfied,[11] the dissent would have heard Hunt's claim.

The problem presented here involves much more than a mere question of statutory interpretation. Indeed, there are statutory provisions designed

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5. 583 S.W.2d at 325. The majority declared that Libyan law controled, but never set forth the contents of such law.

6. *Id.* at 326-37. Justice Steakley wrote the dissent joined by Chief Justice Greenhill and Justice Spears.

7. *Id.* at 327.

8. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

9. 583 S.W.2d at 330 (footnote omitted). The majority phrased the necessary qualifications differently: "1. Expropriated property must come within the territorial jurisdiction of the United States. 2. The act of the expropriating nation must be in violation of international law. 3. The asserted claim must be a claim of title or other right to property." *Id.* at 325 (citing 22 U.S.C. § 2370(e) (1976)). Section 2370(e) actually reads:

> [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 or title or other right 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.

(Emphasis added.)

10. 583 S.W.2d at 330. The dissent relied upon testimony presented to the House committees considering the amendment by Louis Henkin, Columbia University Professor of International Law, Cecil J. Olmstead, Professor of International Law at the New York University School of Law, and Congressman Adair, sponsor of the original amendment in the House. *Foreign Assistance Act of 1965: Hearings on H.R. 7750 Before the House Committee on Foreign Affairs*, 89th Cong., 1st sess., pt. VII, 1076 (1965).

11. Since the Department of State supports Hunt's claim in this case, there is no real doubt about the President's filing with the court a suggestion that the application of the act of state doctrine is required by the foreign policy interests of the United States. And although it is admitted that there is some question whether or not there exists a violation of the principles of international law, under the facts of this case a violation was found to exist. 583 S.W.2d at 334-37, 335 n.12.

to reverse *Sabbatino*;[12] the question is whether or not those provisions are constitutional. In *Sabbatino* the Supreme Court described the act of state doctrine as having "constitutional underpinnings."[13] At the heart of that constitutional connection is the doctrine of separation of powers, which is responsive to the traditional roles of the Executive, Congress, and the Judiciary in the area of foreign affairs. Not only is there a question of interference with the roles of other branches, a role that cannot, in theory, be waived by another branch,[14] but there is also a question of whether the courts are truly suited to handle the kind of dispute presented in cases like *Hunt*.[15] Obviously, definitions in these areas are difficult and will continue to be so until the Supreme Court provides a precise definition and fixes the constitutional status of such definition.

Further, because Middle East oil discovered and produced by Texans now appears to be the product most likely to be "expropriated," we can expect to see much continued litigation in this area. An excellent example, although not involving Middle East oil, is *Industrial Investment Development Corp. v. Mitsui & Co.*,[16] in which the Fifth Circuit was faced with the question of whether the act of state doctrine precluded the plaintiff's antitrust action. Industrial Investment, the plaintiff, decided to enter the logging and lumber products business in Indonesia. Indonesia had enacted a plan for encouraging and regulating foreign private capital investment, which mandated that such investment develop Indonesian manpower and provide opportunities for Indonesian co-ownership. Any foreign private investment involving logging also had to comply with land use regulations. Industrial Investment sought to comply with these Indonesian requirements but ultimately failed, allegedly because the defendant, Mitsui, a Japanese corporation, and its American subsidiary infiltrated the plaintiff's operation in Indonesia for the purpose of destroying plaintiff's logging business. As noted by the majority opinion, "[t]he complaint intricately details a plot, spawned from a 1972 increase in the price of timber, in which the Mitsui companies"[17] sought to eliminate the plaintiffs as potential competitors and thereafter protect their competitive edge.[18] The district court granted defendant's motion for summary judgment on the

12. *See* 28 U.S.C. §§ 1330, 1602-11 (1976).

13. 376 U.S. at 423.

14. Attempted use of an executive waiver generated the so-called *Bernstein* exception. *See* Bernstein v. N. V. Nederlandsche-Amerikaansche, 210 F.2d 375 (2d Cir. 1954). 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. 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.

15. This is often referred to by the courts as a question of whether the issue is presented in a form "traditionally regarded as being subject to resolution by a court." *See generally* Baker v. Carr, 369 U.S. 186 (1962).

16. 594 F.2d 48 (5th Cir. 1979).

17. *Id.* at 50.

18. The plaintiffs also asserted violations of §§ 1, 2, and 73 of the Wilson Tariff Act, 15 U.S.C. § 8 (1976).

ground that the act of state doctrine prevented judicial review of the federal claims.[19]

On appeal the Fifth Circuit reversed. The court was concerned not about legislative attempts to overrule the act of state doctrine[20] but about the nature and applicability of the doctrine itself. Although the constitutional nature of the doctrine was not critical to the resolution of the question formulated, there were constitutional underpinnings. As such the doctrine was seen as a separation of powers question in which the proper distribution depended upon the ramifications of judicial intervention into executive conduct of international relations including those ramificiations that might arise out of inconsistent judicial and executive behavior. From this position the majority viewed recent Supreme Court statements on the act of state doctrine as attempts to determine the proper balance in given cases. The opinion tacitly admitted, however, that more was involved than a mere question of proper balancing; there was a very real question as to what elements are to be properly considered in the balancing.[21] Nonetheless the majority opinion addressed only the issue of balancing and concluded that foreign governmental involvement does not automatically protect anti-competitive conduct illegal in this country from scrutiny by American courts.[22] In the view of the majority, the complaint charges parties subject to the court's authority with conduct that violates United States law, the determination of which did not necessitate a resolution of the propriety of Indonesia's failure to issue a logging license. Rather it was enough that the plaintiffs offer proof to show that the defendants conspired to cause plaintiffs' potential exploitation of an Indonesian concession to "die aborning."[23] Of course, the question of whether the Indonesian Government would have issued a cutting license was relevant to the issue of the value of the destroyed venture. In the majority view, however, the legitimate goal of insuring competition outweighed any minor embarrassment to the executive department resulting from an incidental examination of the actions of a foreign government in connection with a determination of damages.[24] Finally, it was noted that antitrust control would be largely thwarted if mere inclusion of some foreign governmental act in an anticompetitive scheme is enough to invoke the act of state doctrine.[25] The

19. 594 F.2d at 49.

20. In fact the majority asserts, "Although Sabbatino's bar against claims based on the asserted invalidity of Cuban confiscations has been legislatively overruled by the 'Hickenlooper Amendment,' . . . the case is still the leading authority on the act of state doctrine." *Id.* at 51 n.7.

21. For instance, the broad "commercial act" exception to the act of state doctrine was not supported by a majority of the Supreme Court. The Second Circuit, however, at least in a dictum, has treated a commercial exception as firmly established. *Id.* at 52 n.9.

22. *Id.* at 52.

23. *Id.* at 54.

24. *Id.* at 53 (citing Continental One Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976)).

25. *See* 594 F.2d at 54-55, where language in Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), is criticized in this connection. *See also* Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247 (1977);

dissent reasoned, however, that since the damage complained of stemmed directly from the denial by Indonesia of a concession to cut timber in Indonesia, the act of state doctrine was held to require a dismissal.[26] Given that open questions exist as to the exact basis for the act of state doctrine and its status as a constitutional rule, disagreements seem inevitable.

### B. *Jurisdiction of the Person*

*The Constitutional Question.* Recent decisions by the Supreme Court of the United States setting forth the mandates of substantive due process as to the exercise of jurisdiction[27] have generated questions as to the exact requirements of due process and the application of these requirements in individual cases. Last year the Fifth Circuit addressed the question of whether or not an Idaho official charged by Idaho law with regulating a takeover of an Idaho-based corporation by a Texas corporation could constitutionally be subjected to jurisdiction in a Texas court.[28]

Great Western, a Texas corporation, made a tender offer to take over a publicly owned Idaho corporation, Sunshine Mining and Metal Company. Under Idaho law, Great Western was required to satisfy certain statutory provisions designed to protect investors.[29] Following an unsuccessful attempt by Great Western to comply with Idaho law, Great Western filed suit in federal district court. Two Idaho officials appeared, specially contesting, among other things, jurisdiction. A divided panel of the Court of Appeals for the Fifth Circuit found as one basis for assertion of jurisdiction the Texas long-arm statute[30] that was held constitutional when applied to the facts.[31]

The due process clause prohibits any exercise of jurisdiction that offends traditional notions of fair play and substantial justice, which in turn relates to the sufficiency of contacts among the forum state, the defendant, and the litigation. Whether the contacts are sufficient is difficult to determine. Justices of the United States Supreme Court disagree as to the exact meaning and application of the due process jurisdictional formula.[32] Disagreement also existed at the court of appeals level as to whether the "effects" of activity in Idaho on a Texas corporation were sufficient to satisfy constitutional mandates so as to allow a Texas court to exercise jurisdiction. The Supreme Court considered this point on appeal.[33]

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Note, *The Act of State Doctrine: Anti-Trust Conspiracies to Induce Foreign Sovereign Acts*, 10 INT'L LAW & POL. 495 (1978).

26. 594 F.2d at 56.

27. Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977).

28. Great W. United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd sub nom.* Leroy v. Great W. United Corp., 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979).

29. IDAHO CODE §§ 30-1501-13 (Supp. 1977).

30. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1963).

31. *See* Newton, *supra* note 2, at 439-43, for a further discussion of the Fifth Circuit decision.

32. *See* Kulko v. Superior Court, 436 U.S. 84 (1978). *See also* discussion in Lee-Hy Paving v. O'Connor, 437 F. Supp. 994 (E.D.N.Y. 1977), *aff'd*, 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978).

33. Leroy v. Great W. United Corp., 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979).

The major issue in this case, whether the district court had personal jurisdiction over the defendants, is important on its own and becomes even more significant when considered in conjunction with the Supreme Court's recent holding that a state may not automatically claim immunity from suit in the courts of another state.[34] Presently, however, no definite answer is possible because the Supreme Court avoided the issue in *Great Western* by reversing the normal order of considering personal jurisdiction and venue and holding that venue was improper. The majority view notes that "neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties."[35] It is therefore possible, where sound prudential justification exists,[36] to reverse the normal order of considering personal jurisdiction and venue. The sound prudential justification offered by the Court for reversing the normal order was the difficult and previously undecided question of whether an exercise of jurisdiction under the Texas long-arm statute in this case was constitutional.[37] Since the majority found it clear that venue was improper the question was not reached.

*Assertion of Jurisdiction*. During the survey period there were many other cases dealing with assertion of jurisdiction. The most important are briefly discussed below. In *Motiograph, Inc. v. Check-Out Systems, Inc.*[38] the Texas plaintiff advertised in a national magazine. The defendant, a South Carolina corporation, wrote a letter to Texas inquiring about becoming a dealer in South Carolina of the equipment being manufactured in Texas. The plaintiff was not interested but did send the South Carolina corporation some literature. The next year the defendant, after again seeing the plaintiff's advertisement in a national trade magazine, made the same inquiry. This time several telephone calls ensued, and the plaintiff sent a representative to South Carolina. Later, the plaintiff's equipment was demonstrated to the defendant at a national trade meeting in Chicago. Although a dealer contract was never executed, the defendant represented the plaintiff in South Carolina. As a result, the defendant sent two employees to Texas for one week of training, purchased equipment, mailed in two payments, sent a third employee to Texas, and received employees of the plaintiff to install the purchased equipment and to try to solve problems that developed. Unhappily the problems were not resolved, and

34. Nevada v. Hall, 440 U.S. 410 (1979).

35. 99 S. Ct. at 2715, 61 L. Ed. 2d at 472, (citing Olberding v. Illinois Central R. Co., 346 U.S. 338 (1953); Neirbo Co. v. Bethlehem Corp., 308 U.S. 165 (1939)).

36. 99 S. Ct. at 2715, 61 L. Ed. 2d at 472.

37. In oral arguments the attorney for Great Western was questioned as to whether the alleged jurisdictional acts fell within the ambit of statutory authorization. 47 U.S.L.W. 3693, 3693-95 (U.S. Apr. 24, 1979). In *Leroy* the majority indicated at footnote 11 some doubt on this issue although the district court and court of appeals had concluded that statutory authorization existed. 99 S. Ct. at 2715, 61 L. Ed. 2d at 472. *See* Newton, *supra* note 2, at 439. In keeping with its general practice the Supreme Court did not reexamine the state-law determination. The dissent did not directly consider the question of due process.

38. 573 S.W.2d 606 (Tex. Civ. App.—Eastland 1978, writ ref'd).

the defendant ceased payment. These facts constituted sufficient contacts to allow the defendant to be sued in Texas consistent with traditional notions of fair play and substantial justice.[39]

In *Computer Synergy Corp. v. Business Systems Products, Inc.*[40] the trial court granted the special appearance of a California corporation and dismissed the suit for want of jurisdiction. In 1977 Richard J. Feely negotiated a dealer agreement with Business Systems Products, whose principal place of business was California. Pursuant to the terms of the agreement consummated in California, Feely and his Texas corporation, Computer Synergy Corporation, were granted exclusive sales territories in Houston and Dallas-Fort Worth. Initially the agreement seemed to work well: the California corporation shipped goods to the Texas corporation F.O.B. California; payments were made by the California corporation to the Texas corporation; and they communicated by mail and telephone. Problems arose when the Texas corporation contracted with a second Texas corporation granting a right to sell in Texas. The second Texas corporation made a sale in which a down payment was made but goods were never delivered. The two Texas corporations terminated their contract by mutual agreement. At this point the Texas purchaser went to California to investigate. The Texas purchaser ultimately cancelled the sale and the first Texas corporation sued the California corporation, seeking damages for interference with an existing contract and seeking injunctive relief.

On appeal the California corporation had the burden of establishing that it was not amenable to the jurisdiction of the Texas court.[41] Further, since no findings of fact and conclusions of law were filed, the record must be viewed in the light most favorable to supporting the judgment.[42] The court applied the facts pursuant to these rules and sustained the trial court's dismissal. Only by viewing the facts in a light unrealistically favorable to the trial court's determination can the exercise of jurisdiction in this case be said to offend traditional notions of fair play and substantial justice. There was an operative dealership agreement in effect for the most populous areas of Texas. Goods were sent to Texas. Money was sent to Texas and from Texas to California. Then a dispute arose as to that dealership agreement and its operation in Texas. Surely the California corporation was constitutionally amenable to suit in Texas.[43]

On the other hand, the court in *Michigan General Corp. v. Mod-U-Kraf*

39. *Id.* at 607-08. The court found these contacts sufficient to sustain jurisdiction because they satisfied the three-step test set forth in O'Brien v. Lanpar Co., 399 S.W.2d 340, 342 (Tex. 1966). *See* note 53 *infra* and accompanying text. *See also* Docutel Corp. v. S.A. Matra, 464 F. Supp. 1209 (N.D. Tex. 1979); U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977).

40. 582 S.W.2d 573 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

41. *Id.* at 575; *see* Scott v. Scott, 554 S.W.2d 274 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); Gathers v. Walpace Co., 544 S.W.2d 169 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.).

42. 582 S.W.2d at 575.

43. The courts in both *Computer Synergy*, 583 S.W.2d at 575-76, and *Motiograph*, 573 S.W.2d at 607-08, applied the three-element test set forth in note 53 *infra*.

*Homes, Inc.*[44] reversed a trial court order sustaining the defendant's special appearance. In so doing, the court did not discuss the burden of proof in such a hearing[45] or indicate whether there were findings of fact and conclusions of law or what effect they might have. The dispute arose out of an alleged breach of a merger agreement. Michigan General is a corporation with its principal place of business in Dallas, Texas, but with numerous subsidiaries in various states. Mod-U-Kraf is a Virginia corporation active in Virginia and West Virginia. One of the various subsidiaries of the Texas corporation operates in Virginia. This wholly owned Virginia subsidiary of the Texas corporation negotiated a merger agreement with Mod-U-Kraf, the Virginia corporation. The proposed merger was to be between the two Virginia corporations, but Michigan General, the Texas corporation, was also a party because its stock was to replace outstanding shares of stock of Mod-U-Kraf. Mod-U-Kraf signed the agreement in Virginia, while Michigan General and Michigan General of Virginia signed in Dallas.

Although the presence of the Virginia subsidiary complicated the picture, the court held that the suit arose out of a contact that had substantial economic relationships with Texas. While operations in Virginia might remain purely local and therefore distinct from Texas, corporate ownership and control by a Texas corporation, Michigan General, was deemed clearly a substantial economic and legal relationship.[46] Furthermore, Mod-U-Kraf was physically present in Texas on several occasions, and the expenses incurred in preparing the SEC registration statement, expenses that were the basis of the suit, were incurred in Dallas.

In addition to the traditional judgment calls made in determining whether an exercise of jurisdiction comports with due process, as exemplified by the cases previously discussed, two other cases merit mention. The first is *Docutel Corp. v. S.A. Matra*,[47] involving a suit brought in the federal district court in Texas by a Texas corporation against two French corporations. One of the French corporations, Informatique, was formed from a division of the other, S.A. Matra, during the negotiation of a contract with the plaintiff Texas corporation. Informatique completed the contract and was held subject to jurisdiction in Texas in a suit arising out of the contract.[48] The plaintiff also sought recovery against Matra, the larger French corporation, arguing for jurisdiction on the grounds that the

44. 582 S.W.2d 594 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

45. *See* notes 42 & 43 *supra* and accompanying text.

46. Compare the economic and legal relationship in this case to that in Western Desert, Inc. v. Chase Resources Corp., 460 F. Supp. 63 (N.D. Tex. 1978), in which two non-Texas corporations, one with an office in Forth Worth, but neither licensed to do business by the State of Texas, negotiated in Texas and elsewhere an agreement concerning exploring and drilling for oil and gas in Egyptian territory occupied by Israel. A payment was sent to Fort Worth. Perhaps sufficient economic and legal relationships existed here, but the court treated the question as one merely of physical contact. Under that approach the subsequent exercise of jurisdiction seems highly questionable.

47. 464 F. Supp. 1209 (N.D. Tex. 1979).

48. In addition to the breach of contract claim, the Texas corporation claimed violations of the Texas Deceptive Trade Practices—Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1980). 464 F. Supp. at 1214.

smaller French corporation was Matra's alter ego.[49] The court held that the Texas corporation did not introduce sufficient evidence to substantiate its alter ego claim.[50] Consequently, the court considered the question of whether or not unrelated contacts of the large French corporation, Matra, were of such a nature as generally to affiliate it with Texas.[51] Two separate problems are faced in any application of the doctrine of generally affiliating circumstances to a diversity case tried in a federal court. The first is whether article 2031b, as applied by Texas courts, permits such an assertion of jurisdiction.[52] Secondly, even if article 2031b applies, is it constitutional?

The Texas Supreme Court has set forth a tripartite test for applying article 2031b:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.[53]

The problem in the case at bar is that the cause of action does not arise from, nor is it connected with, the nonresident defendant's purposeful acts in Texas.[54] The court, however, determined that the tripartite test is not exclusive and thus turned to the question of whether jurisdiction could constitutionally lie.[55] In support of its conclusion that jurisdiction may be asserted the court cited the United States Supreme Court case of *Perkins v. Benguet Consolidated Mining Co.*[56] and two Fifth Circuit decisions, *Eyerly Aircraft Co. v. Killian*[57] and *Jetco Electronics Industries v. Gardiner*.[58] The Fifth Circuit decisions, held that the nonresidents' substantial and continuous contacts with Texas, unrelated to the plaintiffs' causes of action, constituted independent bases for the assertion of jurisdiction over them. In neither case did the defendants' contacts with Texas approach the impact

49. 446 F. Supp. at 1217-18.

50. *Id.* at 1218. *See also* Walker v. Newgent, 583 F.2d 163 (5th Cir. 1978), and Newton, *supra* note 2, at 442-43, for a discussion of other corporate relationships not rising to alter ego status.

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

52. In this connection the federal court is, of course, bound to follow the rule in Erie R.R. v. Tompkins, 304 U.S. 64 (1933).

53. U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977) (quoting O'Brien v. Lanpar Co., 399 S.W.2d 340, 342 (Tex. 1966), which quotes from Tyee Constr. Co. v. Dulien Steel Prod., Inc., 62 Wash. 2d 106, 381 P.2d 245, 251 (1951)).

54. The purposeful acts of Matra run from 1971 to 1976 and involve purchases of contract computer equipment worth $8,303,494 in one case, $100,000 in a second case, and $448,973 in a third. During this period Matra's representatives visited offices and physical plants in Texas for periods of up to two months.

55. 464 F. Supp. at 1219-20.

56. 342 U.S. 437 (1952).

57. 414 F.2d 591 (5th Cir. 1969).

58. 473 F.2d 1228 (5th Cir. 1973).

of Matra's contacts with Texas. It is submitted, however, that the Fifth Circuit cases cited, and the court in *Docutel*, erroneously relied on *Perkins*. In *Perkins* the defendant had its principal place of business in the forum state, while the cause of action arose in another jurisdiction before the defendant established its principal place of business as the forum state. In that sense the Supreme Court did hold that the defendant's substantial and continuous contacts with the forum state, unrelated to the plaintiff's cause of action, could constitute an independent basis for the assertion of jurisdiction. The proper characterization of *Perkins*, however, is that it never offends traditional notions of fair play and substantial justice for a defendant to be sued in his own backyard, no matter where the cause of action arose. Admittedly in the case of corporate entities with major and continuous financial dealings in a state, the court of that state may be tempted to find jurisdiction. Unless the cause of action arises out of contacts with the state, or unless a defendant is truly being sued in his own backyard, however, no jurisdiction should lie based on unrelated transactions.[59]

A similar mistake, in a far more difficult fact situation, arose in the case of *McBride v. Owens*.[60] In *McBride* a Texas resident brought suit in libel against Robert Owens and Jack Cloherty, syndicated newspaper columnists residing in Maryland and Virginia respectively, the Los Angeles Times Syndicate, which sold and distributed columns written by Owens and Cloherty to newspapers, the Orlando Sentinel Star Company of Florida, and the Denver Post of Colorado. Plaintiff alleged that a libelous article, written by defendants Owens and Cloherty, was distributed by the Syndicate to newspapers throughout the United States. Although the three Texas newspapers to which the libelous article was sent did not print it, certain foreign newspapers did. One or more copies of those foreign newspapers were shipped into Texas for sale. The facts seemed to show that the article on which the suit is based was never published in Texas and that the defendants Owens and Cloherty did not at the time of the suit and had not prior thereto engaged in any direct business activity in Texas. Answers to interrogatories indicated that as of the end of 1977 the Syndicate had received $850 from Texas newspapers as compensation for articles by Owens and Cloherty and that pursuant to the syndication agreement Owens and Cloherty had received less than half of this amount. The Syndicate does maintain an office with a telephone, reporter, and researcher in Houston.

Citing concerns for first amendment considerations along with attenuated contacts,[61] the court properly dismissed the Sentinel and the Post,[62]

59. *See generally* Kulko v. Superior Court, 436 U.S. 84 (1978); Hanson v. Denkla, 357 U.S. 235 (1958).

60. 454 F. Supp. 731 (S.D. Tex. 1978).

61. The *Orlando Sentinel Star*'s only connection with Texas is a mailing of 20 daily copies of its newspaper to Texas in November 1976 out of an average daily circulation of 182,727. The *Denver Post*'s only connection with Texas is that in November 1976 it mailed 69 daily copies of its newspaper to Texas out of an average daily circulation of 254,961. The percentage of total circulation in Texas at the time of the alleged libel amounted to .011% daily for the *Sentinel* and .027% daily for the *Post*.

62. 454 F. Supp. at 735. The court cited three cases as justification for the dismissal on

but sustained jurisdiction as to Owens, Cloherty, and the Syndicate.

Aside from first amendment considerations, this case raised the question of whether attenuated contacts with a forum could nonetheless be sufficient where the acts of the nonresident defendants have an intentional national thrust. The answer is clearly that a nonresident defendant whose primary function is reaching a national audience cannot complain about suit by a plaintiff in the forum of the plaintiff's domicile if the plaintiff was injured there.[63] The nonresident defendant clearly intends to and does benefit from the laws of the forum state in connection with his work. The forum state has an interest in protecting its citizens. Traditional notions of fair play and substantial justice will permit such an exercise of jurisdiction.[64] If the column submitted, however, is not printed in Texas and the only local publication is by sale of foreign newspapers, then the test must be applied to the publication by sale of foreign newspapers only. It would be improper, as it was in *Docutel*,[65] to apply the *Perkins* concept, as set out in *Eyerly Aircraft*,[66] to allow consideration of contacts not related to the cause of action. While the case is obviously a close one, jurisdiction might well lie even though the sale of foreign newspapers was the only connecting link. In any event, jurisdiction could only be asserted on that basis.

*Rule 120a Cases*. When a defendant enters a special appearance pursuant to rule 120a,[67] the question arises whether an ex parte affidavit will be a sufficient basis for a trial court jurisdiction determination. Professor McDonald in his treatise suggests that a sworn motion by the defendant should constitute a prima facie showing of the verity of the facts stated under oath,[68] but in the case of *Main Bank & Trust v. Nye*[69] the court held that an ex parte affidavit is not enough to provide a jurisdictional basis. According to the court, current Texas law requires a defendant to file a special appearance under rule 120a to produce evidence showing lack of amenability to jurisdiction.[70] Absent statutory change or a change in the Texas Rules of Civil Procedure, an ex parte affidavit ranks with hearsay on

due process grounds. *See* Rebozo v. Washington Post Co., 515 F.2d 1208 (4th Cir. 1975); New York Times Co. v. Conner, 365 F.2d 567 (5th Cir. 1966); Buckley v. New York Times Co., 338 F.2d 470 (5th Cir. 1964); *cf.* Anselmi v. Denver Post, Inc., 552 F.2d 316 (10th Cir. 1977) (reversing and remanding a district court dismissal on due process grounds by distinguishing *Buckley*).

63. *See* Hartmann v. Times, Inc., 166 F.2d 127 (3d Cir.), *cert. denied*, 344 U.S. 838 (1948); 61 HARV. L REV. 1460 (1948).

64. Shaffer v. Heitner, 433 U.S. 186 (1977).

65. Docutel Corp. v. S.A. Matra, 464 F. Supp. 1209 (N.D. Tex. 1979).

66. 414 F.2d at 598 n.7.

67. TEX. R. CIV. P. 120a.

68. 2 R. MCDONALD, TEXAS CIVIL PRACTICE § 9.05.3 (1970).

69. 571 S.W.2d 222 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.). Although this decision was reached during the prior survey period it merits discussion.

70. *Id.* at 223-24 (citing Gathers v. Walpace Co., 544 S.W.2d 169 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.); Law, Snakard, Brown & Gambill v. Brunette, 509 S.W.2d 671 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.); Roquemore v. Roquemore, 431

the scale of evidence.[71] Since "hearsay evidence is no evidence at all," according to the court, an ex parte affidavit will not alone support a dismissal on a rule 120a special appearance.

### C. *Contractual Forum Selection*

A suit in federal court growing out of an alleged breach of two subcontracts raised two interesting questions with respect to a contractual venue selection clause. In *Taylor v. Titan Midwest Construction Corp.*[72] the defendant sought dismissal or, in the alternative, transfer based on a contractual clause providing that "jurisdiction and venue shall be in the appropriate court having subject matter jurisdiction over the matter sitting within the County in which the principal offices of the Contractor are located on the date of the dispute."[73] In deciding whether to enforce this contractual provision the court faced two questions. First, the court had to decide whether federal law governs or whether under the *Erie* doctrine state law should control. Secondly, the court had to decide whether such a forum selection clause would be enforced under applicable law.

The court admitted that whether the *Erie* doctrine controlled depended on how the issue was characterized. If the issue was phrased in terms of contract law then *Erie* should apply.[74] On the other hand, if the issue was viewed primarily as a matter of venue then it was essentially procedural. The court in *Taylor* concluded that federal law should control since the overriding question was one of procedure (venue) and not determinative of the ultimate outcome of the lawsuit.[75] While the State of Texas has a strong interest in where its citizens may sue or be sued within Texas courts, the federal courts have a strong interest in where parties sue within the federal court system. Furthermore, the court concluded, resort to state law would "balkanize venue rules when a uniform rule is patently preferable."[76]

The court then turned to the question of whether a forum selection clause will be enforced under federal law. Here the court relied heavily on

S.W.2d 595 (Tex. Civ. App.—Corpus Christi 1968, no writ)). *See also* Thode, *Special Appearance*, 42 TEXAS L. REV. 279 (1964).

71. 571 S.W.2d at 223.

72. 474 F. Supp. 145 (N.D. Tex. 1979).

73. *Id.* at 146.

74. *Id.* at 147. If the applicable state law, determined under Texas conflicts law, were Texas law, then the provision might not be given effect since contractual venue provisions are not enforceable in state courts. *See* Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535, 537 (Tex. 1972). Decisions by other courts as to whether state or federal law ought to be used to determine the enforceability of contractual venue provisions are split. *Compare* Leasewell, Ltd. v. James Shelton Ford, Inc., 423 F. Supp. 1011 (S.D.W. Va. 1976), *and* Davis v. Pro Basketball, Inc., 381 F. Supp. 1 (S.D.N.Y. 1974), *with* St. Paul Fire & Marine Ins. Co. v. Travelers Indemnity Co., 401 F. Supp. 927 (D. Mass. 1975), *and* Brown v. Gingiss Int'l, Inc., 360 F. Supp. 1042 (E.D. Wis. 1973), all cited by the court. 474 F. Supp. at 147.

75. 474 F. Supp. at 147 (citing Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525 (1958); Guaranty Trust Co. v. York, 326 U.S. 99 (1945)).

76. 474 F. Supp. at 147.

the United States Supreme Court decision upholding a forum selection clause in *M/S Bremen v. Zapata Off-Shore Co.*,[77] an admiralty case involving an international agreement to tow an oil drilling rig from Louisiana to Italy.[78] The Supreme Court found uncertainty and inconvenience in such an arrangement if jurisdiction were left entirely to chance. Nevertheless, the Court subjected the contractual jurisdiction clause to scrutiny under a two-pronged test to assure equality of bargaining power and protection of public policy interests.[79] Applying this test, the *Taylor* court upheld the contractual venue provision. The court observed that the contracting parties were of equal bargaining power and that the forum provided was reasonable in that it bore a reasonable relation to the dispute and did not inconvenience the parties.[80]

## II. CHOICE OF LAW

The most important conflict of laws case of the survey period is *Gutierrez v. Collins*,[81] in which the Texas Supreme Court dealt with two issues: the propriety of the dissimilarity doctrine and the proper choice of law approach in tort cases.

It is appropriate to consider first the treatment given the dissimilarity doctrine by the Texas Supreme Court.[82] In its more extreme form the dissimilarity doctrine required courts to dismiss causes of action upon a showing by the defendant that the law of the place of the tort was materially different from the laws of this state. Of course, until July 1979 Texas followed the lex loci delicti rule as to torts so that when the tort law of the place of the injury was "materially different" from Texas tort law, Texas courts refused to entertain the suit.

This curious doctrine seems to have started with the 1887 case of *Texas & Pacific Railway v. Richards*.[83] In that case a minor daughter sought recovery in tort for injuries to her deceased father. As Texas had no survival statute, Justice Stayton reviewed existing law and proclaimed there were three classes of cases dealing with whether or not a right given solely by the statutes of one state will be enforced in the courts of another: (1) cases

77. 407 U.S. 1 (1972).

78. Decisions subsequent to *Bremen*, however, have extended its rationale to domestic nonadmiralty cases. 474 F. Supp. at 148 (citing In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); St. Paul Fire & Marine Ins. Co. v. Travelers Indemnity Co., 401 F. Supp. 927 (D. Mass. 1975); Spatz v. Nascone, 368 F. Supp. 352 (W.D. Pa. 1973), *denying motion to vacate* 364 F. Supp. 967 (W.D. Pa.)). The rationale in *Bremen* consisted of one negative and two affirmative parts. The negative part was an explanation of the historical view holding forum selection clauses unenforceable as against public policy. This historical view was at least in part an outgrowth of the political desire to unify England. Since the unity of the United States seems relatively assured, the historical base is gone. 407 U.S. at 9-11. The two affirmative parts of the *Bremen* rationale require that the agreement be the result of a freely and equally bargained exchange and that no strong public policy be contravened by the agreement. 407 U.S. at 12-15.

79. 407 U.S. at 523-25.

80. 474 F. Supp. at 149.

81. 583 S.W.2d 312 (Tex. 1979).

82. *Id.* at 319-22.

83. 68 Tex. 375, 4 S.W. 627 (1887).

where both states had similar statutes; (2) cases where the state of occurrence had no statute, but the forum state did; and (3) cases where the state of occurrence had a statute creating a cause of action, but the forum state did not. Only in the first instance might a forum state choose foreign law. After establishing that the case at bar fell into the third category the court concluded:

> We know of no rule of law which would authorize a court of this state to give effect to the laws of another state conferring such right as is claimed in this case, when the laws of this state declare that the same facts, transpiring here, as are made the basis of the appellee's claim, could confer no right whatever to the relief sought. The most liberal state comity cannot, in reference to such a matter as that before us, require our state to enforce the laws of another when in conflict with its own.[84]

Only against the backdrop of the pervasive doctrine of territoriality did such a statement make sense.[85] In Texas the general territorial proclivity in exercises of jurisdiction and choice of law took a particularly unhappy turn. In 1896 in the case of *Mexican National Railway Co. v. Jackson*[86] the Texas Supreme Court dealt with a plaintiff who pleaded, proved, and recovered under the law of Mexico at trial. The supreme court decided that there was an established doctrine in Texas against adjudication of rights of parties arising under dissimilar laws and that the laws of Mexico, as pleaded and proved in this case, were dissimilar. The court noted that Mexican tort law was intertwined with Mexican penal laws; Mexican law allowed the plaintiff to recover damages measured by his social position, required payment in installments, allowed the defendant to reduce the amount of payment if the plaintiff recovered, allowed the plaintiff to sue again for complications that might result from the injury after judgment and required the trial court to encourage settlement.[87] As was pointed out in *Gutierrez*, soon after *Jackson* the dissimilarity doctrine was accepted as a per se rule.[88] This rule came to have extreme manifestations. For instance in *El Paso & Juarez Traction v. Carruth*[89] the court held that all the defendant had to show was that the laws of Mexico remained substantially unchanged since *Jackson*, and dismissal pursuant to the dissimilarity doctrine, automatically followed. In the oft-cited case of *Carter v. Tillery*[90] the court classified the dissimilarity doctrine as a jurisdictional question. In *Carter* the plaintiff and defendant were both residents of Potter County,

84. *Id.* at 378-79, 4 S.W. at 629.

85. For instance, Justice Stayton cited Dennick v. Railroad Co., 103 U.S. 17 (1881); Boyce v. Wabash R.R., 63 Iowa 72, 18 N.W. 673 (1840); State v. Pittsburgh & Connellsville R.R., 45 Md. 41 (1876); Le Forest v. Tolman, 117 Mass. 109 (1874); Whitford v. Panama R.R., 23 N.Y. 465 (1861); Leonard v. Columbia Steam Navigation Co., 84 N.Y. 48 (1881); Willis v. Missouri Pac. Ry., 61 Tex. 432 (1884); Needham v. Grand Trunk R.R., 38 Vt. 292 (1865).

86. 89 Tex. 107, 33 S.W. 857 (1896).

87. *Id.* at 113-14, 33 S.W. at 860-61.

88. 583 S.W.2d at 320.

89. 255 S.W. 159 (Tex. Comm'n App. 1923, judgmt adopted).

90. 257 S.W.2d 465 (Tex. Civ. App.—Amarillo 1953, writ ref'd n.r.e.).

Texas. Plaintiff was a gratuitous guest of the defendant on a trip by private airplane that was to have gone from Artesia, New Mexico, to El Paso, Texas, but landed off course in Chihuahua, Mexico. The plane crashed in Mexico as it attempted to take off after the unscheduled landing. In this case the State of Texas clearly had a compelling interest in insuring that Texas plaintiffs had effective legal redress against Texas defendants. Since it is likely that no effective exercise of jurisdiction over the defendant was possible in a Mexican court, the application of the Texas dissimilarity doctrine had the effect of denying the plaintiff any chance of legal redress, truly an "ultimate horror."[91]

Such extreme results were ameliorated in some cases, because Texas courts recognized the potential harshness of the doctrine and sought ways around it. For instance, it was held that in order for a suit to be dismissed on dissimilarity grounds there had to be proof of foreign law. In the absence of such proof the courts presumed the laws of the other state to be the same as Texas.[92] In *Flaiz v. Moore*[93] the Texas Supreme Court held that the dissimilarity doctrine "does not present a jurisdictional question in the sense that it might be raised for the first time on appeal."[94] Thus, failure of the defendant properly to raise the dissimilarity doctrine waived it. Perhaps most important, courts often avoided the dissimilarity doctrine by characterization. A "tort" became a "contract."[95] A rule of substantive law could become a procedural rule, and Texas law thus applied.[96]

Each ameliorating influence on the dissimilarity doctrine had its limits, however. A tort could not be made into a contract if the elements of a contract could not be proven.[97] A plaintiff could not always count on the defendant's failure to raise dissimilarity.[98] Further, the United States Supreme Court considerably limited the right of Texas courts to characterize substantive rights as procedural rights.[99] Given the harsh nature of the rule and the limited measures available to avoid the rule, it is not surprising that the Texas Supreme Court chose to reconsider it.[100] The dissimi-

91. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 225 (1971).

92. Mexican Cent. Ry. v. Mitten, 36 S.W. 282 (Tex. Civ. App. 1896, writ ref'd).

93. 359 S.W.2d 872 (Tex. 1962).

94. *Id.* at 875.

95. *See* Garza v. Greyhound Lines, Inc., 418 S.W.2d 595 (Tex. Civ. App.—San Antonio 1967, no writ); Hudson v. Continental Bus Sys., Inc., 317 S.W.2d 584 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.).

96. *See* Penny v. Powell, 162 Tex. 497, 347 S.W.2d 601 (Tex. 1961).

97. For instance intersection accidents between strangers could not be pleaded under contract theories.

98. *See* Banco de Mexico v. DaCammara, 55 S.W.2d 631 (Tex. Civ. App.—San Antonio 1932, writ dism'd); Compania Bancaria v. Border Nat'l Bank, 265 S.W. 599 (Tex. Civ. App.—El Paso 1924, writ dism'd).

99. *See* Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904), which held that the remedial processes for Mexican tort law were so inextricably linked with the cause of action that a court enforcing a Mexican cause of action must also use Mexican remedial procedures. Consequently, procedural characterization of an issue in a Mexican cause of action could not avoid the dissimilarity doctrine. *See also* Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

100. Commentators have uniformly and vehemently criticized the doctrine. *See* S. BAYITCH & J. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES 150-54 (1968); A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 122 (1972); G. STUMBERG, PRINCI-

larity doctrine was grounded "on notions of practicality, fairness, and public policy prevalent"[101] in 1896. The notion of practicality had to do with obtaining translations of Mexican statutes and judicial opinions, which is no longer a problem today.[102] The notion of fairness had to do with incorrectly interpreting and applying Mexican law. Such incorrect interpretations could result from either a paucity of available translations or an inability on the part of the court to understand and apply foreign law.[103] Having determined that adequate translations were available, it remained only for the court to consider the ability of the judiciary to comprehend and apply laws of other jurisdictions. The supreme court noted that Texas courts have comprehended and applied Mexican law,[104] that courts of other jurisdictions have comprehended and applied foreign law[105] including Mexican law,[106] and that it would be rare to find other states in the United States or "civilized" nations in the world with judicial remedies that could not be approximated in Texas.[107]

This leaves only the question of public policy, which the Supreme Court of Texas noted favored the dissimilarity doctrine.[108] Today's public policy does not mandate retention of the doctrine.[109] The death of the dissimilarity doctrine and the invitation to eschew parochialism are indeed welcome changes in Texas law.

Also welcome is the adoption by the supreme court of the rule of the *Restatement (Second) of Conflict of Laws* in tort cases. This new choice of law approach must be viewed in its historical context. Choice of law problems arise out of private transactions involving more than one sovereign entity. One of the early members of the United States Supreme Court and a faculty member at the Harvard Law School, Joseph Story, published the first comprehensive treatment on American conflicts law. It was noth-

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PLES OF CONFLICTS OF LAWS 210 (3d ed. 1963); R. WEINTRAUB, *supra* note 91, at 225; Paulsen, *Foreign Law in Texas Courts*, 33 TEXAS L. REV. 437 (1955); Stumberg, *Conflict of Laws—Torts—Texas Decisions*, 9 TEXAS L. REV. 21 (1930); Comment, *The Texas Dissimilarity Doctrine as Applied to the Tort Law of Mexico—A Modern Evaluation*, 55 TEXAS L. REV. 1281 (1977); Note, *Conflicts—Recovery in Tort or in the Alternative Breach of Contract When Texas Law Conflicts with Mexican Law*, 20 BAYLOR L. REV. 379 (1968). *See also* Gutierrez v. Collins, 583 S.W.2d 312, 320 (Tex. 1979).

101. 583 S.W.2d at 320.

102. As is noted in the decision, 583 S.W.2d at 320, there must be pleading and proof of the laws of Mexico. *See also* Thomas, *Proof of Foreign Law in Texas*, 25 Sw. L.J. 554 (1971).

103. Although not discussed by the court, this inability to understand and apply foreign law could also involve the differences between the common law and code or civil law.

104. *See* 583 S.W.2d at 521 (citing Ochoa v. Evans, 498 S.W.2d 380 (Tex. Civ. App.—El Paso 1973, no writ); Apodaca v. Banco Longoria, S.A., 451 S.W.2d 945 (Tex. Civ. App.—El Paso 1970, writ ref'd n.r.e.)).

105. *See* cases cited in 583 S.W.2d at 321 n.8.

106. *See* Victor v. Sperry, 163 Cal. App. 2d 518, 329 P.2d 728 (1958).

107. *See* 583 S.W.2d at 321 (citing R. LEFLAR, AMERICAN CONFLICTS LAW § 50 (3d ed. 1977)).

108. *See* notes 82-87 *supra* and accompanying text. Generally, no court will enforce foreign laws violative of the public morals or interests of the forum state.

109. *See* Catilleja v. Camero, 414 S.W.2d 424, 427-28 (Tex. 1967), and cases cited therein.

ing but a restatement of the territorial imperative.[110] Shortly thereafter an Englishman, A.V. Dicey, proposed and popularized a "vested rights" theory of conflicts law. Professor Joseph Beale of the Harvard Law School then took up the case for vested rights and the territorial imperative, and his views prevailed in almost all cases.[111] In 1934 the American Law Institute's first *Restatement of Conflict of Laws*, largely a product of Beale's work, was published. It epitomized the territorial view, lex loci delicti in torts, that had come to be accepted throughout the United States.[112] Texas did not deviate from the majority view.[113]

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110. This view was originally set forth by the Dutch scholar Ulric Huber. Huber espoused three principles:

> (1) The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.
>
> (2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
>
> (3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.

Quoted in E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 164 (1947).

111. For a helpful short characterization of this history, see W. REESE & M. ROSENBERG, CONFLICT OF LAWS 4-5 (1978).

112. Indeed, for several years after 1918 Beale's views seemed to have acquired constitutional underpinnings. *See* New York Life Ins. Co. v. Dodge, 246 U.S. 357, 376 (1918).

113. Starting in 1884 Texas courts recognized as a common law rule applicable in tort cases the concept of lex loci delicti. Willis v. Missouri Pac. Ry., 61 Tex. 432 (1884). This first reported Texas case dealing with a choice of law involved a suit in tort for wrongful death. Mrs. Dora Willis sued the Missouri Pacific Railway Company to recover for the negligent killing of her brakeman husband. The accident occurred in the Indian Territory. There was a wrongful death statute in Texas but none in the Indian Territory. Thus, from the outset in Texas lex loci delicti proved its capacity for causing unjust results. Other early cases were Texas & P. Ry. v. Richards, 68 Tex. 375, 4 S.W. 627 (1887), and St. Louis, I. M. & S. Ry. v. McCormick, 71 Tex. 660, 9 S.W. 549 (1888). Recognition of the content of the rule was followed by adoption of that concept by statute. 1917 Tex. Gen. Laws, ch. 156, at 365. In 1922 the Texas Commission of Appeals, in discussing this statutory embodiment of the territoriality concept in wrongful death cases, utilized the formal Latin label lex loci delictus. Jones v. Louisiana W. Ry., 243 S.W. 976, 978 (Tex. Comm'n App. 1922, judgmt adopted). The first statutory provision was passed in 1913 and provided:

> That whenever the death or personal injury of a citizen of this State or of a country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by a wrongful act, neglect or default in any State, for which a right to maintain an action and recover damages in respect thereof is given by a statute or by law of such State, territory or foreign country, such right of action may be enforced in the courts of the United States, or in the courts of this State, within the time prescribed for the commencement of such action by the statute of this State, and the law of the former shall control in the maintenance of such action in all matters pertaining to procedure.

1913 Tex. Gen. Laws, ch. 161, at 338.

In 1917 a slightly different version was passed. It provided:

> That whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any such foreign state or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign state or country, such right of action may be enforced in the courts of this State within the time prescribed for the commencement of such action by the statute of this State, and the law of the forum shall control in the prosecution and maintenance of such action in the courts of this State in all matters pertaining to the procedure.

By the time that Beale's first *Restatement* came out in 1934, there were persistent critics of the territorial imperative in choice of law. Foremost among these critics were Professor Ernest Lorenzen and Professor Walter Wheeler Cook.[114] The primary thrust of their criticism of the then dominant vested rights approach was that it too often tended to ignore the demands of justice in the particular situation or case.

In addition, within the federal system of the United States, the territorial imperative as to the exercise of in personam jurisdiction was undergoing a dramatic change. In *Pennoyer v. Neff*,[115] decided by the Supreme Court in 1878, the territorial concept was all encompassing. By 1945, however, the exercise of in personam jurisdiction was no longer tied to territoriality alone.[116] Finally, by 1958 the Supreme Court had clearly separated the questions of choice of law and exercise of jurisdiction as they related to constitutional considerations.[117]

Once the monolithic hold of territoriality was broken, courts began to adopt choice of law approaches different from the traditional lex loci delicti rule. In 1968, the Texas Supreme Court was asked to adopt the most significant contacts rule in lieu of the place of the tort rule.[118] The court refused to do so because in its view, at least in a wrongful death case,[119] the law of the place of the tort was *statutorily* mandated.[120]

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1917 Tex. Gen. Laws, ch. 156, § 1, at 365 (TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon 1952)).

That language was thereafter amended in 1975. The statute now provides:

> Whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any foreign State or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign State or country, or of this State, such right of action may be enforced in the courts of this State within the time prescribed for the commencement of such actions by the statutes of this State. All matters pertaining to procedure in the prosecution or maintenance of such action in the courts of this State shall be governed by the law of this State, and the court shall apply such rules of substantive law as are appropriate under the facts of the case.

TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon Supp. 1980).

114. *See generally* E. LORENZEN, *supra* note 110; W. COOK, THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS (1942).

115. 95 U.S. 714 (1878).

116. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

117. *See* Shaffer v. Heitner, 433 U.S. 186, 215 (1977); Hanson v. Denckla, 357 U.S. 235, 254 (1958).

118. Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968).

119. *See* Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979).

120. This statutory mandate, however, was a rather curious one. In 1860 the first wrongful death statute was passed in Texas. 1860 Tex. Gen. Laws, ch. 35, at 32, 4 H. GAMMEL, LAWS OF TEXAS 1394 (1898). Statutory authorization was required since this cause of action was unknown at common law. The Texas statute authorizing recovery for wrongful death did not contain any mention of the territorial reach of the statute. But the Texas court, reflecting the view of the time, held the statute did not have any extraterritorial effect. Willis v. Mo. Pac. Ry., 61 Tex. 432 (1884). This holding was believed to be constitutionally mandated. *See* note 112 *supra*. Therefore, the Texas Legislature acted in 1913 to allow its citizens to bring suit in Texas applying the law of the place of the injury. *See* note 113 *supra*. In this context the permissive nature of the language used indicates that an injured party

The dissent viewed the problem, continued adherence to the lex loci delicti rule, as judicial in nature and would have utilized the "most significant contacts" view of the *Restatement (Second)*.[121]

In 1972 the supreme court was again faced with a request to change the Texas law of lex loci delicti.[122] The court refused. Although there was no dissent, three justices concurred in a request for legislative change.[123] In 1975 the legislature acted.[124] Although some potential problems remained,[125] it was only a matter of time before the supreme court would utilize this legislative authorization to end the lex loci delicti era.[126]

The end of the lex loci delicti era came in a somewhat unusual form. In *Gutierrez v. Collins*[127] a relatively classic fact pattern was presented.[128] Gutierrez and Collins were both residents of El Paso, Texas. While in Mexico, Gutierrez was hurt in an automobile accident and sued Collins, alleging negligence. Collins, relying on the combined effect of the dissimilarity doctrine and the lex loci delicti rule, prevailed in both the district

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could sue in the state of injury where the law of that forum would be applied, or the injured party could sue in Texas, but in that case the law of the place of injury would apply. Although this statutory provision was placed in the wrongful death series, it always purported to apply to either death or personal injury cases. *Id.* The emergency clause to the 1913 Act asserted that there was no existing law permitting citizens of Texas who received injuries "in a foreign country" to bring actions in Texas. The clause provided:

> The fact that there is now no law permitting citizens of this State who receive injuries in a foreign country from bringing an action for said injuries under the laws of this State, creates an emergency and imperative public necessity requiring that the constitutional rule that bills shall be read upon three several days, should be suspended and it is hereby suspended, and this Act shall take effect from and after its passage.

1917 Tex. Gen. Laws ch. 156, § 2, at 365. This was not an accurate statement of the lex loci delicti rule since as to injuries not resulting in death no statutory authorization was necessary; under the traditional common law the forum state applied the tort law of the place of the injury. Of course, the same argument could be made with regard to wrongful death actions. The confusion as to wrongful death is understandable, however, since it was purely a creature of statute.

By the time the supreme court was called on in 1968 to consider the meaning of the appropriate statutory provisions, the idea that states had no power under the United States Constitution to give extraterritorial effect to their laws had long since fallen. Richards v. United States, 369 U.S. 1 (1962). It was argued that the basic Texas wrongful death statute could simply be applied, and the authorization of use of the law of the place of the tort need not be invoked. 430 S.W.2d at 184-85. The majority rejected this invitation to free Texas from a statutorily imposed lex loci delicti rule. Even if previous interpretations were in error by more current views, reasoned the majority, they were not necessarily in error at the time initially made. And further, since the legislature could simply amend the statute if it found the court's interpretation unacceptable, failure to adhere to stare decisis in this case would amount to judicial amendment of a statute. *Id.* at 183-87, 193-94.

121. 430 S.W.2d at 188-93.

122. Click v. Thuron Indus., Inc., 475 S.W.2d 715 (Tex. 1972).

123. *Id.* at 719-20.

124. *See* TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon Supp. 1980); note 113 *supra*.

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

126. *See* Newton, *supra* note 2, at 447.

127. 583 S.W.2d 312 (Tex. 1979).

128. *Compare* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

court and court of civil appeals.[129] The supreme court, however, reversed, holding that in cases involving personal injuries, instead of wrongful death, there was no statutory mandate for the lex loci delicti rule.[130] Although it was conceded that language in many decisions included personal injuries,[131] the court noted (1) that its decisions had always involved wrongful death actions, (2) that most commentators have "suggested that Article 4678 does not mandate enforcement of the lex loci delicti rule,"[132] and (3) that federal district courts had held personal injury cases were not statutorily controlled.[133] The supreme court held that lex loci delicti in personal injury cases was not statutorily mandated.[134] Consequently, the court turned its attention to the question of whether the place of the tort rule should continue as the choice of law rule in Texas.

Three main arguments were recognized as supporting retention of the lex loci delicti rule. First, it was said to be a uniform, consistent, and predictable rule of law. As the court noted, however, even if the rule were uniform, consistent, and predictable it would not be sustainable if it produced arbitrary and unjust results. Further, since courts recognized that the rule often produced arbitrary and unjust results, various subterfuges were employed.[135] This undercut uniformity, consistency, and predictability. Secondly, it was argued that the cure was worse than the disease; every alternative rule or approach was so difficult to apply as to lead to "varying, inconsistent and unpredictable results, which would serve only to confuse the public and profession alike, as well as to burden the courts with a difficult chore."[136] The answer to this observation is that alternative approaches are not necessarily less predictable and uniform than the traditional rule, at least as courts adjust to and refine application of

129. Gutierrez v. Collins, 570 S.W.2d 101 (Tex. Civ. App.—El Paso 1978).

130. 583 S.W.2d at 313-18.

131. *Id.* at 314 (citing Ramirez v. Autobuses Blancos Flecha Roja, S.A. de C.V., 486 F.2d 493 (5th Cir. 1973); Withers v. Stimmel, 363 S.W.2d 144 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.); Carter v. Tillery, 257 S.W.2d 465 (Tex. Civ. App.—Amarillo 1953, writ ref'd n.r.e.); Grandstaff v. Mercer, 214 S.W.2d 133 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.)).

132. 583 S.W.2d at 315 (citing Weintraub, *Choice of Law for Products Liability: The Impact of the Uniform Commercial Code and Recent Developments in Conflicts Analysis*, 44 TEXAS L. REV. 1429, 1441-42, 1442 n.46 (1966)). Of course the statute does not mandate lex loci delicti in wrongful death causes of action either. *See* notes 113 & 118-45 *supra* and accompanying text.

133. Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288 (S.D. Tex. 1976); Couch v. Mobil Oil Corp., 327 F. Supp. 897 (S.D. Tex. 1971). Of course as the opinion of the supreme court in *Gutierrez* makes clear, even if not statutorily mandated, lex loci delicti was clearly the choice of law rule in Texas. Under Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), the federal district courts should not, therefore, have used any rule other than lex loci delicti. *See also* Challoner v. Day & Zimmermann, Inc., 512 F.2d 77 (5th Cir.), *rev'd*, 423 U.S. 3 (1975). The Texas Supreme Court thus cites with approval cases whose reasoning, if not result, is suspect.

134. Contrary language in earlier supreme court opinions and opinions of the courts of civil appeals was therefore amended or overruled.

135. *See generally* R. LEFLAR, AMERICAN CONFLICTS LAW §§ 87-90 (3d ed. 1977).

136. 583 S.W.2d at 317.

them,[137] and that in any event "[e]ase of administration alone is a wholly inadequate reason for retention of an unjust rule."[138] Thirdly, it was asserted that stare decisis precluded a change, an argument rejected by defining the doctrine as preventing change for the sake of change but not preventing change where warranted. Therefore, the supreme court overruled the common law choice of law rule of lex loci delicti as to personal injury cases.[139]

This decision presented the question of what rule or approach should be used in place of lex loci delicti.[140] Most major theories were considered,[141] and the court, agreeing with Professor Leflar,[142] found these theories were substantially represented in the *Restatement (Second) of Conflict of Laws*. Section 6 and section 145 are the applicable sections. Section 6 provides:

§ 6. Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of the interested states and the relative interests of these states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.[143]

Section 145 lists factual matters to be considered when applying the principles of section 6 to a tort case:

§ 145. The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

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137. *See* Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROB. 10 (1977).

138. 583 S.W.2d at 317.

139. *Id.* at 318.

140. *See* W. REESE & M. ROSENBERG, *supra* note 111, at 546.

141. Included were Professor Currie's "governmental interests" test, B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963), Von Mehren and Trautman's "functional approach," A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS (1965), Cavers's "principles of preference," D. CAVERS, THE CHOICE OF LAW PROCESS (1965), Leflar's "choice-influencing considerations" or "better law" theory, R. LEFLAR, *supra* note 135, and Ehrenzweig's lex fori approach, A. EHRENZWEIG, *supra* note 100, ch. 3.

142. *See* R. LEFLAR, *supra* note 135, § 139.

143. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.[144]

Several observations about the adoption by the Texas Supreme Court of the *Restatement (Second)* seem in order. First, the court was undoubtedly accurate in its assessment of the effect of the new approach. There have been growing pains in implementing new approaches, but after some refinement and adjustment there ought not to be any difficulties appreciably greater than those that existed under the old rule. This does not mean that advocacy born out of an understanding of the various theories is inappropriate. On the contrary, since the criteria of the relevant *Restatement (Second)* sections are potentially inconsistent, careful pleading, proof, and characterization will often prove determinative. As the supreme court pointed out in *Gutierrez*, it is the quality not quantity of contacts that counts.[145] Secondly, the *Restatement (Second)* approach to choice of law spotlights the role of the court. Although contested questions of fact can still be tried to a jury, questions such as where did an act occur or where was a party domiciled, the determination of which law ought to be chosen will depend solely on the court's determination. The supreme court cites decisions[146] that hold that in certain fact situations choice of law is a question of law. Appropriate use of rule 296[147] to request findings of fact and law should aid in protecting against parochialism and rationalization. Thirdly, there is a question as to the exact reach of the holding in *Gutierrez*. In a technical sense the *Restatement (Second)* rule applies only to tort cases involving injuries suffered in other jurisdictions. Causes of action in wrongful death, or contract are not covered.[148] It seems clear, however,

144. *Id.* § 145.
145. 583 S.W.2d at 319.
146. *Id.* (citing Moore v. Montes, 22 Ariz. App. 562, 529 P.2d 716 (1974); Hurtado v. Superior Court, 11 Cal. 3d 574, 552 P.2d 616, 114 Cal. Rptr. 106 (1974); Brickner v. Gooden, 525 P.2d 632 (Okla. 1974)). *See also* Sedler, *Choice of Law in Michigan: A Time to Go Modern*, 24 WAYNE L. REV. 829, 831-32 (1978).
147. TEX. R. CIV. P. 296.
148. The applicable *Restatement (Second)* provisions in contract are § 6, set out in the text accompanying note 143 *supra*, and § 188, which provides:

§ 188. Law Governing in Absence of Effective Choice by the Parties
(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

that the *Restatement (Second)* approach will be adopted across the board. In a footnote the court signaled the propriety of adopting the *Restatement (Second)* in wrongful death actions.[149] Surely it is an appropriate guide in contracts as well.[150]

## III. JUDGMENTS

In modern society, with increased personal mobility and increased social acceptance of litigation, questions concerning the effect and finality of judgments, or the amenability of judgments to direct or collateral attack arise frequently. In most instances the cases follow established patterns, but not always. Some of the cases illustrative of interesting variations are briefly discussed.

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

Changes in the law of property, specifically changes relating to retirement benefits, create a special problem with respect to awarding full faith and credit to property divisions made in conjunction with divorce decrees. A final judgment providing for property division upon divorce is entitled to the same recognition, force, and effect in a sister state as in the rendering state.[151] Nevertheless, application of the doctrine of full faith and credit requires the enforcing forum to determine what effect a judgment would have in the rendering state. Courts do not always agree on this issue, and the law of the rendering state may change.

The last *Survey* discussed the case of *Gerhardt v. Welsch*,[152] in which Gerhardt sued her former husband, Welsch, for a partition of his military retirement benefits.[153] The divorce decree and property settlement rendered by the State of Washington trial court failed to mention military retirement benefits. The San Antonio court of appeals decided that under Washington law spouses' unaccrued pension rights were community property, that parties to a divorce become tenants in common of property not disposed of in the divorce decree under Washington law, and that the plaintiff was therefore entitled to a partition upon a proper showing of specific ownership.[154] The supreme court disagreed.[155] Although there were decisions by Washington courts on the nature of military retirement

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These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

149. 583 S.W.2d at 317 n.3.

150. At least one tort case has already followed the *Gutierrez* decision. Bravo v. Texas Farmers Ins. Co., 584 S.W.2d 573 (Tex. Civ. App.—El Paso 1979, no writ).

151. *See* Dunfee v. Duke, 375 U.S. 106 (1963).

152. 568 S.W.2d 873 (Tex. Civ. App.—San Antonio 1978), *rev'd*, 583 S.W.2d 615 (Tex. 1979).

153. *See* Newton, *supra* note 2, at 450-51.

154. 568 S.W.2d at 879.

155. Welsch v. Gerhardt, 583 S.W.2d 615 (Tex. 1979).

benefits at the time of rendition of the original decree, they were in disagreement.[156] About three years after the rendition of the Washington divorce decree, and after the military retirement had completely vested, the Supreme Court of Washington decided, in the case of *Payne v. Payne*,[157] that military retirement benefits were community property subject to division upon dissolution of a marriage. The question of whether Gerhardt acquired an undivided interest in the military retirement benefits thus depended upon whether *Payne* was given retroactive effect. Three Washington courts considered the question and held that the rule should not be given retroactive effect.[158] These decisions stressed that a number of property settlements would be jeopardized by a retroactive application and that no great injustices are done in affirming what were fair dispositions of property at the time made.[159] Since current Washington law forbids the retroactive application of a rule declaring military retirement benefits to be community property, the Texas Supreme Court held that Gerhardt had no cause of action.[160]

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

The finality of a default judgment sought to be enforced in Texas under the full faith and credit clause was raised in *Williams v. Washington*.[161] The State of Washington sued Ralph Williams, individually, and Ralph Williams, Inc. in a Washington court under the Washington Consumer Protection Act.[162] Williams did not appear, and a default judgment was rendered providing for recovery of civil penalties and attorney's fees, and granting an injunction. Thereafter the State of Washington sought enforcement of the judgment in Texas. The Dallas court of civil appeals found that the judgment was not final and therefore was not entitled to enforcement under full faith and credit.[163]

The Texas Supreme Court considered the issue of the finality of the judgment.[164] A question as to the finality of the judgment was raised by a portion thereof that provided: "Jurisdiction 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 or clarification thereof."[165] If the

156. Cases implying that the benefits were community property included Morris v. Morris, 69 Wash. 2d 506, 419 P.2d 129 (1966). Another case rejected this view. *See* Roach v. Roach, 72 Wash. 2d 144, 432 P.2d 579 (1967). *See generally* 50 WASH. L. REV. 506 (1975).

157. 82 Wash. 2d 573, 512 P.2d 736 (1973).

158. *See* Myser v. Myser, 21 Wash. App. 925, 589 P.2d 277 (1979); Martin v. Martin, 20 Wash. App. 686, 581 P.2d 1085 (1978); *In re* Marriage of Hagy, 20 Wash. App. 642, 581 P.2d 598 (1978).

159. 583 S.W.2d at 616.

160. *Id.* at 617.

161. 566 S.W.2d 54 (Tex. Civ. App.—Dallas 1978), *rev'd and remanded*, 584 S.W.2d 260 (Tex. 1979).

162. WASH. REV. CODE ANN. § 19.86 (1978).

163. *See* Newton, *supra* note 2, at 452-53.

164. Washington v. Williams, 584 S.W.2d 260 (Tex. 1979).

165. *Id.* at 261 (emphasis removed).

quoted provision applied only to injunctive relief, then the judgment would be a final one. If, however, it related to all relief, the judgment would not be final.[166] Because a final judgment rendered by a court of one state is generally entitled to the same force and effect in the court of another state as it would have in the rendering state,[167] while a decree subject to modification in the rendering state is not automatically entitled to any recognition, force, and effect in another state,[168] the finality or lack thereof of the Washington decree is determinative. The Texas Supreme Court found (1) that the Washington court's clear intent, as manifest in the opening paragraph of the judgment, was to render a final decree,[169] (2) that the parties considered the judgment final, and (3) that the word "modification" had reference only to the injunctive provisions of the decree.[170] In the view of the supreme court, the trial court retained jurisdiction to enforce compliance, punish violations, and modify or clarify.[171] Enforcement of compliance and punishment of violations obviously refer to post-judgment activities in connection with the injunction. While the third area read alone raises doubt, in context it refers to the injunctive relief as well. "The judgment enjoins twenty-four separate acts and it is reasonable to anticipate that the injunctive language could require modification or clarification from time to time to insure carrying out the trial court's intentions."[172] Retention of this power to modify or clarify injunctive provisions did not affect the finality of the remainder of the judgment.[173]

On remand to the court of civil appeals Williams asserted other points that had been raised but not considered.[174] The major issue concerned whether the Washington judgment was penal in the international sense and thus not entitled to full faith and credit. The court of civil appeals quoted from the United States Supreme Court case of *Huntington v. Attrill*[175] as to when a judgment is penal and not entitled to full faith and credit:

> The question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that

166. *Id.* (citing Stovall v. Banks, 77 U.S. (10 Wall.) 583 (1870); City of Tyler v. St. Louis Southwestern Ry., 405 S.W.2d 330 (Tex. 1966)); *see* Newton, *supra* note 2, at 452-53.

167. 584 S.W.2d at 261 (citing Sistare v. Sistare, 218 U.S. 1 (1910)).

168. 584 S.W.2d at 261 (citing Barber v. Barber, 323 U.S. 77 (1944)).

169. The judgment was final except as to the claims of consumers that were severed as permitted by the Washington civil rules. *See* Washington v. Williams, 584 S.W.2d at 261-62; WASH. REV. CODE ANN. § 19.86 (1978).

170. 584 S.W.2d at 261-62.

171. *Id.* at 262.

172. *Id.*

173. *Id.* (citing State v. Stubblefield, 36 Wash. 2d 664, 220 P.2d 305 (1950)).

174. The six arguments were: (1) that the Washington judgment is penal in nature and not entitled to full faith and credit; (2) the enforcement of this judgment would offend Texas public policy; (3) the judgment is unconstitutionally vague and thus void; (4) the Washington Consumer Protection Act is unconstitutional; (5) the Washington trial court erred in awarding attorney's fees; and (6) the Texas trial court erred in refusing to allow appellants complete discovery. Williams v. Washington, 581 S.W.2d 494, 495 (Tex. Civ. App.—Dallas 1979, no writ).

175. 146 U.S. 657 (1892).

> it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to *punish an offense* against the public justice of the state, or to *provide a private remedy* to a person injured by the wrongful act.[176]

This means that only criminal or quasi-criminal statutes fall under the exception. The court of civil appeals found that the Washington Consumer Protection Act was not criminal or quasi-criminal.[177] Thus, the judgment was not penal in nature and was entitled to full faith and credit.

### C. *Full Faith and Credit: Lack of Subject Matter Jurisdiction*

During the survey period there were numerous cases involving full faith and credit where issues of personal jurisdiction over the defendant in the rendering state, both in default and contested cases, were raised.[178] Less common was the issue of whether the rendering state had subject matter jurisdiction.[179] In *Roath v. Uniroyal, Inc.*[180] the court of civil appeals dealt with the question of subject matter jurisdiction of the rendering court. In 1963 Uniroyal obtained a default judgment in Kansas against Roath, who was then a Kansas resident. In 1967 the judgment was revived, but it became dormant in 1972. Later in 1972 the dormant judgment was revived pursuant to Kansas statutes. In 1971 Roath moved to Texas, and in 1975 the revived judgment was used as the basis of a suit against him in Texas. As to whether subject matter jurisdiction was properly exercised in the Kansas revival action, the court of civil appeals held that Kansas law governs questions relating to the revival of dormant Kansas judgments. Under decisions of the Kansas Supreme Court, suits for revival of dormant judgments are merely continuations of the original suit and, therefore, where the court in the original suit obtained jurisdiction over the parties, such jurisdiction is retained in the revivor action even when a party in the revivor suit is served by publication.[181] The court of appeals then noted that Texas courts are in agreement with this view.[182] The court pointed

176. 581 S.W.2d at 495 (quoting 146 U.S. at 674) (emphasis by the court).

177. This conclusion rested principally on the fact that Washington courts, including the Washington Supreme Court, have held the Act not penal by virtue of its provisions for the imposition of civil penalties in a civil action. 581 S.W.2d at 495 (citing State v. Ralph Williams' North West Chrysler Plymouth, Inc., 82 Wash. 2d 265, 510 P.2d 233 (1973); Johnston v. Beneficial Management Corp., 85 Wash. 2d 637, 538 P.2d 510 (1975)). As further support the court noted that the Washington statute provides that guidance in interpretation thereof shall be had by reference to various federal statutes dealing with the same or similar matters. WASH. REV. CODE ANN. § 19.86.920 (1978). Relevant court decisions as to those federal statutes have held them remedial, as opposed to penal, in nature. 581 S.W.2d at 496 (citing United States v. J.B. Williams Co., 354 F. Supp. 521 (S.D.N.Y. 1973), *aff'd in part on other grounds*, 498 F.2d 414 (2d Cir. 1974); United States v. St. Regis Paper Co., 355 F.2d 688, 693 (2d Cir. 1966)); *see* FTC v. Klesner, 280 U.S. 19 (1929); Regina Corp. v. FTC, 322 F.2d 765 (3d Cir. 1963); Gimbel Bros. v. FTC, 116 F.2d 578 (2d Cir. 1941). Finally, the court found that the judgment itself reflected that its purpose was to protect the consumer.

178. *See* R. LEFLAR, *supra* note 135, at § 79.

179. *See* Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1874).

180. 582 S.W.2d 185 (Tex. Civ. App.—Beaumont 1979, no writ).

181. *Id.* at 188 (citing Riney v. Riney, 205 Kan. 671, 473 P.2d 77 (1970); Hartz v. Fitts, 89 Kan. 751, 132 P. 1187 (1913); Rice v. Moore, 48 Kan. 590, 30 P. 10 (1892)).

182. 582 S.W.2d at 188 (citing Sias v. Berly, 245 S.W.2d 503 (Tex. Civ. App.—Beaumont

out that in Texas a court would consider whether additional liability was imposed upon the defendant in the revivor suit or whether the only object was reactivation of a suspended power to issue writs of execution. Since no additional liability was imposed in the case at bar, the revivor judgment was held to be merely a reactivation of a suspended power.

Fortunately, discussion of the Texas rule as to revivor suits was unnecessary in this case, because Texas law is not a proper basis for determining the subject matter jurisdiction of a Kansas court. In cases where the forum state examines the subject matter jurisdiction of the rendering state, as it may,[183] it sits as a federal court does in a diversity case and must determine and apply the law of the forum state. If the forum state has no applicable rule, then a prediction must be made. Even in that case, however, the forum law would be only persuasive authority, and care must be taken against parochialism.

### D. *Res Judicata and Collateral Estoppel*

The equitable nature of the related doctrines of res judicata[184] and collateral estoppel[185] is perhaps most obvious in cases where one of the parties is a governmental entity.[186] In *Montana v. United States*[187] the United States Supreme Court suggested that an appropriate application of collateral estoppel should resolve three inquiries: (1) whether the issues presented in the instant litigation were in substance the same as those resolved in the previous litigation; (2) whether controlling facts and legal principles have changed significantly since the previous litigation; and (3) whether other special circumstances warranted an exception to the normal rules of preclusion.[188] The second and third inquiries are necessary when either res judicata or collateral estoppel are employed against the government as a party because of the government's functions on behalf of the public. Two cases decided during the prior survey period illustrate applications of these unique inquiries.

*United States v. Lubbock Independent School District*[189] questioned the effect of a previous court order. Suit was initially commenced in 1970 by the United States against the Lubbock Independent School District, seek-

1950), *rev'd on other grounds*, 151 Tex. 176, 255 S.W.2d 505 (1953); Collin County Nat'l Bank v. Hughes, 154 S.W. 1181 (Tex. Civ. App.—Dallas 1913), *aff'd*, 110 Tex. 362, 220 S.W. 767 (1920); 31 TEXAS L. REV. 73 (1952)).

183. *See generally* Hodges, *Collateral Attacks on Judgments*, 41 TEXAS L. REV. 499, 540-41 (1963).

184. The doctrine of res judicata bars the relitigation of all issues connected with a cause of action or defenses that were actually tried or with due diligence should have been tried. *See* Abbott Laboratories v. Gravis, 470 S.W.2d 639 (Tex. 1971).

185. The doctrine of collateral estoppel bars relitigation between the same parties in a subsequent suit upon a different cause of action of essential fact issues actually litigated. *See* Benson v. Wanda Petroleum Co., 468 S.W.2d 631 (Tex. 1971).

186. Res judicata and collateral estoppel are applicable to governmental entities. Montana v. United States, 440 U.S. 147 (1979).

187. 440 U.S. 147 (1979).

188. *Id.* at 975.

189. 455 F. Supp. 1223 (N.D. Tex. 1978).

ing relief as to segregation in the schools. The court entered a memorandum opinion ordering certain remedies. The school system implemented the remedies ordered by the court and at all times operated in accordance with the court's order. In the spring of 1977 the residents of the school district voted to issue tax bonds for new construction, and, because of the court's retention of jurisdiction under its 1970 order, the school district applied for approval of the construction plan. The United States filed in opposition to the proposed construction plan and also sought supplemental relief on the grounds that the 1970 order of the court had not accomplished full integration in the school system. Basing its argument on the doctrines of collateral estoppel and res judicata, the school district opposed the requests for supplemental relief. At the time of the court's 1970 order the judicial remedial powers of courts in school desegration cases were rather unclear. Since that time, however, the United States Supreme Court has significantly clarified those powers.[190] Weighing the overriding public interest in integration, the Court rejected application of the doctrines of res judicata and collateral estoppel because such application would result in manifest injustice.[191]

In *Sullivan v. State*[192] the effect of a plea bargain in a prior suit was in question. Michael Sullivan, Jr., the duly elected Sheriff of El Paso, Texas, was indicted for official misconduct and suit for removal from office followed. The Texas Supreme Court held that the presiding judge was disqualified to hear the suit,[193] and the Honorable Fred Shannon was assigned to the case. Judge Shannon proposed that Sullivan plead guilty to two misdemeanor counts of official misconduct but that he would "not be removed from office by this Court, but will continue in office subject to the will of the voters at the next election."[194]

Sheriff Sullivan thereafter entered a plea of guilty and did not appeal. Several months later the district attorney filed a quo warranto proceeding under a Texas statute[195] declaring that convictions for misdemeanors involving official misconduct result in immediate removal from office. Upon a determination by the district court that the statute was applicable, Sullivan appealed. The court of civil appeals found the statute applicable and constitutional. It recognized that the plea bargain had not been kept and that Sullivan was entitled to have the conviction set aside,[196] but since Sullivan refused to seek such relief, any statute invoked by the conviction must apply.

190. *See* 455 F. Supp. at 1225 (citing Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)).

191. The court noted that the Fifth Circuit had repeatedly upheld this view (citing Ellis v. Board of Pub. Instruction, 465 F.2d 878 (5th Cir. 1972); Dandridge v. Jefferson Parish School Sys., 456 F.2d 552 (5th Cir. 1972)).

192. 572 S.W.2d 778 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

193. Sullivan v. Berliner, 568 S.W.2d 844 (Tex. 1978).

194. 572 S.W.2d at 780.

195. TEX. REV. CIV. STAT. ANN. art. 5968 (Vernon 1962).

196. *See* Santobello v. New York, 404 U.S. 257 (1971); Washington v. State, 559 S.W.2d 825 (Tex. Crim. App. 1977).

This determination raised the question as to whether Judge Shannon's dismissal with prejudice of the original removal suit, including its provision for Sullivan's continuance in office, is res judicata barring the quo warranto proceeding. The court of civil appeals concluded that while the two causes of action involved the same parties, and while the first judgment was final, the facts were not the same. The court reached this conclusion because in the first case Sullivan had not been convicted, while in the second case he had. In addition, the court held that the doctrine of res judicata does not apply when its application would contravene important public policy interests.[197] The better reason is the second, and the court is correct in holding that there is a strong public policy favoring immediate removal from office of officials convicted of official misconduct. In such cases there are clearly special circumstances warranting an exception to the normal rules of preclusion.

197. 572 S.W.2d at 784 (citing Greenfield v. Mather, 32 Cal. 2d 23, 194 P.2d 1 (1948); *In re* Di Carlo's Estate, 3 Cal. 2d 225, 44 P.2d 562 (1935); 46 AM. JUR. 2D *Judgments* § 402 (1969)).