



January 1971

Conflict of Laws

A. J. Thomas Jr.

Recommended Citation

A. J. Thomas, *Conflict of Laws*, 25 Sw L.J. 146 (1971)
<https://scholar.smu.edu/smulr/vol25/iss1/12>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

CONFLICT OF LAWS

by

A. J. Thomas, Jr.*

NO TRULY landmark Texas cases arose in the conflict-of-laws area during the period covered by this *Survey*. However, certain interesting cases may be noted, most of which fall under the jurisdictional rubric.

I. JURISDICTION

A. Long-Arm Statute

Perennial problems of long-arm jurisdiction continue to face the courts. In *Eyerly Aircraft Co. v. Killian*¹ a federal court of appeals was confronted with a products liability case originally brought in a federal district court in Texas and based on diversity of citizenship. Service of process was accomplished against the non-resident corporation under the Texas long-arm statute, article 2031b.² This provision permits service of process to be made upon the Secretary of State of Texas for any cause of action arising out of business done within the state by a non-resident who has not appointed or maintained a designated agent for service within Texas. The doing of business is defined not only in terms of contractual relationships within the state, but includes the commission "of any tort in whole or in part in the state."³ The district court refused to dismiss and quash service against the out-of-state company,⁴ and the court of appeals affirmed, finding a constitutional application of the Texas statute and judicial jurisdiction in personam in Texas. The court was concerned, of course, with the rule of *International Shoe Co. v. Washington*, which requires, for an exercise of jurisdiction over a non-resident not otherwise subject thereto, minimum contacts of a form sufficient to assure "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁵ Without these contacts, an exercise of judicial jurisdiction by a state would offend the constitutional limitation of due process of law.

In *Eyerly Aircraft* an amusement ride had been manufactured some twenty years previously by the defendant Oregon company in that state. The machine was first sold to a Chicago amusement company in 1949, and, in 1964, the Chicago concern sold it to another company. The latter concern toured with it in many states. According to the record, the defendant expected the machine to be moved from one state to another, including Texas. The court also found that the defendant, in the operation

* B.S., Agricultural and Mechanical College of Texas; LL.B., University of Texas; LL.M., S.J.D., University of Michigan. William Hawley Atwell Professor of Constitutional Law, Southern Methodist University.

¹ 414 F.2d 591 (5th Cir. 1969).

² TEX. REV. CIV. STAT. ANN. art. 2031b (1964).

³ *Id.* § 4.

⁴ An interlocutory appeal was taken under 28 U.S.C. § 1292(b) (1964).

⁵ 326 U.S. 310, 316 (1945).

of its business, had availed itself of the protection of Texas laws through continuous and substantial contacts with Texas, such as the sale and delivery of its amusement devices in the state, the extension of credit in the state, the retention of liens filed with state and county authorities, and the servicing of machines and solicitation of business within the state.

However, the tort action in the case was quite unrelated to these contacts in that it arose out of defects in an amusement ride which the defendant had neither sold nor serviced in Texas, and with which it had no contact since the day when it had introduced the ride into interstate commerce by the first sale. The court noted that there was strong authority for a constitutional exercise of jurisdiction based upon the commission of a single tort within a state,⁶ but it refused to base jurisdiction solely on this ground. Rather, it grounded jurisdiction on the substantial contacts of the defendant with Texas, which did not, in and of themselves, relate to the tort,⁷ and also upon the fact that by introducing the product into a stream of interstate commerce, the defendant could reasonably expect that the ride would be brought into the state where the tort occurred. The court's holding is in line with modern thought. The *Restatement (Second) of Conflict of Laws*, in speaking of products liability cases where an act is done in one state which causes effects in another, declares that the latter state may exercise jurisdiction over causes of action arising from these effects if it is reasonable to do so.⁸ Whether or not it is reasonable depends upon whether the defendant, who had no intention to cause effects in the state, could reasonably expect that his acts would cause such effects, as well as upon other factors relating to the convenience of making the defendant stand suit in the state of the cause of action. Thus, the greater the defendant's relationship to the state through other contacts, as in the case at hand, the more convenient it will be to make him defend.

As to the Texas statute itself, two other issues arose in this case. Although some states have interpreted their statutes as not extending to the maximum limits allowable under due process, the court in *Eyerly Aircraft* was of the opinion that the purpose of the Texas statute was to permit an exercise of jurisdiction consistent with the constitutional outer limits. The statute, therefore, encompassed the case by a literal reading of its language, *i.e.*, the commission of a tort in Texas.

Finally, a problem arose concerning certain affirmative pleadings of conditions precedent to jurisdiction under the Texas long-arm statute. Texas courts require two conditions to be met before process through the Secretary of State may be resorted to under the statute. An affirmative

⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS (Prop. Off. Draft, pt. I, 1967) [hereinafter cited as RESTATEMENT (SECOND)] recognizes in § 36 that one who does within a state an act out of which a cause of action in tort arises may be subjected to an exercise of judicial jurisdiction, but §§ 37 and 50 tend to qualify this when the act which causes the tort is done elsewhere.

⁷ Actually, it has long been held that a state could exercise in personam jurisdiction over a corporation where the corporation had large and substantial contacts with the state, even though the cause of action did not arise within the state. See *Reynolds v. Missouri, Kan. & Tex. Ry.*, 228 Mass. 584, 117 N.E. 913 (1917), *aff'd mem.*, 255 U.S. 565 (1921); G. STUMBERG, CONFLICT OF LAWS 92 (2d ed. 1951).

⁸ RESTATEMENT (SECOND) §§ 37, 50.

pleading must be made that the defendant non-resident does not maintain in Texas a regular place of business or a designated agent.⁹ In the case at hand, the plaintiff's complaint failed to allege that the defendant had no designated agent or regular place of business in Texas. However, these facts do appear in other parts of the record. The Federal Rules of Civil Procedure do not require such exactness in pleading, but only a short, plain statement of plaintiff's claim sufficient to give the defendant fair notice of the claim and the grounds upon which it rests.¹⁰ The court held that compliance with the federal rules is requisite, and not compliance with the Texas rule, which requires the information to appear on the face of the pleadings. In reaching this conclusion, the court relied on *Hannah v. Plumer*,¹¹ wherein the Supreme Court of the United States decided that *Erie R.R. v. Tompkins*¹² did not command a federal court in a diversity case to displace a federal rule of procedure through an application of an inconsistent state rule. The two purposes of the *Erie* decision, *i.e.*, to discourage forum shopping and the avoidance of inequitable administration of laws, would not be contravened by the application of the federal rule in *Eyerly Aircraft*. As the court points out, a plaintiff in choosing a federal court will hardly be influenced in his choice by a difference in the rules as to pleadings, inasmuch as he can comply easily with the Texas rule by adding the required words of art to his complaint. Inequitable administration of laws would hardly result because had the plaintiff been litigating in a Texas court, he could have easily complied with the Texas pleading requirement. Thus, the court concluded that the federal rules were applicable and prevailed over the conflicting, and what the court called archaic, Texas rules of pleading.

The Texas long-arm statute was also before the Supreme Court of Texas in *Collins v. Mize*,¹³ a suit on a written contract to recover a real estate commission. At the time of the filing of the action, one of the defendants was an Oklahoma resident, but at the time the Texas contract was executed and the real estate transaction consummated, he was a resident of this state. Service of process was made upon the Secretary of State of Texas in accordance with article 2031b, section 6, which provides that when a person becomes a non-resident after a cause of action arises in Texas but before suit has been brought upon it in a Texas court of competent jurisdiction and when such defendant is not required to appoint a service agent in Texas, service of process may be had upon the Secretary of State. The Oklahoma non-resident defendant appeared specially and alleged a lack of jurisdiction under article 2031b. The plea was sustained by the trial court and the court of civil appeals,¹⁴ but the supreme court found personal jurisdiction over the non-resident defendant. The defendant alleged that the

⁹ *McKanna v. Edgar*, 388 S.W.2d 927 (Tex. 1965).

¹⁰ FED. R. CIV. P. 8(a).

¹¹ 380 U.S. 460 (1965).

¹² 304 U.S. 64 (1938).

¹³ 447 S.W.2d 674 (Tex. 1969).

¹⁴ 436 S.W.2d 938 (Tex. Civ. App.—Amarillo 1968).

Texas case of *McKanna v. Edgar*¹⁵ required strict conformity with the language of section 3 of article 2031b for purposes of an exercise of jurisdiction under its terms. Thus, the defendant argued that section 6 requires a specific allegation that the non-resident defendant was not required to appoint a service agent in Texas. Plaintiff had not so pleaded, although the pleading and the proof did show that the defendant did not have an agent in Texas. The court distinguished *McKanna*, which involved a direct attack upon a default judgment and required particularity of pleading as to jurisdictional facts. Drawing of inferences with respect thereto was not permitted. But the court also disagreed with the defendant non-resident's construction of section 6 by stating that this section has reference to a legal requirement, *i.e.*, under law the person is not required to appoint an agent for service in the state. If this language were made jurisdictional so that the plaintiff would have the burden of showing that the defendant came within the Texas law requiring an appointment of an agent, service, under section 6, would be made impossible in an instance where the defendant was required by law to appoint the agent and had not done so. Referring back to section 1 of article 2031b, which creates a conclusive presumption that the person has designated the Secretary of State as service agent where the person is required to appoint an agent and does not, the court concluded that whether a non-resident defendant was "required by law to appoint an agent or not, in either event service upon the Secretary of State complied with the requirements of Article 2031b."¹⁶

In disposing of the defendant's contention that constitutional minimum contacts with Texas were not present, the court relied upon a 1933 Supreme Court case¹⁷ which held that even though the defendant had ceased to do business in the state, jurisdiction, assuming statutory authorization, could still be obtained through service of process on a state official, if the cause of action were one which arose out of business done within the state previous to the withdrawal.¹⁸ In *Collins* the transaction from which the cause of action arose and which provided the minimum contacts was an exchange of real estate consummated in Texas while the defendant was a resident of the state.

*Uvalde Rock Asphalt Co. v. Consolidated Carpet Corp.*¹⁹ concerns the necessary minimum contacts under article 2031b and the constitutional requirements of due process for maintenance of jurisdiction over a non-resident defendant. In Arizona, Uvalde, a Texas company, solicited an Arizona company, Consolidated Carpet, to become an authorized wholesaler of Uvalde. A contract was thereafter executed by Consolidated Carpet in Arizona, and mailed to Uvalde in Texas, where it was accepted and mailed back to Consolidated Carpet. Following the terms of the contract, merchandise was shipped from Uvalde's Houston plant to Arizona, F.O.B. Houston. Later orders were also shipped to Arizona, although some five

¹⁵ 388 S.W.2d 927 (Tex. 1965).

¹⁶ 447 S.W.2d at 675.

¹⁷ *Washington v. Superior Ct.*, 289 U.S. 361 (1933).

¹⁸ RESTATEMENT (SECOND) § 35 is in accord with this rule.

¹⁹ 457 S.W.2d 649 (Tex. Civ. App.—Beaumont 1970), *error ref. n.r.e.*

orders were placed by Consolidated Carpet to be shipped from Houston F.O.B. with freight prepaid to destinations in Texas. In accordance with the terms of the contract, Consolidated Carpet made a few payments to Uvalde at its San Antonio offices. Large amounts still being owed, Uvalde brought suit against Consolidated Carpet. The trial court found that Consolidated Carpet was not amenable to suit in Texas, but the court of civil appeals upheld Texas judicial jurisdiction under article 2031b on the basis of Consolidated Carpet's doing business in Texas, which for purposes of this case would seem to be "the entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State."²⁰ Although the court regarded the contacts with Texas as minimal, they were not so minimal as to offend traditional notions of fair play and justice, and were stronger than those in *McGee v. International Life Insurance Co.*,²¹ where jurisdiction was upheld by the Supreme Court of the United States as not offending due process of law.

The *McGee* case permitted an exercise of judicial jurisdiction over an out-of-state insurance company where the only contacts with the forum state were (1) that it was the domicile of the insured, which meant that the location of the risk was in the forum state; (2) the mailing of the insurance certificate to the insured in the forum state; and (3) the sending of premiums from that state to the out-of-state insurer. The scope of jurisdiction in *McGee* upon such limited contacts has been thought by some to be limited to insurance contracts.²² But the court in *Uvalde* seems correct in upholding jurisdiction, for the contacts are stronger than those existing in *McGee*. Modern theory permits an exercise of jurisdiction over a defendant as to a cause of action arising from acts done or caused to be done by the defendant within the state, unless the exercise of jurisdiction is unreasonable because of the defendant's relation to the state and the nature of the act. In *Uvalde* one factor of importance bearing upon "relationship" and "reasonableness" is the close relationship of the plaintiff, a Texas company with offices and plant in Texas, to the state. By means of a contract, the defendant was making a profit from the state, which permitted it to sell to persons within the state goods shipped from the plaintiff's Texas plant. This added to the appropriateness of the exercise of jurisdiction. Moreover, these and the other contacts accruing from the whole transaction would appear to bring the defendant in a sufficiently close relationship to the state so that it becomes fair to make him stand suit in the state, particularly when the cause of action arose from this relationship.²³

Two final cases with slight connection to article 2031b are worthy

²⁰ TEX. REV. CIV. STAT. ANN. art. 2031b, § 4 (1964).

²¹ 355 U.S. 220 (1957).

²² Thode, *In Personam Jurisdiction; Article 2031b, the Texas "Long Arm" Jurisdiction Statute; and the Appearance To Challenge Jurisdiction in Texas and Elsewhere*, 42 TEXAS L. REV. 279, 301-03 (1964), points this out and also notes that there are limits to the exercise of jurisdiction. See also cases cited in 457 S.W.2d at 652.

²³ For discussion of the reasonableness as to the exercise of jurisdiction and the relationship to the forum, see RESTATEMENT (SECOND) §§ 35, 36.

of brief mention. The first, *Van Winkle-Hooker Co. v. Rice*,²⁴ involved the doctrine of *forum non conveniens*, which was applied by the trial court to decline an exercise of jurisdiction over a non-resident under article 2031b. The plaintiff pointed out that the defendant is a Texas company and a resident of Texas, that the cause of action arose in Texas and is governed by the state's law, and that the contract which is the basis of the suit expressly states that it is to be construed by Texas law. After noting that the doctrine of *forum non conveniens* should be resorted to with caution and that it had been seldom applied in Texas, the court of civil appeals declared that instances of its application in Texas had occurred when both parties to the suit were non-residents and when the governing foreign law was too dissimilar to Texas law.²⁵ The latter reason had no application in this case, for the contract provided for the application of Texas law. And the former reason was not met, because only one of the parties was a non-resident. The court of civil appeals reversed and concluded that to permit the application of the doctrine of *forum non conveniens* merely upon the non-residency of the defendant would make article 2031b, which permits judicial jurisdiction over non-residents, a nullity.

*Aamco Automatic Transmissions Inc. v. Evans Advertising Agency, Inc.*²⁶ involved a suit against a non-resident under rule 108 of the Texas Rules of Civil Procedure,²⁷ which, in general, permits citation to be made upon a defendant who is absent from the state or who is a non-resident of the state. In *Evans* a default judgment was rendered against the defendant. It was vacated by the court of civil appeals on the ground that the suit against the non-resident was an in personam action, which, for an exercise of jurisdiction, would require a long-arm statute. Rule 108 has been labeled a service provision, not a jurisdictional one.²⁸ Its use has been stated to be limited to providing notice to a non-resident of a suit pending in Texas involving property within the state.²⁹

B. Custody—Full Faith and Credit

*Brownlee v. Brownlee*³⁰ is an application of the rule that a judgment of a court having jurisdiction over a defendant, when based upon the judgment of the court of another state which did not have in personam jurisdiction, is not subject to collateral attack on the ground that the first judgment was invalid.³¹ A Texas judgment awarded the husband a divorce from his wife and custody of a minor child. This judgment later served

²⁴ 448 S.W.2d 824 (Tex. Civ. App.—Dallas 1969).

²⁵ On the doctrine of *forum non conveniens* in general, see *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1946); R. LEFLAR, *AMERICAN CONFLICTS LAW* § 53 (2d ed. 1968) [hereinafter cited as LEFLAR].

²⁶ 450 S.W.2d 769 (Tex. Civ. App.—Houston 1970), *error ref. n.r.e.*

²⁷ TEX. R. CIV. P. 108.

²⁸ See Thode, *supra* note 22, at 304 n.165.

²⁹ VanDercreek, *Texas Civil Procedure, Annual Survey of Texas Law*, 21 Sw. L.J. 155, 156 (1967).

³⁰ 456 S.W.2d 782 (Tex. Civ. App.—Houston 1970).

³¹ See *RESTATEMENT OF JUDGMENTS* § 13 (1942); LEFLAR § 80, at 186; Annot., 44 A.L.R. 450 (1926).

as the basis for a habeas corpus proceeding brought by the husband in Mississippi to recover custody of the minor child. The Mississippi court gave full faith and credit to the prior Texas judgment and awarded custody to the husband, who then returned to Texas with the child. Thereafter, the wife brought a bill of review in a Texas court of domestic relations to set aside the divorce and custody judgment, alleging it to be void. Invalidity was based on a lack of valid service on the wife because she and the child resided in Mississippi. The wife also attacked the form of citation and manner of service, and further claimed the existence of extrinsic fraud which occurred from a lack of notice as to the setting of the case for trial. Upon appeal from a judgment rendered for the husband, the court of civil appeals affirmed. It did not decide the question of validity or invalidity of the judgment. Rather, it held that the Mississippi judgment which had given full faith and credit to the Texas judgment was now itself *res judicata* and to be accorded full faith and credit in the later Texas proceeding.

The court of civil appeals assumed that the Texas judgment could have been subjected to collateral attack for possible want of jurisdiction in the Mississippi proceeding.³² As has often been stated, a judgment rendered where there is a lack of personal jurisdiction in the conflict-of-laws sense is void where rendered as a violation of due process of law, and is not entitled to recognition in other states under principles of full faith and credit.³³ Thus, the wife could have attacked, in the Mississippi habeas corpus proceeding, the enforcement of the Texas judgment on the ground of invalidity for lack of jurisdiction. This she did not do despite the fact that she was subject to the jurisdiction of the Mississippi court. Her failure to attack the Texas judgment in the Mississippi proceeding operated to bar any further attack by her in any later proceeding.

Assumption was also made by the Texas court that the Texas judgment could have been attacked in Mississippi on the ground of extrinsic fraud. Full faith and credit does not preclude an attack upon a judgment for fraud in the procurement if it could have been attacked on that ground in the rendering state.³⁴ But, as with the defense of lack of jurisdiction,

³² The possible lack of jurisdiction of the Texas court is not spelled out in the case. The wife's allegations are very vague. Since she mentions lack of jurisdiction because she and the minor child were residents of the state of Mississippi, she apparently is attacking the custody decree. Traditionally, the state having jurisdiction to issue a valid custody award was the state of the child's domicile. RESTATEMENT OF CONFLICT OF LAWS §§ 117, 145-46 (1934) [hereinafter cited as RESTATEMENT]. A more recent position, however, would find three other bases of jurisdiction: (1) the state of the child's domicile, (2) the state having jurisdiction over the parents of the child, and (3) the state where the child is present. *Sampsel v. Superior Ct.*, 32 Cal. 2d 763, 197 P.2d 739 (1948). See also RESTATEMENT (SECOND) § 79. In *Brownlee* the Texas court did have jurisdiction over the parents. The husband filed the bill of review, and the wife filed a cross action. This appearance would make her personally subject to the jurisdiction of the Texas court, and if personal jurisdiction of the parents is sufficient for a custody decree, jurisdiction should have been present. G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 80 (3d ed. 1963) [hereinafter cited as STUMBERG]. The wife also attacked the manner and want of service of citation in her cross action, but again, her reasons are not clear.

³³ See, e.g., *Hanson v. Denckla*, 357 U.S. 235 (1958). See also STUMBERG 111-12; Introductory note preceding RESTATEMENT OF JUDGMENTS § 15 (1942).

³⁴ RESTATEMENT OF JUDGMENTS § 118, comment *b* (1942). See also LEFLAR § 82, at 189; STUMBERG 114.

the wife failed to raise the defense of fraud until after judgment was rendered against her in the Mississippi suit. At this point, the matter became *res judicata* in a later proceeding.³⁵ As to the issue of whether the Mississippi law would permit such an attack in the Texas court, the court of civil appeals noted that in the absence of a request under Texas Rules of Civil Procedure 184a that judicial notice be taken of the sister state law, or in the absence of pleadings and proof of such law, the Mississippi law would be presumed to be the same as that of Texas.³⁶

*Plass v. Lietbold*³⁷ and *Reinbart v. Mancuso*³⁸ both involved the enforcement of child custody decrees rendered by the courts of other states. In *Plass* an Arizona court, whose jurisdiction was unquestioned, awarded custody of a child to its mother but provided certain visitation rights to the father. Seeking modification of this award, the father instituted suit against the mother and her present husband in a pleading entitled "Application for Modification of Visitation and Custody."³⁹ Over objection, the trial court treated the matter as a mere change of visitation, not of custody, and granted rights of visitation for a two-week period each year at the father's home in California. The Arizona decree had limited such visitation rights to not more than one or two days per week. The Texas court of civil appeals revised the trial court's judgment, holding that although the line between visitation and custody was a fine one to draw, the trial court's judgment changed and modified the Arizona custody decree to such an extent that it amounted to a change in custody. The court stated that a visitation order could have been granted which would have given the father reasonable visitation rights with the child in Texas, but went on to note that the usual rule is that a custody decree issued by a state having jurisdiction is to be given full faith and credit by the courts of sister states and is subject to modification in the latter only upon the basis of changed circumstances and a concern for the best interests of the child.⁴⁰

Inasmuch as there was insufficient evidence to support a finding of a material change of conditions affecting the welfare of the child, it was concluded that the trial court erred in not giving full faith and credit to the Arizona decree. As to criteria which would represent a material change of conditions, the court cited the following from the case of *Leonard v. Leonard*:

Material change of conditions which will require a modification of a decree as to the custody of a child is ordinarily such as (1) Marriage of one of the parties. (2) Poisoning of the mind of the child by one of the parties. (3) One of the parties becoming an improper person for the custody. (4) Change in the home surroundings. (5) One of the parties becoming mean to the child, or some other similar material change of conditions.⁴¹

³⁵ See authorities cited in note 31 *supra*.

³⁶ See 1 C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 99 (2d ed. 1956).

³⁷ 454 S.W.2d 444 (Tex. Civ. App.—Texarkana 1966).

³⁸ 447 S.W.2d 716 (Tex. Civ. App.—Fort Worth 1969).

³⁹ 454 S.W.2d at 446.

⁴⁰ See H. GOODRICH & E. SCOLES, CONFLICT OF LAWS 273 (4th ed. 1964); STUMBERG 322.

⁴¹ 218 S.W.2d 296, 301 (Tex. Civ. App.—San Antonio 1949).

In *Plass* one of the criteria was met—the mother of the child had remarried. But the court believed that such remarriage made possible the mother's providing a better home for the child. Thus, change of custody was not warranted. The lower court decision was then reversed and remanded, inasmuch as it was based on an erroneous theory of visitation. Since the father would be entitled to reasonable visitation rights with the child, the determination should be made in the first instance by the juvenile court.

Conditions which would authorize alteration of a California custody decree were also found wanting by a Texas court of civil appeals in the *Reinbart* case. The father of a child born out of wedlock brought suit in California to determine paternity and custody of the child. The mother was served with process, but thereafter she hurriedly left the state with the child. Judgment was rendered recognizing the plaintiff's paternity and awarding him custody. In a later suit in Texas, where the child had been brought by the mother, a domestic relations court found that changed conditions and the best interests of the child called for an award of custody to the mother. The court of civil appeals reversed and rendered judgment for the father, thereby enforcing the California judgment. It was held that the California judgment was *res judicata* as to the best interests of the child at the time it was rendered, and it could not now be questioned. For a change of custody, it must appear that a positive improvement for the child so demanded a change, and the burden of proof was upon the mother to show such changed conditions. A showing of slight change would not be sufficient. In *Reinbart* the evidence revealed no material change of condition from the time the California judgment had been rendered. Indeed, the court was of the opinion that certain of the mother's conditions had worsened.

Cain v. Cain,⁴² like the previous cases, involved change of an Arizona custody decree. In the Arizona proceeding, the father had been awarded custody. The mother in a Texas court sought modification of the award, giving custody of the child to her and ordering child support from the father. The father was served in Louisiana, the state of his domicile. He appeared specially in the Texas proceeding, claiming that he and the child were domiciliaries of Louisiana and that the Texas court had no jurisdiction over him in an *in personam* action. The plea was sustained, the cause was dismissed by the trial court, and this dismissal was affirmed by the court of civil appeals.

Although the child had sojourned temporarily in Texas, she had been living with her father at his domicile in Louisiana for some sixteen months prior to the Texas proceeding. She therefore was not present in Texas at the time the suit was instituted. Neither was she domiciled in Texas, for the domicile of a minor child follows that of the parent to whom custody has been given.⁴³ Under such a set of facts, jurisdiction for an award or modification of custody was not met. Such jurisdiction, the court said,

⁴² 451 S.W.2d 786 (Tex. Civ. App.—Austin 1970), *error ref. n.r.e.*

⁴³ RESTATEMENT (SECOND) § 22(d).

rested on two alternative bases—domicile or presence of the child in the state.⁴⁴

Note should also be taken of a per curiam opinion of the Supreme Court of Texas in the case of *Meucci v. Meucci*,⁴⁵ which involved modification of an Illinois custody decree. The Texas trial court had found sufficient evidence to warrant a change of custody from the father to the mother, and this decision was affirmed by the court of civil appeals.⁴⁶ In reversing, the supreme court pointed out that there was no evidence of a material change of conditions after the rendition of the Illinois decree. Therefore, the trial court was going behind the Illinois judgment by considering, as a changed circumstance, the mother's improved emotional and mental stability prior to the granting of the Illinois decree. This was said to conflict with the former supreme court case of *Bukovich v. Bukovich*,⁴⁷ wherein the court held that evidence of materially changed conditions after, but not before, the entry of the sister-state judgment would warrant modification thereof. Thus, a change of custody could not be ordered in the absence of proof of a *subsequent* material change of conditions.

Finally, in regard to enforcement and modification of sister-state custody decrees, *Lewis v. Cushing*⁴⁸ is of some interest. There, evidence of a material change of condition sufficient to warrant a change in an Alabama custody decree was introduced. But the mother failed to discharge the burden of showing that the best interest of the children⁴⁹ demanded a change. However, the appellate court reversed the trial court's decision which had refused the custody charge and remanded for a new trial because of jury misconduct.

C. Issuance of a Decree Affecting Foreign Land and To Enjoin Maintenance of a Foreign Suit

The decisions of the justices of the Amarillo court of civil appeals in *Boman v. Gibbs*⁵⁰ present an interesting and complex jurisdictional problem. Involved was Mr. and Mrs. Hodges' community estate, which was composed of real and personal property situated in Texas, Oklahoma, and the Republic of the Philippines. Suit was brought by the heirs of the wife in a Texas district court, seeking to restrain the heirs of the husband from the assertion of a claim in a Philippine probate proceeding that the husband's estate was entitled to receive 100 per cent of certain Philippine

⁴⁴ Some authorities recognize a third basis for jurisdiction, *i.e.*, jurisdiction over the parents. See note 32 *supra*. This too was lacking in the *Cain* case, as the father was not subject to Texas judicial jurisdiction. The father's custody rights could not be cut off by a foreign decree when he was not personally subject to the jurisdiction of the court rendering the decree. The United States Supreme Court held in *May v. Anderson*, 345 U.S. 528 (1953), that custody is a personal right.

⁴⁵ 457 S.W.2d 48 (Tex. 1970).

⁴⁶ 454 S.W.2d 222 (Tex. Civ. App.—Eastland 1970).

⁴⁷ 399 S.W.2d 528 (Tex. 1966).

⁴⁸ 444 S.W.2d 815 (Tex. Civ. App.—Beaumont 1969).

⁴⁹ H. GOODRICH & E. SCOLLES, *supra* note 40, at 273, state that it is generally accepted that a "custody decree can be modified on the basis of changed circumstances and the genuine concern for the interests of the child."

⁵⁰ 443 S.W.2d 267 (Tex. Civ. App.—Amarillo 1969), *error ref. n.r.e.*

properties which had been community assets of the spouses during their lifetime. Specifically, it was contended that the defendants, by asserting the claim, would delay the administration of the estate in the Philippines, and that such claim would discourage the plaintiffs, in that they would be unwilling to spend their personal funds to contest a suit in a distant land and would ultimately be forced to abandon any rights in the Philippine properties. The plaintiffs' rights were based (1) on Mrs. Hodges' will, which gave a life estate in her properties to her husband with remainder over to the plaintiffs; and (2) a Texas judgment which embodied an agreement by the husband renouncing his rights as a life tenant in his deceased wife's estate. This renunciation vested the husband's interest in the wife's estate in the plaintiffs, who claimed that it was *res judicata* as to their rights in *all* of the properties of Mrs. Hodges. The court of civil appeals disagreed with this contention, being of the opinion that the Texas judgment, which was rendered on the basis of *in personam* jurisdiction, was binding and *res judicata* only so far as the Texas property of the wife's estate was concerned. The renunciation of the life estate by the husband vested in the plaintiffs all interest in the Texas estate of Mrs. Hodges. The court then went on to hold that a Texas court could not adjudicate title to the Philippine realty, inasmuch as it had no jurisdiction over such property. Since jurisdiction over the Philippine administrator was lacking as well, the trial court lacked authority to issue an injunction to prevent the Philippine administrator of Mr. Hodges from asserting claims of his estate to the property in question. The court concluded that an injunction would not bind the foreign administrators and would not be effectual in granting any real relief.

The opinion of the court is based on the general rule that land can only be administered in a state of its situs,⁵¹ and further that a state lacks jurisdiction to adjudicate title or rights in foreign land.⁵² But the rule that only the courts of the situs may exercise jurisdiction over real property interests is not inexorable, and subject to certain recognized exceptions. One such exception is that where the defendant is under a personal obligation with respect to property, a court of equity can enforce that obligation if it has jurisdiction over the parties regardless of the location of the *res*. The dissenting opinion in *Boman* declares: "As a contract, therefore, the agreed judgment is binding upon the parties and their privies and may be specifically enforced by decrees *in personam* whether or not it involves property in a foreign jurisdiction."⁵³ The dissent cited *Massie v. Watts*,⁵⁴ where an equity court having jurisdiction over the parties enforced an *in personam* obligation of the defendant by ordering him to convey land located in another state. This old case clearly stands for the proposition that jurisdiction is sustainable by a court in order to issue in

⁵¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 334 (Prop. Off. Draft, pt. III, 1969); LEFLAR 504.

⁵² LEFLAR § 174.

⁵³ 443 S.W.2d at 274.

⁵⁴ 2 U.S. (6 Cranch) 345 (1810).

personam judgments and personal obligation decrees in suits involving foreign land.⁵⁵ Thus, there would seem to be no problem here for a court in Texas to assume jurisdiction to order the defendant heirs, who were personally subject to judicial jurisdiction in Texas, to deliver to the plaintiffs a joint disclaimer and quitclaim of any interest claimed by them in the estate of Mrs. Hodges.

However, the plaintiffs also sought an order enjoining the defendant heirs of the estate of Mr. Hodges from continuing to assert a claim of Mr. Hodges against the estate of his wife. It was requested that the injunction be made applicable not only to defendants, but also to their agents, attorneys, and any other persons participating with them in asserting the claim. This would be an attempt to enjoin the maintenance of a suit in a foreign jurisdiction. Such injunctions have been granted by courts to restrain parties who are subject to the jurisdiction of the court from prosecuting an action pending in another jurisdiction where the foreign suit is taken to harrass and inconvenience a party and make him defend in a remote place.⁵⁶ It should be noted, however, that holdings indicate that such an injunction need not be respected or enforced by courts in the jurisdiction where the action is brought.⁵⁷ Moreover, and in any event, it would be necessary that the court issuing the injunction have jurisdiction of the parties intended to be bound by it. In *Boman* the court pointed out that a Texas court would be without authority to issue an injunction against the Philippine administrators, or, for that matter, any persons in the Philippines. Therefore, the requested injunction was refused. The court is correct in its reasoning as to the lack of binding quality of the injunction against persons not subject to its jurisdiction. But if the Texas court had jurisdiction to grant the judgment which effectuated the renunciation agreement and which vitiated any interest, no matter where situated, of Mr. Hodges and his estate in the estate of his wife, then such judgment would be entitled to full faith and credit as between states of the United States and would seem to be subject to enforcement in a foreign nation, at least to the extent that it would be considered *res judicata* as to the husband's and his estate's interest in the property.⁵⁸ As such, the judgment itself would be made binding on the Philippine administrators and *res judicata* with respect to any claim advanced by the estate of Mr. Hodges in the estate of Mrs. Hodges. This is the opinion of the dissenting justice, who believes that a Texas judgment would be conclusive of the rights and duties of the parties in the land, and would obligate the defendant Hodges and his privies wherever found.

⁵⁵ H. GOODRICH & E. SCOLES, *supra* note 40, at 136-37; LEFLAR 191-92, 429; STUMBERG 98.

⁵⁶ See Pound, *The Progress of the Law, 1918-1919 Equity*, 33 HARV. L. REV. 420, 425-28 (1920); Comment, *Injunctions Against Suits in Foreign Jurisdictions*, 10 LA. L. REV. 302 (1950).

⁵⁷ See *James v. Grand Trunk W.R.R.*, 14 Ill. 2d 356, 152 N.E.2d 858 (1950). LEFLAR § 174, at 429, points out that an injunction issued by one state against maintaining a suit with respect to foreign land will be recognized only by comity except to the extent that it adjudicates facts involved in the parties' dispute.

⁵⁸ See H. GOODRICH & E. SCOLES, *supra* note 40, at 413; LEFLAR § 174, at 429.

II. ENFORCEMENT OF SISTER-STATE INJUNCTION

*Rich v. Con-Stan Industries, Inc.*⁵⁹ is, for Texas, a case of first impression, as it presents for the first time the question of the enforcement of a permanent injunction of a sister state. A California injunction had been issued to restrain the defendant and two distributors from unauthorized use of certain registered trademarks. Despite the fact that enforcement of foreign equitable decrees has engendered a certain amount of controversy, the Texas court of civil appeals found no difficulty in arriving at a conclusion that the permanent injunction of a sister state rendered with jurisdiction over the parties was subject to the full-faith-and-credit clause of the United States Constitution. In fact, the court was of the opinion that for purposes of full faith and credit, there was no difference between a judgment and an equitable decree. The court continued by stating that even though the full-faith-and-credit clause might not command the enforcement of this sister-state injunction, Texas would still recognize and enforce the decree on the ground of comity. An earlier Texas case⁶⁰ was cited in which the court stated that in the absence of a decision by the Supreme Court of the United States concerning the necessity of recognition of the sister-state decree by reason of the full-faith-and-credit command, recognition on the basis of comity could be given.

This court's sanguine approach to the problem is somewhat at odds with the conflicting authority as to the enforcement of foreign equity decrees. Arguments against the enforcement of decrees which command or enjoin the doing of an act by a defendant are grounded upon notions that the duty of the defendant is not merged in the decree, inasmuch as the decree is a procedural device which makes the defendant responsible only to the court issuing the order,⁶¹ or that the forum court called upon to enforce the order might be forced to order an action which would be against its policy.⁶² Nevertheless, and although the Supreme Court of the United States has not spoken conclusively on the issue of full faith and credit, the better opinion today is in line with the decision of the *Rich* court that the decree of an equity court having jurisdiction of the parties and the subject matter is to be treated as conclusive of the rights and duties of the parties.⁶³ Thus, it is to be given full faith and credit and serves as a basis for affirmative relief in another state. This is the view taken by the *Restatement (Second) of Conflict of Laws*,⁶⁴ for it concludes that a judgment enjoining the doing of an act is to be given the same recognition as any other judgment and is entitled to full faith and credit. This language is in contrast to that of the old *Restatement*, which would view the recognition of such a decree by the courts of the other state as a matter of

⁵⁹ 449 S.W.2d 323 (Tex. Civ. App.—Tyler 1969).

⁶⁰ *McElreath v. McElreath*, 162 Tex. 190, 345 S.W.2d 722 (1961).

⁶¹ See, e.g., statements of Professors Langdell and Beale, and Dean Pound in STUMBERG 121.

⁶² *Id.* at 125.

⁶³ See Barbour, *The Extraterritorial Effect of the Equitable Decree*, 17 MICH. L. REV. 527 (1919); Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954); Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183 (1957).

⁶⁴ RESTATEMENT (SECOND) § 102.

discretion.⁶⁵ This view would permit the decree to be enforced by the courts of another state, but would not compel it by constitutional command. This constitutes enforcement by comity without compulsion.⁶⁶ Therefore, where recognition of the judgment does not violate some other constitutional provision, such as due process of law, a state may give a remedy which the full-faith-and-credit clause does not demand.

III. CHOICE OF LAW

A. *Uniform Commercial Code*

*Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Insurance Co.*⁶⁷ involves the application of conflict-of-laws principles contained in the Uniform Commercial Code. In this case an automobile sold in Oklahoma was subject to a valid security interest which had been perfected under Oklahoma law. Later, the automobile was removed to Texas without the consent of the purchasers or of the holder of the security interest, and it was sold to a bona fide purchaser. Thus, the competing rights of the holder of the security interest and the bona fide purchaser were in conflict. The court protected the rights of the former.

Traditionally, the creation of rights in movable property has been determined by the law of the situs of the property at the time of the transaction in question.⁶⁸ Moreover, the mere transportation of movable property across state lines does not change the existing rights in the property.⁶⁹ But what if a new transaction takes place in the state to which the property has been removed, for example, a sale to another person? Although Texas courts formerly held that if property is moved to Texas with or without the consent of the holder of the security interest, the law of the new situs (Texas) governed so that the innocent purchaser prevailed unless there had been a recording of the prior security interest in Texas.⁷⁰ Most jurisdictions, however, distinguished cases where the property was removed to the new situs with the consent of the holder of the security interest, so that the bona fide purchaser in the second state prevailed only when the removal to that state was not wrongful. In 1950, the Supreme Court of Texas held that a valid, properly recorded mortgage executed in the state where the property was situated at the time would be recognized as against bona fide creditors and purchasers in Texas when the property had been surreptitiously removed to Texas without the consent of the holder

⁶⁵ RESTATEMENT § 449.

⁶⁶ For a discussion of "comity without compulsion," see A. EHRENZWEIG, CONFLICT OF LAWS 165-66 (1959).

⁶⁷ 454 S.W.2d 465 (Tex. Civ. App.—San Antonio 1970), *error granted*.

⁶⁸ The old view, that interests in tangible movables were determined by the law of the domicile, which was based upon the maxim that movables follow the persons, has given way to the situs rule. For a discussion of the situs rule, see LEFLAR § 175; RESTATEMENT § 255. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 51, § 224 makes the validity and effect of a conveyance of an interest in a chattel controlled by the law of the state having the most significant relationship to the parties, the chattel, and the conveyance, but notes such place will usually be the situs of the chattel at the time of the conveyance.

⁶⁹ RESTATEMENT § 26; RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 51, § 247.

⁷⁰ Consolidated Garage Co. v. Chambers, 111 Tex. 293, 231 S.W. 1072 (1927).

of the mortgage.⁷¹ This latter rule accords with section 9.103(c) of the Uniform Commercial Code, which has now been adopted by Texas.⁷² According to this section, the validity of the security interest is to be determined by the law of the jurisdiction where it attached, unless, pursuant to the understanding of the parties, the property is brought to Texas within thirty days or the non-possessory interest remains unrecorded in Texas for four months after removal to Texas. But it was claimed in *Phil Phillips Ford, Inc.* that this rule is modified by subsection (d) of section 9.103, which states: "Notwithstanding Subsections (b) and (c), if personal property is covered by certificate of title issued under a statute of this state or any other jurisdiction which requires indication on a certificate of title of any security interest in the property as a condition of perfection, then the perfection is governed by the law of the jurisdiction which issued the certificate."⁷³ The court was of the opinion that the draftsmen of this subsection did not intend its provisions to apply in cases where the state in which the property was sold (here Oklahoma) did not require such an indication on the certificate of title and thereafter the property was brought into a state having such a requirement, such as Texas.

*Moody Day Co. v. Westview National Bank*⁷⁴ also contains a conflict-of-laws issue under the Uniform Commercial Code. Plaintiff bank sought foreclosure of a lien which it had on two compressors located in New Mexico. The security interest was granted to the bank by defendant Wittie. Defendant Moody Day Co. asserted that it had purchased one of the compressors without notice of the bank's claim, and that its interest should prevail because the bank had filed the security interest in New Mexico rather than in Texas. The court stated that article 9.103(b) of the Code was applicable. This provision makes the law of the chief place of business of a debtor controlling in determining the validity and perfection of a security interest in property. The two types of property to which the section alludes are general intangibles and mobile goods usually used in more than one jurisdiction. As to the latter, the general rule which makes the law of the situs of the movable at the time of the transaction determinative of the interest created in the property is changed to the law of the chief place of business of the debtor. This change was effected because under the old rule the holder of the security interest would have to file or record his interest in every state in which the property was to be used in order to protect his rights.⁷⁵

The court does not tell us why the compressors are mobile property, but its opinion must be predicated on this fact if section 9.103(b) is to apply. The court is mainly concerned with the location of the debtor's chief place of business, which, following the comment of the National

⁷¹ *Bank of Atlanta v. Fretz*, 148 Tex. 551, 226 S.W.2d 843 (1950). For discussion, see LEFLAR § 181; STUMBERG 360.

⁷² TEX. BUS. & COMM. CODE ANN. tit. I (1968).

⁷³ *Id.* § 9.103(d).

⁷⁴ 452 S.W.2d 572 (Tex. Civ. App.—Waco 1970), *error ref. n.r.e.*

⁷⁵ See UNIFORM COMMERCIAL CODE Comment 3, on TEX. BUS. & COMM. CODE ANN. § 9.103(b) (1968).

Conference of Commissioners on Uniform State Laws, was stated to be "the place from which in fact the debtor manages the main part of his business operations."⁷⁶ The evidence indicated that the chief place of business was New Mexico, where the debtor's mining operations, in which the compressors were used, were being carried on. Since the chief place of business was in New Mexico, validity and perfection of the security interest was to be determined under New Mexico law.

B. Contracts

*Apodaca v. Banco Longoria, S. A.*⁷⁷ is concerned primarily with the effect to be given to a Mexican promissory note which bore interest at a usurious rate under Texas, but not Mexican, law. The Texas court of civil appeals cited the well-known Supreme Court case of *Seeman v. Philadelphia Warehouse Co.*,⁷⁸ which upheld an usurious contract when valid according to the law of either the place of making or the place of performance. Other authority would subscribe to an even broader rule, upholding the contract according to the law of any state having a substantial bona fide relationship to the contract. Ancient Texas cases have followed such a rule.⁷⁹ Thus, *Dugan v. Lewis*⁸⁰ upheld validity of a note which was usurious in New York but not in Texas. The note was signed in Texas by a Texas domiciliary and secured by a deed of trust on Texas land. However, it was delivered and made payable in New York. The court stated that a citizen of one state who contracts with a citizen of another may establish the interest rate according to either state's law.

In *Apodaca* the Mexican law upholding the contract is clearly applicable under these rules, for Mexico was not only the place of making and performance, but also the place having a substantial relationship, indeed, the most substantial relationship, to the contract.

The court reinforces its holding on United States constitutional grounds, pointing out that the application of the Texas statute and public policy relating to usury so as to defeat the application of Mexican law would deny the plaintiff due process of law because the court would be cutting off rights vested in another jurisdiction (Mexico). By so doing when the rights of the parties have no relation to anything done or to be done in Texas, the due process clause of the fourteenth amendment is violated. *Home Insurance Co. v. Dick*⁸¹ was cited as authority. However, the authority of this Supreme Court decision has been somewhat eroded in more recent cases which would hold that a state does not deny due process through an application of its own law if it has sufficient governmental interest in the transaction.⁸² If it could be shown that Texas had a strong

⁷⁶ 452 S.W.2d at 573.

⁷⁷ 451 S.W.2d 945 (Tex. Civ. App.—El Paso 1970), *error ref. n.r.e.*

⁷⁸ 274 U.S. 403 (1927).

⁷⁹ See Stumberg, *Conflict of Laws—Validity of Contracts—Texas Cases*, 10 TEXAS L. REV. 161, 167, 168, 184 (1931-1932).

⁸⁰ 79 Tex. 246, 14 S.W. 1024 (1891). *But see* Connor & Walker v. Donnell, Lawson & Co., 55 Tex. 167 (1881).

⁸¹ 281 U.S. 397 (1930).

⁸² See *Watson v. Employers Liability Assur. Corp.*, 348 U.S. 66 (1954). For a discussion of the problem, see STUMBERG 57-60.

public policy in preventing its domiciliaries from making usurious contracts and refused to uphold their validity even though made elsewhere, then a governmental interest in Texas could possibly be established. This is especially true when the rights of a Texas domiciliary, the other party to the contract, are involved. Such a showing could hardly be made, however, in view of previous Texas cases which have sought to uphold usurious contracts according to any law which would validate them and which had connection with the contract.

Other conflict-of-laws issues were raised in this case in an attempt to preclude application of the Mexican law. However, all were disposed of by the court unfavorably to the defendant. It was contended that the dissimilarity of Mexican law in relation to Texas law called for a refusal of jurisdiction in Texas, because the lack of Texas administrative machinery would prevent complete enforcement of the Mexican law. In some Texas tort cases the rule of dissimilarity has been followed so as to prevent application of the otherwise proper foreign law. These cases have been subject to criticism.⁸³ In any event, as the court pointed out, the principle of dissimilarity has not been applied in Texas in contract cases.

Short shrift was made of an argument that the Texas court was an inconvenient forum on the ground that the defendant, as independent executor of an estate being probated in Texas, had no legal existence outside of the state. This being true, the plaintiff chose the only forum having jurisdiction over the defendant. In an attempt to restrict enforcement of the contract to Mexico, the defendant asserted that Mexican law provided the remedy for such enforcement. The court said that this assertion referred to a provision in Mexican law which permitted the judge to reduce the interest rate. Inasmuch as this was defensive matter and since it had not been raised in the trial court, it was concluded that it could not be raised on appeal.

A final point has to do with the contention that Mexican law was not properly pleaded or proved. Only opinions of experts were offered by the plaintiffs as to the Mexican law. Such expert opinion was held to be sufficient proof. Therefore, proof by authorized statute books was not thought to be necessary.⁸⁴

*REA Express v. Missouri Pacific R.R.*⁸⁵ was a suit on a contract by a joint employer against the co-employer for indemnity. This indemnity had been paid by the former to a joint employee who had been injured. The trial court overruled a motion to compel arbitration under the terms of the contract. On appeal, the appellate court found that there had been no error. Although the contract did provide that all controversies between the parties should be submitted to arbitration, and although the agree-

⁸³ See Stumberg, *Conflict of Laws—Torts—Texas Decisions*, 9 TEXAS L. REV. 21, 35 (1930-1931).

⁸⁴ This seems to be borne out by McCormick and Ray who state that for evidence as to "the existence, construction or application of a foreign rule of law, written or unwritten . . . resort may be had to the opinions of skilled persons." 2 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1424, at 264 (2d ed. 1956).

⁸⁵ 447 S.W.2d 721 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*

ment provided that it was made in New York and that all questions of its interpretation and effect should be governed by the law of New York, which did permit full enforcement of arbitration agreements, the Texas court held in accord with the traditional rule that arbitration was a procedural matter to be governed by the law of the forum.⁸⁶ Under Texas procedural law at the time, Texas recognized arbitration of existing disputes only, and agreements to submit to arbitration were always revocable up to the time of award. In addition, provision in an executory contract to submit disputes to arbitration was against the public policy of Texas, because the Texas courts would be ousted of jurisdiction.⁸⁷ Thus, the arbitration agreement could not be enforced.

⁸⁶ In this regard, Justice Cardozo stated that "arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which the differences grow." *Berkovitz v. Arbin & Houlberg, Inc.*, 230 N.Y. 261, 270, 130 N.E. 288, 289 (1921). For criticism of the view that arbitration is procedural, see STUMBERG 274-76. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 218 (Prop. Off. Draft, pt. II, 1968) views the validity and effect of arbitration agreements as substantive.

⁸⁷ The Texas General Arbitration Act, which became effective in 1966, TEX. REV. CIV. STAT. ANN. arts. 224-38 (Supp. 1969), changes Texas law so that today arbitration of existing as well as future disputes is recognized, and agreements to submit to arbitration are irrevocable. This statute applies only to agreements made after the effective date of the Act.