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Conflict of Laws

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CONFLICT OF LAWS

by

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CONFLICT of laws involves problems conveniently grouped under the headings of jurisdiction, choice of law, and judgments. During the previous survey period the major development in Texas concerned choice of law principles. This year, however, the major developments occurred nationally in all three areas.

I. JURISDICTION

A. *Jurisdiction of the Person*

Formal judicial resolution of civil disputes requires that there be jurisdiction. Jurisdiction has many aspects,[1] one of which, judicial jurisdiction, raises the question of what limits the Constitution places on the attempts of the courts of one state to render binding judgments against the citizens of another state.[2] More specifically, judicial jurisdiction focuses on the potential deprivation of a defendant's due process protections.[3]

In 1977 the Supreme Court announced in *Shaffer v. Heitner*[4] that the "traditional notions of fair play and substantial justice" rule of *International Shoe*[5] would apply to in rem and quasi in rem actions as well as to in personam actions.[6] Further, the Court stated that the tripartite relationship among the defendant, the forum, and the litigation[7] should be ex-

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1. The question of jurisdiction can be broken down into two basic categories, legislative and judicial. Legislative jurisdiction deals "with whether the state, through its courts or otherwise, has power to act upon the matter in issue by using the state's rules of law to regulate or control it." R. LEFLAR, AMERICAN CONFLICTS LAW § 3 (3d ed. 1977). Judicial jurisdiction deals more with the power of a court to act "against the particular person . . . against whom, or the thing against which, the court is asked to act." *Id.* In order to have judicial jurisdiction a court must have jurisdiction over the subject matter involved, as well as over the person. In order to satisfy subject matter jurisdiction, examination of statutory as well as constitutional authority may be sufficient. For the court to have jurisdiction over the person, however, both procedural and substantive due process requirements must be satisfied. Use of the term "jurisdiction" then requires observation of both the legislative and judicial categories. *See id.*

2. *See id.*

3. U.S. CONST. amend. XIV. Substantive due process requires that a state have some basis for exercising power. Procedural due process addresses the question of whether the defendant was given adequate notice of the proceedings and a reasonable opportunity to be heard. *See* R. LEFLAR, *supra* note 1, §§ 20-21.

4. 433 U.S. 186 (1977).

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

6. 433 U.S. at 207.

7. *Id.* at 204.

amined in determining constitutional limits. This new formulation raised three major questions. First, was the formulation meant to be conjunctive or disjunctive? Secondly, what were the proper meanings of the elements of this new tripartite test? Thirdly, to what extent does this approach apply to cases involving status?[8] During the survey period the United States Supreme Court handed down two decisions that helped to provide some insight into the first two questions,[9] and a Texas court of civil appeals addressed the third.[10]

Conjunctive or Disjunctive. In *Rush v. Savchuk*[11] the Supreme Court dealt with the question of whether the tripartite test was conjunctive or disjunctive. The *Rush* case arose from an application of the territoriality principle to a quasi in rem action based on an insurance policy. Two Indiana residents were involved in an automobile accident in Indiana. After the collision the plaintiff changed his residence from Indiana to Minnesota. The defendant's insurer, however, did business in both Indiana and Minnesota.

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8. Possibly, the result could be different in a true in rem admiralty situation.

9. Rush v. Savchuk, 444 U.S. 320 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). In addition to these major Supreme Court decisions there were many federal and state court decisions dealing with jurisdiction. *See* Familia De Boom v. Arosa Mercantil, S.A., 629 F.2d 1134 (5th Cir. 1980) (when the trial record did not show that due process requirements for personal jurisdiction had been met, jurisdiction could not be found to exist by waiver due to refusal by the defendant to answer interrogatories that would have determined jurisdiction); Southwest Offset, Inc. v. Hudco Publishing Co., 622 F.2d 149 (5th Cir. 1980) (Alabama publisher held amenable to suit by a Texas printer suing on contracts to be performed in part in Texas); Sheehan v. Army & Air Force Exch. Serv., 619 F.2d 1132 (5th Cir. 1980) (in determining subject matter jurisdiction, an examination of article II constitutional limits and other statutory grants of power is necessary; when the federal government is the defendant, sovereign immunity acts as an additional limit to subject matter jurisdiction); Hearth, Inc. v. Department of Pub. Welfare, 612 F.2d 981 (5th Cir. 1980) (fourteenth amendment alone does not provide a basis for invoking federal jurisdiction); Hunt v. BP Exploration Co., 492 F. Supp. 885 (N.D. Tex. 1980) (res judicata barred an American citizen from seeking relief in the United States when an English court had proper jurisdiction over the action); K.L. Cattle Co. v. Bunker, 491 F. Supp. 1314 (S.D. Tex. 1980) (Texas long-arm statute does not provide for jurisdiction over a nonresident executor or administrator); Jamesbury Corp. v. Kitamura Valve Mfg. Co., 484 F. Supp. 533 (S.D. Tex. 1980) (a Japanese corporation was not doing business under the Texas long-arm statute when no evidence showed that any part of the performance of a purchase agreement occurred in Texas and when the corporation's only contacts within the state were contacts by two of its agents over a seven-month period to initiate the incorporation of a subsidiary); Sherman Gin Co. v. Planters Gin Co., 599 S.W.2d 348 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.) (a contract to be performed by a Texas corporation for a Mississippi corporation, wholly within Mississippi, provided no basis for exercise of jurisdiction in Texas); Rosemont Enterprises, Inc. v. Lummis, 596 S.W.2d 916 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (affirming jurisdiction in a suit on a note when the nonresident maker had transacted business with a Texas bank); DeJulio v. Lawler, 593 S.W.2d 837 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (Texas could exercise personal jurisdiction over a limited partnership and its general partner, formed under California law, because it had limited partners in Texas and the suit involved land in Texas); Walker v. Associates Financial Servs. Corp., 588 S.W.2d 416 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.) (when out-of-state lender loaned money to a Texas resident, contractual provision stipulating that transaction would be governed by laws of state in which lender was licensed and regulated was valid).

10. Perry v. Ponder, 604 S.W.2d 306 (Tex. Civ. App.—Dallas 1980, no writ).

11. 444 U.S. 320 (1980).

The plaintiff thus brought suit in Minnesota under the *Seider v. Roth*[12] rationale, attaching the insurer's obligation to the insured. The Minnesota Supreme Court upheld such an assertion of jurisdiction[13] not only under the legacy of *Harris v. Balk*,[14] but also by later characterizing the cause of action so as to satisfy the *Shaffer* test, despite the absence of contacts between the defendant and the forum.[15] The issue was thus squarely presented to the Court: in a quasi in rem suit, in which jurisdiction is based solely on the contractual obligation of the insurer to defend its insured, must all three prongs of the *Shaffer* test be satisfied? The Supreme Court answered this question in the affirmative and discussed a threefold litany of substantive due process as it applies to judicial jurisdiction:[16] the application of *International Shoe* standards to *all* assertions of state-court jurisdiction;[17] a recitation of the standard as involving, in the case of absent defendants, "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' ";[18] and an inquiry into the relationship among the defendant, the forum, and the litigation.[19]

The first argument the Court dealt with in *Rush* was that the test was satisfied by the facts at bar because the defendant owned property in the forum state. The Court found this argument unpersuasive, stating that the argument rested on legal fictions that could not be allowed to obscure the lack of true contact between the defendant and the forum state.[20] The majority stressed the necessity of fairly applying the previously enunciated standards of due process.[21] Thus, mere presence of property is not sufficient constitutionally to assert jurisdiction.

The majority did not accept a characterization of the insurance policy as the primary focus of the suit so as to provide sufficient contacts. As the majority correctly noted, the insurance policy was neither the basis of the suit nor did it have any relation to the "operative facts of the negligence action."[22] In fact the insurance policy only related to matters pertaining to the conduct of the litigation and certain consequences of such litigation. According to the Court, this relationship provided an insufficient contact between the litigation in question and the forum.[23]

The majority also rejected the fictions of debt situs and corporate presence based on business activities within a state. "State Farm is 'found,' in

12. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).
13. Savchuk v. Rush, 311 Minn. 480, 245 N.W.2d 624 (1976).
14. 198 U.S. 215 (1905).
15. Savchuk v. Rush, 311 Minn. 480, 272 N.W.2d 888 (1978).
16. 444 U.S. at 327-30.
17. As the Court noted in *Shaffer*, however, some situations such as marital status cases do not necessarily fit within the *International Shoe* context. 433 U.S. 186, 207 (1977).
18. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
19. *See* Shaffer v. Heitner, 433 U.S. 186, 204 (1977).
20. 444 U.S. at 328.
21. *Id.*
22. *Id.* at 329.
23. *Id.* at 329-30.

the sense of doing business, in all 50 States and the District of Columbia. Under appellee's theory, the 'debt' owed to Rush would be 'present' in each of those jurisdictions simultaneously. It is apparent that such a 'contact' can have no jurisdictional significance."[24]

A final argument addressed by the Court attributed the insurer's forum contacts to the defendant by characterizing the attachment procedure as the "functional equivalent of a direct action against the insurer."[25] Such a characterization drew heavily on two assertions: first, that any liability is limited to the policy amount and thus involves no personal liability of the defendant;[26] secondly, that any judgment against the defendant would be satisfied from the policy proceeds available only for that purpose.[27] According to the direct action argument, it is therefore fair to consider an insured as a "nominal defendant" in a suit designed to obtain jurisdiction over the insurance company. This argument and its underlying characterizations, however, were rejected by the Court. As the majority correctly points out, any exercise of judicial jurisdiction requires a constitutionally fair assertion of power over the nominal defendant.[28] Only after such a proper exercise of judicial power can the insurer be brought in as a garnishee.

The crux of the majority's analysis of the direct action argument relates to how suits regarding absent defendants must be characterized. Under *Shaffer* the relationships to be examined involve the defendant, the forum, and the litigation.[29] Under the direct action approach the focus of the inquiry is shifted to the relationship "among the plaintiff, the forum, the insurer, and the litigation."[30] If this shift is permitted, the plaintiff's contacts with the forum become determinant of the defendant's due process rights. According to the Court, "[s]uch an approach is forbidden by *International Shoe* and its progeny."[31]

Meanings of the Elements. This issue was addressed in the case of *World-Wide Volkswagen Corp. v. Woodson*,[32] a products liability suit. The plaintiffs purchased an Audi automobile in New York and subsequently left New York for a new home in Arizona. While driving in Oklahoma, the plaintiffs were hit from behind and a fire ensued. The plaintiffs brought suit in Oklahoma against, among others,[33] the wholesale dealer and the retailer of the automobile, both New York corporations with business of-

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 330-32.
29. Shaffer v. Heitner, 433 U.S. 186, 204 (1977).
30. *Id.* at 332.
31. *Id.*
32. 444 U.S. 286 (1980).
33. Plaintiffs joined as defendants the automobile manufacturer, Audi; the importer, Volkswagen of America; the regional distributor, World-Wide Volkswagen Corp.; and the retail dealer, Seaway. *Id.* at 288.

fices in New York. As a wholesaler, World-Wide distributed vehicles, parts, and accessories under contract with a German automobile manufacturer to retail dealers in Connecticut, New York, and New Jersey. Seaway, the retailer, did business only in New York. Both wholesaler and retailer were "fully independant corporations whose relations with each other and with Volkswagen and Audi [were] contractual only."[34] As to these defendants no showing was made that any automobile, other than that of the plaintiffs, sold by either had ever entered Oklahoma.

The majority viewed the facts as revealing "a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction"[35] because the defendants did not sell or service cars in Oklahoma, did not generally avail themselves of privileges or benefits of Oklahoma law, did not solicit business in ways reasonably calculated to reach Oklahoma, and did not regularly sell directly or indirectly to Oklahoma customers.[36] "In short," the Court noted, "[the plaintiffs] seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma."[37] The *World-Wide Volkswagen* majority viewed the question of a defendant's contacts as one necessitating a specific purposeful act by which the defendant invoked a benefit, the privilege of conducting activities, from the forum state. Such a view narrowly traces the absent defendant's activities and thus limits the viability of the effects doctrine.[38]

Furthermore, the majority found little reason to distinguish between commercial and noncommercial activity. Rather, the opinion characterized any expansion of the effects doctrine as an adoption of foreseeability as a fairness standard. As the Court stated, if foreseeability were the test, then "[e]very seller of chattels would in effect appoint the chattel his agent for service of process."[39] The majority considered this test to be analogous to the *Harris v. Balk*[40] rule that was rejected in the companion *Rush* case.[41] The Court in *World-Wide Volkswagen* held that unless the absent defendant's conduct, whether under the guise of foreseeability or enjoy-

34. *Id.* at 289.
35. *Id.* at 295.
36. *Id.*
37. *Id.*
38. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971) provides:
> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

See Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
39. 444 U.S. at 296.
40. 198 U.S. 215 (1905).
41. 444 U.S. at 296; *see* 444 U.S. at 327-30.

ment of financial benefits accruing from a collateral relation to the forum, is such that he should reasonably anticipate being taken to court, then jurisdiction cannot be exercised.[42]

An uncertainty after *World-Wide Volkswagen* is the role to be played by interstate federalism in the due process limitations on the exercise of judicial jurisdiction.[43] The Court described the fairness doctrine as performing two related but distinguishable functions: "It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[44] Rejection of a pure territoriality approach to judicial jurisdiction was not intended, however, to suggest that state lines were irrelevant. Instead these lines are no longer absolutely determinative. The power to try cases, a basic attribute of sovereignty, was retained by the individual states, but it had to be exercised within a federal system. This required "a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."[45] According to the Court this meant that the state must at least have certain contacts with the defendant. The Court recognized, however, that jurisdiction cannot be exercised in every case in which the state has certain contacts with the defendant:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for the litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[46]

The importance of "interstate federalism" needs to be determined. The use of this term could mean that there is a new fourth element in judicial jurisdiction under due process. Conversely, it could mean that there is a duality to the forum state's interest in the tripartite test. In either case the result is the same; the forum state must not only have an affirmative interest in the controversy but that interest must be such that it will support the exercise of jurisdiction without unduly affecting the sovereign rights of other states. According to these requirements a court must consider a controversy as would an impartial observer, asking which state's or states' sov-

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42. *Id.* at 297.

43. Some cases already have begun the process of accommodating the principles announced in *World-Wide Volkswagen*. *See* Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980) (Japanese manufacturer of millions of cigarette lighters sold in the United States held amenable to suit in Texas); Castanho v. Jackson Marine, Inc., 484 F. Supp. 201 (E.D. Tex. 1980) (shipowner held subject to jurisdiction of a Texas court in a suit by a seaman, even though accident occurred in Great Britian, when base of shipowner's operation was in Texas).

44. 444 U.S. at 292.

45. *Id.* at 293.

46. *Id.* at 294.

ereignty is actually involved in a given dispute. Such an approach offers an alternative determinant in cases in which a focus on the defendant's contacts, particularly under the effects test, is not clear.

Great Western United Corp. v. Kidwell[47] was such a case and is therefore useful in illustrating the potential of such an approach. In that case a Delaware corporation, with its principal offices in Texas, attempted a takeover of a corporation having its principal office and assets in Idaho. When compliance with the Idaho takeover statute presented a problem, the Texas purchaser filed suit in Texas to enjoin enforcement of the statute by Idaho state officials. Even if one were to agree with the Fifth Circuit that the Idaho defendant did foresee or should have foreseen the effect that enforcement of the Idaho statute would have on a Texas corporation's business plans, thereby satisfying the defendant's contacts requirement,[48] the needs of interstate federalism, nevertheless, might well have prevented an exercise of jurisdiction. An impartial observer of the facts in this case would undoubtedly conclude that Idaho was the best forum for litigating this dispute. If not, then the kind of self-restraint necessarily owed sovereign coequals would be entirely missing.

As has been suggested, this concept of interstate federalism might logically be considered as a new fourth element or as an indication that the forum state's interest has a dual nature. Unless this concept is analogized to the defendant's contacts element of the "fairness" test, however, at least one technical problem arises. According to the language of the majority opinion in *World-Wide Volkswagen* "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."[49] To the extent that this language applies to the forum state, it cannot be waived by the defendant.[50] As a result, successful collateral attacks would be possible and would be functionally equivalent to those attacks based on a lack of subject matter jurisdiction. Furthermore, as the state whose sovereignty is violated would not normally be present before the forum state court, when a final judgment is brought to the state for enforcement it could, and if it were acting parochially would, raise the issue on its own motion. Surely this result is unintended and counterproductive. If this result did occur, however, a special type of collateral estoppel could be applied to prevent it.[51]

Status Cases. Exercise of judicial jurisdiction in cases involving family relationships has always involved special considerations. In the era of *Pen-*

47. 577 F.2d 1256 (5th Cir. 1978), *rev'd sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979). *See generally* Newton, *Conflict of Laws, Annual Survey of Texas Law*, 34 Sw. L.J. 385, 389 (1980).

48. 577 F.2d at 1267.

49. 444 U.S. at 294.

50. In the case of personal jurisdiction a general appearance subjects the defendant to the court's power. *See* R. LEFLAR, *supra* note 1, § 30.

51. *See, e.g.*, Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573 (1974) (Supreme Court fashioned a special doctrine of collateral estoppel for use in admiralty).

noyer v. Neff[52] the language but not the complete rationale of territoriality applied. The Court in *Pennoyer* spoke of a marriage "res."[53] Even though the Court in *Shaffer* eliminated the differences between suits in personam, quasi in rem, and in rem, it nonetheless cited with approval Justice Field's opinion in *Pennoyer*, and stated that Field "carefully noted that cases involving the personal status of the plaintiff, such as divorce actions, could be adjudicated in the plaintiff's home State even though the defendant could not be served within that State."[54] As a result, after *Shaffer* two major questions in this area developed. When does a case involve status? Once a case is determined to involve status, what are the specific requirements of fairness? *Kulko v. Superior Court*[55] addressed the first question and held that a claim for a support order is not a status case, thus rendering *Shaffer* inapplicable.[56] Divorce cases have long been held to be status cases.[57]

Perry v. Ponder[58] addressed both the status and the fairness issues. The

52. 95 U.S. 714 (1878).

53. *Id.* at 734-35.

54. Shaffer v. Heitner, 433 U.S. 186, 201 (1977). The due process clause still applied to such cases, but "fairness" was defined differently. *See* Williams v. North Carolina, 317 U.S. 287, 298-99 (1942) (divorce decree based on substituted service held valid); Wicks v. Cox, 146 Tex. 489, 493, 208 S.W.2d 876, 878 (1948) (jurisdiction over custody of children upheld based on state duty to provide for their welfare).

55. 436 U.S. 84 (1978).

56. *Id.* at 100-01.

57. *See, e.g.*, Williams v. North Carolina, 317 U.S. 287 (1942).

58. 604 S.W.2d 306 (Tex. Civ. App.—Dallas 1980, no writ). For other cases involving jurisdiction in status cases, see Felch v. Felch, 605 S.W.2d 399 (Tex. Civ. App.—Waco 1980, no writ) (jurisdiction attached to suit filed by mother in Texas for divorce and child custody, even though children were with their father in Washington, because domicile of children was in Texas); Cossey v. Cossey, 602 S.W.2d 591 (Tex. Civ. App.—Waco 1980, no writ) (trial court's refusal to assume jurisdiction over mother and children who had been absent from Texas for more than a year prior to the father's filing suit upheld); Oliver v. Boutwell, 601 S.W.2d 393 (Tex. Civ. App.—Dallas 1980, no writ) (special standards of inconvenience of the parties or forum are not to be considered as obstacles to jurisdiction in a modification of conservatorship suit, as long as due process is satisfied); Bergdoll v. Whitley, 598 S.W.2d 932 (Tex. Civ. App.—Austin 1980, no writ) (contacts not sufficient to warrant personal jurisdiction over the nonresident in a suit to increase child support payments when the only contact that he had with Texas was that his former wife lived there with his children); Comisky v. Comisky, 597 S.W.2d 6 (Tex. Civ. App.—Beaumont 1980, no writ) (district court had jurisdiction to grant a divorce because it was an in rem proceeding, but the court did not have personal jurisdiction over the parties because they had not been married in Texas, the wife had never been a resident of Texas, the children had never been before the court, and no proof existed that they had ever been in Texas); Bragdon v. Bragdon, 594 S.W.2d 561 (Tex. Civ. App.—Amarillo 1980, no writ) (judgment against husband for past-due support and maintenance payments based on Alabama divorce decree and Connecticut property settlement held enforceable, and husband precluded from attacking such decree because he acquiesced in the decree by remarrying another person); *Ex rel.* D.N.S., 592 S.W.2d 35 (Tex. Civ. App.—Beaumont 1979, no writ) (putative father held not subject to jurisdiction in Texas when his only alleged contact with the state was that the child resided in Texas according to his directives or approval); Crockett v. Crockett, 589 S.W.2d 759 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (Texas Family Code's long-arm statute was valid, and refusal to give extraterritorial effect to the concept of continuing jurisdiction with respect to a foreign divorce court was justified); Alston v. Rains, 589 S.W.2d 481 (Tex. Civ. App.—Texarkana 1979, no writ) (Arkansas probate court had jurisdiction to determine guardianship of the child, and full faith and credit was to be granted Arkansas decree in Texas); Brock v. Brock, 586 S.W.2d 927 (Tex. Civ. App.—El Paso 1979, no writ) (trial court did not

plaintiff-mother in *Perry* brought suit for child support and custody. She and the father had formerly lived in Alabama, were divorced in Alabama, and she moved to Texas with the child after having been awarded custody by the Alabama divorce court. Apparently the child was taken to Texas without the father's consent. About ten months after the divorce, and about six and one-half months after the mother had moved to Texas with the child, the father obtained a modification of the Alabama decree granting him custody. The mother then filed suit in Texas, and the father specially appeared, claiming that the court lacked personal jurisdiction over him. Because this case was one of child support and custody, the court had to confront the support question. The court correctly noted that *Kulko* had held that support cases were not status cases; therefore the fairness test of *Shaffer* applied and personal jurisdiction would not exist because the father did not purposefully benefit from any activities relating to the forum state.[59] This conclusion raised the question of whether the fairness test of *Shaffer* should apply to custody cases.

Two main differences between support cases and custody cases prevent *Kulko* from mandating application of *Shaffer*. First is the fact that a support order is a judgment establishing a direct obligation to pay,[60] whereas custody can be enforced without necessarily requiring affirmative action by the nonresident parent.[61] Secondly, "although in both types of litigation the interests of the child should be paramount, the child's interests are less easily identified with the interests of one parent if the issue is custody rather than support."[62] Of course, the presence of the child within the state asserting jurisdiction is important in this connection, and if the child is not present, then minimum contacts with the defendant parent may well be necessary.[63] As the court in *Perry* noted, there is a real disadvantage in any rule that would allow a court to adjudicate custody but not allow it to render a support decree.[64] This possibility is, however, inherent in *Kulko*.[65] In most instances a statutory answer exists: the adoption of the Uniform Reciprocal Enforcement of Support Act.[66]

The *Perry* court quite properly concluded that the United States

abuse its discretion in prohibiting former wife from taking child out of state without written permission of court and with notice to father of child).

59. 604 S.W.2d at 312; *see* Kulko v. Superior Court, 436 U.S. 84, 89 (1978); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

60. 604 S.W.2d at 313. Courts of the state of a party's residence are usually in a better position to determine the circumstances bearing on the ability to pay. *Id.*

61. A court acting in the best interests of the child must theoretically be willing to award custody to the nonresident. To the extent, therefore, that a constitutional exercise of jurisdiction depends on the question of whether a judgment has only a negative effect on the nonresident instead of requiring an affirmative obligation, a determination on the merits awarding custody to the nonresident results in a loss of the court's jurisdiction.

62. 604 S.W.2d at 313 (citing Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U. CAL. D.L. REV. 229, 233 (1979)).

63. *See* Oliver v. Boutwell, 601 S.W.2d 393, 396 (Tex. Civ. App.—Dallas 1980, no writ).

64. 604 S.W.2d at 313.

65. *See* Weintraub, *Texas Long-Arm Jurisdiction in Family Law Cases*, 32 SW. L.J. 965, 981 (1978).

66. UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT (1968). The Act has been

Supreme Court's decision in *May v. Andersen*[67] was not dispositive of either the status or fairness issues.[68] As to the proper characterization of custody cases, the court noted that custody of children is a status or relationship in precisely the same manner as the existence or nonexistence of a marriage.[69] A state has at least as great an interest in the custody of children as it has in a marriage.[70] Furthermore, as the interests of the children should be paramount, some basis for the exercise of jurisdiction is practically necessary for a child residing within the state's borders.[71]

If jurisdiction in a child custody case is to be exercised over the absent parent-defendant who has not purposefully availed himself of the privilege of conducting activities within the forum state, two basic theoretical approaches apply. First, the absent defendant's needs can be considered as much as possible within the context of the needs and interests of the plaintiff-parent, the child, and the forum state. As the discussion in the *Perry* case made clear, this approach is the better of the two. Secondly, the absent defendant can be ignored, and the action can be treated as one involving only the present parent and child. As status cases permit application of an undefined, particularized standard of fairness,[72] commentators have suggested that status is a res that may be determined wholly without regard to minimum contacts.[73] Alternately, a custody case could be viewed as one involving only subject matter jurisdiction, namely the status of a child, and, therefore, jurisdiction over the nonresident defendant is rendered unnecessary.[74]

Both of these approaches suffer from a common deficiency by ignoring

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adopted in both Alabama and Texas. *See* ALA. CODE, tit. 34, §§ 105-123 (1959); TEX. FAM. CODE ANN. §§ 21.01-.66 (Vernon 1975).

67. 345 U.S. 528 (1953).

68. 604 S.W.2d at 320-21. The court cited several reasons why *May* did not control. First, *May* did not involve the situation in which the state that rendered the child custody decree was also the residence of one of the parents and the child. Secondly, the *May* opinion was agreed to by only a plurality, not a majority, and therefore is only persuasive and not authoritative. Thirdly, since *May* was handed down, other cases, such as *Shaffer*, have been rendered. Finally, *May* does not necessarily address itself to the best interests of the child, the proper basis for a decision according to most legal scholars; rather, it looks to the rights of parents. *Id.* at 321.

69. Divorce cases provide the primary exception to a standard application of the due process fairness test. *See* notes 53-57 *supra* and accompanying text.

70. 604 S.W.2d at 315 (citing Wicks v. Cox, 146 Tex. 489, 494, 208 S.W.2d 876, 878 (1948) and Goldsmith v. Salkey, 131 Tex. 139, 145, 112 S.W.2d 165, 168 (1938)).

71. 604 S.W.2d at 315 (citing Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379, 387 (1959), Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 827 (1964), and Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 661 (1959)). Child custody has usually been seen as a status that can be determined by the child's domicile. *See* Peacock v. Bradshaw, 145 Tex. 68, 76, 194 S.W.2d 551, 555 (1946); Mills v. Howard, 228 S.W.2d 906, 908 (Tex. Civ. App.—Amarillo 1950, no writ).

72. *See generally* Bodenheimer & Neeley-Kvarme, *supra* note 62, at 230; *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1240 (1980).

73. *See* 604 S.W.2d at 314-16.

74. *Id.* at 322. This procedure was used in two other cases. *See* Thornlow v. Thornlow, 576 S.W.2d 697, 700-01 (Tex. Civ. App.—Corpus Christi 1979, writ dism'd w.o.j.), *cert. denied*, 100 S. Ct. 1596, 63 L. Ed. 2d 784 (1980); Hilt v. Kirkpatrick, 538 S.W.2d 849, 851 (Tex. Civ. App.—Waco 1976, no writ).

the basic, logical reality accepted in *Shaffer*. In that case the Supreme Court accepted the fact that a defendant's interest in the matter in litigation is necessarily and always affected in a civil suit.[75] As a result, the due process clause must be viewed with the individual in mind. Whether or not the same fairness standards apply or are to be applied in a similar manner, the court in the *Perry* case is correct in rejecting those approaches to judicial jurisdiction that eschew this basic holding. Treating child custody cases as res cases or cases involving only subject matter jurisdiction is clearly improper. Indeed, as the court notes, the logical extension of these approaches is that the absent defendant need not even be notified, a conclusion that belies the rationale of *Shaffer*, the teachings of *Mullane v. Central Hanover Bank & Trust Co.*,[76] and common sense.[77]

Due process requires that a forum state inquire:

> into the circumstances of the parties and the child for the purpose of determining whether the child and the [plaintiff-parent] have been in Texas long enough to give this state a sovereign's interest in and responsibility for the child's welfare and to provide access to sufficient evidence to make an informed decision concerning the child's best interests. If the court determines on this basis that due process has been satisfied, the court should then inquire as to whether the child's interests would be better served by an adjudication of custody by the courts of [the absent defendant's domicile or some other state].[78]

Perhaps this test could be molded in terms of *Shaffer* to require that a jurisdictional inquiry focus on the relationship among the plaintiff, the forum, and the litigation.

Some statutory basis for the exercise of jurisdiction must exist, or the court is without power to act. Consequently, an examination of the applicable statutory provisions for an affirmative grant is important. The Texas Family Code contains not only specific enumerations but also a blanket jurisdictional grant on "any basis consistent with the constitutions of this state or the United States for the exercise of the personal jurisdiction."[79] The obvious intent of this provision is to assert jurisdiction in the broadest possible sense.[80] Facts falling under either the specific grants or the generic grant must, however, still pass constitutional muster; that is, they must pass the test of fairness in child custody cases.

The court in *Perry* formulated the test in a child custody case so as to require that the plaintiff, the forum, and the litigation have sufficient contacts. The plaintiff could be either an individual or the state in the case of an emergency. In a true emergency the mere presence of the child would suffice; otherwise the parent would need to have resided in the state for a

75. Shaffer v. Heitner, 433 U.S. 186, 205 (1977).
76. 339 U.S. 306, 314 (1950).
77. 604 S.W.2d at 316.
78. *Id.* at 318.
79. TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1980-1981).
80. *See generally* U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (Tex. 1977); Weintraub, *supra* note 65.

sufficient period of time to establish legitimate relations. The forum has sufficient contacts when its interest in and responsibility for the child's welfare exist affirmatively and are not clearly outweighed by those of another state. The litigation has sufficient contacts when it is possible to obtain sufficient evidence to make a properly informed decision concerning the child's best interests. Further, as the court notes in *Perry*[81] while this approach does not necessarily show that the defendant has intentionally availed himself of the benefits of the forum state, nonetheless the defendant is affected and must be notified under the teachings of *Mullane*.[82] While this approach does not mean that there has to be a nonstatus showing of minimum contacts, it does mean that if the status requirement of due process is met, then a state court has personal jurisdiction over the defendant. Of course, the jurisdiction may not extend to the imposition of a purely personal duty.[83]

While the standard announced in *Perry* is imprecise, it is no less precise than the area of due process requirements generally. One very material difference, however, exists: concurrent jurisdiction may result in the courts of more than one state, a possibility that could clearly be detrimental to a proper determination of custody. The more affluent parent, once an amenable jurisdiction is found, may litigate the other parties into final, often unhappy, submission. No complete answer exists to this problem. Of course, the fact that two states could exercise jurisdiction does not mean that they would do so or that they would reach different results. Even if they did, application of full faith and credit to a custody decree would be a possible solution. While full faith and credit is an unsettled matter of federal constitutional law,[84] Texas law does give custody decrees full faith and credit.[85] In other states the doctrine of comity is used.[86] In either case changed circumstances allow the issue to be relitigated by any court with jurisdiction.[87]

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81. 604 S.W.2d at 316.

82. 339 U.S. 306, 314 (1950).

83. *See* note 61 *supra*.

84. *See generally* R. LEFLAR, *supra* note 1, § 244; R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 5.3B (2d ed. 1980); Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1210-13 (1969).

85. *See* Bukovich v. Bukovich, 399 S.W.2d 528, 529 (Tex. 1966).

86. *See* 604 S.W.2d at 319.

87. Excessive litigation is clearly not in the best interests of justice of the child whose custody is in question. The Texas Family Code addresses this problem in the context of a child and managing conservator who have left Texas and have lived in another state for more than six months. Section 11.052 provides that unless there is a written agreement regarding the continuing jurisdiction of the original supervisory court, that court may not exercise its continuing jurisdiction to modify a decree. TEX. FAM. CODE. ANN. § 11.052(a) (Vernon Supp. 1980-1981); Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 34 SW. L.J. 159, 160-61 (1980). Section 11.053 provides that Texas courts shall recognize and enforce original or modified final decrees of other states so long as that state exercised jurisdiction "substantially in accordance with the jurisdictional prerequisites of this code." TEX. FAM. CODE ANN. § 11.053 (Vernon Supp. 1980-1981).

B. *Jurisdiction in Estate Tax Cases*

Estates of the rich, who seem to have a penchant for travel and for multiple homes, present special jurisdictional problems when more than one state lays claim to an estate as being a part of its tax base. Such multiple taxation, at least in theory, is not permissible.[88] The problem for the estate and for the individual claimants thereunder is finding a forum to hear claims of double taxation. Resort to the state courts, given the difficulty of conclusively fixing domicile, often does not work.[89] Use of the Federal Interpleader Act[90] was disallowed by the Supreme Court in *Worcester County Trust Co. v. Riley*.[91] Two years later, however, the Court seemed to offer some hope to exceptional estates in *Texas v. Florida*.[92] In that case the Court allowed the invocation of its original jurisdiction over disputes between the states when the pleading alleged that not all of the claims of the contending states could be satisfied out of the estate.[93]

The death of Howard Hughes is proving to be the basis for a new examination of the problem of double estate taxation by states. California filed suit in the Supreme Court against Texas, alleging that the state of Howard Hughes was insufficient to satisfy the claims of both California and Texas. Under the authority of *Texas v. Florida*, this approach seemed appropriate;[94] in June 1978, however, the Supreme Court denied California's motion for leave to file a bill of complaint.[95] Three different concurring opinions, representing the views of four Justices, suggested that while no relief was possible by way of an original suit before the Supreme Court, judgment under the federal interpleader statute[96] might be possible.[97] After the Supreme Court denied California's motion, the Texas administrators of the Hughes estate filed an interpleader action, *Lummis v. White*,[98] in a federal district court in Texas.

In *Lummis* the district court determined the parties to be the Texas ad-

88. For the taxation situs of tangible property, see City Bank Farmers Trust Co. v. Schnader, 293 U.S. 112, 119 (1934); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 206 (1905). For the taxation situs of intangible property, see Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 436 (1980). Intangible personal property may be taxed only at the place of the owner's domicile. *See* First Nat'l Bank v. Maine, 284 U.S. 312, 323 (1932). *See generally* Tweed & Sargent, *Death and Taxes Are Certain—But What of Domicile*, 53 HARV. L. REV. 68 (1939).

89. *Compare* Dorrance's Estate, 309 Pa. 151, 163 A. 303, *cert. denied*, 287 U.S. 660, 288 U.S. 617 (1932) *with* Hill v. Martin, 296 U.S. 393 (1935) *and* New Jersey v. Pennsylvania, 287 U.S. 580 (1932) (per curiam) *and In re* Estate of Dorrance, 115 N.J. Eq. 268, 170 A. 601, 116 N.J. Eq. 204, 172 A. 503 (supp. op.) (1934).

90. 28 U.S.C. § 1335 (1976).

91. 302 U.S. 292, 299-300 (1937).

92. 306 U.S. 398 (1939).

93. *Id.* at 405-10.

94. In the more common estate case, states are unlikely to sue each other in the Supreme Court. In a celebrated case, however, such as that of Howard Hughes, such action is predictable.

95. California v. Texas, 437 U.S. 601, 601 (1978) (per curiam).

96. 28 U.S.C. § 1335 (1976).

97. 437 U.S. at 602 (Brennan, J., concurring); *id.* at 614 (Stewart, J., concurring); *id.* at 616 (Powell, J., concurring).

98. 491 F. Supp. 5 (W.D. Tex. 1979), *rev'd*, 629 F.2d 397 (5th Cir. 1980).

ministrator of the Hughes estate on one side, and the United States and the states of California and Texas on the other.[99] This alignment caused problems with establishing diversity jurisdiction even under the minimal diversity requirements of interpleader actions.[100] The court found that minimal diversity was lacking because the United States is not a "citizen of a state" for diversity purposes,[101] and a state is not a citizen of itself for federal diversity purposes.[102] The interpleader claim was, therefore, dismissed for want of diversity.[103]

On appeal the Fifth Circuit characterized its task as deciding "whether the federal system that has spawned Lummis' dilemma of double taxation provides him with a remedy."[104] As this formulation of the issue makes clear, common sense demands that there be some available forum for conclusively determining domicile and therefore death taxes. After noting that four Justices of the Supreme Court supported the use of the federal interpleader statute,[105] the court turned to the question of the diversity necessary in an interpleader action.[106] The court concluded that only minimal diversity was required among the claimants, and that the citizenship of an interested stakeholder may be considered for purposes of this showing of minimal diversity.[107] The court thus held that the district court had jurisdiction.[108]

II. CHOICE OF LAW

A. *The Constitutional Question*

In the case of *Allstate Insurance Co. v. Hague*[109] the Supreme Court addressed the question of the meaning of the due process and full faith clauses in choice of law decisions. In *Hague* the cause of action arose out of an automobile and motorcycle accident that occurred in Wisconsin near the Minnesota line. The passenger on the motorcycle was killed, and his wife sued his insurance carrier seeking recovery under uninsured motorist coverage. The motorcycle passenger lived in Wisconsin at the time of death, but had worked across the state line in Minnesota for fifteen years. While living in Wisconsin, the decedent had purchased insurance coverage from Allstate. After the accident, the widow moved to Minnesota where she established her residence. She later married a resident of Minnesota, sought and obtained appointment as a personal representative of the estate

99. 491 F. Supp. at 7.
100. *See* 28 U.S.C. §§ 1332, 1335 (1976); J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE 627-28 (2d ed. 1974).
101. 491 F. Supp. at 8; *see* Kent v. Northern Cal. Regional Office of Am. Friends Serv. Comm., 497 F.2d 1325, 1327 (9th Cir. 1974).
102. 491 F. Supp. at 8; *see* Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894).
103. 491 F. Supp. at 8.
104. 629 F.2d 397, 404 (5th Cir. 1980).
105. 28 U.S.C. § 1335 (1976).
106. 629 F.2d at 399.
107. *Id.* at 399-401.
108. *Id.* at 403.
109. 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981).

of her deceased husband in Minnesota, and then filed suit in Minnesota against Allstate. After finding that it had jurisdiction and after refusing to dismiss on the ground of forum non conveniens, the Minnesota trial court applied Minnesota law and granted summary judgment for the plaintiff.[110] On appeal the Supreme Court upheld the application of Minnesota law, indicating that the due process and full faith clauses act as a rather limited check on state choice of law power.[111] This conclusion, however, was reached without majority agreement on the underlying principles and their proper application to the facts.

The plurality opinion[112] viewed the due process clause and the full faith and credit clause as functionally the same for purposes of constitutional analyses.[113] The test cited by the Court is that "for a State's substantive law to be selected in a constitutionally permissible manner, the State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[114] According to the plurality, Minnesota had three contacts with the parties and the occurrence giving rise to the litigation that, in the aggregate, permitted the selection of Minnesota law.[115] The three contacts listed by the court were: (1) Mr. Hague's status as a member of Minnesota's workforce;[116] (2) Allstate's presence in Minnesota;[117] and (3) the fact that Mrs. Hague became a Minnesota resident prior to institution of the instant litigation.[118]

Of these contacts the first is the most significant. Although resident status establishes a more important state interest than employment status, employment in the state is nonetheless sufficient for the application of that state's laws. The interests of the state of employment are in general analogous to the interests of the state of residence and involve police power responsibilities, state services and amenities, a concern for the safety and well being of a workforce, and the "concomitant effect on Minnesota employers."[119] The fact that Mr. Hague was not killed while in Minnesota or while commuting to work there does not defeat these interests in that the employment relationship is affected even by the death of an employee in another state. Further, while Mr. Hague's residence in Wisconsin may well support application of Wisconsin law, it does not constitutionally mandate it to the exclusion of Minnesota law.

The second contact identified was Allstate's presence in Minnesota. Because Allstate was at all times present and doing business in Minnesota, it could hardly claim surprise with respect to the application of local law,

110. 289 N.W.2d 43, 44 (Minn. 1979).
111. 101 S. Ct. at 644, 66 L. Ed. 2d at 535.
112. Justices White, Marshall, and Blackmun joined Justice Brennan's plurality opinion.
113. 101 S. Ct. at 637 n.10, 66 L. Ed. 2d at 527 n.10.
114. *Id.* at 640, 66 L. Ed. 2d at 531.
115. *Id.*
116. *Id.*
117. *Id.* at 642, 66 L. Ed. 2d at 533.
118. *Id.* at 643, 66 L. Ed. 2d at 534.
119. *Id.* at 641, 66 L. Ed. 2d at 531.

especially insofar as it affected a Minnesota resident and a longstanding member of Minnesota's workforce.

Thirdly, Mrs. Hague became a resident of Minnesota prior to institution of the litigation. While this factor is insufficient in itself to support a choice of law, when there is no suggestion that the change in residence was made for the purpose of "finding a legal climate especially hospitable to her claim,"[120] Minnesota at least has an interest in full compensation for resident accident victims.

The concurring opinion of Justice Stevens stated that a proper analysis of choice-of-law questions requires independent review under the full faith and credit clause and under the due process clause.[121] Justice Stevens argued that full faith and credit deals with the federal interest in insuring respect for state sovereignty, while due process deals with the litigants' interest in a fair adjudication of their rights.[122] Because there was no showing that Minnesota's refusal to apply Wisconsin law posed any direct or indirect threat to Wisconsin's sovereignty, and because application of Minnesota law did not result in unfairness to either litigant, the concurrence found no constitutional violation to exist.[123] Justice Stevens reached this conclusion even though he regarded the decision to apply Minnesota law as unsound as a matter of conflicts law.[124]

The dissent[125] agreed with the plurality that the due process and full faith and credit clauses form a single unit for constitutional review in choice-of-law cases.[126] According to the dissent, two enduring constitutional policies were implicated: first, a concern that the contacts between the forum state and the litigation not be so slight and casual that application of forum law would be fundamentally unfair to a litigant;[127] secondly, a showing that the forum state has a legitimate interest in the outcome of the litigation before it.[128]

The dissent found that the litigants in this case, Allstate and the insured, had no reasonable expectations that were frustrated.[129] Looking at the contractual relationship between the parties at the time of its execution, the dissent concluded that the risk insured was not geographically limited in that Hague commuted daily to Minnesota and there was a reasonable probability that the risk would materialize there.[130] As the dissent noted, "[t]he fact that the accident did not, in fact, occur in Minnesota is not controlling because the expectations of the litigants *before* the cause of ac-

120. *Id.* at 643, 66 L. Ed. 2d at 534.
121. *Id.* at 645, 66 L. Ed. 2d at 536.
122. *Id.* at 644, 66 L. Ed. 2d at 535.
123. *Id.* at 647, 650, 66 L. Ed. 2d at 538-39, 542.
124. *Id.* at 646, 66 L. Ed. 2d at 537.
125. Chief Justice Burger and Justice Rehnquist joined Justice Powell's dissenting opinion. Justice Stewart took no part in the consideration or decision of this case.
126. 101 S. Ct. at 650, 66 L. Ed. 2d at 543.
127. *Id.* at 651, 66 L. Ed. 2d at 543.
128. *Id.* at 651, 66 L. Ed. 2d at 544.
129. *Id.* at 651, 66 L. Ed. 2d at 543.
130. *Id.*

tion accrues provide the pertinent perspective."[131]

But the dissent could find no showing that the forum state had a legitimate interest in the outcome of the litigation before it.[132] The dissent examined the three contacts cited by the plurality[133] and found that they failed to establish a connection between Minnesota and the issues in litigation.[134] The dissent stated that the post-accident change of residence was constitutionally irrelevant because of precedent[135] and because any other view would invite forum shopping, defeat the defendant's reasonable expectations at the time the cause of action accrued, and give effect to unrelated facts and rules.[136] The dissent emphasized that the fact that Allstate did business in the forum state was meaningful as a separate factor only as to property, persons, or contracts executed within or to be carried out within the forum state.[137] Finally, the dissent viewed the fact that the insured was a member of Minnesota's workforce as providing no contact in that the question of payment of benefits to the estate of a nonresident employee hardly furthers any substantial state interest relating to employment.[138] As the dissent pointed out: "The substantive issue here is solely one of compensation, and whether the compensation provided by this policy is increased or not will have no relation to the State's employment policies or police power."[139]

In sum, the Supreme Court decision in *Hague* stands for the propositions that there is no constitutional review of choice-of-law methodologies as such and that the due process and the full faith and credit clauses provide only a modest check on state power in this area. Unfortunately, the exact test and its underlying policies remain in doubt. Of the three approaches, that of the dissent seems the best.

B. *From Lex Loci to the Restatement—The Choice of Law Rule in Texas*

Last year's *Survey* article discussed in detail the case of *Gutierrez v. Collins*[140], in which the Texas Supreme Court adopted the most significant

131. *Id.* at 653, 66 L. Ed. 2d at 546 (emphasis in original).

132. *Id.*

133. *See* notes 115-18 *supra* and accompanying text.

134. 101 S. Ct. at 653-54, 66 L. Ed. 2d at 546-48. Important to note is the difference in the formulation of the test for sovereign interests adopted by Justice Stevens in concurrence as compared to that used by Justice Powell in dissent. Justice Stevens argues that a forum's choice of law is constitutionally invalid only upon a showing of improper interference with some other sovereign, *id.* at 647, 66 L. Ed. 2d at 538-39, while Justice Powell stresses the need of the forum affirmatively to show sufficient contacts. *See id.* at 651, 66 L. Ed. 2d at 543.

135. *Id.* at 653, 66 L. Ed. 2d at 546 (citing John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 182 (1936) and Home Ins. Co. v. Dick, 281 U.S. 397, 408 (1930)).

136. 101 S. Ct. at 653, 66 L. Ed. 2d at 546.

137. *Id.*

138. *Id.* at 654, 66 L. Ed. 2d at 547.

139. *Id.*

140. 583 S.W.2d 312 (Tex. 1979); *see* Newton, *supra* note 47, at 397.

relationship test of the *Restatement (Second) of Conflicts*[141] as to personal injuries suffered in another jurisdiction.[142] During this survey period additional Texas cases dealt with choice of law.

The Texas Supreme Court in *Robertson v. Estate of McKnight*[143] addressed the question of whether the Texas doctrine of interspousal tort immunity bars a suit by the wife's estate against the husband's estate for wrongful death resulting from a plane crash in Texas. In December 1974 a plane took off in New Mexico, with Byron McKnight, the pilot, and Amelda McKnight, his wife and passenger. The plane crashed in Texas, killing both. Byron and Amelda, both domiciliaries of New Mexico, intended to return to New Mexico and their only connection with Texas was the fact that the accident occurred in that state.[144] Roberston, the executor of the wife's estate, sued the husband's estate for wrongful death in a district court in Travis County, Texas.

The trial court granted the defendant's summary judgment motion, holding that Texas law applied and barred the action under the doctrine of interspousal tort immunity.[145] The court of civil appeals at Tyler affirmed, holding that article 4678,[146] as it existed at the time of the crash, applied and mandated application of Texas law.[147] According to the court, the alteration of article 4678[148] to allow a free choice of law did not apply in the case at bar because the amendments occurred after the date of the crash.[149] The court noted that because the amendments were substantive they were not to be given retroactive effect absent a clearly expressed legislative intent.[150] The court found no such intent with regard to the amendments in question.[151] The supreme court, however, reviewed article 4678 and concluded that it "*only* applied to deaths or injuries that occurred *outside* Texas."[152] Article 4678 had no application, therefore, because the death in question occurred in Texas. The court held that the applicable

141. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971).
142. 583 S.W.2d at 318.
143. 24 Tex. Sup. Ct. J. 74 (Nov. 15, 1980).
144. *Id.* at 75.
145. 591 S.W.2d 639, 640 (Tex. Civ. App.—Tyler 1979).
146. 1917 Tex. Gen. Laws, ch. 156, § 1, at 365.
147. 591 S.W.2d at 643.
148. TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon Supp. 1980-1981).
149. 591 S.W.2d at 643.
150. *Id.* at 644.
151. *Id.* at 644-45 (citing Penry v. William Barr, Inc., 415 F. Supp. 126, 127 (E.D. Tex. 1976); Gutierrez v. Collins, 570 S.W.2d 101, 103 (Tex. Civ. App.—El Paso 1978), *aff'd*, 583 S.W.2d 312 (Tex. 1979); Cass v. Estate of McFarland, 564 S.W.2d 107, 110 (Tex. Civ. App.—El Paso 1978, no writ)).
152. 24 Tex. Sup. Ct. J. at 74 (emphasis in original) (citing Brown v. Seltzer, 424 S.W.2d 671 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.)); *see* New York Life Ins. Co. v. Baum Media Sales & Marketing, Inc., 617 F.2d 1201 (5th Cir. 1980) (judgment for insurer on ground that policy was void ab initio under Louisiana law was premature because choice of law was unresolved); Baird v. Bell Helicopter Textron, 491 F. Supp. 1129 (N.D. Tex. 1980) (Texas law applied to product liability and to contribution claims, but Canadian law applied to nonpecuniary damages claim); Hayward v. Southwest Ark. Elec. Coop. Corp., 476 F. Supp. 1008 (E.D. Tex. 1979) (under 1975 amendment to Texas Wrongful Death Act, Texas courts may apply Arkansas statute when deceased killed in Arkansas).

Texas statute was the pre-1975 amendment form of article 4671.[153] Looking at that provision, the supreme court declared that "[a]rticle 4671 contained no statutory choice of law to be applied in wrongful death actions where the death occurred in Texas."[154] Choice of law, therefore, was to be determined by the common law of Texas.[155]

Until *Gutierrez v. Collins*[156] Texas followed the rule of lex loci delicti as to choice of law. In that case, the supreme court adopted the most significant relationship doctrine set forth in the *Restatement (Second)*.[157] The supreme court in *Robertson* held that the *Restatement* applied to interspousal tort immunity and that it applied to this cause of action even though the case arose prior to the *Gutierrez* decision.[158] Based on section 169 of the *Restatement*, the court concluded that the decedents' domicile would control choice of law.[159] As a result of *Robertson* little doubt exists that in Texas the *Restatement (Second) of Conflicts* applies to choice of law questions where not prohibited by statute.

The *Robertson* court also discussed whether New Mexico law, which permits spouses to recover from each other for negligently inflicted injuries, violated good morals, natural justice, or was prejudicial to the general interests of Texas citizens.[160] Both as a matter of common sense and because a larger number of states[161] allow interspousal suits, the court determined that the rule did not violate good morals or natural justice.[162] Further, the court noted that when both spouses involved are New Mexico domiciliaries, failure to apply a Texas rule designed to protect domestic tranquility and conform with special marital property laws would not prejudice Texans.[163]

Two rather specialized cases of importance to choice of law questions were decided during the survey period: *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co.*[164] and *Fisher v. Agios Nicolaos V.*[165] *Woods-Tucker*, involving a chapter XI bankruptcy proceeding, posed the question whether a particular transaction was in fact a sale-leaseback or was instead a usurious secured loan. Citing Professor Moore, the court noted that in federal matters a federal court is not bound by the forum

153. 24 Tex. Sup. Ct. J. at 74-75.
154. *Id.* at 75.
155. *Id.*
156. 583 S.W.2d 312 (Tex. 1979).
157. *Id.* at 318.
158. 24 Tex. Sup. Ct. J. at 75.
159. *Id.*
160. *Id.*; *see* Gutierrez v. Collins, 583 S.W.2d 312, 321 (Tex. 1979); California v. Copus, 158 Tex. 196, 203, 309 S.W.2d 227, 232 (1958).
161. *See* Annot., 29 A.L.R.3d 603 (1970).
162. 24 Tex. Sup. Ct. J. at 75.
163. *Id.*
164. 626 F.2d 401 (5th Cir. 1980). [Editor's Note: After this Article went to print the Fifth Circuit, on petition for rehearing, withdrew and vacated its previous opinion, substituting a new opinion in its place. No. 79-1651 (5th Cir. Apr. 3, 1981). The court upheld the contractual choice of law allowed by the UCC and affirmed the judgment of the district court. *Id.*, slip. op. at 5545. This case will be discussed at length in next year's *Survey*.]
165. 628 F.2d 308 (5th Cir. 1980).

state's conflicts rules.[166] Instead, the court stated that a bankruptcy court should look to the law of the state with the most significant contacts to the transaction when federal law does not offer a controlling answer.[167] As the court viewed the facts, Texas had the most significant contacts with the transaction at issue.[168] The contract in question, however, contained a choice of law clause stipulating that it was to be governed by Mississippi law. According to the majority, Texas choice-of-law rules in usury cases, like Texas usury laws, were designed and have been interpreted to protect Texas borrowers.[169] The court noted that when a Texas borrower transacts in Texas, a contractual provision choosing a law other than Texas law may be ignored if it amounts to a device to evade the usury laws of Texas.[170] In such cases, the court stated that Texas usury law is to be applied.[171] Because the provision named a state that had no interest in the application of its own usury laws, the court concluded that Texas usury laws should apply despite the parties' contrary stipulation.[172]

In his dissent Judge Tate agreed that Texas choice of law should apply,[173] but argued that such a rule must be attuned to commercial law and to Texas's commitment to the overriding policy of national uniformity that was ratified by the Texas Legislature when it adopted the Uniform Commercial Code.[174] In light of the applicable UCC provisions,[175] the dissent would have upheld the parties' contractual choice of law.[176]

Fisher v. Agios[177] dealt with the proper relationship between choice of law factors and the issue of forum non conveniens in an admiralty case. A Greek citizen, hired in Greece, came to Beaumont to serve on a vessel owned by a Liberian corporation and operated by a Panamanian corporation. Nine days after joining the crew he was killed in an onboard accident. His surviving widow and dependents sought recovery in a United

166. 626 F.2d at 406 (citing 1A MOORE'S FEDERAL PRACTICE, pt. 2, ¶ 0.325 (2d ed. 1980)).

167. 626 F.2d at 406 (citing Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161-62 (1946)).

168. 626 F.2d at 406.

169. *Id.* at 406-10 (citing Building & Loan Ass'n v. Griffin, 90 Tex. 480, 39 S.W. 656 (1897); Dugan v. Lewis, 79 Tex. 246, 14 S.W. 1024 (1891); High Fashion Wigs Profit Sharing Trust v. Hamilton Inv. Trust, 579 S.W.2d 300 (Tex. Civ. App.—Eastland 1979, no writ); Comment, *Usury in the Conflict of Laws: The Doctrine of the Lex Debitoris*, 55 CALIF. L. REV. 123, 183-88 (1967), and distinguishing Securities Inv. Co. v. Finance Acceptance Corp., 474 S.W.2d 261 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.)); *cf.* R. LEFLAR, *supra* note 1, § 152 (discussing cases that uphold a contract if its rate of interest is permitted by any state to which the contract is substantially related).

170. 626 F.2d at 407.

171. *Id.* at 409.

172. *Id.* at 414.

173. *Id.* at 415.

174. *Id.*

175. TEX. BUS. & COM. CODE ANN. § 1.105(a) (Tex. UCC) (Vernon Supp. 1980-1981); U.C.C. § 1-105(1) (1972 version).

176. 626 F.2d at 421. Justice Tate's position was eventually adopted by the court. *See* note 164 *supra*. *Cf.* Walker v. Associates Financial Servs. Corp., 588 S.W.2d 416 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.) (if no claim of fraud or subterfuge is raised, choice of law provision will be upheld).

177. 628 F.2d 308 (5th Cir. 1980).

States District Court under the Jones Act and general maritime law. After a judgment favorable to plaintiffs, defendants appealed, claiming in part that the trial court should have applied the doctrine of forum non conveniens or, in the alternative, that Greek rather than American law should have applied. The court noted that, although the issues of choice of law and forum non conveniens share similar elements, the choice of law test set forth in *Lauritzen v. Larsen*[178] was held not determinative[179] of the forum non conveniens issue, which the court ruled was controlled by *Gulf Oil Corp. v. Gilbert*.[180] Finally, the court concluded that the trial court did not err in choosing to apply American law.[181]

III. JUDGMENTS

Article IV, section 1 of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."[182] In the case of judgments, full faith and credit[183] mandates that the general doctrine of res judicata[184] be applied. Thus if a court with jurisdiction has rendered a final judgment, that judgment may have no less finality in a sister state. This doctrine has bound the states together by preventing individuals from undoing formal determinations by crossing boundary lines.

In the case of rules of law, however, the situation has been quite different.[185] Full faith and credit has not been interpreted to mean the same when applied to public acts as when applied to judicial proceedings. While the propriety of this dichotomy has sometimes been challenged,[186] especially in the area of workers' compensation,[187] it has been considered

178. 345 U.S. 571, 588-90 (1953); *see* Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 308-09 (1970); Romero v. International Terminal Operating Co., 358 U.S. 354, 381-84 (1959).

179. 628 F.2d at 313.

180. 330 U.S. 501, 508 (1947).

181. 628 F.2d at 318.

182. U.S. CONST. art. IV, § 1. The remainder of this section provides: "And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof." *Id.*

183. This concept should be contrasted with the idea of comity. Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another *nation*." Hilton v. Guyot, 159 U.S. 113, 164 (1895) (emphasis added). The use of the comity concept does not necessarily result in a mandatory application of res judicata.

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." Newton, *supra* note 47, at 411 n.184 (citing Abbott Laboratories v. Gravis, 470 S.W.2d 639 (Tex. 1971)). "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." Newton, *supra* note 47, at 411 n.185 (citing Bensen v. Wanda Petroleum Co., 468 S.W.2d 631 (Tex. 1971)).

185. This common sense distinction is reflected in case law even though the language of art. IV, § 1 does not appear to distinguish between rules of law and judgments.

186. *See* Yarborough v. Yarborough, 290 U.S. 202, 213-27 (1933) (Stone, J., dissenting); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971).

187. *See* Wolkin, *Workmen's Compensation Award—Commonplace or Anomaly in Full Faith and Credit Pattern*, 92 U. PA. L. REV. 401 (1944).

settled law.[188] The recent case of *Thomas v. Washington Gas Light Co.*,[189] however, has considerably altered the settled nature of the law of full faith and credit.

Thomas, a resident of the District of Columbia and an employee of a District of Columbia company, worked primarily in the District but also worked in Virginia and Maryland. While at work in Arlington, Virginia, he sustained a back injury. Two weeks later he entered into a Virginia worker's compensation agreement that subsequently was approved by the Virginia Industrial Commission. More than three years later, Thomas sought compensation in the District of Columbia under the District of Columbia act. The primary issue raised was whether the Virginia award constrained the District of Columbia from giving a second supplemental award in light of full faith and credit requirements.[190] Seven Justices concluded that a supplemental award was not barred.[191] Four of those Justices joined in a plurality opinion[192] that proved to be of interest.

The plurality examined two existing Supreme Court decisions. The first, *Magnolia Petroleum Co. v. Hunt*,[193] held that the full faith and credit clause precluded an employee who had received a workers' compensation award from seeking a supplemental award in another state. The second, *Industrial Commission v. McCartin*,[194] held that absent "unmistakable language" that an initial award was intended to preclude a supplemental award in another state, such a supplemental award was not foreclosed.[195] Finding that subsequent decisions overwhelmingly adopted the *McCartin* test, the plurality concluded that *Magnolia* should be overruled.[196] Although the Virginia Workmen's Compensation Act's[197] exclusive remedy provision was not exactly the same as the Illinois provision involved in *McCartin*, it did not, according to the plurality, contain "unmistakable

188. *See* R. LEFLAR, *supra* note 1, §§ 74-75; R. WEINTRAUB, *supra* note 84, §§ 9.3, 9.3B.

189. 100 S. Ct. 2647, 65 L. Ed. 2d 757 (1980). Under 28 U.S.C. § 1738 (1976), the District of Columbia is obligated to give full faith and credit to judgments just as is a state. Other recent developments in the area of judgments include: Royal Bank v. Trentham Corp., 491 F. Supp. 404 (S.D. Tex. 1980) (rejection of doctrine of reciprocity); General Exploration Co. v. David, 596 S.W.2d 145 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (plaintiff entitled to judgment for amount of California judgment when defendant permitted judgment to become final); Cousins v. Cousins, 595 S.W.2d 172 (Tex. Civ. App.—Tyler 1980, writ dism'd) (under Oklahoma statute a valid decree of divorce barred wife from claiming benefits in subsequent Texas divorce action); Cobb v. Pratt, 593 S.W.2d 351 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (final partition judgment subject to collateral attack only in face of jurisdictional defect in prior judgment); Colson v. Thunderbird Bldg. Materials, 589 S.W.2d 836 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (full faith and credit clause does not prohibit test of foreign forum's jurisdiction); Exxon Corp. v. Butler, 585 S.W.2d 881 (Tex. Civ. App.—San Antonio 1979, no writ) (law of case doctrine binds appellate court to prior decision of former appeal of same case).

190. 100 S. Ct. at 2653, 65 L. Ed. 2d at 763.

191. The majority included Chief Justice Burger and Justices Brennan, Stewart, White, Blackmun, Powell, and Stevens.

192. Justices Brennan, Stewart, Blackmun, and Stevens joined in the plurality opinion.

193. 320 U.S. 430 (1943).

194. 330 U.S. 622 (1947).

195. *Id.* at 628.

196. 100 S. Ct. at 2663, 65 L. Ed. 2d at 776.

197. VA. CODE § 65.1-1 to -152 (1973 & Supp. 1979).

language" designed to preclude a supplemental award in another state.[198]

While the allowance of a supplemental award was acceptable to a majority of the Justices,[199] the four Justices who joined in the plurality opinion were unhappy with the rationale of the *McCartin* decision.[200] The plurality implicitly recognized certain "normally accepted full faith and credit principles,"[201] such as the idea that "the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was produced."[202] Under this formula, a state might indirectly determine the extraterritorial effect of its judgment by defining the effect of its judgment within the state. While the plurality considered this acceptable, it found that the *McCartin* rule, "focusing as it does on the extraterritorial intent of the rendering State, is fundamentally different"[203] because it encourages parochialism.[204] The plurality, therefore, called for a new examination of full faith and credit principles.[205]

The plurality then proposed a balancing test involving state interests without discussing its merits.[206] According to the plurality, Virginia's interest in limiting liability of companies that transact business within its borders, and the interest of both Virginia and the District in the injured employee, and Virginia's interest in having the integrity of its formal determinations respected by other sovereigns, represented conflicting legitimate concerns that are to be resolved under the teachings of *Alaska Packers Association v. Industrial Accident Commission*[207] and its progeny.[208] State interests in "compensation policies,"[209] according to the plurality, are not to be resolved " 'by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.' "[210] This approach, then, requires choice, but does not mandate a particular choice and would allow an employee such as Thomas to seek compensation under the scheme of either the jurisdiction where he is employed or where the accident occurred.[211] Any individual state's interest in limiting potential liability would not be controlling because it would

198. 100 S. Ct. at 2654, 65 L. Ed. 2d at 765.
199. *Id.* at 2663, 2665, 65 L. Ed. 2d at 776, 778.
200. *Id.* at 2656, 65 L. Ed. 2d at 767.
201. *Id.* at 2655, 65 L. Ed. 2d at 766.
202. *Id.* (citing Hampton v. M'Connel, 16 U.S. (3 Wheat.) 234, 235 (1818)).
203. 100 S. Ct. at 2655, 65 L. Ed. 2d at 767.
204. *Id.* at 2656, 65 L. Ed. 2d at 767.
205. *Id.* at 2658-59, 65 L. Ed. 2d at 770.
206. *Id.* at 2659, 65 L. Ed. 2d at 770-71.
207. 294 U.S. 532 (1935).
208. 100 S. Ct. at 2659, 65 L. Ed. 2d at 771.
209. *Id.*, 65 L. Ed. 2d at 770-71; *see* Crider v. Zurich Ins. Co., 380 U.S. 39, 42-43 (1965); Carroll v. Lanza, 349 U.S. 408, 412-13 (1955).
210. 100 S. Ct. at 2659, 65 L. Ed. 2d at 771 (quoting Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 547 (1935)).
211. This is true whether or not either statute purported to confer an exclusive remedy. 100 S. Ct. at 2660, 65 L. Ed. 2d at 772.

not be directly achieved. Because both Virginia and the District had an interest in providing adequate compensation to the injured worker, the plurality found that the allowance of successive awards presented "no danger of significant conflict."[212]

This analysis is superficially attractive but does not withstand close scrutiny. The primary fallacy is that it equates statutes with judgments[213] without showing that this equality is logically appropriate. As a result, Virginia's interest in fixing a limit on liability through a judgment[214] is largely ignored. In addition, by focusing on the fact that the Virginia workmen's compensation award is not a final judgment made by a tribunal with choice of law power, the plurality invites the very parochialism that it condemns. Employers will now be encouraged to turn awards into final judgments and to lobby for legislative changes to give workers' compensation boards choice of law power.[215]

Finally, the plurality opinion's discussion of Virginia's interest in the integrity of its judicial system misplaces the proper emphasis of full faith and credit. The collective interest[216] of the United States lies at its heart. The plurality approach is proper only if it does not undercut the nationally unifying force of full faith and credit.[217]

Both concurring and dissenting Justices agreed that application of the plurality's balancing test could produce uncertainty and undermine the general purpose of the full faith and credit clause.[218] The concurring opinion succinctly noted that the plurality rationale would, after a court-entered judgment in a wrongful death action in one state under the law of that state, permit the plaintiff to obtain a subsequent judgment in another state for damages exceeding the first state's liability limit. This result

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212. *Id.*

213. The dissent noted this fallacy and referred to Chief Justice Stone's opinion in Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 436 (1943), which emphasized the difference between statutes and judgments after the lower court had failed to make the distinction. 100 S. Ct. at 2667, 65 L. Ed. 2d at 780 (Rehnquist, J., dissenting). Five of the Justices in *Thomas* recognized the statute-judgment dichotomy.

214. Although a workers' compensation award is not technically a judgment, the same result should apply. *See* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 440-41 (1943).

215. 100 S. Ct. at 2663-65, 65 L. Ed. 2d at 776-78 (White, J., concurring); 100 S. Ct. at 2667, 65 L. Ed. 2d at 780 (Rehnquist, J., dissenting).

216. The plurality stated that each state must formulate its policy on whether to allow supplemental awards, according to its view of its own needs. It attempts to narrow its decision by stating: "We simply conclude that the substantial interests of the second State in these circumstances should not be overridden by another State through an unnecessarily aggressive application of the Full Faith and Credit Clause . . . ." 100 S. Ct. at 2663, 65 L. Ed. 2d at 776. In support of this, the plurality cites Yarborough v. Yarborough, 290 U.S. 202, 227 (1933) (Stone, J., dissenting). The *Restatement* states that a judgment rendered in one state need not be recognized in another state if not required by the natural policy of full faith and credit; to require otherwise would be improper interference in the affairs of a sister state. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971). *Contra* Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230, 1240 (1965).

217. *See* Sherrer v. Sherrer, 334 U.S. 343, 355 (1948).

218. 100 S. Ct. at 2665-68, 65 L. Ed. 2d at 776-80; *see* Riley v. New York Trust Co., 315 U.S. 343, 348-49 (1942).

would be a revolutionary development sorely testing tenets of finality and national unity.