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# Conflict of Laws

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# CONFLICT OF LAWS

*by*

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BETWEEN July 1, 1972, and December 31, 1973, Texas courts and federal courts sitting in Texas or in Texas appeals decided some forty conflict-of-laws cases by published opinion. This rather remarkable figure includes two Texas Supreme Court and five Fifth Circuit decisions.[1] Furthermore, at the outset of the period here covered, the Supreme Court of the United States decided *M/S Bremen v. Zapata Off-Shore Co.*,[2] which involves a major Texas interest.

There is also some ground for believing that Texas interests are increasingly involved in sister-state and foreign litigation,[3] but no attempt will be made here to cover these activities comprehensively. On the other hand, two developments in neighboring states deserve special mention. In a dramatic reversal of a position long held and recently defended with some vehemence,[4] Louisiana has abandoned the lex loci rule for torts, and has adopted the governmental-interests approach developed by Brainerd Currie.[5] More recently, Colorado, too, has abandoned the traditional choice-of-law rule for torts, replacing it by the "most significant relationship" test of the *Restatement (Second)*.[6] Since Louisiana continues to furnish the major part of Texas torts conflicts cases,[7] and as Colorado was the locus of *Marmon v. Mustang Aviation, Inc.*,[8] these two developments are not likely to remain without impact here.

The 63d Legislature enacted an unusually large number of reform measures. Some of these, especially the ban on indirect choice-of-venue clauses in consumer contracts,[9] the repeal of archaic and confusing service-of-process provisions relating to out-of-state corporations,[10] and the revamping of jurisdiction, venue, and residence requirements in the family law area,[11] are of direct interest for present purposes. Other enactments designed to protect consumers against deceptive trade practices and "hard-sell" home solicitation transactions,[12] are likely to test the ingenuity of out-of-state predators and the determination of the judiciary to protect Texas consumers.[13]

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1. Ramirez v. Autobuses Blancos Flecha Roja, S.A., 486 F.2d 493 (5th Cir. 1973); Howell v. American Livestock Ins. Co., 483 F.2d 1354 (5th Cir. 1973); Dailey v. Transitron Electronic Corp., 475 F.2d 12 (5th Cir. 1973); Jetco Electronic Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973); Whitney v. L & L Realty Corp., 500 S.W.2d 94 (Tex. 1973); Rodgers v. Williamson, 489 S.W.2d 558 (Tex. 1973).

2. 407 U.S. 1 (1972).

3. *See* notes 36, 63, 101-04, 189-207, 357-58 *infra*, and accompanying text.

4. Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 236 So. 2d 216 (1970).

5. Jagers v. Royal Indemn. Co., 276 So. 2d 309, 311 n.2 (La. 1973), citing and quoting Couch, *Choice-of-Law, Guest Statutes, and the Louisiana Supreme Court: Six Judges in Search of a Rulebook*, 45 TUL. L. REV. 100 (1970). *See also* Romero v. State Farm Mut. Auto. Ins. Co., 277 So. 2d 649 (La. 1973); notes 220-21 *infra*, and accompanying text.

6. First Nat'l Bank v. Rostek, 514 P.2d 314 (Colo. 1973).

7. *See* note 24 *infra*; text accompanying notes 202-21 *infra*.

8. 430 S.W.2d 182 (Tex. 1968).

9. TEX. REV. CIV. STAT. ANN. art. 1995(5)(b) (1973); *see* text accompanying notes 126-28 *infra*.

10. Ch. 431, §§ 1-2, [1935] Tex. Laws 1688-89 (repealed 1973); ch. 376, § 1, [1943] Tex. Laws 674-75 (repealed 1973).

11. *See* part VII *infra*.

12. TEX. REV. CIV. STAT. ANN. arts. 5069—13.01-.06 (1973).

13. *See* text accompanying notes 292-94 *infra*; *cf.* Nabhan & Talpis, *Le droit inter-*

## I. JURISDICTION

### A. *The Long-Arm Statute*

Foreign legal entities and non-resident natural persons who "engage in" business in Texas are subject to service of process at the hands of the Texas secretary of state in any action arising out of such business. "Doing business" as here understood includes contracting, by mail or otherwise, with a resident, if the contract is to be performed in whole or in part in Texas, or committing a tort, if the tort is committed in whole or in part in Texas.[14]

Additionally, out-of-state corporations "transacting" business in Texas are required to have a registered office and a registered agent within the state, and if such an agent is not appointed or cannot be found, service of process against them may be made upon the secretary of state. The notion of "transacting" business as here used is considerably narrower than the concept of "engaging in" business. It does not include any business transactions in interstate commerce, isolated transactions completed within thirty days, or eleven other specifically enumerated types of activity, among which "effecting sales through independent contractors" deserves special mention.[15]

It follows from the interplay of the Texas "long-arm" statute and the Texas Business Corporations Act, as amended by the 63d Legislature,[16] that (1) foreign legal entities and non-resident individuals are subject to the jurisdiction of Texas courts with respect to claims *arising out of* their Texas-connected torts and contracts, while (2) foreign *corporations* "transacting" business in Texas are *generally* subject to the jurisdiction of Texas courts. The operation of this scheme should ordinarily entail two similar but distinct tasks of state statutory construction: the ascertainment of minimum contacts for claim-related ("relational") jurisdiction over nonresidents, and the determination of criteria for finding foreign corporations to be "generally present" in view of their unrelated within-state transactions.[17]

Like all state law, Texas long-arm legislation is subject to federal constitutional restraints; it may not "offend traditional notions of fair play and substantial justice."[18] Here as elsewhere, these restraints draw the outside limits within which state legislative power may be exercised, but do not determine the contents of the state enactments themselves. However, since state judiciaries have tended to err on the side of caution when faced with this type of constitutional constraint, the most expansive initial interpretations of the Texas long-arm statute have come from the federal courts. These

*national privé québecois et canadien de la protection juridique du consommateur*, 33 R. DU B. 330 (1973).

14. TEX. REV. CIV. STAT. ANN. art. 2031b, §§ 3-4 (1964).

15. *Id.* art. 2031b, § 1; TEX. BUS. CORP. ACT ANN. arts. 8.10 (1956), 8.01B(1)-(13) (Supp. 1974). That list is not exclusive. *See generally* 2 R. HAMILTON, BUSINESS ORGANIZATIONS § 973 (1973).

16. *See* Doty & Parker, *Changes in the Texas Business Corporation Act and Related Statutory Provisions*, 10 HOUSTON L. REV. 1009, 1027 (1973).

17. There appear to be no Texas cases on this latter point. 2 R. HAMILTON, *supra* note 15, § 973, at 460, states that "[w]here the cause of action does not arise out of the activities of the defendant within the State, a considerably more substantial and continuing presence in the State is necessary."

18. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

courts have generally equated the reach of that statute with the maximum permissible under the federal constitution.[19] This approach has been challenged on occasion,[20] but as the following four cases indicate, seemingly without much hope of success.

In *Dorsid Trading Co. v. Du-Wald Steel Co.*[21] a Colorado company had purchased a quantity of steel angles, C.I.F. Duty Paid Port of Houston, from a Texas company. The order had been placed by telephone from Denver to Houston. The written contract was prepared and signed by the seller in Houston and mailed to the buyer in Denver, where it was executed and mailed back. A clause in the contract provided for arbitration in Houston (not requested by either party); another clause stated that the contract was to be governed by Texas law. The goods were shipped to Denver but rejected by the purchaser, and the seller sued on the contract in Texas. In reversing the dismissal of the action by the trial court upon the special appearance of the defendant, the Houston court of civil appeals observed that it was "clear that the cause of action arose of and was connected with" a purchase contract with a Texas company through the Port of Houston, and that the assumption of jurisdiction by a Texas court in the circumstances did "not offend traditional notions of fair play and substantial justice."[22] The court nevertheless felt the need to state, additionally, that the defendant had in the past made similar purchases from Texas.[23] It is to be hoped that this gesture of prudence will not serve to encourage those who (like the trial judge in the instant case) still find it difficult to accept that Texas may and does claim jurisdiction over out-of-state parties to single-transaction contracts to be performed at least in part in Texas.[24]

*Geodynamics Oil & Gas, Inc. v. U.S. Silver & Mining Corp.*[25] involves claims arising out of the alleged breach of a contract for the drilling of a test well in Panama. Plaintiff Geodynamics was an out-of-state corporation licensed to do business in Texas, and defendant Silver was an out-of-state corporation not so licensed. The negotiations between the parties had been conducted in Texas, and two agreements, styled "settlement agreement" and "loan agreement" respectively, had been executed by the defendant's president in Dallas. The loan agreement provided that it was "entered into and executed entirely" in Texas and to be construed pursuant to Texas law; the

19. *See, e.g.*, Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847, 852 (5th Cir. 1966), and authorities cited therein, and the authorities listed in 2 R. HAMILTON, *supra* note 15, § 973, at 458 n.18. The most recent manifestations of this approach are Jetco Electronic Indus., Inc. v. Gardiner, 473 F.2d 1228, 1234 (5th Cir. 1973) (*see* text accompanying notes 35-45 *infra*); Geodynamics Oil & Gas, Inc. v. U.S. Silver & Mining Corp., 358 F. Supp. 1345, 1347 (S.D. Tex. 1973) (*see* text accompanying notes 25-30 *infra*); and Hoppenfeld v. Crook, 498 S.W.2d 52, 56 (Tex. Civ. App.—Austin 1973), *error ref. n.r.e.* (*see* text accompanying notes 374-75 *infra*).

20. *See* sources cited in 2 R. HAMILTON, *supra* note 15, § 973, at 458 n.18 *in fine*.

21. 492 S.W.2d 379 (Tex. Civ. App.—Houston [14th Dist.] 1973).

22. *Id.* at 381.

23. *Id.* at 380-81.

24. Another example of this attitude is implicit in Stewart v. Walton Enterprises, Inc., 496 S.W.2d 956 (Tex. Civ. App.—Austin 1973), *error ref. n.r.e.* In Dodson v. Fontenot, 285 So. 2d 328 (La. App. 1973), a Texas default judgment against a Louisiana one-transaction purchaser was given full faith and credit. *See also* Coleman v. Patterson, 57 F.R.D. 146 (S.D.N.Y. 1972).

25. 358 F. Supp. 1345 (S.D. Tex. 1973).

settlement agreement contained the same choice-of-law provision and fixed the place of payment and venue in Nueces County, Texas. A promissory note also sued on in this action was payable in Corpus Christi, where the suit was brought in federal court. In addition to breach of contract, plaintiff alleged fraudulent misrepresentation, an allegation which the court characterized as sounding in tort under Texas law.[26]

Judge Cox had no difficulty in concluding that under the facts stated, defendant Silver had sufficient minimum contacts in the State of Texas, in connection with the transaction before the court. The Texas long-arm statute, he held, "will reach just as far as the constitutional eye can see."[27] The principle of minimum contacts, he continued, "is now the order of the day," and the only limitation on this expanded reach, "if this is any" is, in his view, the requirement of *Hanson v. Denckla* that there be "some act by which the defendant purposely avails itself of the privilege of conducting activities within the Forum State, thus invoking the benefits and protection of its laws."[28] While it would indeed be foolhardly to suggest that Texas lacked the power to subject Silver to the jurisdiction of its courts constitutionally with respect to claims relating to the transactions described above, the narrow question before the court was whether the Texas long-arm statute, as properly read by Texas judges, had asserted that power. The statute is in terms limited to contracts "with a resident" of Texas, and a crucial point relating to the contract cause[29] in the *Geodynamics* case might have been whether a foreign corporation licensed to do business in Texas is a "resident" within the meaning of that statute. This question is passed over in silence, probably because the defendant, well aware that it had been recently answered in the affirmative in *National Truckers Service, Inc. v. Aero Systems, Inc.*[30] wisely chose not to raise it again.

*Tabulating Systems & Service, Inc. v. I.O.A. Data Corp.*,[31] a carefully reasoned decision by Chief Judge Nye of the Corpus Christi court of civil appeals, serves well to illustrate the basic, but frequently neglected, point that the Texas long-arm statute is "relational," that is, that it requires a connection between the Texas contact and the specific contract or tort underlying the cause of action against the out-of-state defendant. Plaintiff Tabulating Systems had purchased some computer equipment from the first defendant, IPS. The equipment was to be shipped via the third defendant, North American Truck Lines, to the plaintiff at Harlingen, Texas. It was to be serviced by the second defendant, IBM, and insured by the fourth defendant, the Home Insurance Company of New York. None of these

26. *Id.* at 1347-48.
27. *Id.* at 1347.
28. *Id.*, citing and quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958).
29. The Texas long-arm statute does not require that the victim of a *tort* committed in whole or in part within this state be a resident. TEX. REV. CIV. STAT. ANN. art. 2031b, § 4 (1964).
30. 480 S.W.2d 455 (Tex. Civ. App.—Fort Worth 1972), *error ref. n.r.e., discussed in* Lebowitz, *Corporations, Annual Survey of Texas Law*, 27 SW. L.J. 85, 124-25 (1973). Further authorities on this point are collected in Hughes Tool Co. v. Meier, 486 F.2d 593 (10th Cir. 1973).
31. 498 S.W.2d 690 (Tex. Civ. App.—Corpus Christi 1973).

parties challenged the jurisdiction of the Texas court to determine which of them, if any, was liable for the allegedly insufficient insurance coverage and the malfunctioning of the computer equipment. I.O.A., fifth defendant and the only one to make a special appearance for the purpose of contesting jurisdiction, was the owner of the equipment at the time of the sale. The delivery was made at the instruction of IPS from the New York warehouse of I.O.A. through the truck line, with I.O.A. designated as the shipper in the bill of lading. The record was silent as to the relationship, if any, between IPS and I.O.A.

The trial judge severed the cause of action against this defendant, and dismissed it for want of jurisdiction. At first sight, this disposition of the case seems questionable, for the defendant had a number of contacts with the transaction and with Texas. As stated in the appellate opinion, I.O.A., which owned at least part of the equipment, had advertised the computer in a national trade journal seeking a buyer. Some of the advertising reached into Texas through the trade journal's within-state subscribers. The defendant had also contacted another Texas company, to see if it could find a buyer, and had made numerous telephone calls to prospective purchasers, including one to the plaintiff. However, nothing came of this contact. Finally, the defendant had sold some computer machinery on one occasion to a bank in Harlingen, Texas.[32]

The plaintiff alleged that the defendant was negligent in failing to protect the computer equipment while it was in storage and while it was being transported, but did not assert that the defendant had committed any tort in whole or in part in Texas. Furthermore, there was no allegation that the cause of action was connected with any Texas transaction between these parties. The court of civil appeals concluded, therefore, that plaintiff did not allege a cause of action which "*relates to* any of the foregoing contacts in Texas."[33] The tort, if any, had occurred elsewhere; there was no purchase contract between the parties; and the bill of lading did not constitute a contract between a shipper acting under the seller's instructions and the purchaser-consignee. The judgment of the trial court dismissing the action against I.O.A. for want of jurisdiction was, accordingly, affirmed.

Could it not have been argued that the negligent loading of goods in another state for shipment to Texas, together with damage suffered in Texas by the recipient due to malfunction caused by such shipment, constitutes a tort "committed in whole or in part within this State" under the long-arm statute?[34] This brings us to *Jetco Electronic Industries, Inc. v. Gardiner*,[35] a recent Fifth Circuit decision by Judge Thornberry. Engineers Testing Laboratory (ETL), an Arizona corporation with its principal place of business in that state, had been employed by Gardiner, an Arizona manufacturer of treasure hunting devices, to authenticate a previous comparative test by Gardiner of his own products and those of his competitors, including

32. *Id.* at 694.
33. *Id.* (emphasis added).
34. TEX. REV. CIV. STAT. ANN. art. 2031b, § 4 (1964).
35. 473 F.2d 1228 (5th Cir. 1973).

those of the two plaintiffs, who were Texas residents. The report verifying Gardiner's self-complimentary comparison (which, incidentally, earned ETL the lavish fee of $85) was then incorporated in a catalog of Gardiner products. Gardiner advertised these products in several magazines of widespread circulation, and some of the advertisements offered the readers free copies of the catalog, stating that it contained the report of the comparative test. Some 20,000 persons were said to have requested and received this catalog, and plaintiffs alleged that their sales had been adversely affected thereby.

Assuming that ETL had been negligent in authenticating Gardiner's test, and further assuming its liability for the consequences of that negligence was triggered by the mailing of Gardiner's catalog independently prepared by the latter, did ETL come within the reach of Texas long-arm jurisdiction? Judge Thornberry observed that this was a question controlled by state law, subject to federal constitutional restraints imposed by the due process clause.[36] He also pointed out that the Texas long-arm statute reached nonresidents doing business in Texas only in respect of suits arising from such business. ETL had, in fact, performed two soil testing jobs in El Paso in 1970, but because the suit did not relate to these tests, only the tort clause of the long-arm statute could support Texas jurisdiction in the instant case.[37]

Had the plaintiff made a prima facie showing[38] that ETL had in part committed a tort in Texas? Judge Thornberry answered this question in the affirmative. First, he wrote, "[i]t is immaterial that the tortious act occurred outside the state, for it is well established that the statute extends to injury occurring within the state as a result of a wrongful act committed outside the state."[39] Secondly, and more fundamentally, he observed that "Article 2031b represents an effort by Texas to exploit to the fullest the expanding limits of *in personam* jurisdiction."[40] Thirdly and finally, as regards the due process limitation, Judge Thornberry stated:

> When a nonresident defendant introduces a product into interstate commerce under circumstances that make it reasonable to expect that the product may enter the forum state, the forum may assert jurisdiction over the defendant in a suit arising out of injury caused by the product in the forum, if the defendant's other activities within the forum, even though wholly unrelated to the suit, satisfy the minimum contacts requirement.[41]

He then resurrected the two 1970 El Paso soil tests (yielding less than two-tenths of ETL's gross receipts for that year) in order to find such unrelated other activities sufficient to satisfy the due process requirement in the instant case.[42]

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36. *Id.* at 1230, 1232.
37. *Id.* at 1232.
38. Judge Thornberry held that the plaintiff only had to make a prima facie showing at this point, although the jurisdictional facts might still need to be proved at trial by a preponderance of the evidence if challenged. *Id.* at 1232 & n.4.
39. *Id.* at 1232 n.5.
40. *Id.* at 1234.
41. *Id.*
42. *Id.* at 1234-35.

The crucial step in this line of reasoning is the second one, which turns entirely on Texas law. Unfortunately, Judge Thornberry cites only federal authority in support of his construction; even more unfortunately, he did not then have the advantage of the Corpus Christi court's opinion in *Tabulating Systems*, which was decided almost five months later.[43] In that case, Texas declined to exercise jurisdiction in spite of rather substantially stronger within-state contacts, both relational and unrelated, and it expressly refused to use the latter in order to bolster the former.[44] It is perhaps not entirely without significance that the decision in *Jetco*, which was available in the Federal advance sheets some two months before the filing of the opinion in *Tabulating Systems*, finds no mention in the latter.[45]

In conclusion, it is submitted that the Texas long-arm statute is entirely "relational"; that even isolated sales to and from Texas come within the contract clause of that statute; but that within-state injury due to the isolated shipment of goods from out of state does not come within its torts clause as presently construed by Texas courts. It therefore seems highly desirable that *Jetco* should be reexamined in the light of *Tabulating Systems*, and that the concept underlying the latter be further elaborated at an early date, for what is ultimately at stake here is, of course, Texas jurisdiction in what David Cavers has recently called the "burgeoning field" of products liability.[46]

### B. *Federal Question Cases*

Pursuant to section 12 of the Clayton Act, actions under the federal antitrust laws against a corporation may be brought in any district "wherein it may be found or transacts business."[47] In *San Antonio Telephone Co. v. American Telephone & Telegraph Co.*,[48] twenty-two out-of-state regional subsidiaries of AT&T moved to dismiss, as to them, a private action under the Sherman and Clayton Acts filed in the Western District of Texas. It was asserted that these companies "transacted business" in Texas through providing interconnecting telecommunication facilities and sharing long-distance revenue thereby generated, and that they also advertised such service. The district court held that these two contacts did not constitute "transacting

43. *Jetco* was decided on Feb. 8, 1973: rehearing and hearing en banc were denied on March 21. *Tabulating Systems* was decided on June 28 of that year.

44. *See* text accompanying notes 32-33 *supra*.

45. The West Publishing Company advance sheet including 473 F.2d 1228 is dated April 23, 1973.

46. Cavers, *Comparative Conflicts Law in American Perspective*, [1970] 3 Recueil des Cours 193. Garza v. Frank Hrubetz & Co., 496 S.W.2d 143 (Tex. Civ. App.—San Antonio 1973), fails to provide guidance in this area, since the out-of-state defendant successfully denied having manufactured the product. Hoppenfeld v. Crook, 498 S.W.2d 52, 56 (Tex. Civ. App.—Austin 1973), *error ref. n.r.e.*, holds that fraud is a "two-element tort which is not actionable until relied upon to the detriment of the person to whom the representations were made," and that reliance in Texas is sufficient to make a fradulent misrepresentation in another state a tort committed partially in Texas under art. 2031b, § 4. In that case, however, the Texas contacts of a New York corporate officer sued in his personal capacity were found to be so tenuous as to preclude, under the due process clause, the application of the Texas long-arm statute.

47. 15 U.S.C. § 22 (1970); *see, e.g.*, Fulton Co. v. Beaird-Poulan, Inc., 54 F.R.D. 604 (N.D. Miss. 1972), and cases there cited.

48. 364 F. Supp. 1157 (W.D. Tex. 1973).

business" within the Western District of Texas under section 12. It noted in connection with the latter point that the advertisements had been made in the respective districts of the out-of-state AT&T subsidiaries. The court also rejected the single-entity theory which would treat these subsidiaries as mere components of the parent corporation, as there had not been sufficient disregard of the corporate structure to warrant application of that doctrine for venue purposes.[49]

This decision evidences the continued, if greatly limited, vitality of the *Cannon* doctrine, and shows the difficulties inherent in attempts to reach parent companies through subsidiaries or, as here, the subsidiaries through the parent. These difficulties were even more manifest in *Frito-Lay, Inc. v. Procter & Gamble Co.*,[50] a patent invalidity suit. The parent company, which was the owner of the patent and hence an indispensable party, was not licensed to do business in Texas and did not maintain a regular place of business or a registered agent here. Its products were marketed in Texas through the Procter and Gamble Distributing Company, a wholly-owned subsidiary. Four of the seventeen directors of the parent were members of the five-man board of the subsidiary, and fifteen of Procter and Gamble's twenty-nine officers were the officers of the distributing company. There was undisputed though self-serving evidence that while the parent ultimately controlled the subsidiary through stock ownership and was informed of important decisions, the subsidiary enjoyed independent responsibilities for the management of its business, including control over day-to-day operations. On the other hand, the parent company had made reference to consolidated earning reports and to combined employee figures in financial statements and in a prospectus for sinking fund debentures, filed with the SEC, stating that liability for these debentures was to be assumed by the parent and all domestic subsidiaries.[51]

Judge Mahon proceeded from the premise that *Cannon Manufacturing Co. v. Cudahy Co.*[52] was still good law, and that " 'as a general rule, the relationship of parent corporation and subsidiary corporation is not of itself a sufficient basis for subjecting the non-resident parent corporation to the jurisdiction of the forum state.' "[53] He held that under the facts as outlined above, the plaintiff had not "made a *prima facie* showing of actual control of the internal affairs of the subsidiary by the parent."[54]

The plaintiff had also relied on some federal decisions in the antitrust area, especially *United States v. Scophony Corp.*[55] Judge Mahon pointed out that jurisdiction in antitrust matters rested on section 12 of the Clayton

49. *Id.* at 1160-61, citing Cannon Mfg. Co. v. Cudahy Pkg. Co., 267 U.S. 333 (1925).
50. 364 F. Supp. 243 (N.D. Tex. 1973).
51. *Id.* at 248-49.
52. 267 U.S. 333 (1925). Note, incidentally, that Cannon could now sue Cudahy in North Carolina under either of two pertinent North Carolina long-arm statutes. N.C. GEN. STAT. § 1-75-4(5)(d) (1969); § 55-145(1) (1973). *See* Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).
53. 364 F. Supp. at 247, quoting 2 W. MOORE, FEDERAL PRACTICE ¶ 4.25[6], at 1174 (2d ed. 1970).
54. *Id.* at 249.
55. 333 U.S. 795 (1948).

Act, whereas in the instant case, out-of-state parties could be reached only through the Texas long-arm statute.[56] For the reason previously stated, the defendant parent company was not "doing business" in Texas, and although patent infringement sounded in tort, there was nothing to show that the *defendant* had committed all or any part of a tort in Texas or elsewhere. The action was accordingly dismissed for want of joinder of an indispensable party.[57]

There might be some question whether this latter holding is compatible with *Jetco*, which is cited as authority.[58] Surely, the registration of an invalid United States patent and the exclusive licensing of that patent to a Texas distributor inflicts harm in Texas on others who are thus unjustifiably restrained from making use of technical innovations, and who thus have to compete with the licensee or his purchasers on unequal terms. On a fundamental level, the *Frito-Lay* case raises the question whether it might not be desirable to enact a *general* venue statute for federal causes of action (possibly modeled on section 12 of the Clayton Act), instead of leaving the localization of federal-question litigation to the vagaries of state long-arm statutes.

### C. *Service of Process and Special Appearance*

It is "imperative and essential" in Texas "that the record affirmatively show a strict compliance with the provided mode of service."[59] A recent illustration of this requirement of strict compliance is *Day-Bright Lighting Div. v. Texas Metalsmith, Inc.*,[60] an appeal by writ of error from a default judgment against a foreign corporation. Plaintiff's amended petition stated that it had attempted to serve defendant-appellant's last named registered agent who could, however, not be found at his address, and had thereupon served process upon the secretary of state pursuant to article 2031b. The Dallas court of appeals stated that "the statutory prerequisites to substituted service must be clearly shown by allegations in the petition."[61] As the statute requires *two* such unsuccessful attempts before service on the secretary of state may be resorted to, the decision below was reversed.[62] In accordance with rule 123 of the Texas Rules of Civil Procedure which conclusively presumes the filing of an appeal or a writ of error because of defective service of process to be a general appearance at the term of court at which the mandate is filed, the case was not dismissed but remanded for trial. Thus, by his election to pursue this remedy rather than to appear specially,

56. 364 F. Supp. at 249-50.
57. *Id.* at 250.
58. *Id.*
59. McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965). Further authorities are collected in 2 R. HAMILTON, *supra* note 15, § 981, at 470.
60. 499 S.W.2d 336 (Tex. Civ. App.—Dallas 1973).
61. *Id.* at 337.
62. *Id.* In James Edmond, Inc. v. Schilling, 501 S.W.2d 432 (Tex. Civ. App.—Waco 1973), plaintiff had failed to allege that defendant was a corporation, and that it did not maintain a regular place of business in Texas. For these reasons, and on the same grounds as in *Day-Bright Lighting*, a default judgment in favor of a Texas seller against an out-of-state purchaser was reversed, and the cause remanded for trial. *Id.* at 434.

the "victorious" out-of-state appellant was precluded from pressing his additional points of error that there had been no proof of facts which would bring it within the terms of the long-arm statute, and that article 2031b was unconstitutional if applied under the facts and circumstances of the case.[63]

The category of facts required to be shown affirmatively by the record in default judgments based on substituted service was re-defined and perhaps somewhat expanded by the supreme court in its recent decision in *Whitney v. L & L Realty Corp.*[64] The appellees had leased apartments to the defendants in Dallas for one-year terms. During the term, the defendants had abandoned their apartments, moved out of the state, and ceased rental payments. The appellee thereupon took default judgments against them after service of process on the secretary of state as authorized by article 2031b. However, the record did not indicate whether the secretary of state had forwarded a copy of the process to the out-of-state defendants.

Section 6 of article 2031b provides that when a party becomes a nonresident after a cause of action arises against him in Texas, he can be "served with citation by serving a copy of the process upon the secretary of state of Texas, who shall be conclusively presumed to be the true and lawful attorney to receive service of process; *provided that the Secretary of State shall forward a copy of such service . . . by certified or registered mail, return receipt requested.*"[65] The same requirement, in somewhat different language, is contained in section 5, which relates to substituted service under the Texas long-arm statute in general.[66]

Is the part of section 6 italicized above an integral part of substituted service without which such service is not properly made, or is it an independent statutory duty of the secretary of state? Writing for a unanimous supreme court, Chief Justice Greenhill conceded that the statute was ambiguous in this respect, but should be construed in the former sense, since Texas decisions requiring particularity in pleading amenability to service "reflect a strong policy that defendants ought not to be cast in personal judgment without notice."[67] More particularly, he stated that while the requirement of proof of forwarding of process would not cause any significant hardship to plaintiffs seeking judgments against nonresidents, the absence of such a

63. Woodcock, Cummings, Taylor & French, Inc. v. Crosswell, 468 S.W.2d 864, 866 (Tex. Civ. App.—Houston [1st Dist.] 1971); Roberts Corp. v. Austin Co., 487 S.W.2d 165 (Tex. Civ. App.—Houston [14th Dist.] 1972). *See also* text accompanying notes 72-75 *infra.*

64. 500 S.W.2d 94 (Tex. 1973).

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

66. Whenever process against a foreign corporation, joint stock company, association, partnership, or non-resident natural person is made by delivering to the Secretary of State duplicate copies of such process, the Secretary of State shall require a statement of the name and address of the home or home office of the non-resident. Upon receipt of such process, the Secretary of State shall forthwith forward to the defendant a copy of the process by registered mail, return receipt requested.

TEX. REV. CIV. STAT. ANN. art. 2031b, § 5 (1964). A like requirement is contained, with respect to domestic corporations, in TEX. BUS. CORP. ACT art. 2.11B (1956).

67. 500 S.W.2d at 97. In Southwestern Remodelers of Houston, Inc. v. Lumaside, Inc., 501 S.W.2d 759 (Tex. Civ. App.—Houston [1st Dist.] 1973), the proof-of-forwarding requirement was extended to substituted service on *domestic* corporations pursuant to TEX. BUS. CORP. ACT ANN. art. 2.11B (1956).

requirement would entail a much more serious hardship for out-of-state defendants. The latter would then be precluded from timely review by writ of error and relegated to the bill-of-review remedy, with the initial burden of proving that there was a good defense and absence of fault in failing to appear.[68] These disadvantages, incidentally, were graphically illustrated by the case of *Dosamantes v. Dosamantes*,[69] which will be discussed further below.

Chief Justice Greenhill wrote in *Whitney* that a certificate from the office of the secretary of state, which could be furnished for a trivial fee, would suffice as proof of forwarding of process.[70] This suggestion was quickly taken up by the secretary of state, who now furnishes such certificates routinely on request.[71]

While Texas requires strict compliance with the provided mode of service, it also requires strict compliance with the mode for filing special appearances to challenge jurisdiction. Pursuant to Texas Rule of Civil Procedure 120a, a special appearance may be made in person or by counsel, for the purpose of objecting to the jurisdiction of the court over the defendant on the ground that he is "not amenable to process" issued by Texas courts. This special appearance is to be made by *sworn* motion filed prior to any other plea or motion. Every appearance, prior to judgment, that is not in compliance with rule 120a is declared to be a general appearance.

*Stewart v. Walton Enterprises, Inc.*[72] serves to illustrate this draconic consequence of failure to comply strictly with rule 120a. The plaintiffs, who resided in Austin, had contacted the defendant, a Florida company, in response to the latter's newspaper advertisements. This resulted in some transactions between the parties, but ultimately, the plaintiffs brought action against the defendant in Texas for breach of contract to supply them with Walt Disney toys for distribution and sale in Texas, and for fraud in inducing them to make the contract without intention to perform. The defendant first filed, through Florida counsel, an *unsworn* special appearance to contest jurisdiction. Plaintiffs urged that not being sworn, this appearance was general, not special. Defendant later filed the sworn motion under rule 120a in proper form through Texas counsel.

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68. 500 S.W.2d at 96.

69. 500 S.W.2d 233 (Tex. Civ. App.—Texarkana 1973); *see* text accompanying notes 416-34 *infra*.

70. 500 S.W.2d at 96.

71. The following statement appeared in 11 TEXAS LAWYERS' WEEKLY LETTER No. 44, Nov. 14, 1973, at 1:

> Because of the recent Texas Supreme Court decision in *Whitney v. L & L Realty Corporation* . . . the Office of the Secretary of State has established a standard procedure for furnishing the required certificate to the requesting attorney. When forwarding his Citation and Petition to the Sheriff for service on the Secretary of State under the long-arm statute, the attorney desiring a certificate showing that a copy was mailed to the defendant should send a carbon copy of his letter to the Secretary of State, attn: Administrative Division, accompanied by the $2.00 fee and noting upon the carbon his request to be furnished such a certificate. Upon being served by the Sheriff the Secretary of State will furnish his certificate to the requesting attorney.

72. 496 S.W.2d 956 (Tex. Civ. App.—Austin 1973), *error ref. n.r.e.*

The trial court implicitly rejected the plaintiffs' contention, and held that article 2031b could not be constitutionally applied to obtain jurisdiction over the defendants under the set of facts as described. On appeal, the Austin court of civil appeals reversed, holding that the unsworn purported special appearance filed through Florida counsel was indeed a general appearance since it did not strictly comply with rule 120a. Since the Florida defendant had thus subjected himself to the jurisdiction of the Texas court for purposes of the suit, the court of civil appeals remanded the cause for trial without passing on the point decided adversely to plaintiffs below.[73] Assuming that *York v. Texas*[74] is still good constitutional law, and good Texas law to the extent that it has not been specifically replaced by rule 120a, this result is not quite as absurd as it might seem. This is likely to bring little solace to the first victim of "Rule Catch-120a,"[75] but it might impress him (and others in his position) with the eminent desirability of retaining Texas counsel in connection with Texas proceedings.

### D. *Forum Non Conveniens and Injunctions Against Foreign Litigation*

*PPG Industries, Inc. v. Continental Oil Co.*[76] marks the beginnings of energy crisis litigation in Texas. Continental (a Delaware corporation with a regional office in Houston) contracted to furnish a substantial portion of the natural gas requirements of a Lake Charles, Louisiana, chemical plant owned by PPG, a Pennsylvania corporation with plants and offices in Harris County, Texas. The gas furnished under this contract is produced totally from Louisiana lands and delivered through pipelines in that state; it may be used by PPG only at its Lake Charles facilities and may not enter interstate commerce. In 1969, Continental determined that it would have difficulties in meeting the delivery requirements of its contracts with PPG and with the Olin Corporation, another natural gas user. Olin is a Virginia corporation that also has offices and plants in Harris County; all three companies are, of course, licensed to do business in Texas.

Negotiations between the parties having proved fruitless, Continental brought suit against PPG and Olin in Texas, seeking a declaration of its obligations and an equitable decree allocating its available supplies of natural gas. Continental alleged that because of the energy shortage and due to changes in government regulations, the delivery of the gas required had become impossible or commercially impracticable. Three weeks after the filing of the Texas suit, PPG filed suits against Continental in a Louisiana state court, and in the United States district court in Lake Charles, Louisiana. These actions were stayed pending the outcome of the Texas litigation, and the stay issued by the federal district court was upheld on

73. *Id.* at 959.

74. 137 U.S. 15 (1890), *aff'g* York v. State, 73 Tex. 651, 11 S.W. 869 (1889). *See generally* 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 (1964).

75. This expression was suggested to the present author in conversation by his colleague, Professor David Anderson of the University of Texas School of Law.

76. 492 S.W.2d 297 (Tex. Civ. App.—Houston [1st Dist.] 1973), *error ref. n.r.e.*

appeal by the Fifth Circuit.[77]

The Texas trial court found that the Texas action was filed first, that the two controversies were identical, and that the prosecution of the Louisiana suit would interfere with the exclusive jurisdiction of the Texas court. It accordingly granted the injunction sought. PPG appealed, contending, in essence, that judicial discretion had been abused in restraining foreign litigation between foreign companies where no Texas interests were involved, and where the controversy clearly was a "Louisiana controversy between two foreign corporations and should be litigated in Louisiana."[78]

As regards the first point, the Houston court of civil appeals held that a foreign corporation licensed to do business here "is treated as a resident of the state within the principles involved in suits for injunctions against proceedings in other states."[79] These principles, it went on to state, were the duty of the court to protect its jurisdiction, and the objective of preventing a multiplicity of suits. On the other hand, the Houston court said, the power of the court to enjoin proceedings in a foreign state should be used sparingly, and only to prevent manifest wrong and injustice.

Did the trial court abuse its discretion here because the matter could be more appropriately tried in Louisiana? The Houston court formulated the following pertinent test: "If under the doctrine of forum non conveniens a serious question arises as to whether the Texas court should retain jurisdiction of the case, it would amount to an abuse of discretion to continue in force an injunction prohibiting trial in a convenient foreign jurisdiction."[80] It then listed the following as some of the factors to be considered in that connection: (1) the private interest of the litigant; (2) ease of access to sources of proof; (3) availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; (4) the ability to give effective relief; (5) whether foreign law must be applied to the facts of the case, and, if so, whether it is so dissimilar to the laws of this state as to be difficult or incapable of enforcement here.[81]

As regards the factor last mentioned, it was as yet uncertain, despite what is termed the "Louisiana flavor" of the case, whether Texas or Louisiana law would ultimately be held applicable. Accepting Mr. Justice Jackson's famous statement in *Gulf Oil Corp. v. Gilbert*[82] that unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed, the Houston court of civil appeals affirmed the judgment below. However, the Houston court pointedly observed that the facts with reference to *forum non conveniens* were not as yet fully developed, and that such a plea might yet be presented at a later point.[83]

The *PPG* case can be cited for three propositions: that *forum non con-*

77. PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674 (5th Cir. 1973), *discussed in* 51 TEXAS L. REV. 1252 (1973).
78. 492 S.W.2d at 299.
79. *Id.*
80. *Id.* at 300.
81. *Id.*
82. 330 U.S. 501 (1947).
83. 492 S.W.2d at 301; *see* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

*veniens* as authoritatively elaborated in *Gulf Oil* is part of the law of Texas; that injunctions in restraint of *foreign* litigation, although to be used sparingly, are reviewable only if there is at least a "serious question" whether the *Texas* action should be dismissed on *forum non conveniens* grounds; and that in applying these two propositions, foreign corporations licensed to do business in Texas are to be treated as Texas residents. The last proposition seems plausible;[84] the first one is debatable;[85] and the second one is novel. Texas trial courts should have general power to protect their jurisdiction over matters that are properly before them; whether the matters are properly before the court should be developed by the usual methods, including, perhaps, pleas based on the *forum non conveniens* doctrine.

Resort to that doctrine at an earlier stage seems as uneconomical as it seems misplaced, as the subsequent history of this litigation amply demonstrates. On remand, and some ten months after the litigation has commenced, PPG filed its *forum non conveniens* plea in abatement and the trial court dismissed the suit on this ground. In *Continental Oil Co. v. PPG Industries*,[86] the Houston court of civil appeals reversed this order of dismissal, and remanded the cause for trial.

In its second *PPG* opinion, the Houston court held, on the authority of *H. Rouw Co. v. Railway Express Agency*,[87] that "a foreign corporation having a permit to do business in Texas has a statutory right to sue in the Texas courts another foreign corporation having a permit to do business in Texas."[88] It then went on to state, in much broader terms, that Texas courts "have no discretion to exercise in the matter of retaining the jurisdiction acquired, and are required to try such a case just as such courts would be required to try a case brought against a Texas corporation by another Texas corporation, or by a citizen of Texas against another Texas citizen, regardless of where the cause of action might have arisen."[89] The opinion might have stopped here, but Justice Coleman, speaking for the unanimous Houston court, proceeded to drive a few more nails into the coffin of *forum non conveniens* in Texas. He held that, in any event, the moving party had the burden of proving the facts required to sustain a plea of abatement, and that this proof had to be made by competent trial evidence. Thus, affidavits were not only insufficient, but even inadmissible. So was, oddly enough, the official transcript of testimony at the previous trial *in the same case*, for there was no showing that the former trial was on the same issues or that the witnesses were now unavailable. Finally, the Houston court held, the degree of trial court discretion in declaratory judgment proceedings is not materially different from trial court discretion in other actions.[90]

84. For a parallel point, see text accompanying note 30 *supra*.
85. Flaiz v. Moore, 359 S.W.2d 872 (Tex. 1962), expressly did not pass on "the extent to which the forum non conveniens principle is recognized in Texas." *Id.* at 876. According to Van Winkle-Hooker Co. v. Rice, 448 S.W.2d 824, 827 (Tex. Civ. App.—Dallas 1969), where further authorities are collected, the doctrine has been applied "only sparingly" in Texas.
86. 504 S.W.2d 616 (Tex. Civ. App.—Houston [1st Dist.] 1973).
87. 154 S.W.2d 143 (Tex. Civ. App.—El Paso 1941), *error ref.*
88. 492 S.W.2d at 620.
89. *Id.*
90. *Id.* at 623.

It thus appears that in Texas, the plea of *forum non conveniens* is never available against Texas residents, Texas corporations, or foreign corporations qualified to do business in Texas. The rule is different in federal courts and in what appears to be a growing number of other states, including some of the more important ones.[91] It also seems that Texas courts will not follow the lead of the federal courts in letting a prima facie showing suffice at the jurisdictional stage, subject to verification at trial if challenged.[92] Most remarkably, if the view of the Houston court of civil appeals in the second *PPG* case should prevail on this point, the verification of jurisdictional facts for *forum non conveniens* purposes requires a separate full-blown trial *on that issue.*

This chilly attitude towards *forum non conveniens* by a state court is not entirely illogical. When a federal district court, acting pursuant to the *Gilbert* doctrine as now codified in section 1404(a) of the Judiciary Code,[93] transfers a case to another federal district court sitting in another state, the latter must now apply the choice-of-law rules prevailing at the transferor forum,[94] so that "ease of application of law" consideration in *forum non conveniens* becomes an innoccuous term. The *PPG* litigation devastatingly shows that this simply is not so between courts of different states having different choice-of-law rules. Few will quarrel with Justice Coleman's expression of confidence in the ability of Texas courts to apply Louisiana law if called upon to do so.[95] What is at issue is not the correct administration of the law held to be applicable by both Texas and Louisiana, but the initial selection of that law by processes which, at least in the opinion of the parties to this litigation, are crucially different in these two states. As tersely stated by Judge Thornberry in the Fifth Circuit case of *PPG Industries, Inc. v. Continental Oil Co.*: "Since the filing of the original Texas suit by Conoco, PPG has undertaken several manuevers [*sic*] designated to relocate the litigation on the contractual questions in Louisiana, where it believes the applicable choice-of-law rule and the substantive contracts law are more favorable, and Conoco has battled—successfully so far—to confine the litigation to the Texas forum."[96]

In these circumstances, *forum non conveniens* becomes what the United States Supreme Court has called, in *Van Dusen v. Barrack*, "primarily . . . a forum-shopping instrument."[97] For that very reason, that Court held that as between federal courts, the transferee forum had to apply the choice-of-law rules prevailing at the transferor forum. Since state courts are by definition unable to control the choice-of-law process in sister states once

91. *See* CAL. CIV. PRO. CODE § 410.30 (1973); J.F. Pritchard & Co. v. Dow Chem. of Canada Ltd., 462 F.2d 998 (8th Cir. 1972); Turner v. Evers, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (1973); Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972); *cf.* Cray v. General Motors Corp., 389 Mich. 382, 207 N.W.2d 393 (1973).

92. *See* note 38 *supra.*

93. 28 U.S.C. § 1404(a) (1970).

94. Van Dusen v. Barrack, 376 U.S. 612 (1964).

95. 492 S.W.2d at 621.

96. 478 F.2d 674, 676 (5th Cir. 1973).

97. 376 U.S. at 636, citing Currie, *Change of Venue and the Conflict of Laws,* 22 U. CHI. L. REV. 405, 441 (1955).

they have relinquished jurisdiction over a controversy pending before them, *forum non conveniens* should in principle not be available where choice-of-law rules are likely to lead to conflicting results, and a motion on this ground should never be granted where such a difference in choice-of-law rules is the very reason for the motion.

However, it is conceivable that the application of the choice-of-law rules of the forum leads to the conclusion that the law of another state should be applied. In Texas contracts conflicts cases, this will be so if the forum's "connection with the transaction is minimal and fortuitous, and if it has no interest in the . . . controversy."[98] In such a situation, the normal course would be to apply the law of the other state and decide the controversy on its merits. In applying the law of another state, however, a court is acting much in the manner of an amateur photographer; it is not called upon, nor indeed competent, to develop that law in a creative manner so as to meet new situations. Therefore, if it should develop that no Texas interest is involved, and that Louisiana law might have to be applied not mechanically but creatively (that is, in the manner of an architect rather than a photographer)[99] dismissal on *forum non conveniens* grounds might still be appropriate even at that late date.

### E. *Jurisdiction by Consent: Arbitration and Choice-of-Forum Clauses*

The record compiled above will hardly impress the student of judicial administration or the layman interested in the speedy dispensation of justice. None of the ten cases discussed was decided on the merits. Two of the three federal district court cases were dismissed for lack of venue or jurisdiction, as was one of the cases decided by a Texas court of appeals.[100] Thus assigned to limbo in Texas, these three cases will have to be filed elsewhere *de novo*, if at all. Two further cases in the Texas courts were remanded because of improper service.[101] Trial courts declined to exercise their jurisdiction in no less than six of the ten cases discussed. Four of these dismissals were challenged on appeal; three of them successfully.[102]

The layman might be told that this bleak picture reflects the pathology, not the anatomy of interstate litigation, since easy cases do not figure promi-

98. Continental Oil Co. v. Lane Wood & Co., 443 S.W.2d 698, 701 (Tex. 1969); *see* text accompanying notes 336-68 *infra*.

99. This picture is suggested by W. GOLDSCHMIDT, SUMA DEL DERECHO INTERNACIONAL PRIVADO 92 (2d ed. 1961).

100. San Antonio Tel. Co. v. American Tel. & Tel. Co., 364 F. Supp. 1157 (W.D. Tex. 1973); Frito-Lay, Inc. v. Procter & Gamble Co., 364 F. Supp. 243 (N.D. Tex. 1973); Tabulating Systems, Inc. v. I.O.A. Data Corp., 498 S.W.2d 690 (Tex. Civ. App. —Corpus Christi 1973).

101. Whitney v. L & L Realty Corp., 500 S.W.2d 94 (Tex. 1973); Day-Bright Lighting Div. v. Texas Metalsmith, Inc., 499 S.W.2d 336 (Tex. Civ. App.—Dallas 1973).

102. Jetco Electronic Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973) (reversing trial court); Frito-Lay, Inc. v. Procter & Gamble Co., 364 F. Supp. 243 (N.D. Tex. 1973); San Antonio Tel. Co. v. American Tel. & Tel. Co., 364 F. Supp. 1157 (W.D. Tex. 1973); Stewart v. Walton Enterprises, Inc., 496 S.W.2d 956 (Tex. Civ. App.—Austin 1973), *error ref. n.r.e.* (reversing trial court); Dorsid Trading Co. v. DuWald Steel Co., 492 S.W.2d 379 (Tex. Civ. App.—Houston [14th Dist.] 1973) (reversing trial court); Tabulating Systems, Inc. v. I.O.A. Data Corp., 498 S.W.2d 690 (Tex. Civ. App—Corpus Christi 1973).

nently in the law reports. However, both he and his counsel are not likely to be impressed by the current state of the art as shown by the record, and will look for appropriate precautionary measures designed to avoid jurisdictional pitfalls. The two most important devices currently employed for this purpose are arbitration agreements and choice-of-forum clauses.

*Arbitration.* Texas follows the traditional common law rule that in the absence of statute, executory contracts to submit future disputes to arbitration are unenforceable.[103] The Texas General Arbitration Act, which became effective on January 1, 1966,[104] was supposed to remedy this deficiency, but fell short of its objective in two important respects. First, it does not apply to the construction and insurance industries. Secondly, even outside these two areas, an agreement to arbitrate is enforceable under the act only if it is "concluded upon the advice of counsel to both parties as evidenced by counsels' signatures thereto."[105] This second requirement is unique in the United States, and is reported to be met with "amusement and incredulity" at sister state bar association meetings.[106] Its short-range impact on arbitration in Texas has been nothing short of disastrous.[107] However, in recent years, the gap left by the Texas General Arbitration Act has been closed by the progressive application of the Federal Arbitration Act[108] to arbitrate clauses in Texas-connected contracts involving interstate or foreign commerce.

In *Lawn v. Franklin*[109] a federal district court compelled the then Roman Catholic Bishop of Austin, Msgr. Reicher, to submit to arbitration in New York on the basis of an arbitration clause contained in a contract involving interstate commerce. The arbitration clause called for arbitration in New York City under the rules of the American Arbitration Association. Msgr. Reicher contended that his co-defendant Franklin, who is a member of the Texas bar, had signed the contract as an escrow agent, and not as his counsel. Therefore, he asserted, the arbitration clause was invalid as not in conformity with the Texas arbitration statute. The district court considered this issue immaterial, holding that the state statute could not, in any event, pre-

103. Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634, 636 (Tex. Civ. App.—Dallas 1973); REA Express v. Missouri Pac. R.R., 447 S.W.2d 721, 726 (Tex. Civ. App. —Houston [14th Dist.] 1969).

104. TEX. REV. CIV. STAT. ANN. arts. 224-38 (1973).

105. *Id.* art. 224. The legislative history of this clause is documented in Carrington, *The 1965 General Arbitration Statute of Texas*, 20 SW. L.J. 21, 61-62 (1966), and in 44 TEXAS L. REV. 372 (1965).

106. Coulson, *Texas Arbitration—Modern Machinery Standing Idle*, 25 SW. L.J. 290 (1971).

107. *Id.* at 295.

108. 9 U.S.C. §§ 1-14 (1970). Section 2 reads as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Pursuant to § 1, "commerce" as here used means interstate and foreign commerce generally.

109. 328 F. Supp. 791 (S.D.N.Y. 1971).

vail over the Federal Arbitration Act, in that the latter "created Federal substantive law."[110]

This doctrine was further extended in *Collins Radio Co. v. Ex-Cell-O Corp.*,[111] a decision of the Federal Court of Appeals for the Eighth Circuit. Collins, an Iowa corporation with a plant in Texas, had purchased three shipments of computer parts from Ex-Cell-O, a Michigan corporation. The third purchase order contained an arbitration clause and a choice-of-law clause to the effect that Texas law governed the agreement. Collins brought suit in federal district court on the purchase orders, and Ex-Cell-O countered by demanding arbitration. This was met with the contention that the arbitration clause was invalid under Texas law, which had been expressly chosen by the parties to govern their agreement. In a unanimous opinion written by Chief Judge Mathes, this argument was rejected. The Chief Judge wrote: "While we have grave doubts that the Texas statute contains the provincial requirement that the advising attorneys be licensed in Texas, we need not decide that state law question of first impression because we hold the Federal Act bars resort to state arbitration rules to determine the validity of arbitration clauses in interstate contracts."[112]

The third and so far the most recent case to be considered in this context is *Mamlin v. Susan Thomas, Inc.*[113] The plaintiff had been employed by the defendant, a New York manufacturer, as a sales representative in Texas and in five other states. The contract contained a choice-of-law clause selecting New York law, and the standard arbitration clause calling for arbitration in New York City in accordance with rules of the American Arbitration Association and the laws of New York. Mamlin brought suit, alleging non-payment of commissions earned. The employer-defendant filed a sworn plea in abatement, alleging that it had demanded arbitration pursuant to the contract. The plea was sustained and the action eventually dismissed when neither party seasonably commenced arbitration. On appeal, Mamlin argued that as no motion had been made to take judicial notice of New York law, that law had to be presumed to be identical with Texas law,[114] with the result that the arbitration clause was invalid for failure to comply with the Texas arbitration statute and otherwise unenforceable at common law.

The Dallas court of civil appeals held that the choice of New York law did not evince an intention to exclude the federal statute which declares the arbitration clause to be enforceable, as the parties could not be presumed to have chosen an invalidating law.[115] This was clearly a transaction involving commerce as defined by the Federal Arbitration Act, and the latter had been "held to be substantive rather than procedural, and equally applicable in state and federal courts, even though the contract provides that any dis-

110. *Id.* at 794.
111. 467 F.2d 995 (8th Cir. 1972).
112. *Id.* at 997.
113. 490 S.W.2d 634 (Tex. Civ. App.—Dallas 1973).
114. *Id.* at 636. *See generally* text accompanying notes 149-56 *infra.*
115. 490 S.W.2d at 637, citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, comment *c* (1971); *see* text accompanying notes 250-51 *infra.*

pute should be settled by arbitration under the laws of a particular state."[116]

It follows that arbitration clauses in transactions involving commerce are now enforceable in federal and state courts alike within the terms of the Federal Arbitration Act. This is a remarkable advance, which is likely to make such clauses more attractive for Texas enterprises in the future than they have been up to now. On the international level, there is the additional advantage of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[117] which extends to most major trading nations,[118] and of numerous (though somewhat less progressive) provisions on arbitration in bilateral treaties of Friendship, Commerce and Navigation.[119]

*Choice-of-Forum Clauses.* While arbitration clauses in transactions involving interstate and foreign commerce have thus become an effective device for the localization of dispute settlement, there is reason to believe that their utilization, though substantially increased, will still be limited. First, it might be felt that there is less certainty as to the outcome (and the parties' influence on it) in arbitration than there is in adjudication, so that geographical certainty is bought at the price of the diminished predictability of the outcome. Secondly, the dispute that actually arises may not be one that is arbitrable, or the arbitrator may not be competent to grant the appropriate relief. For instance, there is continuing doubt as to the arbitrability (if any) of disputes arising out of securities transactions, and in trademark controversies where injunctions are the prime remedy, arbitration is not likely to be very fruitful. For reasons such as these, even existing and presumably enforceable arbitration clauses are not infrequently ignored by both parties.[120]

For these reasons, among others, parties frequently resort to choice-of-forum clauses that seek to select not a locus for arbitration but a court for adjudication. Such clauses have two functions: they *confer* jurisdiction upon the court chosen (*prorogatio fori*), and they oust, or at least suspend, the jurisdiction of other courts that would otherwise by operation of law be competent (*deregatio fori*). Will such clauses be given effect in Texas?

The contractual *conferral* of jurisdiction on Texas courts does not seem to pose formidable obstacles, at least outside of the area of consumer trans-

116. 490 S.W.2d at 637. Lawn v. Franklin, 328 F. Supp. 791 (S.D.N.Y. 1971), is among the authorities cited in support of this statement. 490 S.W.2d at 637 n.3.

117. 9 U.S.C. §§ 202-08 (1970); T.I.A.S. No. 6997, 330 U.N.T.S. 3 (1958). It is understood that the text of this treaty, and of other multilateral treaties relating to the resolution of transnational civil and commercial disputes, will be reproduced in a forthcoming edition of *Martindale-Hubbel's Lawyers' Directory.*

118. The list includes Mexico, see Carl, *Relevance to Texas Practitioners of Recent Conventions on International Conflict of Laws,* 35 TEX. B.J. 425 (1972). Unfortunately, it does not include Canada.

119. *E.g.,* with Germany. *See* Batson Yarn & Fabrics Mach. Group, Inc. v. Saurer-Allma GmbH-Allgauer Maschinenbau, 311 F. Supp. 68 (D.S.C. 1970).

120. *Compare* Alberto-Culver Co. v. Scherk, 484 F.2d 611 (7th Cir. 1973), *cert. granted,* 39 L. Ed. 2d 108 (1974) (No. 73-781), *with* Alco Standard Corp. v. Benalal, 345 F. Supp. 14 (E.D. Pa. 1972) (transactions involving securities), *and* Scovill Mfg. Co. v. Dateline Elec. Co., 461 F.2d 897 (7th Cir. 1972) (trademark infringement); cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973). *See also* Dorsid Trading Co. v. Du-Wald Steel Co., 492 S.W.2d 379 (Tex. Civ. App.—Houston [14th Dist.] 1973).

actions. In *National Equipment Rental Ltd. v. Szukhent*[121] the United States Supreme Court held that service upon a contractually designated within-state process agent was sufficient to comply with federal rule 4(d)(3), which permits service on "any . . . agent authorized by appointment . . . to receive service of process." The *Szukhent* clause is directly applicable only where the requirements of substantive federal jurisdiction are otherwise met, that is, where there is federal-question or diversity jurisdiction. However, the Texas long-arm statute authorizes service on a "person who, at the time of the service, is in charge of any business in which the defendant or defendants are engaged in this State . . . ,"[122] so that the designation of a within-state *business* agent might achieve the same result for Texas state courts. The danger is, of course, that the appointment is revoked before service is effected.

An express choice-of-forum clause, for example, "the appropriate Texas state court sitting in Harris County, Texas, shall be competent to decide all disputes arising under, out of, or in connection with the present agreement," might similarly be effective under the Texas long-arm statute as a "contract . . . with a resident of Texas to be performed in whole or in part by either party in this State . . . ."[123] However, Texas courts have consistently held that contracts to change the law with reference to *venue* are void as in violation of public policy,[124] and there is some possibility that they might take the same approach towards jurisdiction-conferring clauses. A more promising approach would be the drafting of a clause localizing at least partial performance of the contract in Texas. This would be the equivalent of the customary device for conferring venue in Texas, which is through specifying that a contract is to be performed in a specific county named.[125]

In a recent pioneering article, Professor John J. Sampson has drawn attention to the possibilities for "distant forum abuse" made possible by this scheme, and has called for remedial consumer protection legislation.[126] The 63d Legislature has heeded his call, and article 1995(5)(b) of the Texas Civil Statutes now localizes venue for money claims arising out of consumer transactions for goods, services, loans, or extensions of credit intended primarily for personal, family, household *or agricultural* use in the county where the defendant in fact signed the contract or where he now resides. This provision cannot be waived contractually.[127]

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121. 375 U.S. 311 (1964).
122. TEX. REV. CIV. STAT. ANN. art. 2031b, § 2 (1964).
123. *Id.* § 4.
124. *See* Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535, 537 (Tex. 1972).
125. TEX. REV. CIV. STAT. ANN. art. 1995(5)(a) (1973) provides that if a person has contracted to perform an obligation in a particular county, "expressly naming such county, or a definite place therein," he can be sued on that obligation in the county thus designated. "Expressly," it has recently been reconfirmed, means exactly what it says. Harkness v. Employers Nat'l Ins. Co., 497 S.W.2d 645 (Tex. 1973).
126. Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 TEXAS L. REV. 269 (1973).
127. TEX. REV. CIV. STAT. ANN. art. 1995(5)(b) (Supp. 1974). "Agricultural" use was not covered by Professor Sampson's draft statute, Sampson, *supra* note 126, at 287.

It seems clear that so far as Texas courts are concerned this localization of venue is applicable to consumer transactions of the type described between Texas consumers and out-of-state sellers. Clauses deviating from this scheme will not be enforced in Texas. Furthermore, if *forum non conveniens* is part of Texas law or if jurisdiction-*ousting* clauses are eventually upheld here, Texas courts still should not enforce choice-of-forum clauses in favor of out-of-state forums with respect to such Texas consumer transactions. In appropriate cases, they should issue injunctions restraining foreign litigation with respect to these transactions. Texas courts are of course unable to control the effect given these clauses in such cases by out-of-state courts, but it is to be hoped that the latter will not fail to take into account their illegality under Texas law.

Until 1972 Texas counsel would probably have regarded choice-of-forum clauses in favor of out-of-state courts, for example, "[a]ny dispute arising must be treated before the London Court of Justice," as quite ineffective to "oust" the jurisdiction of otherwise competent Texas courts. In the leading case of *International Travellers' Ass'n v. Branum*, the supreme court of Texas stated, in no uncertain terms, its conviction that "it is utterly against public policy to permit bargaining in this state about depriving courts of jurisdiction, expressly conferred by statute, over particular causes of action and defenses"[128] and this position has been frequently reiterated in the course of the last fifty years.[129] But in *M/S Bremen v. Zapata Off-Shore Co.*[130] the rather inelegantly drawn choice-of-forum clause just quoted was given effect by the United States Supreme Court, so as to stay proceedings by a Houston-based Delaware corporation against a German ocean-going tug before an otherwise competent American court, and to remit the proceedings to the High Court in London. The latter had already declared itself competent in this dispute between two foreign parties arising out of an ocean towage contract, and this decision affirming the jurisdiction of the English courts over the matter solely on the basis of the choice-of-forum clause had been upheld by the Court of Appeal.[131]

Speaking for the majority, Chief Justice Burger observed that choice-of-forum clauses have "historically not been favored by American courts."[132] However, he noted a recent trend towards a "more hospitable attitude" towards such clauses, and concluded by endorsing Judge Wisdom's view, expressed in a powerful dissent below,[133] that such clauses are prima facie valid and should be enforced unless enforcement is shown to be unreasonable under the circumstances.[134] This, he said, was merely the "other side" of the proposition recognized by *Szukhent*, that "in federal courts a party

128. 109 Tex. 543, 548, 212 S.W. 630, 632 (1919).
129. *See, e.g.*, Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535 (Tex. 1972).
130. 407 U.S. 1 (1972).
131. Unterweser Reederei GmbH v. Zapata Off-Shore Co., [1968] 2 Lloyd's List L.R. 158 & 161 (C.A.).
132. 407 U.S. at 9.
133. 428 F.2d 888, 896-912 (5th Cir. 1970), and 446 F.2d 907, 908-11 (5th Cir. 1971) (en banc).
134. 407 U.S. at 9-10.

may validly consent to be sued in a jurisdiction where he cannot be found for services of process through contractual designation of an 'agent' for receipt of process in that jurisdiction."[135]

Like *Szukhent, Zapata* is directly applicable only in federal courts, and initial reaction was to regard it as limited to admiralty matters—although the internal reference to *Szukhent* suggests otherwise.[136] However, subsequent decisions have applied the *Zapata* rule quite generally in diversity cases,[137] and it is believed that this is now supported by better opinion.[138] Still, where the prerequisites for federal jurisdiction are lacking, the *Zapata* rule will prevail in Texas only if, and to the extent that, the state supreme court reconsiders its position announced in *Branum.*[139] Such a reconsideration need not endanger the interests of Texas consumers sought to be protected by the "Sampson Act,"[140] for Chief Justice Burger was careful to limit the *Zapata* holding to agreements "unaffected by fraud, undue influence, or overweening bargaining power."[141] The reason for abandoning *Branum* in favor of *Zapata* would, it is submitted, be as simple as it is compelling. As Chief Justice Burger wrote so eloquently in *Zapata,* the elimination of uncertainties "by agreeing in advance on a forum acceptable to both parties is an indispensable element in *international* trade, commerce, and contracting."[142] The bleak record of disputes relating to jurisdiction presented in this *Survey* amply demonstrates that this need for certainty is just as strong in *interstate* trade, commerce, and contracting.

## II. PROOF OF FOREIGN LAW, CHARACTERIZATION, AND PUBLIC POLICY

### A. *Proof of Foreign Law*

*In State Courts.* Texas state courts take judicial notice of Texas law, including Spanish and Mexican law where applicable as the law of a former Texas territorial sovereign (that is, primarily in historical land title and water rights disputes).[143] They also take judicial notice of federal law, but are not, it seems, required to take judicial notice of federal administrative regulations not brought to their attention.

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135. *Id.* at 10-11.

136. This was first pointed out by Juenger, *Supreme Court Validation of Forum-Selection Clauses,* 19 WAYNE L. REV. 49, 59-60 (1972).

137. In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 234 n.24 (6th Cir. 1972) (dictum); Spatz v. Nascone, 364 F. Supp. 967 (W.D. Pa. 1973); Copperweld Steel Co. v. Demag-Mannesmann-Boehler, 347 F. Supp. 53 (W.D. Pa. 1972). In *Mannesmann,* it is submitted, the *Zapata* test was not correctly applied. In Roach v. Hapag-Lloyd, A.G., 358 F. Supp. 481 (N.D. Cal. 1973), *Zapata* was applied to enforce a choice-of-forum clause in an ocean bill of lading between two West German parties.

138. *See, e.g.,* Maier, *The Three Faces of Zapata: Maritime Law, Federal Law, Federal Courts Law,* 6 VAND. J. TRANS. L. 363 (1973).

139. *See* notes 128-29 *supra,* and accompanying text.

140. *See* notes 126-27 *supra,* and accompanying text.

141. 407 U.S. at 12.

142. *Id.* at 13-14 (emphasis added).

143. State v. Sais, 47 Tex. 307, 318 (1877); *cf.* Strong v. Delhi-Taylor Oil Corp., 405 S.W.2d 351 (Tex. Civ. App.—Corpus Christi 1966), *error ref. n.r.e.*; State v. Valmont Plantations, 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *aff'd,* 355 S.W.2d 502 (Tex. 1962).

In *Tippett v. Hart*[144] the plaintiff alleged that the defendant had knowingly interfered with her performance of a Cropland Adjustment Agreement with the United States Department of Agriculture. The specific regulation pertaining to "Noncompliance" was introduced into evidence by the defendant, but the plaintiff seemingly did not introduce the other pertinent federal regulations. The Amarillo court of civil appeals held that the plaintiff had established her case in this respect because "Texas courts are required to take judicial notice of the laws of the United States, including all the public acts and resolutions of Congress, and proclamations of the president thereunder, as well as administrative rules and regulations adopted by boards, departments and commissions pursuant to federal statutes."[145] In a brief per curiam opinion, the supreme court refused error but observed that the statement just quoted was overbroad and unnecessary insofar as it postulated a *requirement* to take judicial notice of federal administrative rules and regulations.[146]

Pursuant to rule 184a of the Texas Rules of Civil Procedure, judicial notice "shall" be taken, upon the motion of either party, of the "common law, public statutes, and court decisions of every other state, territory, or jurisdiction of the United States."[147] There is no equivalent provision for law of foreign countries. However, article 3718 of the Texas Revised Civil Statutes provides that the printed statute books of "any State or territory of the United States *or of any foreign government*, purporting to have been printed under the authority thereof, shall be received as evidence of the acts and resolutions therein contained."[148]

It is well established in Texas that no judicial notice can be taken of sister state law unless the appropriate motion has been made under rule 184a, and that foreign-country law requires strict proof, that is, by expert testimony and by proof documentary of the type covered by article 3718. Where the appropriate motion has not been made as regards sister state law, or where there is failure of proof as to foreign-country law, it is conclusively presumed that the law of the foreign state or country concerned is identical with Texas law. This presumption applies to civil law as well as to common law jurisdictions, and to statutory as well as judicially declared law.[149]

The uncertainties of the choice-of-law process combine with the attractiveness of the presumption to divert the attention of counsel from the niceties of pleading and, if need be, of proving, foreign law in Texas. In *Brazeal v. Renner*[150] plaintiff sought to recover arrearages for child support under

144. 497 S.W.2d 606 (Tex. Civ. App.—Amarillo), *aff'd per curiam*, 501 S.W.2d 874 (Tex. 1973).
145. 497 S.W.2d at 613.
146. 501 S.W.2d at 874-75.
147. TEX. R. CIV. P. 184a.
148. TEX. REV. CIV. STAT. ANN. art. 3718 (1926) (emphasis added).
149. *See* 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 99 (2d ed. 1956), and the numerous authorities therein cited; Gevinson v. Manhattan Constr. Co., 449 S.W.2d 458, 465 n.2 (Tex. 1969); Ogletree v. Crates, 363 S.W.2d 431, 435 (Tex. 1963).
150. 493 S.W.2d 541 (Tex. Civ. App.—Dallas 1973).

a Missouri decree. No motion to take judicial notice was filed with the trial court, although the trial judge examined, over the defendant's objection, a book represented as containing a copy of Missouri law. The record did not show whether this copy was authenticated, nor indeed what its contents were. The Dallas court of civil appeals sustained the dismissal of the action, holding that the plaintiff had failed to prove that her rights to past-due installments were vested and not subject to modification under Missouri law. As no motion under rule 184a had been made, Missouri law was presumed to be identical with Texas law, and under the latter, the rendering court had authority to modify or suspend child support decrees "as the facts and circumstances and justice may require."[151]

*Utica Mutual Insurance Co. v. Bennett*[152] involved a claim under an insurance policy held to be governed by Mississippi law, which permitted recovery. Texas law, however, did not; and the question to be decided on appeal was whether Mississippi law was properly before the court so as to be capable of being noticed judicially. Plaintiff's counsel had made an oral motion under article 184a, requesting the court to take judicial notice of three cases not otherwise introduced in evidence. Defendant had claimed surprise, but seemingly did not press its objection at this point when the plaintiff assumed the burden of proof in this respect. The Houston court of civil appeals cited Professor Thomas for the proposition that under rule 184a "the motion for judicial notice should set forth with some particularity the law that is to be relied upon,"[153] and went on to hold that this requirement had been met in the instant case. This generous disposition of the issue was perhaps influenced by the fact that the question of foreign law was narrowly circumscribed, that the moving party had voluntarily assumed the burden in this respect, and that the opponent, although expressing surprise, had not seen fit to ask for a continuance.

In *State v. Liquidating Trustees of Republic Petroleum Co.*[154] the State of Texas sought to escheat some bank deposits maintained by a foreign corporation in a Texas bank for the benefits of its stockholders. Ordinarily, the power of escheat may be exercised only by the state of the last known address of the creditor as shown by the debtor's books and records. However, where there is no record of any such address at all, or where that address is in a state which does not provide for the escheat of the property in question, the state of the corporate domicil may escheat the property.[155] The state maintained that it was incumbent upon the defendant liquidators to offer proof that the laws of the sister states of last known address had provisions for escheat of the funds in question. This contention received short shrift indeed from the Waco court of civil appeals, which noted that neither

151. Ch. 127, § 1, [1953] Tex. Laws 439, now repealed and replaced by TEX. FAM. CODE ANN. § 14.08(c) (Supp. 1973); see text following note 436 *infra*.

152. 492 S.W.2d 659 (Tex. Civ. App.—Houston 1973).

153. *Id.* at 663-64, citing Thomas, *Proof of Foreign Law in Texas*, 25 SW. L.J. 554 (1971).

154. 497 S.W.2d 527 (Tex. Civ. App.—Waco 1973), *error granted.*

155. Texas v. New Jersey, 379 U.S. 674 (1965); Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961).

party had invoked rule 184a, nor made any pleading or proof of any law of any other state. Consequently, "the trial court was obliged to indulge the presumption that the law of all the other states in question is the same as the law of Texas."[156]

In *Norris v. State*[157] the court of criminal appeals affirmed a finding below that the appellant had been previously convicted of a felony in Oklahoma. The law of that state was proved by copies of Oklahoma statutes purported to have been published under official authority. This mode of proof was clearly appropriate under article 3718, which is cast in general terms. The trial judge, however, additionally observed that he took judicial notice of the Oklahoma statutes under rule 184a. Unfortunately, the court of criminal appeals did not address itself to this observation, which appears to mark the first instance of resort to that rule in a criminal proceeding. Previous authority, both statutory and decisional, supports the proposition that the Texas Rules of Civil Procedure do *not* apply to criminal proceedings, with the result that sister-state and foreign-country law can be proved in such proceedings only pursuant to article 3718 or through strict proof by expert testimony.[158] In the absence of proof, the presumption of identity applies in criminal cases as well, but only—at least so it appears—in favor of the accused.[159] While the legislature might well consider the desirability of facilitating the proof of foreign law in criminal cases,[160] it seems unlikely that the *Norris* case signifies a judicial departure from previous authority as here summarized.

Mention has laready been made of *Mamlin v. Susan Thomas, Inc.*,[161] where the out-of-state defendant successfully invoked a clause calling for arbitration "in the City of New York in accordance with the then current arbitration rules of the American Arbitration Association and the laws of the State of New York."[162] Since the defendant failed to make a motion pursuant to rule 184a, the plaintiff was able to advance the stunning argument that New York law had to be presumed to be identical with Texas law, which would have invalidated the arbitration clause because it had not been adopted on the advice of counsel to both sides as evidenced by their signatures.[163] The Dallas court of civil appeals overruled this contention,

156. 497 S.W.2d at 529.
157. 488 S.W.2d 84 (Tex. Crim. App. 1972).
158. TEX. REV. CIV. STAT. ANN. art. 1731a (1941); TEX. R. CIV. P. 2; *Ex parte* Peairs, 283 S.W.2d 755 (Tex. Crim. App. 1955); Holloway v. State, 178 S.W.2d 688, 689 (Tex. Crim. App. 1944).
159. *Ex parte* Ivy, 419 S.W.2d 862 (Tex. Crim. App. 1967); *Ex parte* Parker, 390 S.W.2d 774 (Tex. Crim. App. 1965), citing further authorities; Green v. State, 303 S.W.2d 392 (Tex. Crim. App. 1957). *Contra, Ex parte* Gesek, 302 S.W.2d 417 (Tex. Crim. App. 1956).
160. *Cf.* FED. R. CRIM. P. 26.1: "A party who intends to raise an issue concerning the law of a foreign country shall give reasonable notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 26. The court's determination shall be treated as a ruling on a question of law." For discussion, see 2 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 431 (1969) [hereinafter cited as WRIGHT & MILLER].
161. 490 S.W.2d 634 (Tex. Civ. App.—Dallas 1973).
162. *Id.* at 636.
163. *Id.*; *see* text accompanying note 105 *supra.*

holding that the arbitration clause was valid under the Federal Arbitration Act which prevailed over Texas law.[164] In the alternative, the court stated that even if the parties had the power to exclude the federal act by their contract, they could not be presumed to have intended to do so by choosing an *invalidating* law.[165] Thus the defendant was saved by the fact that the Federal Arbitration Act, as federal law, is subject to judicial notice without motion. If this avenue had not been available, failure to make the appropriate motion under rule 184a would indeed force the Dallas court to presume that "the exotic provisions of the Texas Act," which "always produce amusement and incredulity" with informed observers throughout the United States,[166] are also in effect in the very state where the American Arbitration Association has its headquarters and where most of the nation's commercial arbitration activities are centered. It is difficult to envisage a more extreme example of the sweep of the Texas presumption of identity, and of the possible consequences of the failure to make the appropriate motion under rule 184a.

*In Federal Courts.* Federal courts take judicial notice of international law,[167] and of all law that emanates from authorities subject to the Constitution of the United States. This includes federal, territorial, and state law; the last category includes the law of *all* states of the Union.[168] Since sister-state law need not and perhaps even may not be pleaded in federal courts,[169] and since no motion is required to induce a federal court to take judicial notice of United States state law, two of the six cases discussed in the previous section would have been decided differently, or for different reasons, by federal courts; and at least three of the remaining four would hardly have been contested on the point disposed of on appeal.

The requirements as to the pleading and proof of foreign-country law in federal courts are now codified in federal rule 44.1. This rule, which is the product of a major and well-conceived reform effort,[170] lays down three basic principles. First, a party who intends to raise an issue concerning the law of a foreign country has to give notice in his pleadings "or other reasonable written notice." Secondly, in determining foreign law, the court may consider "any relevant material or source, including testimony," whether or not submitted by a party or admissible in evidence. Finally, the court's determination of foreign law is a ruling on a question of law, and thus subject to appeal.

The second of these principles is, of course, the most important one. Its purpose is to permit the efficient, speedy, and economical proof of foreign

164. 490 S.W.2d at 637; *see* text accompanying notes 115-16 *supra.*
165. 490 S.W.2d at 637; *see* text accompanying notes 250-51 *infra.*
166. Coulson, *supra* note 106, and accompanying text.
167. Banco Nacional de Cuba v. Sabbatino, 379 U.S. 398, 423 (1964); The Paquete Habana, 175 U.S. 677, 700 (1900).
168. Bowen v. Johnston, 306 U.S. 19, 23 (1939); Harley v. Donoghue, 116 U.S. 1, 6 (1885); Lamar v. Micou, 114 U.S. 218, 223 (1885); Owings v. Hull, 34 U.S. (9 Pet.) 607 (1835).
169. FED. R. CIV. P. 8(a); *see* 5 WRIGHT & MILLER § 1253.
170. 9 WRIGHT & MILLER §§ 2441-49 (1971); Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine,* 65 MICH. L. REV. 613 (1967).

law by rational means, unencumbered by the technical rules of evidence.[171] Nevertheless, experience continues to show that there is no more convincing evidence of foreign law than expert testimony in open court.[172] Consequently, if the foreign-law issues are controversial and crucial, prudent counsel will still resort to formal proof through the testimony of duly qualified experts.[173]

This continued preference for traditional means in complicated foreign-law cases is illustrated by *Texasgulf, Inc. v. Canada Development Corp.*,[174] a much-publicized dispute over the proposed takeover of a Texas-incorporated American "multinational" corporation by a Canadian government corporation.[175] Plaintiff sought an injunction restraining the Canada Development Corporation (CDC) from implementing its cash takeover tender, and contended, *inter alia*, that the CDC-nominated Texasgulf directors would be duty-bound to advance the Canadian national interest and would thus be unable to fulfill their fiduciary obligations towards the non-Canadian shareholders of the latter company. This contention was based, in the main, on the language of the statutory charter of the CDC, which defined the objects of that corporation in terms of the Canadian national interest. (It also provided, however, that these objects were to be "carried out in anticipation of profit and in the best interests of the shareholders as a whole."[176])

Plaintiff's expert witness, Professor Ivan R. Feltham Q.C. of Osgoode Hall and of the Ontario bar, testified that "in his opinion based on his familiarity with the statute and its legislative history, CDC would be bound at all times to give priority to and emphasize industrial development in Canada."[177] This testimony was supported by the only Canadian member of Texasgulf's pre-takeover board, but flatly contradicted by the president and the chairman of the board of CDC, who stated that, should they become directors of Texasgulf, they knew of "no limitation in CDC's charter or otherwise which would prevent [them] from discharging [their] duty to seek a maximum profit for Texasgulf, commensurate with sound business practices."[178] Judge Seals expressed his inclination towards the view that CDC, should it become a controlling shareholder of Texasgulf, could some day be faced with conflict of interest problems. However, he regarded such conflicts as not different in kind from those arising in interlocking directorate

171. *See* 9 WRIGHT & MILLER § 2441 (1971).
172. *See* Baade, *International Civil and Commercial Litigation: A Tentative Checklist*, 8 TEX. INT'L L.J. 5, 6-8 (1973).
173. *Id.* at 8-9. In Carl Zeiss Stiftung v. VEB Carl Zeiss Jena, 433 F.2d 686, 707 (2d Cir. 1970), the "difference of opinion on the part of German legal experts with respect to the applicable German law" was deemed material in determining that defendant had not acted in bad faith in a trademark infringement case.
174. 366 F. Supp. 374 (S.D. Tex. 1973).
175. One widely publicized event was the testimony of Senator Bentsen on behalf of Texasgulf on Aug. 9, 1973. The junior Senator from Texas apparently expressed his concern about investments by foreign governments in United States corporations. N.Y. Times, Aug. 11, 1973, at 29, col. 3 (late city edition). The relevance of such testimony is not immediately apparent, and its propriety seems doubtful. It deservedly escaped mention in Judge Seale's opinion.
176. 19-20 Eliz. II, c. 49, § 6 (Can.).
177. 366 F. Supp. at 416 & n.63.
178. *Id.* at 416.

situations generally. As Texas law provided adequate protection to minority shareholders in such situations if and when they might occur in the future, he declined to issue an injunction on this ground at the present time.

It might be worth noting that Professor Feltham based his conclusions not only on the text of the Canadian statute creating CDC, but also on the legislative history of that statute. As Canadian courts may not resort to legislative history in aid of statutory construction,[179] the question arises whether a United States federal court construing Canadian statutory law has to observe the same constraint. There seems to be no clear-cut answer to this question, as even where formally excluded, legislative history has a way of seeping into judicial consciousness through past political experience, public knowledge, incorporation into books of authority, and the like. In the instant case, in any event, resort to such evidence seems to have been entirely proper, for the United States District Court for the Southern District of Texas was not called upon to determine the meaning of the statutory charter in the same manner as a Canadian court would have done, but to ascertain the actual impact of the charter of the CDC on its present officers and directors.

While the *Texasgulf* case demonstrates that rule 44.1 will not necessarily provide expeditious shortcuts to litigants in complicated and controversial foreign-law disputes, the recent decision of the Fifth Circuit in *Ramirez v. Autobuses Blancos Flecha Roja, S.A.*[180] illustrates the operation of that rule in its intended setting. Plaintiff sought to recover for a wrongful death that occurred in Mexico, and defendant moved to dismiss, arguing that Texas would not enforce the applicable Mexican law due to its dissimilarity with Texas law (all of the parties were Mexican, and dismissal in dissimilarity cases is without prejudice).[181] The dissimilarity between the two laws was established, to the satisfaction of the court, by *unauthenticated* copies of the pertinent Mexican codes. As Judge Brown noted, rule 44.1 "was intended to provide a uniform and liberal federal procedure for determining foreign law divorced from the limitations of conflicting state and former federal doctrines," and it "clearly and properly permits the District Court to consider any relevant material or sources in determining foreign law."[182]

*Outlook.* The question arises whether the Texas law on pleading and proof of foreign law should be brought into line with this modern and liberal federal scheme. In his leading study of the subject which appeared in these pages three years ago, Professor Thomas noted that "the Texas law pertaining to proof of foreign law as gleaned from cases is confused, incomplete, and in some instances behind the time."[183] He nevertheless did not go so far as to urge the adoption of the federal method, that is, automatic judicial notice of sister-state law without any requirement as to pleading or notice,

179. Attorney General of Canada v. Reader's Digest Ass'n (Canada), [1961] S.C.R. 775.
180. 486 F.2d 493 (5th Cir. 1973).
181. *Id.* at 494; *see* text accompanying notes 318-39 *infra.*
182. 486 F.2d at 497 n.11, citing Miller, *supra* note 170, and 9 WRIGHT & MILLER §§ 2441-49 (1971).
183. Thomas, *Proof of Foreign Law in Texas*, 25 SW. L.J. 554, 570 (1971).

and notice pleading plus unrestricted proof of foreign-country law. The reason for his reluctance to recommend this obvious remedy is not difficult to fathom: the outmoded and cumbersome Texas rules on the proof of foreign law are, in essence, triggering devices for the presumption of identity, and that presumption is, in turn, the most important safety valve of a much more dangerously outmoded choice-of-law system.

Two examples may suffice here to illustrate a proposition basic to employing the presumption, which is intuitively familiar to practitioners in the now-fading garb of the "Texas convention"—the tacit agreement of counsel not to raise conflict-of-laws questions. In *Garza v. Greyhound Lines, Inc.*[184] plaintiff sought to recover for injuries suffered in a bus accident in Mexico. He met the dissimilarity defense, but as defendant sought to prove Mexican statute law by a copy of the Mexican Civil Code not purporting to be published under the authority of the Mexican government, this proof failed and plaintiff recovered under Texas law. On its face, this case is the identical twin of *Ramirez*, decided differently only because of the difference in Texas and federal rules pertaining to the proof of foreign-country law.[185] Nothing could be further from reality: Garza was a citizen of the United States and a resident of Texas who had booked a round trip in San Antonio with Greyhound to Monterrey and back. Absent the use of the "Texas convention," Texas choice-of-law rules might have relegated him to a Mexican remedy in a Mexican court. This would have been so irrational as to raise serious questions of due process. Mrs. Ramirez, on the other hand, was a Mexican national who had bought a one-way ticket, printed in Spanish, on a Mexican bus to her home in Mexico. The only connection with the United States was that the trip commenced in the United States border town of Laredo. In this case, saddling the Mexican defendant with liability under Texas law would have been a wholly irrational act of meddling, which would have raised constitutional issues of at least similar magnitude.[186]

In the more recent case of *NHA, Inc. v. Jones*,[187] which was picked literally at random from the advance sheets, twenty former employees of NHA sought to recover damages for breach of employment contract. The sole purpose of their employment was the repair of United States Army helicopters in Vietnam, and it would have been entirely possible for one side or the other to argue that Vietnamese law applied as the law of the place of performance.[188] Mercifully, the "Texas convention" prevailed, and the Fort Worth court of civil appeals disposed of the case almost as if it had occurred at Dallas Love Field.[189] Of course, the defendant could have chosen to

184. 418 S.W.2d 595 (Tex. Civ. App.—San Antonio 1967).
185. *See* text accompanying notes 180-82 *supra*, and 318-39 *infra*.
186. Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 181-82 (1964); Home Ins. Co. v. Dick, 281 U.S. 397 (1930).
187. 500 S.W.2d 940 (Tex. Civ. App.—Fort Worth 1973).
188. *See* text accompanying note 260 *infra*.
189. This is, however, subject to one exception. The Fort Worth court noted that "[t]he contracts involved required each of the plaintiffs to perform services around 9,000 miles from home, in a war zone in and near Vietnam. . . . We hold that because of the very nature of the subject matter of these contracts this Court will take judicial notice that the time of payment of a workman's salary under an employment

plead and prove Vietnamese law—at considerable expense, and with doubtful results. However, in the face of the Texas requirement of strict proof as reinforced by the presumption of identity, it could not simply have introduced Vietnamese law and thereby forced the plaintiff to share, or perhaps even to carry, the burden of coping with that law. In a case where the typical recovery turned out to be around $500, this seems to be an eminently satisfactory situation.

It follows that the presumption of identity is presently an important element of the Texas choice-of-law system, and that the "outmoded" Texas rules on the proof of foreign law should be changed only along with even more outmoded Texas choice-of-law rules which have in the past been tolerable only because their applicability in actual cases has been severely limited by that presumption. In view of this vital function of the presumption, the question arises whether (and, if so, to what extent) federal courts sitting in diversity cases in Texas should give effect to it under the *Erie-Klaxon* rule.[190] Clearly, under long-standing and unchallenged authority, they cannot do so with respect to sister-state and United States territorial law.[191] Furthermore, where the content, tenor, or construction of foreign-country law is actually ascertained pursuant to the "uniform and liberal federal procedure for determining foreign law" proved by federal rule 44.1, the presumption is, of course, displaced. Its potential sphere of applicability is thus limited to cases potentially involving foreign law where that law has not been ascertained, either because the party seeking to rely on it failed to give adequate notice, or because the court failed to receive the necessary guidance and information. In these situations, it is submitted, federal courts sitting in Texas in diversity cases should apply the Texas presumption that the foreign-country law to which the Texas choice-of-law rule refers but which has not been ascertained is identical with Texas law.[192]

While it is thus concluded that the Texas rules on proof of foreign law should not be brought into line with the corresponding federal rules by an isolated reform, there is one progressive feature of the federal system that might be implemented even now by a functional interpretation of existing Texas law. Pursuant to rule 44.1, a determination of foreign law is a ruling on a question of law, and thus subject to appeal. The Fifth Circuit, in particular, has taken its responsibilities in this connection quite seriously, and has substituted its own contrary findings on foreign law for those of the trial court in two out of six rule 44.1 cases decided by that court of appeals.[193]

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contract under circumstances such as those existing here is of the essence." 500 S.W.2d at 947.

190. Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487 (1941); Erie R.R. v. Tompkins, 304 U.S. 64 (1938). *See generally* Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 CORNELL L. REV. 1 (1973).

191. *See* text accompanying note 168 *supra*.

192. See Krasnow v. National Airlines, 228 F.2d 326 (2d Cir. 1955). Schlesinger, *supra* note 190, at 20, describes the position taken in the text as stating the "prevailing view," seemingly with approval. See, however, Miller, *supra* note 170, at 702-15, 723-31, 746-84.

193. Ramirez v. Autobuses Blancos Flecha Roja, S.A., 486 F.2d 493 (5th Cir. 1973); Gillies v. Aeronaves de Mexico, S.A., 468 F.2d 281 (5th Cir. 1972) (reversal of

It is well established in Texas that even without the benefit of a judicial notice statute, foreign law is determined by the judge, not the jury;[194] and Texas Rule of Civil Procedure 184a provides that "(t)he *judge* upon the motion of either party shall take *judicial notice* of the common law, public statutes, and court decisions of every other state, territory, or jurisdiction of the United States."[195] As shown by the terms here italicized, there is no compelling reason for treating findings pursuant to rule 184a differently from other determinations of law by the trial court. Appellate review of trial court findings on foreign law would be desirable in Texas for at least two reasons. First, it would provide accessible guidance on the actual operation of this aspect of the judicial process in Texas, which is now lacking since Texas state trial court opinions are not published. Secondly, and more importantly, it would advance the main objective of intermediate appellate review, which is to ensure the correct application of the law.

In the *Utica Mutual Insurance Co.* case, for instance, the plaintiff would have failed to recover under Texas law because the insured did not comply with the provisions of his insurance policy, but it was successfully contended below that the applicable Mississippi rule in point was different. The Houston court of civil appeals limited itself to observing, on this key issue, that the law of Mississippi on this subject "is *apparently* different in that even if the policy condition of giving notice to the insurer as soon as practicable is not complied with, the insured may still recover if the failure to give such notice did not prejudice the rights of the insurer."[196] The word here underscored evidences an act of judicial prudence that now seems almost prescient, for a recent comment in the *Mississippi Law Journal* informs us that the law on insurance notice clauses in Mississippi is "in great need of clarification," and that Mississippi counsel "confronted with a problem involving a notice clause will be faced with various inconsistencies in his research which may plague him throughout his handling of the case."[197] Still, it is submitted, the cause of justice would have been advanced, and judicial time and energy much better invested, if the Houston court of civil appeals had ventured into this thicket and made its own determination of Mississippi law. This could not, of course, have been done unless the issue had been squarely presented on appeal, and perhaps should not be done even then unless Mississippi law was adequately briefed and argued. It seems reasonable to assume, however, that these requirements will be increasingly met once Texas courts of civil appeals indicate their willingness to review lower court findings on foreign law in a more comprehensive manner.[198]

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foreign law findings below); McDaniel v. Petroleum Helicopters, Inc., 455 F.2d 137 (5th Cir. 1972) (contents of foreign law not disputed); Diaz v. Southeastern Drilling Corp. of Argentina, S.A., 449 F.2d 258 (5th Cir. 1971); Ramsay v. Boeing Co., 432 F.2d 592 (5th Cir. 1970); First Nat'l City Bank v. Compania de Aguaceros, S.A., 398 F.2d 779 (5th Cir. 1968) (reversal of foreign law findings below).

194. Willard v. Conduit, 10 Tex. 213 (1853); Williams v. State, 27 Tex. Crim. 466, 472, 11 S.W. 481, 482 (1889).

195. TEX. R. CIV. P. 184a (emphasis added).

196. 492 S.W.2d at 659.

197. Comment, *Insurance Notice Clauses in Mississippi*, 44 MISS. L.J. 947 (1973).

198. A good example was set by Chief Justice Calvert's detailed discussion of the

### B. *Characterization*

In the lucid analysis of Professor Weintraub which is here adopted, the process of characterization (or of qualification; classification) is employed at three levels in the traditional solution of conflict-of-laws problems.[199] First, it is used to pidgeonhole the case at hand as, for example, sounding in tort or in contract.[200] Secondly, after first-level characterization has led to the ascertaining of the nature or "character" of the controversy and the selection of the appropriate choice-of-law rule, the characterization process is used again in order to localize the connecting factors of the rule thus selected, for example, the place of the wrong or of the making of the contract. Thirdly and finally, if this process leads to the "choice" of a system of law other than that of the forum, characterization is used once again in order to determine *how much* of the foreign law thus chosen shall be applied to the case at hand.

Texas presently follows the traditional rule that "[m]atters of remedy and procedure are governed by the laws of the State where the action is sought to be maintained."[201] Texas courts must therefore engage in third-level characterization for the purpose of determining whether a particular rule of the foreign law selected is "substantive" and thus applicable, or "procedural" and therefore displaced by the apposite rule of Texas law. The most common example of this process is furnished by statutes of limitation. In *Culpepper v. Daniel Industries, Inc.*[202] plaintiff sought to recover for damages suffered in a valve explosion accident that had occurred in Louisiana. The action was brought in Texas after one year, but within two years following the date of the accident. It was thus timely under the Texas statute of limitation, but prescribed in Louisiana.[203]

The trial court granted defendant's motion to dismiss the action as time-barred under the applicable Louisiana law, and the Houston court of civil appeals reversed. The basic question, according to the latter court, was "whether this is a matter of substantive right, controlled by the laws of Louisiana, or whether it is a matter of remedy and procedure, governed by the laws of Texas."[204] The action had been brought under article 2315(1) of the Louisiana Civil Code which provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."[205] Actions under article 2315(1) must be initiated within one year (ar-

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Louisiana authorities in Francis v. Herrin Transp. Co., 432 S.W.2d 710, 713-17 (Tex. 1968).

199. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 40-46 (1971).

200. Ramirez v. Autobuses Blancos Flecha Roja, S.A., 486 F.2d 493, 495 (5th Cir. 1973), required analysis under both of these headings. *See* text accompanying notes 256-64, 318-39 *infra*.

201. Hobbs v. Hajecate, 374 S.W.2d 351, 352 (Tex. Civ. App.—Austin 1964), *error ref.*

202. 500 S.W.2d 958 (Tex. Civ. App.—Houston [1st Dist.] 1973), *error ref. n.r.e.*

203. *Id.* at 958. The Texas "borrowing statute," TEX. REV. CIV. STAT. ANN. art. 5530 (1958), applies only to foreign judgments, not to foreign causes of action generally.

204. 500 S.W.2d at 958.

205. LA. CIV. CODE ANN. art. 2315 (West 1971). For a trenchant study of Louisiana torts law as judicially developed on this statutory basis, see Robertson, *Reason*

ticle 3536); and the latter provision, the Houston court noted, had been held to be "prescriptive, and therefore is procedural; it bars the remedy but does not extinguish the right."[206]

The problem of characterizing statutes of limitations within the common-law family is formidable enough, but it seems almost easy when compared with what Learned Hand once termed "the attempt to import into the French law the refined notion which pervades our own, of a right barred of remedy, but still existing in nubibus."[207] In *Wood & Selick, Inc. v. Compagnie Generale Transatlantique,*[208] from which this quotation is taken, the fact that the French judge cannot raise the issue of prescription *ex officio* tipped the scales in the direction of the characterization of the French limitation as "procedural,"[209] while in the recent Fifth Circuit case of *Ramsay v. Boeing Co.*[210] the fact that the Belgian judge could and indeed had to raise the issue of prescription there involved led to the opposite conclusion.

The Houston court of civil appeals did not pursue this avenue, but limited itself to citing two Fifth Circuit cases and one Louisiana decision in support of the proposition that article 3336 was prescriptive and, hence, procedural.[211] The court was thus able to distinguish the present case from *Francis v. Herrin Transportation Co.*,[212] where the Supreme Court of Texas had held the built-in limitation for wrongful death actions contained in article 2315 of the Louisiana Civil Code to be peremptive, and as such, a substantive condition on the right of recovery. The Houston court saw the decisive distinguishing element of the *Francis* case in the fact that there, "the very statute which created that right of action also incorporated an express limitation upon the time within which the suit could be brought."[213]

The *Culpepper* case raises more questions than it seeks to resolve. First, when dealing with a codified civil-law system, does it make much sense to speak in terms of the "very statute which created the right of action"? After all, the Civil Code is one statute, and it is a basic proposition of the civil law that *all* of its provisions have to be interpreted in a harmonious manner.[214] Secondly, if Learned Hand was correct in saying that "a right without any remedy is a meaningless scholasticism,"[215] why are some statutes of limitations regarded as "substantive" and others as "procedural"? And last but certainly not least, which system of laws furnishes the ultimate criteria for drawing this distinction?

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*Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Associates, Inc.*, 34 LA. L. REV. 1 (1973).

206. 500 S.W.2d at 958-59.

207. Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 942 (2d Cir. 1930).

208. 43 F.2d 941 (2d Cir. 1930).

209. *Id.* at 942-43. The transcript of the expert's testimony on this point is reproduced in R. SCHLESINGER, COMPARATIVE LAW 129-42 (3d ed. 1970).

210. 432 F.2d 592 (5th Cir. 1970).

211. 500 S.W.2d at 959, citing Huson v. Chevron Oil Co., 430 F.2d 27 (5th Cir. 1970); Page v. Cameron Iron Works, 259 F.2d 420 (5th Cir. 1958); Istre v. Diamond M. Drilling Co., 226 So. 2d 779 (La. App. 1969).

212. 432 S.W.2d 710 (Tex. 1968).

213. 500 S.W.2d at 959.

214. *See* Robertson, *supra* note 205, at 23-27.

215. Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 943 (2d Cir. 1930).

Some light is shed on this last question by *Nelms v. State Farm Mutual Automobile Insurance Co.*,[216] a Fifth Circuit decision in a Texas appeal. Plaintiff, seemingly a Texas resident, had been bitten by his grandfather's dog while visiting in Louisiana, and he brought a direct action against the grandfather's insurer as permitted by Louisiana law.[217] Since Texas law does not permit direct actions against insurers and as the action was brought in a federal district court sitting in Texas, the court had to decide whether the Louisiana direct action statute was "substantive" or "procedural." The plaintiff-appellant argued that the Louisiana courts, after much hesitation, had finally concluded that the Louisiana direct action statute was "substantive." This, the Fifth Circuit noted, was not dispositive of the issue at hand:

> A federal district court located in Texas and sitting on the basis of diversity jurisdiction must indeed apply the Louisiana 'substantive' law, but only if that Louisiana law is or would be characterized as 'substantive' *by the state courts of Texas*. . . . That characterization is a matter for Texas law, not Louisiana law, although Texas courts have examined the characterizations and interpretations accorded by the courts of other states to their own state laws.[218]

As Texas courts and federal courts applying Louisiana law had "uniformly concluded that direct actions are, under Louisiana law, 'procedural,' " the court concluded that the cases cited by the appellant would not convince a Texas court "that these earlier Texas cases were an incorrect interpretation of Louisiana's 'substantive' interests in direct actions."[219] The judgment below in favor of defendant was accordingly affirmed.

The same defendant did not fare equally well in *Romero v. State Farm Mutual Automobile Insurance Co.*,[220] a direct action of a Louisiana wife-passenger against her husband's insurer for damages arising out of a Texas accident caused by the husband's negligence. The intermediate Louisiana appellate court applied Texas law as the *lex loci delicti* and reversed a judgment in favor of plaintiff, since Texas does not permit direct actions against insurers and since, moreover, under Texas law, wives do not have an action in tort against their husbands. The Supreme Court of Louisiana, in turn, reinstated the judgment of the trial court. After pointing out that the *lex loci delicti* rule was no longer followed in Louisiana, the court stated:

> Since the factual situation in the instant case presents one where only Louisiana has an interest in the application of its laws and Texas has none, the law of Louisiana will be applied. Under Louisiana law, a wife can bring a direct action in tort against her husband's liability insurer. . . . Furthermore, there is no prohibition in Louisiana to a suit by a guest passenger against his host driver. Accordingly, plaintiff's claim must be determined by the Louisiana law of negligence.[221]

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216. 463 F.2d 1190 (5th Cir. 1972).
217. LA. REV. STAT. § 22:655 (1959).
218. 463 F.2d at 1192 (emphasis in original).
219. *Id.*
220. 277 So. 2d 649 (La. 1973).
221. *Id.* at 651.

It should be noted that this passage does not contain any reference to the talismanic words, "substance" and "procedure." Louisiana has adopted a modern, functional approach to the choice of law, and under this approach, the applicability of potentially pertinent rules of law is determined not by their labels, but in the light of their underlying purposes as measured against the particular issue at hand. Within the last year, two states—New Jersey and Wisconisn—have applied the functional method to statutes of limitation as well.[222] Their example is likely to be followed, and it is hoped that Texas, too, will soon re-evaluate the practical utility of third-level characterization.

This re-examination is not likely to burden Texas courts with claims that are stale in Texas, but still current under their "proper" law. As regards tort actions brought pursuant to article 4678 of the Texas Revised Civil Statutes, that article expressly provides that such actions must be commenced "in the courts of this State within the time prescribed for the commencement of such actions by the statutes of this State."[223] The same principle is easily applied, if need be, by analogy to tort conflicts actions outside of article 4678,[224] and it is but a small step from there to the general conclusion that *all* Texas statutes of limitations are intended to function as "time clocks" for all actions brought in Texas courts.[225]

### C. *Public Policy*

Even if foreign law is selected by the appropriate domestic choice-of-law rule, established to the satisfaction of the court, and characterized as "substantive" rather than "procedural," it may still be refused effect domestically, under the traditional system, if found to be contrary to public policy. As the Supreme Court of Texas has said, courts in this state will not follow the general choice-of-law rule as to contracts "when to enforce a foreign contract, according to the provisions of the foreign laws, will contravene some established rule of public policy of the state of the forum."[226] A more recent formulation of the public-policy exception is found in *California v. Copus*, where that court stated: "To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens."[227]

This latter passage was quoted with approval by the supreme court in *Rodgers v. Williamson*,[228] where it was contended that a passage in an Illi-

222. Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973); Air Prods. & Chem., Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973).
223. TEX. REV. CIV. STAT. ANN. art. 4678 (1952).
224. On the issue whether art. 4678 is the exclusive Texas choice-of-law rule for foreign tort and wrongful death actions in Texas, see text accompanying notes 303, 307-09 *infra*.
225. *See, e.g.*, Tieffenbrun v. Flannery, 198 N.C. 397, 151 S.E. 857 (1930); H. GOODRICH, CONFLICT OF LAWS 155 (4th ed. Scoles 1969).
226. King v. Bruce, 145 Tex. 647, 657, 201 S.W.2d 803, 809 (1947).
227. 158 Tex. 196, 204, 309 S.W.2d 227, 232 (1958).
228. 489 S.W.2d 558, 561 (Tex. 1973).

nois adoption decree which permitted the natural father visitation rights was against Texas public policy. After stating that the full faith and credit clause had not as yet been extended to sister-state equity decrees and that the approach urged by the adoptive parents was thus not foreclosed,[229] the supreme court nevertheless proceeded to find "no compelling reason of public policy to deny effect to the Illinois decree."[230] There is only one reason assigned for this conclusion: The Illinois court, it was pointed out, had evidently felt that it would be in the best interests of the child for the father to visit him at the designated times and places.[231]

While this cautious use of the public-policy exception surely merits approval, one might have hoped for a somewhat more detailed articulation of the standard applied. It seems likely, however, that the court was not uninfluenced by the fact that this was an adoption of a six-year-old legitimate child by his mother and her second husband, a situation to which any Texas policy in favor of anonymity of blood parentage[232] can hardly be said to apply. Furthermore, the supreme court expressly directed the trial court to re-examine the matter of visitation "according to the welfare of the child under present circumstances,"[233] thus assuring that the operation of the Illinois decree *pro futuro* would be in compliance with Texas law and policy.

## III. CONTRACTS

When Professor Stumberg first addressed himself to the subject of the validity of contracts under Texas conflict-of-laws rules, he prefaced his remarks with a quotation from a then leading treatise, to the effect that this was "the most confused subject in the field of Conflict of Laws."[234] Some four decades later, his successor at the University of Texas recorded that it is still "common for American Conflicts scholars to refer to contracts as the most complex and confused area of choice-of-law problems."[235] Writing in 1932, Professor Stumberg arrived at the conclusion that Texas authorities then extant supported the place of the making, the place of performance as presumably intended by the parties, and the application of that law which upholds the contract. He called for a supreme court decision "to clear, so to speak, the legal atmosphere."[236] Since that time, the Supreme Court of Texas has had several opportunities to speak on the subject,[237] but a casual observer may well doubt whether this has brought much of a change.

It is submitted, nevertheless, that the subject loses most of its mythical qualities if approached along the lines recently suggested by Professor Wein-

229. *Id.* at 560, citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, comment *c* (1971).
230. 489 S.W.2d at 561.
231. *Id.*
232. *See* TEX. FAM. CODE ANN. §§ 11.17(b), (d) (1973).
233. 489 S.W.2d at 561.
234. Stumberg, *Conflict of Laws—Validity of Contracts—Texas Cases,* 10 TEXAS L. REV. 163 (1932), quoting H. GOODRICH, CONFLICT OF LAWS 228 (1927).
235. R. WEINTRAUB, *supra* note 199, at 263.
236. Stumberg, *supra* note 234, at 183.
237. *See* Austin Bldg. Co. v. National Union Fire Ins. Co., 432 S.W.2d 697 (Tex. 1968); Castilleja v. Camero, 414 S.W.2d 424 (Tex. 1967).

traub. Questions relating to the validity and the construction of contracts pose different issues, and require separate analysis. The interpretation of contracts, on the other hand, that is, the determination of the *actual* intent of the parties, does not as such raise choice-of-law questions.[238] The framework of analysis here adopted applies only to judicially developed choice-of-law rules. Statutory choice-of-law rules, which are less uncommon than might be thought, will require separate treatment.[239]

### A. *Validity*

As classically formulated by Professor Weintraub, a "choice-of-law problem involving the validity of a contract arises when, under the domestic law of one state having some contact with the problem, a provision in a contract is invalid, but under the law of another contact state, the same provision is enforceable."[240] The actual intention of the parties can be ascertained, but one state refuses to give effect to that intention. Whether the provision in issue is enforced "depends upon which law is 'chosen' to govern its validity."[241]

In *Dailey v. Transitron Electronic Corp.*[242] plaintiff sought to recover damages for wrongful early discharge from his three-year employment as the engineering manager of a Nuevo Laredo plant which was a wholly-owned subsidiary of Transitron, a Delaware corporation with headquarters in Massachusetts. Transitron seemingly wore its corporate garments rather haphazardly, for the offer was made by Transitron Mexicana, S.A., a wholly-owned Mexican subsidiary; the written contract was executed in Nuevo Laredo with Transitron Overseas Corporation, a wholly-owned Delaware subsidiary; and Dailey was discharged by Transitron itself. This aspect of the case will require brief mention below in another connection, but the parties apparently accepted Transitron Overseas as the real employer and the proper party defendant.[243]

The district court held Texas law to be applicable, and denied a motion to dismiss the action as time-barred under the pertinent rule of Mexican law, which appears to be of the type characterized as "substantive" under the traditional approach.[244] This decision was affirmed on appeal to the Fifth Circuit. Speaking for the Fifth Circuit, Judge Wisdom said that Texas follows "the traditional rule of applying the law of the place of performance or the law of the place where the contract was made, in the absence of a contrary manifestation of intent by the parties."[245] He added, however, that this traditional rule was "not conclusive but is presumptively applied if the

238. R. WEINTRAUB, *supra* note 199, at 263-64.
239. *See* text accompanying notes 278-94 *infra.*
240. R. WEINTRAUB, *supra* note 199, at 263.
241. *Id.*
242. 475 F.2d 12 (5th Cir. 1973).
243. *See* text accompanying notes 376-83 *infra.*
244. It had been construed as "substantive" under Florida choice-of-law rules in Gillies v. Aeronaves de Mexico, S.A., 468 F.2d 281 (5th Cir. 1972), *cert. denied,* 410 U.S. 931 (1973).
245. 475 F.2d at 14.

parties' intent is not determinable."[246] Nevertheless, he held in view of the "overwhelming relationship of the parties to Texas and the United States," it was unnecessary to engage in further inquiries in this direction.[247]

A second significant route for determining intent, Judge Wisdom added, was the "presumption that the parties intended to make a legally binding agreement."[248] Article 40 of the Mexican New Federal Labor Code limited the duration of employment contracts to one year, so that, presumably, the contract of employment here sued on, which was for a three-year period, would have been wholly or partially void. Since Dailey and Transitron would not be presumed to enter into an agreement that was not legally binding, Judge Wisdom concluded that "the intent of the parties was to be bound by the law of Texas."[249]

The same proposition was stated, in even stronger terms, in *Mamlin v. Susan Thomas, Inc.* which has been mentioned repeatedly above.[250] There, the parties had *expressly* chosen New York law to govern the arbitration clause, and that law (at least as grotesquely distorted by the Texas presumption of identity) made the clause unenforceable. In refusing to give effect to this *real* choice of a (fictitiously) invalidating law, the Dallas court of civil appeals stated:

> When courts apply the law chosen by the parties, they do so for the purpose of giving effect to their intention. . . . The law chosen by them will not be applied when it would defeat their intention by invalidating the contract, since they can be assumed to have intended that the contract be binding. . . . In order to give effect to that presumed intention, when courts have a choice of law, they will apply the law which upholds the contract.[251]

If *Daley* and *Mamlin* should come to be accepted as authoritative statements of the law presently prevailing, it seems possible, at long last, to summarize current Texas choice-of-law rules on the validity of contracts with some hope of accuracy. The keystone of these rules is the presumption, adopted from domestic Texas contract law, that "when parties make an agreement they intend it to be effectual, not nugatory."[252] Accordingly, contracts and contract clauses will be given effect if they are valid under the law actually chosen, or the law that might have been chosen, by the parties. The latter includes, but is not logically limited to, the law of the places of contracting and of the place or places of performance. The ex-

246. *Id.*

247. *Id.*, citing Austin Bldg. Co. v. National Union Fire Ins. Co., 432 S.W.2d 697 (Tex. 1968).

248. 475 F.2d at 14, citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 188, 196 (1971) and R. LEFLAR, AMERICAN CONFLICTS LAW § 103 (1968). *See also* text accompanying notes 376-83 *infra.*

249. 475 F.2d at 14.

250. 490 S.W.2d 634 (Tex. Civ. App.—Dallas 1973), *discussed in* text accompanying notes 113-16, 161-66 *supra.*

251. 490 S.W.2d at 637, citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, comment *c* (1971); Robbins v. Pacific E. Corp., 8 Cal. 2d 241, 65 P.2d 42, 58 (1937); Storing v. National Sur. Co., 56 N.D. 14, 215 N.W. 875 (1927); Ryan v. Missouri, K. & T. Ry., 65 Tex. 13 (1885).

252. Texas Gas Util. Co. v. Barrett, 460 S.W.2d 409, 412 (Tex. 1970).

press choice of an invalidating law, on the other hand, is disregarded as an egregious error. These rules are subject, of course, to Texas statutory prohibitions or restrictions where applicable, and to the general prohibition against the enforcement of contracts, by whatever law governed, against Texas public policy.[253]

### B. *Construction*

Problems of construction rather than validity arise, in Professor Weintraub's parlance, whenever "the intention of the parties on some important aspect of their agreement is unknown and unknowable."[254] To take an example previously mentioned: If it turns out that due to the present energy shortage, Conoco can no longer meet its contractual obligations towards PPG and Olin, the question arises whether this supervening impossibility excuses performance. This question could have been disposed of by contract, in which case both Louisiana and Texas would have given effect to the terms agreed upon. In the hypothetical situation here posed, there was, however, no such agreement, and (again pursuant to that hypothesis) there is a crucial difference between Texas and Louisiana "stopgap" contract law on the issue of excuse by virtue of supervening factual or commercial impossibility.[255]

In *Ramirez v. Autobuses Blancos Flecha Roja, S.A.*[256] plaintiff sought to recover damages from a Mexican bus company for the wrongful death of his mother in a Mexican collision caused by the negligence of the driver or the unsafe condition of the vehicle. The only connection with Texas was that plaintiff's decedent had purchased a one-way bus ticket, printed in Spanish, in Laredo for the fateful trip commencing there and scheduled to take her to Saltillo, Coahuila, Mexico. Plaintiff urged liability under a Texas contract of safe carriage as an alternative ground for recovery, obviously in order to escape dismissal under the "dissimilarity" rule which is limited to torts.[257]

The parties could theoretically have chosen Texas law as the law of the contract of carriage, although this seems barely short of absurd.[258] Since

253. *See* text accompanying notes 226-33 *supra*.

254. R. WEINTRAUB, *supra* note 199, at 263.

255. *See* text accompanying notes 76-96 *supra*. In PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 676 nn.3-4 (5th Cir. 1973), the court stated: "While the parties apparently agree that a state or federal court in Louisiana, using the Louisiana choice-of-law rule, would apply Louisiana substantive contract law, it is uncertain whether the Texas court will apply Texas or Louisiana contract law." The Uniform Commercial Code forms a part of the Texas law of contracts, but Louisiana has not adopted the UCC. Apparently, the UCC provision which PPG hopes to escape by litigating in a Louisiana forum is § 2-615, which provides in part: "Delay in delivery or non-delivery in whole or in part by seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made . . . ." TEX. BUS. & COMM. CODE ANN. § 2.615 (1968).

256. 486 F.2d 493 (5th Cir. 1973).

257. *See* text accompanying notes 318-39 *infra*.

258. In Hodgson v. Union de Permisionarios Circulo Rojo, S. de R.L., 331 F. Supp. 1119, 1122 (S.D. Tex. 1971), Judge Garza said, in declining to apply United States minimum wage law to the drivers of a Mexican bus company operating between Matamoros, Mexico, and Brownsville, Texas: "Employees of this Mexican bus company

no such express choice had in fact been made, the court had to determine which was the applicable law so as to ascertain the appropriate rules of construction. The Fifth Circuit held that Texas would not, in any event, permit recovery for wrongful death on a contract rather than a tort theory. Judge Brown, speaking for a unanimous panel, nevertheless added that it was "far from clear" whether the plaintiff would fare any better under Texas contracts choice-of-law rules. He summarized the latter as follows:

(1) "In Texas, the law of the place where the contract is made generally governs;"[259]
(2) "When a contract is made in one state to be performed in another, the place of performance governs;"[260]
(3) "[W]here a contract is to be performed in more than one place, the place of making governs unless the parties intended otherwise."[261]

The present case, Judge Brown continued, involved "a Mexican National who purchased a one way bus ticket to Mexico printed in Spanish, in a Texas border town from a Mexican bus company which did not operate between cities in the United States."[262] While the contract was made in Texas, it was "to be performed almost entirely in Mexico."[263] Consequently, he concluded, the facts of the instant case lent "more support to the inference that the parties may have assumed that the laws of Mexico rather than Texas governed this transaction and its incidents."[264] For the reason already indicated above, however, the court chose not to resolve this question.

*Utica Mutual Insurance Co. v. Bennett*[265] involved an attempt by the victim of a Texas motor vehicle collision to collect an unsatisfied judgment from the defendant's insurer as a third-party beneficiary under the insurance contract. As already mentioned, there had been no strict compliance with the notice provisions of the insurance policy. This was fatal to plaintiff's claim against the insurer under Texas law, but not—at least so the trial court found and the Houston court of civil appeals assumed—under Mississippi law.[266] The insurance policy had been issued in Mississippi to the insured,

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earn less per week than most United States laborers earn per day, and the bus fares are priced accordingly. This valuable bus service would obviously have to be discontinued in the event the company was forced to pay a minimum wage, because if fares were raised to compensate for the wage-hike, the buses would be devoid of passengers." These considerations, it would seem, are equally pertinent to accident claims, as Mexico "does not allow damages for pain and suffering or physical injury in the common tort suit but rather provides compensation for lost wages calculated through a formula based on the injured party's former wages and the Mexican federal labor wage standards." Ramirez v. Autobuses Blancos Flecha Roja, S.A., 486 F.2d 493, 497 (5th Cir. 1973), citing Ley Federal del Trabajo (Federal Labor Law) arts. 287-89, 293-94, 301, 502 [1945] D.O.; C. Civ. Dist. y Terr. Fed. (Federal Civil Code) art. 1915 (Editorial Porrua 1966).

259. 486 F.2d at 496, citing Austin Bldg. Co. v. National Union Fire Ins. Co., 432 S.W.2d 697 (Tex. 1968).

260. 486 F.2d at 496, citing Castilleja v. Camero, 414 S.W.2d 424 (Tex. 1967).

261. 486 F.2d at 496, citing Hatchett v. Williams, 437 S.W.2d 334 (Tex. Civ. App. —Houston [1st Dist.] 1968), *cert. denied*, 396 U.S. 963 (1969).

262. *Id.*

263. *Id.*

264. *Id.*

265. 492 S.W.2d 659 (Tex. Civ. App.—Houston [1st Dist.] 1973). *See also* text accompanying notes 152-53, 196-98 *supra.*

266. 402 S.W.2d at 663; *see* text accompanying notes 196-98 *supra.*

a Mississippi resident, through Utica's agent, a Mississippi insurance agency. The Houston court decided, safely enough, that Mississippi law applied, since "[o]bligations of contracts are to be determined by the laws of the state where the contracts were made and performed."[267]

*Ramirez* and *Utica Mutual* can be read as supporting the proposition that, in Texas, the construction of contracts is governed by the law actually chosen by the parties, or in the absence of such an express choice, by that law which they presumably would have chosen. In ascertaining the presumptive intent of the parties, the place of performance would appear to be regarded as a more weighty factor than the place of contracting. This process of ascertaining the presumed intent of the parties is governed by objective, not subjective, criteria. As had been said by eminent authority, when a court presumes that the parties intended the law of the place of contracting or of performance to be applied, it is "not making a nice assessment of the probabilities that this was the law that the parties actually had in mind," but "formulating a norm to guide decision, a rough-cut standard of fairness, to be used in the absence of an express choice of law by the parties."[268]

It is submitted that the presumptive-intent rule as thus described is preferable to a mechanical place-of-the-making or place-of-performance rule, but that it is still far from satisfactory. For one thing, as English and West German experience has amply demonstrated, the "proper law of the contract" or the law chosen by the "hypothetical intent of the parties" has persistently eluded efforts at judicial formulation in terms assuring predictability.[269] Secondly, but of course not secondarily, the rule does not take into account the policies underlying potentially conflicting rules of substantive law, thus preventing a functional analysis that might eliminate spurious or false conflicts. To illustrate: Only Mexico had an interest in compensating the survivors of Mrs. Ramirez and in admonishing the bus company to exercise more care. Mexican law seemingly tilts the balance in favor of encouraging potentially harmful conduct rather than full compensation for the damage suffered, and the application of this lesser standard between these two parties in relation to a Mexican road accident does no violence to the policies underlying the much more stringent Texas rules as to liability for damage. Similarly, only Mississippi had an interest in permitting a Mississippi insured to shift liability to his "Mississippi" insurer[270] in situations where the insured had not strictly complied with his obligations under the

267. 492 S.W.2d at 664.

268. Cavers, *Oral Contracts to Provide by Will and the Choice-of-Law Process: Some Notes on Bernkrant*, in PERSPECTIVES OF LAW, ESSAYS FOR AUSTIN WAKEMAN SCOTT 38, 49-50 (1964). Professor Cavers quotes the delightful comment of George Stumberg, now to be found in G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 234-35 (3d ed. 1963), that under the "presumed intention" rule, "the contract is governed by the law which the parties should have intended if the court had been there to give advice." Cavers, *supra*, at n.31.

269. Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation SA, [1971] A.C. 572 (1970); Miller v. Whitworth Estates, [1970] A.C. 583; U. DROBNIG, AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW 229-240 (2d ed. 1972). *See also, e.g.*, BGH, Sept. 19, 1973, [1973] Neue Juristische Wochenschrift 2151.

270. The insurance policy was issued to a Mississippi insured in Mississippi through a local insurance agency representing Utica Mutual. 492 S.W.2d at 664.

policy. As it was, the application of the Mississippi rule also worked to the benefit of the Texas plaintiff, since he now found a deeper pocket to satisfy his claim. This result was, however, neither required by, nor contrary to, the teleological objectives of Texas insurance law. The latter would have given the plaintiff no recourse here, but this stricter reading of correspective obligations under insurance contracts was intended for the protection of companies writing insurance in Texas or for Texans.

It thus appears, in conclusion, that in terms of functional analysis, *Ramirez* and *Utica Mutual* were false or spurious conflict cases, and that they were correctly decided, although not diagnosed, in those terms. This outcome should come as no surprise, for the presumptive intent rule serves, as Professor Cavers observed, as "a rough-cut standard of fairness."[271] It is submitted, however, that the process of articulation would have been more visible, and the result more predictable, if functional analysis had been adopted instead.

### C. *Statutory Choice-of-Law Rules*

Several Texas statutes contain provisions as to their territorial or personal scope, and the reach of several other Texas statutes is readily delimited by their nature and purpose without resort to choice-of-law rules. Express unilateral statutory choice-of-law rules occur primarily, though not exclusively, in laws relating to consensual agreements. Thus, the Texas Workmen's Compensation Law is expressly applicable where "an employee, who has been hired in this State, sustain[s an] injury in the course of his employment . . . ."[272] Similarly, the Texas Insurance Code provides that "[a]ny contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby."[273] The Mechanics' Lien Law makes contractors and subcontractors the trustees of funds paid to them "under a construction contract for the improvement of specific real property in this state."[274] The Uniform Commercial Code is applicable to "transactions bearing an appropriate relation to this state," but subject to several specific exceptions listed in the Code, the parties may agree on the application of the law of another state or county with respect to a transaction that "bears a reasonable relation" both to Texas and to the state or country thus designated.[275] A recent amendment of that Code, enacted by the 63d Legislature, lays down detailed choice-of-law rules on the perfection of security interests in multiple state transactions.[276]

The implied delimitation of the sphere of the spatial and personal reach of a statute by the nature and purpose (but not the language) of that stat-

271. Cavers, *supra* note 268, at 49.
272. TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (1967).
273. TEX. INS. CODE ANN. art. 21.42 (1963).
274. TEX. REV. CIV. STAT. ANN. art. 5472E, § 1 (1973).
275. TEX. BUS. & COMM. CODE ANN. § 1.105(A) (1973).
276. *Id.* §§ 1.105(b), 9.103.

ute itself occurs primarily in those areas where according to conventional wisdom, foreign law is not applied at all, that is, public, fiscal, and penal law. Remarkably enough, the new Texas Penal Code enacted by the 63rd Legislature contains an express provision generally delimiting the penal jurisdiction of the State of Texas,[277] so that the reach of Texas criminal law is now determined by express unilateral choice-of-law rules rather than by necessary implication. There are, however, other areas where the latter method is still appropriate. These include two subjects touching upon consensual obligations: state antitrust law and, it is submitted, at least some aspects of consumer protection.

*Express Rules. Howell v. American Live Stock Insurance Co.*[278] was an action on a livestock insurance contract to recover for the death of a horse. The insured was a citizen of Texas, although his breeding and training farm was located in New Mexico. The horse had been kept at that farm at all times material, and the insurance contract had been made and executed in New Mexico. In addition to the value of the horse, plaintiff sought to recover twelve percent of that value plus reasonable attorneys' fees as provided by Texas law whenever an insurance company unjustifiably fails to pay the claim within thirty days after demand.[279] Howell maintained that Texas law was applicable by virtue of the unilateral choice-of-law clause of the Texas Insurance Code which provides in terms that any contract of insurance between a Texas resident and any insurance company which is doing business in Texas is to be governed by Texas law.[280] Since the American Live Stock Insurance Company does business in Texas as well as in New Mexico, that clause seemed literally applicable.

In an opinion written by Judge Wisdom the Fifth Circuit affirmed a trial court decision adverse to the plaintiff on this point. The Supreme Court of Texas, he held, had read that clause as "designed only to assure that Texas law will apply to contracts made between Texas citizens and insurance companies doing business in Texas, *when and only when* those contracts are made in the course of the company's Texas business."[281] Otherwise, Judge Wisdom went on to observe, the law to be applied under the pertinent Texas choice-of-law rule is the law the parties intended to apply. Under the circumstances of the case as summarized above, he concluded that it was "fair to assume . . . that the parties intended New Mexico law to apply."[282]

*Implied Rules.* It is well established in Texas that a contract by which a distributor obtains an exclusive territory for the resale of articles purchased from the supplier, and by which the distributor is given a contractual right

277. TEX. PEN. CODE ANN. § 1-104 (1974).
278. 483 F.2d 1354 (5th Cir. 1973).
279. Id. at 1358; TEX. INS. CODE ANN. art. 3.62 (1963).
280. TEX. INS. CODE ANN. art. 21.42 (1963). Recent illustrations of the seemingly automatic application of Texas law where the insured is a Texas resident are Fritz v. Old Am. Ins. Co., 354 F. Supp. 514 (S.D. Tex. 1973), and Mustang Beach Corp. v. Fidelity & Cas. Co., 348 F. Supp. 1270 (S.D. Tex. 1972).
281. 483 F.2d at 1359. The authority relied on is Austin Bldg. Co. v. National Union Fire Ins. Co., 432 S.W.2d 697 (Tex. 1968).
282. 483 F.2d at 1361.

to prevent sales by the supplier to others in that territory, violates the antitrust laws of Texas and is unenforceable.[283] In *E.F.I., Inc. v. Marketers International, Inc.*[284] it was held that this rule applied to an exclusive dealer agreement between a Florida manufacturer and a Texas distributor. A summary judgment in favor of the Texas defendant was nevertheless reversed by the Houston court of civil appeals, since the defendant had not established by the record that the contract was intrastate as to performance or that the transactions contemplated by and carried out under the contract were essentially intrastate. Under the exclusive distributorship agreement Marketers was (subject to some minor exceptions) the exclusive distributor of E.F.I. products throughout the United States, and there was evidence that Marketers had made some deliveries of these products to customers in other states. These "transactions in interstate commerce," the Houston court held, "were contemplated by the contract and were not subject to control by Texas antitrust statutes."[285]

This narrow construction of the Texas antitrust acts as not affecting transactions in interstate commerce reflects venerable authority, and finds some additional support in the titles of the original enactments which uniformly described that statute as intended to "promote free competition in the State of Texas."[286] A reading of the older authorities would appear to show, however, that they were primarily motivated by the desire to reconcile the exercise of Texas legislative power with federal constitutional constraints as then perceived.[287] The Fifth Circuit has recently held that "state and federal governments may enforce concurrently their antitrust laws,"[288] and has cited with approval a Texarkana court of civil appeals decision holding that "state protection of its own commerce against conspiracies in restraint of trade which also violate interstate commerce, is supplementary to the Federal regulatory scheme."[289]

It is therefore suggested that the restrictive interpretation of the Texas antitrust act as not reaching transactions in interstate commerce should be reexamined at an early opportunity. This question is of substantial current importance because, as the *E.F.I.* case shows, Texas antitrust law as to exclusive distributorships is considerably more restrictive than are the corresponding rules of federal antitrust law.[290]

283. Sherrard v. After Hours, Inc., 464 S.W.2d 87 (Tex. 1971); Climatic Air Distrib. v. Climatic Air Sales, Inc., 162 Tex. 237, 345 S.W.2d 702 (1961).

284. 492 S.W.2d 302 (Tex. Civ. App.—Houston [1st Dist.] 1973), *error ref. n.r.e.*

285. *Id.* at 305.

286. *See* the captions of Act of March 31, 1903, ch. 94, [1903] Tex. Laws 119; Act of April 30, 1895, ch. 83, [1895] Tex. Laws, 10 H. GAMMEL, LAWS OF TEXAS 842 (1898); Act of March 30, 1889, ch. 117, [1889] Tex. Laws, 11 H. GAMMEL, LAWS OF TEXAS 202 (1898).

287. *See, e.g.*, Albertype Co. v. Gust Feist Co., 102 Tex. 219, 114 S.W. 791 (1908).

288. Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1313 (5th Cir. 1971).

289. State v. Southeast Tex. Chap. of Nat'l Elec. Contractor's Ass'n, 358 S.W.2d 711, 714 (Tex. Civ. App.—Texarkana 1962), *cert. denied*, 392 U.S. 965 (1963). *See generally*, to the same effect, J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 109-226 (1964).

290. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); Comment, *Vertical Territorial and Customer Restrictions Under the Sherman Act: Decisions Since United States v. Arnold, Schwinn & Co.*, 22 J. PUB. L. 483 (1973).

Quite apart from this, however, a long line of cases supports the principle that an agreement between an out-of-state supplier or manufacturer and a Texas distributor that allocates the latter an exclusive territory in Texas is in violation of Texas antitrust law and will not be enforced.[291] This conclusion is reached independently of the wording of the titles of the original enactments, which have in any event long receded from memory and are not contained in the Revised Civil Statutes. Furthermore, this conclusion is reached quite uniformly without resort to choice-of-law considerations regarding contracts, such as the law of the place of contracting or the parties' presumed choice of a validating law. The reason for this direct application of the Texas antitrust law to interstate contracts without the intermediary of choice-of-law rules seems quite clear: these laws are not subject to the disposition of private parties, and they cast what Arthur Nussbaum once called their own "spatial shadow."

It is submitted that such a "spatial shadow" is also cast by the Home Solicitation Transactions Act, which was enacted by the 63d Legislature.[292] Pursuant to that act, consumer transactions concluded at the consumer's residence for a consideration in excess of $25 can be unilaterally cancelled by the consumer within three business days next following the transaction. The merchant must furnish the consumer with a statement calling attention to this right of cancellation. Sales or contracts entered into in violation of this act are declared void and unenforceable, and the consumer is given other remedies to vindicate his rights thereunder. It seems clear that this statute is intended to protect Texas consumers, and to apply to all door-to-door salesmen operating in this state, no matter whom they represent. Thus, any attempt, by, for example, an out-of-state encyclopedia sales enterprise, to circumvent the Texas Home Solicitation Transactions Act by the "choice" of the more lenient law of another state should fail not because it is against Texas public policy, but because under the Act, there is no room for considering anything but Texas law in this connection.

A strong argument can similarly be made for the integral application of the new Deceptive Trade Practices and Consumer Protection Act to all Texas-connected transactions involving consumers who are residents in Texas. That act expressly declares any waivers of its benefits by a consumer to be contrary to public policy, unenforceable, and void. Furthermore, the sanctions include criminal penalties, and the Consumer Protection Division of the state attorney general's office is assigned key functions in the enforcement of the act.[293] This suggests the presence of an overriding state interest in controlling consumer transactions affecting Texas consumers in Texas. It also appears that examples will not be lacking if the legislature should feel the need to clarify its intent as to the personal and spatial reach of Texas

291. National Automatic Mach. Co. v. Smith, 32 S.W.2d 678, 680 (Tex. Civ. App. —Austin 1930) (citing further authorities); Anheuser-Busch Brewing Ass'n v. Houck, 27 S.W. 692 (Tex. Civ. App. 1894), *aff'd*, 88 Tex. 184, 30 S.W. 869 (1895).

292. TEX. REV. CIV. STAT. ANN. arts. 5069—13.01-.06 (Supp. 1974).

293. TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Supp. 1974). *See* Comment, *Caveat Vendor: the Texas Deceptive Trade Practices and Consumer Protection Act*, 25 BAYLOR L. REV. 425 (1973).

consumer protection legislation.[294] It is hoped, however, that the judicial construction of this legislation in the light of its manifest purpose will make such action unnecessary.

## IV. TORTS

In his concurring opinion in *Click v. Thuron Industries* Mr. Justice Daniel noted that "at least twenty" states and the District of Columbia "have abandoned the rigid 'place-of-wrong' rule, under which only the law of the state of the injury or death may be considered and applied," and that they "have adopted the state-interest analysis or 'most significant contacts' rule, under which is applied the law of the state having the most significant relevant contacts with or interest in the parties or the occurrence."[295] Since the last *Survey* in which *Click* was noted,[296] the Supreme Court of Texas has not had occasion to speak again on this issue. Some more states, however, including the neighboring states of Colorado and Louisiana,[297] have joined this trend, and Texas has at least not taken the retrogressive step, initiated by Connecticut and North Carolina,[298] of proclaiming everlasting commitment to the *lex loci delicti.* In view of the dramatic shift of the Supreme Court of Louisiana within two years after what seems to be the most eloquent articulation of lasting commitment to the traditional rule,[299] this was surely not unwise.

Against this background of continuing uncertainty, it seems advisable to start with three basic propositions still clearly commanding judicial support. First, it seems assured, in the light of the decisions of the Texas Supreme Court in *Marmon* and in *Click*,[300] that the Texas wrongful death statute as currently construed by Texas courts has no extra-territorial effect. Secondly, there is a Texas statutory choice-of-law rule with respect to out-of-state torts. Article 4678 of the Texas Revised Civil Statutes expressly provides that whenever the "death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights

294. Other legislatures have recently preferred to address themselves to this issue more directly. Thus, the 1971 Quebec Consumer Protection Act provides that every clause of a consumer contract making it subject in whole or in part to an act other than Canadian Dominion or Quebec provincial legislation shall be void. Quebec Stat. 1971, ch. 74, § 8. *See generally* Nabhan & Talpis, *Le droit international privé québecois et canadien de la protection juridique du consommateur,* 33 R. DU B. 330 (1973). The 1972 South Australian Consumer Protection Act declares itself to be applicable to consumer transactions (a) of which South Australian law is the "proper law" by virtue of choice-of-law rules there prevailing, or (b) relating to goods or services that are delivered or rendered within that state. 21 Eliz. II no. 135 of 1972, § 6 (S. Aust.).

295. 475 S.W.2d 715, 719-20 (Tex. 1972).

296. Thomas, *Conflict of Laws, Annual Survey of Texas Law,* 27 Sw. L.J. 164, 166-67 (1973).

297. First Nat'l Bank v. Rostek, 514 P.2d 314 (Colo. 1973); Jagers v. Royal Indem. Co., 276 So. 2d 309 (La. 1973).

298. Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966); Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963).

299. Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 236 So. 2d 216 (1970), *overruled by* Jagers v. Royal Indem. Co., 276 So. 2d 309 (La. 1973); *see* Note, *Conflict of Laws—Torts—False Conflicts—Louisiana Rejects Lex Loci Delicti,* 48 TULANE L. REV. 149 (1973).

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

with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any foreign State or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign State or country, such right of action may be enforced in the courts of this State."[301] Thirdly, however, this statutory choice-of-law rule, and the judicially-developed choice-of-law rule which it parallels or perhaps displaces, does not apply to Mexican tort law, as the latter is so "materially different" from Texas law that Texas courts cannot adjudicate the rights of the parties.[302]

The sense of certainty conveyed by these three basic propositions is considerably undercut by four recurring and as yet unanswered questions. First, does article 4678 displace judicially-developed choice-of-law rules on torts, or does it merely provide an alternative or an additional remedy?[303] Secondly, on either assumption, does the traditional Texas rule refer to the place of the act or omission or to the place of the injury? (The statute refers to the "wrongful act, neglect or default of another in any foreign State or country," seemingly pointing to the place of conduct or omission,[304] but dicta heavily favor the place of injury.)[305] Thirdly, can the dissimilarity doctrine be expected to shrink again, as it has in the past with respect to sister-state law,[306] as Mexican law becomes more similar or as Texas state courts grow more confident of their ability to apply it? Fourth, but by no means last, how will the state supreme court decide when the question of continued adherence to the *lex loci delicti* is inescapably presented, and the issue turns solely on the viability of a judicially developed choice-of-law rule?

On these four questions the reader of the current *Survey* should expect rather less additional insight than Saul is recorded to have received on the road to Damascus. First, on the issue whether article 4678 is the sole choice-of-law rule for foreign tort and wrongful death actions in Texas, two recent court of civil appeals decisions can be cited as supporting opposite conclusions. In *Culpepper v. Daniel Industries, Inc.*,[307] which has already been mentioned in another connection,[308] the Houston court referred to that article as "applicable" to a personal injury claim based on damages suffered in a valve explosion accident that had occurred in Louisiana. In *Lee v. Howard,* an out-of-state duck hunting accident between two Texas residents, the trial court applied Arkansas "substantive" law "since the alleged tortious *conduct* occurred in Arkansas."[309] The application of Arkansas law in the

301. TEX. REV. CIV. STAT. ANN. art. 4678 (1952).
302. Ramirez v. Autobuses Blancos Flecha Roja, S.A., 486 F.2d 493 (5th Cir. 1973).
303. The latter possibilities are suggested by Weintraub, *Choice of Law for Products Liability: The Impact of the Uniform Commercial Code and Recent Developments in Conflicts Analysis,* 44 TEXAS L. REV. 1429, 1441-42 n.46 (1966).
304. *Id.*
305. *See, e.g.*, Ramirez v. Autobuses Blancos Flecha Roja, S.A., 486 F.2d 493, 496 (5th Cir. 1973).
306. *See* text accompanying notes 319-24 *infra.*
307. 500 S.W.2d 958 (Tex. Civ. App.—Houston [1st Dist.] 1973), *error ref. n.r.e.*
308. *See* text accompanying notes 202-13 *supra.*
309. 483 S.W.2d 922, 923 (Tex. Civ. App.—Eastland 1972), *error ref. n.r.e.* (emphasis added).

latter case was not disturbed by the Eastland court of civil appeals, which seemingly felt no need to refer to article 4678 in this connection.

It seems reasonably certain that both in *Culpepper* and in *Lee*, the tortious conduct as well as the injury occurred in the same foreign state, so that nothing turns on the question whether article 4678 granted the sole remedy available in Texas. *Lee*, however, requires some brief further comment. As already mentioned, both the plaintiff and the defendant were from Texas, and members of a four-man hunting party. Howard accidentally shot Lee in the back; there was some doubt whether he had his gloved finger on the trigger while raising his gun when a duck appeared. The jury found, however, that Lee was contributorily negligent in failing to keep an adequate lookout.

Under Texas law as it then stood, contributory negligence on the part of the defendant constituted an absolute defense. Arkansas is a comparative-negligence state; but under its law, as under Texas law at the present, the plaintiff cannot recover if his negligence exceeds that of the defendant.[310] The jury, instructed on the basis of Arkansas law, found against the plaintiff on that issue. On appeal, it was argued that the trial court committed error by failing to instruct on "discovered peril," a Texas variant of the last-clear-chance doctrine[311] which, the plaintiff contended, was established in the instant case as a matter of law.

The Eastland court of civil appeals quite earnestly, and without a backward glance, discussed the applicability of the "discoverd peril" doctrine to the instant case *in terms of Texas law*.[312] It has noted initially that the case was to be decided pursuant to Arkansas "substantive law," but a scant three pages later, that guidepost seems to have simply disappeared.

This is not to suggest that *Lee v. Howard* was wrongly decided. Far from it: the jury found that the plaintiff could not recover under *Arkansas* law, and the court, applying the Texas "discovered peril" doctrine, eventually found that he would also lose under *Texas* law. If Texas law had been applied as to both contributive/comparative negligence and "discovered peril," the result would have been the same. If Arkansas law had been applied as to these two issues, the outcome would hardly have been different. It is highly unlikely that a comparative-negligence jurisdiction would continue to apply common-law doctrines such as last clear chance or discovered peril, which are basically "humanitarian" exceptions to the harshness of contributory negligence, but still operate in the same chilly winner-take-all atmosphere.[313] Be that as it may, whenever a rule of foreign law is selected for the purpose of deciding a local controversy, that rule will have to be applied according to its own, and not according to the forum's enlargements and exceptions. To quote Brainerd Currie: "It is one thing to fall between two schools; it is quite another to put together half a donkey and

310. ARK. STAT. ANN. § 27-1765 (1973).
311. *See* Gentry v. Southern Pac. Co., 457 S.W.2d 889 (Tex. 1970).
312. 483 S.W.2d at 925-26.
313. Comment, *Comparative Negligence in Texas*, 11 HOUSTON L. REV. 101, 114-17 (1973).

half a camel, and then ride to victory on the synthetic hybrid."[314]

That, however, did not happen in *Lee v. Howard.* Taken by itself, the application of the Texas discovered peril doctrine to this case makes good sense. The facts are virtually indistinguishable from the classic first prototype employed by Dr. Morris in his seminal study on the "proper law" of tort,[315] and there seems to be no conceivable reason for a Texas court to apply anything but Texas law to the consequences of this particular accident between these particular parties. By its automatic application of Texas law on the issue of discovered peril, the Eastland court of civil appeals seems to have tacitly or at least instinctively indicated its preference for a more modern, enlightened approach to choice of law in torts.

On the question whether Texas follows the place-of-impact rule or the place-of-conduct rule, within the confines of traditional doctrine, the current crop of cases offers little additional insight. *Lee* speaks of "conduct," but nothing turns on this. *Ramirez* talks of "place of injury," but again, the difference is not decisive.[316] The long-arm statute cases should probably not be considered in this connection. Both *Jetco* and *Hoppenfeld* could probably be read in terms of place-of-impact, for the torts there involved are discussed exclusively in Texas terms.[317] All they decided at that stage, however, was that a tort had been committed "in whole or in part" in Texas, which was the question to be decided under the Texas long-arm statute. This jurisdictional requirement is ordinarily met by either conduct or injury within the state, given reasonable (and perhaps constitutionally mandated) forseeability, and in the nature of things, torts cases under the long-arm statute will typically involve within-state injury caused by out-of-state conduct rather than the obverse pattern.

*Ramirez v. Autobuses Blancos Flecha Roja, S.A.*,[318] has once again focused attention on the issue of "dissimilarity." This was an action for damages for a wrongful death that had occurred in Mexico, and under the authority of *Marmon* as reiterated in *Click*, recovery could not be had under the Texas wrongful death act, which is strictly territorial. The plaintiff

314. As quoted in D. CAVERS, THE CHOICE OF LAW PROCESS 39 (1965).

315. Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881, 885 (1951):

> An American co-educational school establishes for its students a summer vacation camp in the lake and forest country of northern Quebec. The camp is entirely self-contained and self-supporting and there is no other human being within 50 miles. One of the girls is seduced by one of the boys so that she becomes pregnant; another is bitten by a dog kept in the camp by another boy. Neither incident would have happened but for the negligence of the camp organizers, who are instructors in the school. The girls, the boys, and the organizers are all residents of State *X*, an American state, where also the school is located. Does it make sense to say that the question whether the girls or their parents can sue the boys or their parents or the camp organizers in State *X* 'must' be governed by the law of Quebec, merely because the incidents happened there? To the present writer it does not.

316. *See* text accompanying notes 305, 309 *supra.* In both cases, the conduct and the injury occurred in the same foreign state or country.

317. Jetco Electronic Indus., Inc. v. Gardiner, 473 F.2d 1228, 1232-33 (5th Cir. 1973); Hoppenfeld v. Crook, 498 S.W.2d 52, 56 (Tex. Civ. App.—Austin 1973), *error ref. n.r.e.* The latter case is discussed in text accompanying notes 374-75 *infra.*

318. 486 F.2d 493 (5th Cir. 1973).

could recover, if at all, only under Mexican law, and here, he met the defense of "dissimilarity."

In this connection, a few historical observations are called for. In the leading case of *Willis v. Missouri Pacific Railway* the Texas Supreme Court held that the Texas wrongful death statute applied only to "cases occurring within (Texas) borders."[319] It added, however, that an action for wrongful death occurring in another state might be entertained in Texas if that other state had the "same statute."[320] In *Texas & Pacific Railway v. Richards* recovery for wrongful death in Louisiana was refused because there was no "like right" (of survivorship) in Texas.[321] The *Willis-Richards* rule served to preclude recovery under an Arkansas statute which was "dissimilar in many respects" from the Texas statutes in *St. Louis, I.M. & S. Railway v. McCormick.*[322] In *DeHarn v. Mexican National Railway*[323] the rule was applied to Mexico, with, however, the warning that Texas would enforce "substantially" similar rights conferred by foreign law. In *Mexican National Railway v. Jackson*[324] the *Willis-Richards* rule was applied to bar a personal injury claim based on an accident in Mexico. The Texas Supreme Court stated the rule to be that "the courts of this State will not undertake to adjudicate rights which originated in another State or country, under statutes materially different from the law of this State in relation to the same subject."[325]

Subsequent to *Jackson* courts of civil appeals approved the application of sister state wrongful death statutes characterized as substantially similar to, or not essentially different from, the Texas statute.[326] In *De Herrera v. Texas-Mexican Railway*,[327] however, the same enlightened treatment was refused Mexican law. At this precise point, the legislature intervened, enacting the first precursor of article 4678. The emergency clause of the 1913 Act stated, appropriately enough, that "the fact that there is now no law permitting citizens of this State who receive injuries in a foreign country from bringing an action for said injuries under the laws of this State, creates an emergency . . . ."[328] A subsequent re-enactment of 1917 extended the benefits of the 1913 Act to foreign nationals.[329] These two enactments were combined into the present article 4678 by the draftsmen of the 1924 Revised Civil Statutes.[330]

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319. 61 Tex. 432, 434 (1884).
320. *Id.* at 435.
321. 68 Tex. 375, 4 S.W. 627 (1887).
322. 71 Tex. 660, 668, 9 S.W. 540, 543 (1888).
323. 86 Tex. 68, 69, 23 S.W. 381 (1893).
324. 89 Tex. 107, 33 S.W. 857 (1896).
325. *Id.* at 113, 33 S.W. at 860.
326. Texas & N.O.R.R. v. Gross, 60 Tex. Civ. App. 621, 128 S.W. 1173 (1910), *error ref.*; Texas & N.O.R.R. v. Miller, 60 Tex. Civ. App. 287, 128 S.W. 1165 (1910), *error ref.*; St. Louis & S.F.R.R. v. Sizemore, 53 Tex. Civ. App. 491, 116 S.W. 403 1909); Missouri, K. & T. Ry. v. Kellerman, 39 Tex. Civ. App. 274, 87 S.W. 401 (1905), *error ref.*
327. 154 S.W. 594 (Tex. Civ. App.—San Antonio 1913), *error ref.*
328. Ch. 161, [1913] Tex. Laws 338.
329. Ch. 156, [1917] Tex. Laws 365; *see* Allan v. Bass, 47 S.W.2d 426, 427 (Tex. Civ. App.—El Paso 1932), *error ref.*
330. It is hardly surprising that the 1913 Act was introduced by Senator Hudspeth

Even without the benefit of this legislative history, Judge Brown noted, in *Ramirez*, that article 4678 "would appear to grant the courts of Texas a clear mandate to apply the law of Mexico where applicable."[331] Nevertheless, he went on to observe, even in the face of this statute "the Texas courts have consistently refused to apply the tort laws of the Republic of Mexico and its political subdivisions . . . on the ground that they are too dissimilar to the laws of Texas."[332] This line of authority is traceable to *El Paso & Juarez Traction Co. v. Carruth*, where the Commission of Appeals held that the 1917 statute "merely declared" pre-existing law, and that it had become the "settled policy" of Texas not to enforce Mexican tort law because it is "so materially different from the laws of our state relating to torts that Texas courts cannot undertake to adjudicate the rights of the parties."[333]

In *Ramirez* the Fifth Circuit seems to have assumed without further inquiry that the dissimilarity defense is dispositive in federal courts sitting in diversity in Texas where Mexican tort law fails to be applied. This again requires some historical comment, for much to its credit, the Fifth Circuit sitting in Texas appeals had initially refused to participate in this twice-misguided exercise in "Anglo" racism.[334] In *Slater v. Mexican National Railroad*,[335] however, the United States Supreme Court held that while Mexican law created an obligation (*obligatio*) in respect of torts committed in Mexico that was enforceable in the United States, the remedy provided by Mexican law was comparable to an alimony decree, which could not be granted by United States federal courts sitting at law.[336] Subsequent to *Slater* the Fifth Circuit routinely dismissed Mexican tort and wrongful death cases without prejudice to "an action in any court willing and competent to administer relief under the laws of Mexico."[337]

All of this occurred three decades before *Erie* and the adoption of the Federal Rules of Civil Procedure. *Ramirez* seems to be the first federal case in over sixty years where the dissimilarity issue was squarely raised. Since the distinction between actions at law and suits in equity in federal courts has now almost receded from momory, could it not presently be said that federal courts are perfectly competent, and that they should be willing, to administer relief under Mexican tort law? If so, the question arises whether federal courts sitting in Texas in diversity cases should nevertheless

from El Paso who, in 1917, assisted Representative Thomason, also of El Paso, in obtaining passage of the second enactment.

331. Ramirez v. Autobuses Blancos Flecha Roja, S.A., 486 F.2d 493, 497 (5th Cir. 1973).

332. *Id.*

333. 255 S.W. 159, 160 (Tex. Comm'n App. 1923), *holding approved*; *see* Carter v. Tillery, 257 S.W.2d 465 (Tex. Civ. App.—Amarillo 1953), *error ref. n.r.e.*

334. Mexican Cent. Ry. v. Marshall, 91 F. 933 (5th Cir. 1899); Evey v. Mexican Cent. Ry., 81 F. 294 (5th Cir. 1897). So far as can be ascertained, the rule was almost exclusively used to deny recovery by Texas "Anglo" workers or their widows from their American corporate employers. The enactment of the precursor of TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (1967) in 1918 mitigated this repulsive practice by extending the benefits of Texas workmen's compensation law to workmen "hired in" Texas.

335. 194 U.S. 120 (1904).

336. *Id.* at 126-28. *See also* Central Mexican Ry. v. Eckman, 205 U.S. 538 (1907).

337. Central Mexican Ry. v. Eckman, 156 F. 1023 (5th Cir. 1907); Choquettee v. Mexican Cent. Ry., 156 F. 1022 (5th Cir. 1907).

apply the Texas dissimilarity doctrine as part of the forum's choice-of-law rules. On the authority of *Angel v. Bullington*[338] an affirmative answer to this question seems inescapable. It is much to be hoped, however, that Texas state courts will soon find the opportunity to re-examine the dissimilarity doctrine.

In spite of what Judge Brown quite appropriately called the "clear mandate" of article 4678, the Fifth Circuit was therefore compelled by existing authority to dismiss the action. This dismissal was, however, "without prejudice to any future attempt to bring this action in a different and more appropriate forum."[339] The last three words just quoted should guide defendants in future cases of this type: where, as here, all of the parties are Mexican nationals and the accident occurred in Mexico, a federal court can be expected to be very receptive, indeed, to a motion to dismiss for *forum non conveniens*.[340]

*Ramirez* was a wrongful death action where the Texas choice-of-law rule is clear, at least so long as both the conduct and the injury occur in the same foreign state. *Couch v. Mobil Oil Corp.*,[341] a recent federal district court decision which has so far inexplicably escaped notice by Texas commentators, involved a tort action, and thus was better suited to raise the basic questions as to the present contours of the Texas choice-of-law rule for torts generally.

J.M. Couch, a Texas resident, was hired in Texas by the Arabian Bechtel Corporation for work in Libya pursuant to a contract between his employer and defendant, the Mobil Oil Corporation. While in Libya, he was severely injured when a Mobil employee prematurely turned on a gas valve, causing an oil tank to explode. After returning to Texas where he was hospitalized and received treatment, Couch brought action against the Mobil Oil Corporation. Plaintiff's theory sounded in common law negligence, and no reliance was placed on article 4678.

Defendant contended that Libyan law should be applied as the *lex loci delicti*. There was extensive evidence as to the contents of that law, the crucial point apparently being that under Libyan law as contradistinguished from Texas law, Couch would be "liable" for Bechtel's failure to supervise Mobil's employee. Put somewhat differently, Libya seemingly does not apply *respondeat superior* so as to impose tort liability in the absence of a direct contractual nexus between the principal and the injured party.[342]

Judge Singleton's decision of the choice-of-law issue in *Couch* is summed up as follows in the penultimate paragraph of his opinion: "With all the relevant Texas contacts of both the plaintiff and defendant and due to the difficulty of applying Libyan law in a jury case as well as the inherent conflict of public policy on particular issues . . . , it would seem more appropriate to apply Texas law, which this court will do, thereby adopting the

338. 330 U.S. 183 (1947); *see* R. WEINTRAUB, *supra* note 199, at 450-52.
339. 486 F.2d at 497.
340. *See, e.g.*, Olympic Corp. v. Societe Generale, 462 F.2d 376, 379 (2d Cir. 1972).
341. 327 F. Supp. 897 (S.D. Tex. 1971).
342. *Id.* at 902, 903.

interest analysis test in this thorny field of conflicts of law."[343] This remarkable conclusion rests on a series of equally spectacular analytical steps. First, Judge Singleton expressed the view that the case was not governed by *Marmon* and by the choice-of-law rule contained in article 4678. The latter, he wrote, was not applicable because, "as stated in the introductory paragraph to the entire Title 77 of the statute, the act was intended to encompass only 'injuries causing the *death* of any person.' "[344] With respect, this construction cannot be followed. It is not only contrary to the legislative history of article 4678 as above described and as readily bolstered on this very point, but also contrary to the express language of that statute and, as *Culpepper* continues to demonstrate, to the *routine* construction of that statute by Texas courts.[345] Judge Singleton would have been on much safer ground if he had held, along with what appears to be better authority, that article 4678 is not the *exclusive* Texas choice-of-law rule for torts.

Once article 4678 has been eliminated from the frame of reference, the next logical step is, of course, the selection of an alternate choice-of-law rule. The considerations governing this second stage are not fully articulated, but Judge Singleton appears to have started from the premise that even without the mandate of article 4678, a Texas court would still have looked to Libyan law. For at the third stage of his analysis, he holds Libyan law to be inapplicable as "obnoxious" to Texas law and as too unstable to permit accurate ascertainment.

Two arguments are advanced to bolster this breath-taking third step. First, it is said that the Libyan "theory of holding an employee liable for his employer's lack of supervision would be obnoxious to Texas public policy by denying recovery against a primary contractor."[346] Secondly, the "efficient aids" of federal rule 44.1 are declared to be of "little assistance" in the instant case, for "the complexities of interpretating [*sic*] the laws of a country that is in political upheaval and unrest is tenuous at best."[347] (It is understood that the court had before it the expert deposition testimony of a former member of the Supreme Court of Libya, and Judge Singleton shows no difficulty in analytically discussing, and quoting from, a number of articles of the Libyan Civil and Commercial Codes.)

The next step in Judge Singleton's analysis is the conclusion that in the interest of "effective justice," Libyan law should not be applied.[348] The learned Judge's view of that precept seems somewhat blurred by the odd notion, apparently inspired by some language in *Zapata* which was then pending before a full bench of the Fifth Circuit, that the plaintiff was somehow in danger of being deprived of his day in court. Upon review of the facts, Judge Singleton wrote, "it would be a denial of justice to close the doors of this court to an American plaintiff suing an American company,

343. *Id.* at 905.
344. *Id.* at 900.
345. *See* text accompanying note 307 *supra.*
346. 327 F. Supp. at 903.
347. *Id.*
348. *Id.*

and require him to travel half way around the world to find a forum."[349] It is difficult not to express one's agreement with unqualified enthusiasm; a motion on the part of Mobil to dismiss on *forum non conveniens* grounds would have stood about as good a chance as a snowball in Libya.[350] The issue was, of course, not whether the United States District Court for the Southern District of Texas should hear and decide this case on the merits, but which legal rule or rules it should apply in so deciding.

On this last issue, Judge Singleton's decision can only be accepted as correct on either of two alternative grounds.[351] First, within the conventional framework of analysis, a Texas court may well have held that Libyan law, as *prima facie* applicable here, was against Texas public policy. In view of the sparing use of that notion by Texas courts,[352] this conclusion would however appear to require much further substantiation than it received in the *Couch* opinion. Secondly, in the alternative, Judge Singleton might after all be justified in his visceral hunch that in or because of cases like this, Texas courts are now ready for a modern, functional approach to torts conflicts cases. Before a Texas state court speaks to either of these two issues, the *Couch* case is seemingly destined to remain a warning sign rather than a guidepost.

## V. SALES AND SECURED TRANSACTIONS

Pursuant to section 1.105 of the Texas Business and Commercial Code, the parties are generally free to choose the law of some state or nation other than Texas with respect to a transaction that bears a "reasonable relation" to the jurisdiction selected. In its original version, this freedom to choose the applicable law was restricted, as regards security transactions, by any limitations that might be contained in the law (including the conflict of law rules) of the jurisdictions specified by sections 9.102 and 9.103. These covered the policy and the scope of the chapter on secured transactions. Under section 1.105 as revised by the 63d Legislature, this restrictive reference is now limited to section 9.103 which, as simultaneously revised, deals with the *perfection* of security interests in multiple state transactions only. As stated in Mr. Coogan's authoritative exegesis of the new version of article 9, the consequence of this amendment is that "the parties to a security agreement are permitted by the revised code to stipulate the governing law

349. *Id.* at 904-05.

350. *See, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1344 (2d Cir. 1972); Olympic Corp. v. Societe Generale, 462 F.2d 376, 379 (2d Cir. 1972).

351. A third possibility is spelled out by Mendiola v. Gonzales, 185 S.W. 389, 390 (Tex. Civ. App.—San Antonio 1916):

> This court judicially knows that a condition of revolution, anarchy, and strife prevailed in Mexico, when the wrong was committed and this suit instituted, that the courts of that republic were powerless, and that force alone was dominant, and under such circumstances when a party who has been in that country disregarded the rights of our citizens and appropriated their property, he should be held responsible in our courts for such wrongs.

It is very doubtful, however, whether a historical parallel can be drawn between Libya in 1970 and Mexico in 1915.

352. *See* text accompanying notes 227-33 *supra.*

on matters which do not involve the rights of third parties in the way that the perfection provisions do."[353]

Section 9.103 of the Texas Business and Commercial Code in its present form lays down choice-of-law rules on the perfection and the effects of the perfection or non-perfection of security interests for four separate categories of assets. (1) Documents, instruments, ordinary goods, and possessory security interests in chattel paper are "governed" (*i.e.*, as to these issues) by "the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected."[354] (2) Certificates of title are "governed" by "the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond surrender of the certificate."[355] (3) Accounts, general intangibles, mobile goods, and non-possessory chattel interests in commercial paper are "governed" by the "law (including the conflict of laws rules) of the jurisdiction in which the debtor is located."[356] (4) Finally, as to minerals, perfection and the effect of perfection or non-perfection of a security interest which is created by a debtor who has an interest in minerals or the like (including oil and gas) before extraction and which attaches thereto as extracted, or which attaches to an account resulting from the sale thereof at the wellhead or minehead, is "governed by the law (including the conflict of laws rules) of the jurisdiction wherein the wellhead or minehead is located."[357]

The first three rules set forth here are subject to numerous exceptions. As to these, a summary reference to Mr. Coogan's commentary and to other pertinent literature must suffice for present purposes.[358] An outside observer and a non-specialist in the law of secured transactions may note one point of general significance: The four choice-of-law rules formulated in section 9.103 of the Texas Business and Commercial Code as amended by the 63d Legislature are what is commonly termed multilateral or general choice-of-law rules. They do not merely specify the spatial and the territorial reach of the forum's own enactments, but lay down, more or less in the manner of the first *Restatement on the Conflict of Laws*, rules "governing" the applicability of foreign law as well. This is quite a new development in Anglo-American legislative draftsmanship and, it is believed, a complete novelty in Texas.

There are no current Texas conflicts decisions on article 9, and none, of course, on its recent revision which became effective on January 1, 1974. The only recent case on security interests is *Nuclear Corporation of America*

353. Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 530 (1973). *See also* TEX. BUS. & COMM. CODE ANN. §§ 1.105(b), 9.103 (Supp. 1973).
354. TEX. BUS. & COMM. CODE ANN. § 9.103(a) (Supp. 1973).
355. *Id.* § 9.103(b).
356. *Id.* § 9.103(c).
357. *Id.* §§ 9.103(c), (d), (e). Note § 9.103(c)(3), relating to debtors located outside the United States.
358. Coogan, *supra* note 353, at 529-58; Funk, *The Proposed Revision of Article 9 of the Uniform Commercial Code*, 27 BUS. LAW. 321, 337-46 (1971).

*v. Hale*,[359] a materialman's lien case. Nuclear, a Delaware corporation with its headquarters in North Carolina, had sold two quantities of steel joists and related materials to Mac Steel Inc., a Texas steel fabrication company. The first shipment was used by Mac Steel as a subcontractor for construction work at an air force base in Texas, and the second shipment was similarly used at a hospital construction site in Oklahoma. Mac Steel Inc. was paid by the contractors for both jobs, but became bankrupt before paying Nuclear. The latter sought to hold Hale, Conley, and Ruby, the three leading shareholders, managers, and directors of Mac Steel, liable individually as trustees in respect of funds paid to the corporation for materials supplied by Nuclear for these two projects but expended for other purposes.

The defendants contended that Texas law was applicable to both causes of action, as the agreements under which the materials were supplied were made and performed in Texas. Nuclear, on the other hand, argued that while Texas law applied to the Texas project, Oklahoma law applied to the Oklahoma project. The United States District Court for the Northern District of Texas accepted the plaintiff's view. A materialman's lien, it held, "is a creature of the law of the state where the real property, benefited by the materials, is situated and that law governs the mode of its operation."[360] This was so, the court added, even where the contract for supplying the materials was made and performed in another state by individuals and corporations who were not residents of the state where the real property was located.[361] No Texas authority was cited in support of the rules thus stated.

The real dispute in the instant case concerned the liability of Ruby, who, while formally an officer and a director, did not participate in the management of Mac Steel. Under the Texas materialmen's lien law, officers, directors, or agents of corporations "having control or direction of same" are liable for misapplying funds received for the benefit of materialmen under construction contracts for the improvement of real estate.[362] The Oklahoma lien law, on the other hand, imposes a like liability on the "managing officers" of construction companies.[363] It was urged by Nuclear—although no Oklahoma authority in point was produced—that Ruby was a "managing officer" of Mac Steel under the Oklahoma statute even if he should not have "control or direction of the same" under the Texas statute.

The court rejected this reading of Oklahoma law. It found that Hale and Conley were liable under both Texas and Oklahoma law, and that Ruby was not liable under either. With Texas and Oklahoma law thus in full harmony, *Nuclear* seems to be a false-conflicts case in every conceivable understanding of that term: nothing turns on the choice of law because as on issue to be decided, all conceivable alternatives lead to the same result. Let us assume, however, that Ruby would in fact have been liable under Oklahoma law as a "managing officer," but not under Texas law because

359. 355 F. Supp. 193 (N.D. Tex. 1973).
360. *Id.* at 196.
361. *Id.* at 197.
362. TEX. REV. CIV. STAT. ANN. art. 5472e, § 1 (Supp. 1974).
363. OKLA. STAT. ANN. tit. 42, § 153(2) (Supp. 1973-74).

he did not have "direction or control." Should a Texas court (or a federal court sitting in diversity in Texas) hold him liable under Oklahoma law as to the Oklahoma project merely because the real property benefited by that work is in Oklahoma?

A Texas court would presumably have applied Texas law as to Ruby's liability simply by virtue of the unilateral statutory choice-of-law rule contained in the Texas materialman's lien law, which renders the resulting trust provisions of that law applicable to funds paid to subcontractors "under a construction contract for the improvement of specific real property in the state."[364] Statutory choice-of-law rules, if constitutional, prevail over judicially-developed ones, and that is the end of the matter so far as the Texas air force construction project is concerned. But this unilateral choice-of-law rule cannot simply be "multilateralized" or generalized by analogy in the same manner as unilateral choice-of-law rules in the French or German civil codes.[365] In contradistinction to these, the Texas rule—which probably was unknown to the parties before this litigation, as it certainly was to the present author—is *not* part of an attempt to codify the conflict of laws, but a minor element in a statutory scheme designed for the protection of materialmen. It was also, in a sense, a statute for the protection of shareholders in construction companies, for it assured those who invested in such companies that they would not be held personally liable for the mismanagement of company funds unless they themselves exercised control or direction. Ruby, a Texas shareholder in a Texas company, had an apparent right to rely on that protection, and Texas had an interest in protecting him from liability not contemplated by Texas law. Assuming Oklahoma law to be different on this point, did Oklahoma have a contrary interest in the instant case? If so, should and would a Texas court yield to that Oklahoma interest in our hypothetical variant of *Nuclear*?

Part of the answer can seemingly be found in *Continental Oil Co. v. Lane Wood & Co.*,[366] a 1969 decision of the Supreme Court of Texas that has unfortunately so far escaped notice. The facts are unusually complicated, and simplified somewhat for present purposes. The Western Gas Service Company ordered a quantity of plastic pipe from Allied Supply Company, Inc., a Texas distributor, to be delivered at its work site in Texhoma, Oklahoma. Allied "bought" the pipe from Carlon, the wholly-owned Texas division of Continental, an Ohio company with a Texas plant. The goods were delivered by Carlon to Allied in Texas and by Allied to Western in Oklahoma. Allied "paid" Continental by a check which was dishonored for insufficient funds. Continental immediately brought suit for the return of the pipe or, in the alternative, for the purchase price. It joined Lane Wood as a party. The latter, by virtue of a prior factor's lien agreement and an assignment of accounts receivable agreement with Allied, had some interest in the fund held by Western, the ultimate purchaser. Western, an innocent

364. TEX. REV. CIV. STAT. ANN. art. 5472e, § 1 (Supp. 1974).
365. *See* Baade, *Foreword, New Trends in the Conflict of Laws*, 28 LAW & CONTEMP. PROB. 673, 676 (1963), and sources cited therein.
366. 443 S.W.2d 698 (Tex. 1969).

bystander if ever there was one, paid the purchase price into court, and not entirely unexpectedly, Allied went bankrupt. Continental and Lane Wood now fought over the fund created by Western's payment into court: the former on the theory that an intended cash sale had not been consummated so that Continental was still the owner, the latter on a number of contrary theories. Under Texas law as it then stood, Continental's theory was viable; under Ohio and Oklahoma law where article 2-403 of the Uniform Commercial Code was already in effect,[367] it was not.

The Supreme Court of Texas held that the sale between Continental had been intended as a cash sale, and that Texas law applied as between Continental and Allied, with the result that Continental (the original seller) prevailed over Lane Wood (the secured assignee of the bankrupt intermediary). Writing for a unanimous court, Mr. Justice Walker said:

> The sale was thus arranged in Texas between parties doing business here. The pipe had not previously been in Oklahoma but was moved there solely for the purpose of making delivery to Western. Any title owned by Allied would have passed in Texas if it had elected to make delivery by common carrier rather than by its own trucks. It does not appear that Continental, Carlon, Allied or Western is a resident of Oklahoma. Lane Wood is a Texas corporation and relies on the law of this state to give priority and effect to its assignment of accounts and factor's lien agreement. Oklahoma's connection with the transaction is minimal and fortuitous, and it has no interest in the present controversy. We hold that the Texas law controls.[368]

This language seems dispositive of the present case, and of its hypothetical variant. The present author is tempted to go further, and to suggest that in *Continental Oil* the Supreme Court of Texas has adopted the functional or governmental-interests approach to the conflict of laws, at least in false-conflicts cases. The difficulty with that view is, of course, that *Continental Oil* has been ignored by courts and commentators for almost five years. It is to be hoped, however, that this deficiency will soon be remedied. Choice-of-law decisions by courts of last resort are much too precious a commodity to be overlooked, and especially a polished gem such as this will not remain undetected for long.

## VI. CORPORATIONS

Out-of-state corporations licensed to transact business in Texas are assimilated to Texas corporations in several important respects. They are deemed Texas residents within the meaning of the contract clause of the long arm statute, and thus are entitled to use it in the same manner as Texas citizens and are entitled to vindicate their rights under contracts with non-residents which are to be performed in whole or in part in Texas.[369] Furthermore,

367. Article 2.403(b) of the Uniform Commercial Code, now TEX. BUS. & COMM. CODE ANN. § 2.403(b) (1968), reads as follows: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business."

368. 443 S.W.2d at 701.

369. *See* note 30 *supra*, and accompanying text.

they receive the same advantages as Texas corporations when seeking or opposing injunctions in restraint of out-of-state litigation or dismissal on *forum non conveniens* grounds.[370]

At least one statutory disadvantage remains, however. Pursuant to article 1995, section 27 of the Texas Revised Civil Statutes, a foreign corporation (but not a Texas corporation) may be sued in any county where it "may have an agency or representative." The constitutionality of that provision has been upheld by the Supreme Court of Texas and, on its authority, by other Texas courts.[371] *Humble Oil & Refining Co. v. Preston*[372] is the most recent example in point, but as the United States Supreme Court has granted *certiorari* in that case, a change may well be in the offing.

The separate legal entity of foreign corporations continues to be respected in the same manner as that of Texas corporations. The *Cannon* rule is still followed, and a foreign parent corporation can only be reached through its within-state subsidiary either if the latter is its *alter ego*, or to the extent that the within-state entity is acting as the agent of the out-of-state entity.[373]

*Hoppenfeld v. Crook*[374] involved a somewhat unusual variant of this separate entity rule. Plaintiff Crook alleged that he was fraudulently induced by defendant Hoppenfeld, the president and the majority shareholder of Law Research Service Inc., to purchase a franchise from that corporation for Austin and San Antonio. Law Research is a New York corporation, now in bankruptcy, and the misrepresentations were alleged to have been made by Hoppenfeld in New York. It seems clear that under the facts as alleged, the *corporation* was amenable to the jurisdiction of Texas courts with respect to a tort committed in part in Texas when plaintiff Crook acted there in reliance on the representations made to him in New York. Indeed, jurisdiction had been obtained over Law Research by substituted service pursuant to article 2031b, and plaintiff Crook had obtained a judgment against that corporation on the merits. The trial judge, however, had granted a motion for new trial, but before that trial could be had, the federal court sitting in bankruptcy had enjoined all further litigation against Law Research outside the bankruptcy proceedings.

Crook now sought to hold Hoppenfeld *personally* responsible for the alleged misrepresentations. The Austin court of civil appeals held that Hoppenfeld was not, on the same facts, subject to Texas jurisdiction individually for acts admittedly done in his capacity as a corporate officer unless he was the "*alter ego* of the corporation" or had "*personally* invoked the protections and benefits of the laws of Texas."[375]

*Hoppenfeld* illustrates the importance of observing the distinction between

370. *See* text accompanying notes 79, 87, 88 *supra*.
371. Commercial Ins. Co. v. Adams, 369 S.W.2d 927 (Tex. 1963). Further authorities in point are collected in 2 R. HAMILTON, BUSINESS ORGANIZATIONS § 982 n.68 (1973).
372. 487 S.W.2d 956 (Tex. Civ. App.—Beaumont 1972), *error dismissed, cert. granted sub nom.* Exxon Corp. v. Preston, 94 S. Ct. 538, 38 L. Ed. 2d 328 (1973) (No. 73-232).
373. *See* text accompanying notes 50-57 *supra*.
374. 498 S.W.2d 52 (Tex. Civ. App.—Austin 1973), *error ref. n.r.e.*
375. *Id.* at 58 (emphasis added).

legal entities and their major shareholders, whether or not themselves corporate, in interstate and international transactions. In *Dailey v. Transitron Electronic Corp.* which has already been discussed above,[376] this distinction was ignored in a truly remarkable manner by a "multinational" corporate defendant: the plaintiff was approached by the Mexican-incorporated manufacturing subsidiary which he was to manage, employed by the Delaware-incorporated foreign operations subsidiary that was in charge of the marketing of, among other things, the products of that manufacturing subsidiary, and he was subsequently discharged by the parent company itself.

In that case, this disregard of corporate form was immaterial for jurisdictional purposes and of tangential significance for the choice of law. The normal so-called multinational corporation consists of an American (usually Delaware-incorporated) parent, a Delaware-incorporated, wholly-owned subsidiary with international operations, and a series of foreign-incorporated manufacturing or marketing corporations which are not subsidiaries of the parent but of the international operations company. The interposition of the latter serves primarily the purpose of insulating the parent from quasi in rem jurisdiction abroad.[377]

As evidenced by the two-tier organization apparently chosen by Transitron for a three-company complex, and by its cavalier handling of the niceties of separate corporate existence, these considerations were not deemed very important by it. Let us assume, however, that Dailey had actually contracted in Mexico with Transitron Mexicana, S.A., and that the corporate defendant had deliberately pursued the objective of limiting him to his remedies under Mexican law. Would a Texas court still have applied that law, even as regards clauses or rules that could not have been validly stipulated between an employer and an employee under Texas law?

This question is suggested by Judge Wisdom's reference to *Hellenic Lines v. Rhoditis*[378] in his *Transitron* opinion, and by the recent decision of the court of appeals in *Sayers v. International Drilling Co. NV* which, although much commented upon abroad, has not yet attracted the attention of Texas authors.[379] In *Rhoditis* the United States Supreme Court upheld a Fifth Circuit decision written by Judge Goldberg, approving the application of the Jones Act[380] so as to allow recovery to a Greek seaman who was injured in a United States port on a Greek-flag vessel ultimately owned and controlled by United States domiciliaries through the intermediaries of the Panamanian subsidiary of a Greek-incorporated parent.

Although United States labor relations law has been held not applicable to alien crews on foreign-flag vessels irrespective of such beneficial American

376. 475 F.2d 12 (5th Cir. 1973); *see* text accompanying notes 242-49 *supra.*

377. *See* Buechner v. Farbenfabriken Bayer AG, 154 A.2d 684 (Del. 1959); Comment, *Attachment of Subsidiary's Assets in Action Against Parent,* 12 STAN. L. REV. 854 (1960). *See generally* Baade, *Multinational Corporations and American Conflicts Law,* 37 RABELSZ 5, 18-20 (1973) (in German, with summary in English).

378. Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970), cited in Dailey v. Transitron Electronic Corp., 475 F.2d 12, 14 (5th Cir. 1973).

379. Sayers v. International Drilling Co. NV, [1971] 3 All E.R. 163 (C.A.).

380. 46 U.S.C. § 688 (1970).

or American-based ownership, and although the Jones Act does not normally apply to accidents of alien seamen aboard foreign-flag vessels in American ports,[381] the latter rule was held inapplicable in the present circumstances despite the fact that Rhoditis had signed on in Greece under articles specifying the exclusive applicability of Greek law. Speaking for a majority of the United States Supreme Court, Mr. Justice Douglas said:

> We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act "employer." The flag, the nationality of the seaman, the fact that his employment contract was Greek, and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country.[382]

In *Sayers*, on the other hand, a similar exclusive-remedy agreement between an English skilled oil drilling rig worker and the Netherlands subsidiary of the Offshore Company of Houston was given effect, although the agreement was in fact signed in London at the office of Offshore's English subsidiary and although under English law, the workman's remedies in tort may not be validly waived by contract with his employer. This decision has been criticized with, it is believed, good reason as an unjustifiable sacrifice of English interests in the welfare of English workers hired in England.[383] Be that as it may, the question soon likely to be faced by Texas courts and corporate counsel, as well as by the personal-injury bar, is whether in transnational operations such as these, domestic corporations should be permitted to limit their liabilities, especially towards Texas employees, by interposing foreign-incorporated subsidiaries as the formal parties to employment contracts. In this connection, Judge Wisdom's almost casual reference to *Rhoditis* in the *Transitron* case may yet acquire a cardinal significance.

*Texasgulf, Inc. v. Canada Development Corp.*,[384] which has also been mentioned in another connection,[385] fails to raise major choice-of-law issues concerning multinational corporations because the company sought to be taken over by the CDC was a Texas corporation with its business headquarters in Houston, and the tender offer was made to the American stockholders in the United States. The federal securities laws were clearly applicable to this dispute between the pre-takeover management and the CDC;[386] and in addition, the relations between the directors, officers, and shareholders

381. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).
382. 398 U.S. at 310.
383. Collins, *Exemption Clauses, Employment Contracts and the Conflict of Laws*, 21 INT'L & COMP. L.Q. 320 (1972).
384. 366 F. Supp. 374 (S.D. Tex. 1973).
385. *See* text accompanying notes 174-79 *supra*.
386. *See, e.g.*, Travis v. Anthes Imperial, Ltd., 473 F.2d 515 (8th Cir. 1973); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); Kohn v. American Metal Climax, Inc., 458 F.2d 255 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972).

of Texasgulf were clearly subject to Texas law.[387]

In this latter connection, an odd question arose. Texasgulf contended that if the takeover were carried through and a majority of the new Board became Canadians, the charter of the corporation would be subject to cancellation by the secretary of state pursuant to article 1527 of the Texas Revised Civil Statutes. That quaint provision, which had seemingly escaped notice by courts and commentators in the first half century of its existence, authorizes the establishment of "international trading" corporations, with the proviso that "the control of such corporations shall never in any instance be vested in citizens of other countries than the United States."[388] Texasgulf had been chartered some twelve years before the enactment of this provision but contended, nevertheless, that any corporation which at any time files a broad general purpose clause including a provision which could possibly be construed to include the trading of natural resources, is automatically subject to article 1527. Judge Seals rejected this argument as untenable under Texas corporation law. This aspect of the case is discussed elsewhere in these pages by Professor Lebowitz, and need not be pursued further at this point.

Choice-of-law doctrine regarding the "internal affairs" of corporations is currently in a state of flux. As recently as 1963, the draft *Restatement (Second)* followed the place-of-incorporation rule as regards the "internal affairs" of corporations, that is, relations to shareholders, directors, and officers. This blanket reference was abandoned by the Proposed Official Draft of 1969, which referred to the local law of the state with the most significant relationship to the particular issue. However, it also provided that this would be the state of incorporation unless another state had a more significant relationship. This formulation and the Reporter's Comments thereon were strongly criticized at the 1969 meeting of the American Law Institute by corporate law practitioners; and while a motion to return to the internal affairs rule was defeated, the *Restatement (Second)* now provides that a law other than that of the state of incorporation shall only apply in "unusual" cases.[389]

In *Teague v. Home Mortgage & Investment Co.*[390] the owners of a building in Arkansas sought recovery for damage alleged to have been caused by the O.R.C., a Texas corporation which was subsequently merged into another Texas corporation, the defendant herein. The Supreme Court of Arkansas held that as both companies were Texas corporations, "the merger of the two, and the dissolution of O.R.C., are governed by Texas laws."[391] This same instinctive preference for the law of the place of incorporation is also apparent in *B & H Warehouse, Inc. v. Altas Van Lines, Inc.*[392]

387. This seems to have been assumed by all concerned, *see, e.g.*, 366 F. Supp. at 384.
388. TEX. REV. CIV. STAT. ANN. art. 1527 (1962).
389. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971); Baade, *supra* note 377, at 20-22.
390. 250 Ark. 322, 465 S.W.2d 312 (1971).
391. *Id.* at 323, 465 S.W.2d at 313.
392. 348 F. Supp. 517 (N.D. Tex. 1972).

Here, a Texas corporation sought damages for, or the rescission of, the imposition of restrictions on its right to sell its shares in defendant, a Delaware corporation. These restrictions had first been imposed by a voting trust agreement that had lapsed according to its own terms, and subsequently by an amendment of the corporate charter in 1966. That amendment had been filed with the Delaware Secretary of State, and its validity was uncontested.

The United States District Court for the Northern District of Texas held that "State law governs the assertion of rights by a stockholder against a Delaware corporation."[393] This elliptic reference was apparently to the law of the state of incorporation, for Judge Woodward then proceeded to discuss plaintiff's contentions in terms of Delaware law. As the 1966 charter amendment was concededly valid and dispositive of the issue, the action was destined to fail. Plaintiff contended, however, that the 1966 charter amendment was ineffective as to the shares owned by B & H Warehouse, because the restrictions on transferability were not stated on the stock certificates as then required by the Uniform Stock Transfer Act. This argument was rejected, first for the obvious reason that the purpose of that Act is "merely one of providing fair notice to a purchaser for value," and secondly because the certificates were in actual fact still in the possession of defendant so that the missing statement could be affixed to them at any time.[394]

Judge Woodward also rejected plaintiff's arguments based on the *Sandor* case, mainly because it was "not expressive of the law of the State of Delaware,"[395] and secondly, in view of factual differences. The Texas rule, as stated in *Sandor* and as now codified, is that while reasonable preemptive obligations to resell and restrictions on the alienability of shares are not illegal, they may not be validly imposed on holders of unrestricted shares without their consent by subsequent bylaw amendment even if the amendment of the bylaws by the board of directors is authorized in the original bylaws.[396] The question thus presented, but not decided, in *Atlas Van Lines* was whether the Texas rule favoring the protection of the "vested" rights of shareholders should have been applied in the instant case to protect a Texas shareholder against the infringement of his rights.

In the instant case, it is submitted, the application of the Texas protective rule would not have been justified. When purchasing his shares in this Delaware corporation, B & H knew or could have ascertained that the bylaws authorized their own amendment, and that under Delaware law as it then stood, subsequent bylaws amendments could impair "vested" rights of nonconsenting shareholders. Since Texas law does not protect shareholders against subsequent restrictions of this type that have been contemplated in advance, the application of Delaware law in accordance with the presumed

393. *Id.* at 521.
394. *Id.* at 523, 524.
395. *Id.* at 524, referring to Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614 (Tex. Civ. App.—Eastland 1939), *error ref. n.r.e.*
396. TEX. BUS. CORP. ACT ANN. art. 2.22B (Supp. 1974); Ling & Co. v. Trinity Sav. & Loan Ass'n, 482 S.W.2d 841 (Tex. 1972).

and perhaps even the actual intent of the parties does no violence to Texas policy.[397]

## VII. DOMESTIC RELATIONS

The 63d Legislature has enacted some significant revisions of the law of divorce and particularly of the law governing parent-child relations, which is now title 2 of the Family Code. That latter title, especially, contains numerous new provisions on jurisdiction, venue, and even choice-of-law that require detailed attention. No attempt will be made to discuss all of these provisions, although it is hoped that the list in the footnotes is reasonably complete.[398] With that exception, coverage is limited to the three subjects shown to be of continued prime importance by the reported cases—divorce, support, and child custody—and the one subject likely to attain central significance as Texas continues to attract prosperous new residents, community property.

### A. *Divorce and Annulment*

Texas is now primarily a no-fault divorce state. Pursuant to section 3.01 of the Family Code, a divorce may be decreed on the petition of either party "without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation."[399] The 63d Legislature has underlined the no-fault character of this insupportability ground by expressly abolishing the defense of adultery. Condonation, however, continues to be a defense, but only "if the court finds that there is a reasonable ground for reconciliation."[400]

As divorces may thus plainly be obtained by "guilty" spouses, waiting periods and jurisdictional requirements have assumed added significance. These, too, have been revised in 1973. The basic rule now is that the *petitioner* or the *respondent* must be (1) a Texas domiciliary, (2) a resident of Texas for six months, and (3) a resident of the county for ninety days.[401] Members of the armed forces of the United States who are stationed in

397. *See generally* Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433 (1968).

398. TEX. FAM. CODE ANN. §§ 3.21-.25 (Supp. 1973) (divorce, nullity, and annulment jurisdiction and venue); *id.* §§ 5.26-.27, .831, .85-.87 (property interests of prisoners of war and persons missing while on federal official service); *id.* § 11.04(c)(5) (residence for venue purposes of child with foreign-appointed guardian or custodian); *id.* § 12.02(b) (legitimation by putative marriage of parents in another state or country); *id.* § 13.02 (voluntary legitimation; statement to be executed before Texas notary); *id.* § 14.08 (modification of custody and support orders); *id.* § 14.10(b) (enforcement of custody decrees of other states or nations by habeas corpus proceedings); *id.* § 15.04(b)(3) (paternity under law of other state or nation); *id.* §§ 16.01-.02, .51 ("residence" within state of child, adoptive parents, and of person adopting an adult as prerequisite for adoption); *id.* §§ 21.01-.66 (uniform reciprocal enforcement of support); *id.* §§ 25.01-.09 (return of runaway juveniles); *id.* §§ 31.01-.03, .05 (removal of disabilities of minorities; residents and nonresidents; venue; appearance by nonresident); *id.* § 31.08 (registration of disability-removing decrees of other state or nation; effects thereof).

399. *Id.* § 3.01.

400. *Id.* § 3.08.

401. *Id.* § 3.21.

Texas for six months or more, and at a military installation within a Texas county for ninety days, are "considered" to have been domiciliaries of the state, and residents of that county, for the purpose of bringing suits for divorce, annulment, and marriage nullity.[402] There is no time requirement for annulment or nullity suits, but such suits may be brought in Texas only if the parties were married here or if either of them is a Texas domiciliary.[403] It follows that service personnel not otherwise domiciled in Texas are subject to the statutory waiting and residence periods in connection with annulment actions and nullity suits as well, unless these relate to marriages entered into in Texas.

If the *respondent* is a Texas domiciliary and the petitioner is not, suits for divorce may be brought in any county where the respondent currently resides. The only time requirement in this situation is that the respondent must have been a domiciliary of the state for at least six months.[404]

In the last few years, the constitutionality of durational residence requirements for divorce actions has been challenged in several states.[405] Until recently, the current of opinion seemed to be that a one-year residence requirement was reasonable but that a two-year requirement was not.[406] In the more immediate past, however, one-year residence requirements as well have been challenged successfully.[407] It is nevertheless believed that the current Texas six-month durational requirement will survive constitutional challenge. The constitutionality of the blatant, though probably accidental, discrimination against Texas-domiciled divorce petitioners as regards the ninety-day within-county residence requirement, however, is another matter.

Thus, while out-of-state divorce seekers probably can no longer complain that Texas discriminates against them, there now is the very real question whether Texas has not gone too far in asserting jurisdiction to divorce, to annul, or to declare invalid the marriages of nondomiciliaries. Since Texas will apply Texas law at least in divorce actions, the non-fault dissolution of a marriage between two parties currently domiciled in a fault-divorce state might be deemed an unconstitutional intrusion of Texas into a matter that is not its concern. (This situation will arise only with respect to service personnel domiciled elsewhere but "considered" domiciled here for divorce jurisdiction purposes by statutory fiction.)

For reasons set out at greater length elsewhere, it is believed that the test to be applied here is not to be found in this or that dictum in the *Williams* cases.[408] Instead, a three-step process of analysis is called for. First, it must be determined whether the interest of Texas in the spouses, or in either

402. *Id.* § 3.23.
403. *Id.* § 3.25.
404. *Id.* § 3.24.
405. *See* 51 TEXAS L. REV. 585 (1973).
406. *See, e.g.*, Davis v. Davis, 210 N.W.2d 221 (Minn. 1973), and cases therein cited; Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I. 1973).
407. Mon Chi Heung Au v. Lum, 360 F. Supp. 219 (D. Hawaii 1973).
408. Williams v. North Carolina II, 325 U.S. 226 (1945); Williams v. North Carolina I, 317 U.S. 287 (1942); *see* Baade, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329, 333-45 (1972).

of them, or in the marriage is "too slight and too casual" to justify the application of Texas law.[409] If this question is tentatively answered in the affirmative, the next issue is whether some other state actually has a better claim to the applicability of its law. Finally, even if this, too, is answered in the affirmative, it must be asked whether in the case at hand, the application of Texas law thwarted any interest of that other state. To take one obvious example: On what conceivable ground could Florida (a non-fault state)[410] object to the divorce of Florida domiciliaries on the same grounds in Texas?[411]

Rather obviously, the same arguments operate in reverse. As a no-fault divorce state, Texas has virtually no interests at stake when the marriage of Texas domiciliaries is dissolved in other states or nations, for whatever remedy is granted there would presumably also have been available at home. This means, in blunt terms, that Texas should now recognize divorces of the *Williams* and even of the *Rosenstiel* type[412] as a matter of course, even in the absence of constitutional compulsion.

The radical solution of the divorce-recognition problem here proposed is, however, subject to two limitations. First, the possibility of reconciliation continues to be a defense in Texas, even in actions based on the no-fault ground of "insupportability."[413] Consequently, *ex parte* sister-state and foreign country divorces might still be denied recognition in the absence of constitutional compulsion where the foreign waiting period, for example, one day, is such as to preclude the other party from urging the possibility of reconciliation in a realistic manner. In simple terms, Texas should still exercise prudence in recognizing one-day *ex parte* Haiti divorces.[414] There is, however, no longer any reason for refusing to recognize *bilateral* one-day Haiti divorces, as both parties are obviously agreed on the futility of reconciliation. For the same reason, there might not even be much of a point in refusing to recognize *ex parte* one-day Haiti divorces where the life pattern of the spouses after such a divorce clearly shows (as it almost invariably will) that reconciliation is *now* pointless. Why require a second adjudication confirming the existence of a legal situation that is now perfectly compatible with Texas law?

The second limitation upon the radical divorce-recognition solution here recommended is to some extent equally a consequence of the fact that the possibility of reconciliation remains a justiciable issue even in no-fault cases under current Texas law. Whatever the foreign court does, it must do consistently with procedural due process. This means that there must be a rea-

409. Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 182 (1964).
410. FLA. STAT. ANN. § 61.052 (Supp. 1972); Ryan v. Ryan, 277 So. 2d 266 (Fla. 1973).
411. *See* Baade, *supra* note 408, at 340-45.
412. Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), *cert. denied*, 384 U.S. 971 (1966).
413. Cusack v. Cusack, 491 S.W.2d 714 (Tex. Civ. App.—Corpus Christi 1973), *error dismissed.*
414. *Compare* Kugler v. Haitian Tours, Inc., 120 N.J. Super. 260, 293 A.2d 706 (1972), *with* Kraham v. Kraham, 73 Misc. 2d 977, 342 N.Y.S.2d 943 (Sup. Ct. 1973). Note, incidentally, that an advertisement offering information on the law of Haiti in the *Texas Bar Journal* has been discontinued.

sonable effort to give the Texas respondent notice of the pendency of the out-of-state proceedings, and the realistic opportunity to interpose a defense.[415]

These essential requirements of procedural due process seemingly received but scant attention in the recent case of *Dosamantes v. Dosamantes*.[416] Manuel and June Dosamantes were married in Mexico in 1963. He was a citizen of Mexico, and she was a citizen of the United States. A child was born to the marriage in 1965, but in 1966 June left for Texas, taking the child with her. In 1967 Manuel brought divorce and custody proceedings in Mexico. Two days after being served in these proceedings by the Mexican consul in Dallas, June in turn filed for divorce from Manuel in Texas. The present controversy concerns, in the main, the regularity of service in the Texas proceedings. (Manuel also contended that a Texas court was without jurisdiction to divorce the marriage of a foreign citizen resident abroad, but this argument, which seemingly came with ill grace from a citizen of Mexico, was properly rejected by the Texarkana court of civil appeals.)[417]

The Texas trial court issued a nonresident notice to Manuel, and service of process was attempted by one Alcantara who attempted to deliver the papers at Manuel's home in Mexico. Manuel came to the door, and Alcantara tried to "deliver the papers to him in English." Manuel, who could not speak English, refused acceptance and closed the door, and this procedure was repeated once more with the Dosamantes' maid. Alcantara thereupon slipped the papers under the door where Manuel, according to his testimony, found them some two months later. After having them translated into Spanish, he tried to intercede in the Texas proceedings through letters rogatory, but this attempt proved unsuccessful since the divorce had already been granted to June, and the thirty-day period for a motion for a new trial had lapsed. Some considerable time later, Manuel brought the present bill of review, trying to set aside the Texas divorce.

Pursuant to Texas Rule of Civil Procedure 108, process on defendants who are absent from the state may be served "by any disinterested person competent to make oath of the fact"[418] in the same manner as provided by rule 106 for within-state service. That rule, in turn, generally requires delivering to the defendant, in person, a true copy of the citation. Where such service is impractical, however, the *court* may authorize service "in any

415. Armstrong v. Manzo, 380 U.S. 545 (1965); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Valley Bank v. Skeen, 366 F. Supp. 95 (N.D. Tex. 1973).

416. 500 S.W.2d 233 (Tex. Civ. App.—Texarkana 1973), *error dismissed.*

417. *Id.* at 236. Until quite recently, some Mexican courts have been very liberal indeed in exercising divorce jurisdiction over citizens of the United States. J. BAYITCH & J. SIGUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES 103, 241-57 (1968). The authors state: "Compared with the torrential flow of Mexican divorce decrees into the United States, the movement in the opposite direction is, for obvious reasons, insignificant." *Id.* at 257. Texas cases involving the validity of Mexican divorces granted to residents of Texas are Webb v. Webb, 461 S.W.2d 204 (Tex. Civ. App.—San Antonio 1970), and Dunn v. Tiernan, 284 S.W.2d 754 (Tex. Civ. App.—El Paso 1955), *error ref. n.r.e. Cf.* Risch v. Risch, 395 S.W.2d 709 (Tex. Civ. App.—Houston 1965), *error dismissed, cert. denied,* 386 U.S. 10 (1967).

418. TEX. R. CIV. P. 108.

other manner which will be reasonably effective to give the defendant notice of the suit."[419]

The Texarkana court of civil appeals held that generally, "*one who is within the jurisdiction* has the obligation to accept service of process when it is reasonably attempted," and that he is "usually held to have been personally served if he physically refuses to accept the papers and they are then deposited in an appropriate place in his presence or near him where he is likely to find them, *if he is also informed of the nature of the process and that service is being attempted.*"[420] Here, the two requirements set in italics by the court had not been met, "especially since delivery was attempted in English while appellant speaks only Spanish and the server was not an officer authorized under Mexican law to serve process of that country . . . ."[421] Furthermore, no attempt had been made to obtain prior court authorization for an alternate method of service as contemplated by rule 106. The Texarkana court concluded, therefore, that the defendant had not been properly served under rules 106 and 108.[422]

Nevertheless, the court refused to set aside the divorce decree obtained by these illicit means. In *McEwen v. Harrison* the Supreme Court of Texas had held that when the thirty-day period prescribed by rule 329-b for filing a motion for a new trial has expired and relief may no longer be obtained by appeal, "a proceeding in the nature of a bill of review is the exclusive method of vacating a default judgment rendered in a case in which the court had jurisdictional power to render it."[423] This category, the supreme court went on to hold, included "those cases in which a default judgment is asserted to be void for want of service, or of valid service, of process."[424] As expressly held in *McEwen*, an appellant challenging a default judgment for want of valid service or of service of process must prove not only the invalidity of the judgment, but also that he had a valid defense to the original cause of action.[425] Otherwise, Chief Justice Calvert said, in that case, the setting aside of the judgment would be "a vain act and a trespass on the time of the court."[426] In *Dosamantes* Manuel argued on appeal that he could show desertion and recrimination on the part of June, and that these would constitute meritorious defenses to her cause of action. Since he had

419. TEX. R. CIV. P. 106.
420. 500 S.W.2d at 237.
421. *Id.* In Scucchi v. Woodruff, 503 S.W.2d 356 (Tex. Civ. App.—Fort Worth 1973), out-of-state service pursuant to rules 106 and 108 was held defective because the return did not contain a sworn statement by the person making it, stating that he was a disinterested person competent to make oath of the fact. This led to the setting aside of a default judgment against an out-of-state party with actual knowledge. Note, incidentally, that rule 109 in terms authorizes citation by publication of a defendant who is "not within the continental United States, and is not in the Armed Forces of the United States," and purports to dispense with the need for personal service in such cases even if the address of the defendant is known. It is submitted that for reasons which are developed more fully in the text such service by publication on nonresident defendants in cases such as *Dosamantes* fails to meet due process requirements.
422. 500 S.W.2d at 237.
423. 162 Tex. 125, 131, 345 S.W.2d 706, 710 (1961).
424. *Id.*
425. *Id.* at 132, 345 S.W.2d at 710-11.
426. *Id.* at 131, 345 S.W.2d at 710.

not, however, actually proved these matters at the trial on the bill of review, the Texarkana court of civil appeals affirmed the judgment below denying the bill.

With respect for the court's decision, this disposition of the case cannot be accepted as correct. The Supreme Court of the United States held in *Mullane v. Central Hanover Trust Co.*, that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[427] In the instant case, the Texarkana court expressly found that there had been no such reasonable effort to give notice, and its determination of this question, especially of the language issue, surely deserves approval.[428] Once it is established, however, that a judgment defendant was deprived of due process by constitutionally insufficient notice, this defect may not be cured by a subsequent proceeding in the cause which places upon the defendant the burden of affirmatively showing that he had a good defense. In *Armstrong v. Menzo*[429] the United States Supreme Court expressly held such a shifting of the burden upon judgment defendant under Texas law in defective-notice cases to be a denial of due process. In that case, the Court held that the opportunity to be heard must be granted "at a meaningful time and in a meaningful manner."[430] Only the setting aside of the decree and an adjudication de novo, the Court wrote, "would have wiped the slate clean" and "restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place."[431]

It should nevertheless be added that in the *Dosamantes* case, this constitutional blemish almost has the appearance of harmless error. The controversy was unusually stale, especially for divorce litigation; some six years had elapsed between the Texas judgment and the disposition of the bill of review. The recrimination defense was soon to be abolished by the legislature; desertion was no longer a defense to a no-fault divorce suit. True, in such a suit, the respondent still has the right to litigate the issue of the possibility of reconciliation.[432] In the instant case, however, Manuel had himself obtained a seemingly unimpeachable *ex parte* divorce from June in Mexico,[433] and he was accordingly estopped by conduct if not by record from raising this defense. Thus, despite the lack of notice and the shifting of the burden which are, as pointed out, defects of constitutional magnitude, it is difficult to see how Manuel was actually disadvantaged, and just as difficult not to find some sympathy with Chief Justice Calvert's statement in *Mc-*

427. 339 U.S. 306, 314 (1950).
428. *See* text accompanying note 421 *supra*; Julen v. Larson, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972); Comment, *Citado a Comparecer: Language Barriers and Due Process*, 61 CALIF. L. REV. 1395 (1973); 83 YALE L.J. 385 (1973).
429. 380 U.S. 545 (1965).
430. *Id.* at 552.
431. *Id.*
432. *See* note 413 *supra*, and accompanying text.
433. 500 S.W.2d at 235. There seems no doubt that Manuel Dosamantes was domiciled in Mexico, and his wife June received notice of the proceedings.

*Ewen* that without such a showing of disadvantage, "the setting aside of the judgment would be a vain act and a trespass on the time of the court."[434]

### B. *Alimony and Support*

There is no post-divorce alimony in Texas, but Texas courts give effect to sister state alimony decrees to the extent required by the full faith and credit clause of the United States Constitution. As presently construed by the Supreme Court, that clause does not require the enforcement of accrued alimony claims under sister state decree if under the law of the state of rendition, the accrued sum is subject to judicial modification.[435] In *Brazeal v. Renner*[436] this rule was applied by the Dallas court of civil appeals to deny the enforcement, by way of a Texas money judgment, of arrears accumulated under an Oklahoma custody and child support decree. As Oklahoma law was not proved and since no motion was made pursuant to rule 184a to take judicial notice of Oklahoma law, the Dallas court presumed that law to be identical with Texas law. At the time, the latter permitted the modification or suspension of child support decrees from time to time as the facts, circumstances and justice might require.[437] Consequently, the plaintiff had not established that under the law of the state of rendition, the support decree had become absolute and final as to each installment as it fell due.

The outcome would in all probability be different today because pursuant to section 14.08(c) of the Family Code, an order providing for child support may be modified "only as to obligations accruing subsequent to the motion to modify."[438] Thus, under the shadow of the Texas presumption of identity, the defendant father would have had the burden of proving a different rule of Oklahoma law, or at least of making the appropriate motion for judicial notice. The new situation is preferable, but still hardly satisfactory. Runaway fathers are not in need of special protection by the American federal system. Quite the contrary, the general enactment of the Uniform Reciprocal Enforcement of Support Act shows that the prime area of concern in this field is the fate of wives and children abandoned by their foot-loose breadwinners. Under the new Family Code which reflects the Texas variant of that Act, the obligee of a foreign support order may register that order in a Texas court. The court of registry has power to adjudicate arrearages, and future enforcement of the order thus registered is "as in civil cases, including the power to punish the defendant for contempt as in the case of other orders for payment of temporary alimony, maintenance, or support entered in this state."[439] *Brazeal* need not happen again.

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434. 162 Tex. at 132, 345 S.W.2d at 710.
435. Aldrich v. Aldrich, 378 U.S. 540 (1964); Barber v. Barber, 323 U.S. 77 (1944); Sistare v. Sistare, 218 U.S. 1 (1910). *See generally* R. WEINTRAUB, *supra* note 199, at 187-88.
436. 493 S.W.2d 541 (Tex. Civ. App.—Dallas 1973); *see* text accompanying notes 141-42 *supra*.
437. Ch. 127, § 1, [1953] Tex. Laws 439 (repealed 1973); Menner v. Ranford, 487 S.W.2d 698 (Tex. 1972).
438. TEX. FAM. CODE ANN. § 14.08(c) (Supp. 1973).
439. *Id.* § 21.66. *See also id.* §§ 21.62-.65.

### C. *Custody and Visitation Rights*

Section 14.07(a) of the new Family Code states, in familiar terms, that "[t]he best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession, and support of and access to the child."[440] Although or perhaps because this fundamental principle is universally recognized, interstate child custody disputes continue to be troublesome. The evaluation of the best interests of the child is subject to constant revision according to changing circumstances, and no award of custody has the finality of a money judgment. The problem of recognition of sister-state custody decrees is thus to some extent comparable to the question of the effect of foreign support orders. The Supreme Court of Texas has taken the position, however, that sister-state custody decrees are entitled to full faith and credit as to the determination of the best interests of the child at the time of the decree, so that modification is permissible only if it is established that the factual situation changed after the effective date of the decree which is challenged or flouted.[441] The new Family Code goes one step further, and provides for the preemptory enforcement of sister state *and foreign-nation* custody decrees through habeas corpus proceedings unless it is determined that the rendering court did not have jurisdiction over the parties or that the child has been in Texas for at least twelve months immediately preceding the filing of the writ.[442] The new Penal Code makes the taking of children out of the state in knowing violation of a custody decree, or with knowledge of the pendency of a custody or divorce proceeding, a felony of the third degree.[443] It is understood that this penalization is intended to facilitate the extradition (or, more realistically, the *threatened* extradition) of obdurate child-nappers.

With this unmistakable trend to render custody decrees more effective, the initial localization of custody adjudications has assumed added significance. The new Family Code has commendably broken with past tradition here as well, and has enacted a detailed scheme for venue in custody cases, designed to assure the elimination of parallel proceedings and adjudication in the most appropriate forum. Pursuant to section 11.04 of the Code, this is generally the county where the child resides as therein defined, but section 11.06(c) provides that on the timely motion of any party, the court may, "[f]or the convenience of the parties and witnesses and in the interest of justice . . . transfer the proceeding to a proper court in any other county in the state."[444] It should be noted that where a custodian or guardian has been appointed for a child by order of a court of another state or nation,

440. *Id.* § 14.07(a).
441. Bukovich v. Bukovich, 399 S.W.2d 528 (Tex. 1966). This rule is applied with commendable firmness. *See* Meucci v. Meucci, 457 S.W.2d 48 (Tex. 1970).
442. TEX. FAM. CODE ANN. §§ 14.10(a), (b) (Supp. 1973). Note, however, the exception that "[t]he court may issue any appropriate temporary order if there is a serious immediate question concerning the welfare of the child." *Id.* § 14.10(c).
443. TEX. PEN. CODE ANN. § 25.03(c) (1974). *See also* text accompanying note 488 *infra*.
444. TEX. FAM. CODE ANN. § 11.06(c) (Supp. 1973).

for venue purposes the child legally resides in the county of residence of such guardian or custodian.[445] It would seem to follow that unless the child is actually in Texas and appears not to be under the care and control of any adult,[446] no custody determination may now be made by a Texas court to the detriment of a non-resident foreign court-appointed guardian or custodian. Where the parents live in different states and there has as yet been no adjudication of custody, however, the child resides, for custody venue purposes, in the county where the parent having custody and control of the child resides.[447]

As shown once more by *Hinds v. Hinds*,[448] this last mentioned fact pattern is quite usual in the interstate context as well. The parties were married in Louisiana in 1969, and lived there together until May 1972, when the wife left for San Antonio, taking along the two minor children of the marriage. In June 1972, the husband filed suit in Louisiana, seeking a separation and custody of the children. The wife was personally represented at the Louisiana hearing by both Texas and Louisiana counsel, but nevertheless brought a custody suit in San Antonio ten days after the Louisiana proceedings had been filed by the husband. The latter specially appeared in the Texas proceedings under rule 120a, and urged that the San Antonio court was without jurisdiction because of the pendency of a prior suit on the same matter at the marital domicile.

The San Antonio court of civil appeals affirmed a dismissal below of the wife's suit for want of jurisdiction. Writing for the court, Chief Judge Barrow stated that "[i]t is settled law that a Texas court may exercise jurisdiction over the custody of a child which is physically present in the state, although the child's legal domicile may be in another state."[449] This, he went on to state, did "not mean, however, that our courts must or should take jurisdiction in every case where the child happens to be before the court."[450] In this connection, he quoted the following passage from the opinion of the Supreme Court of Texas in *Wicks v. Cox*: "Ordinarily the courts of the domiciliary state are in a better position to pass intelligently on the matter of the child's welfare, and good order frequently requires that they do so to the exclusion of courts of other states in which the child is temporarily resident."[451]

Chief Judge Barrow went on to point out that the Louisiana court had a prior suit pending, involving the same issue, and both parties were before that court; that the marital domicile of the couple was in Louisiana; and, therefore, that the witnesses would be much more accessible in Louisiana. Furthermore, the wife might still be held to be domiciled in Louisiana, although she had been in Texas about three weeks, and testified that her intention was to permanently reside here. Consideration of these facts, he

445. *Id.* § 11.04(c)(5).
446. In such cases, the child is deemed to reside where found. *Id.* § 11.04(c)(6).
447. *Id.* § 11.04(c)(3).
448. 491 S.W.2d 448 (Tex. Civ. App.—San Antonio 1973).
449. *Id.* at 449.
450. *Id.*
451. 146 Tex. 489, 493-94, 208 S.W.2d 876, 878 (1948).

concluded, "fully justified" the trial court in declining jurisdiction.[452]

*Hinds* reaches an eminently sound result, and deserves to be followed widely. Nevertheless, some of the language in Chief Judge Barrow's opinion seems less than precise. There can be little doubt that the San Antonio court had jurisdiction over the subject matter, the children, and the wife, though probably not over the husband.[453] Its refusal, for good reason, to exercise that jurisdiction in the instant case is grounded not on lack of competence, but on an enlightened use of *forum non conveniens*.[454]

That doctrine is now recognized for change-of-venue purposes in the Family Code,[455] and its analogous application to interstate custody disputes does not pose the difficulty encountered in civil and commercial cases. Both Louisiana and Texas apply the best interests of the children as the overriding criterion, and Louisiana, as the state of the marital domicil, is better equipped to judge this issue.[456] It is to be hoped that the doctrine of *H. Rouw Co. v. Railway Express Agency*[457]—if it should indeed withstand reexamination—will not apply to custody cases. Otherwise, Texas might become a haven for child-napping spouses from other states who are alert enough to move before their former home states find the time to make a custody adjudication, and glib enough to claim Texas as their new permanent homes.

In *Rodgers v. Williamson*[458] the Supreme Court of Texas faced another perennial problem in interstate custody battles: the attempt to relitigate issues supposedly agreed upon between the parties. Lauretta and Ronald Rodgers were divorced in 1965 in Texas, and Lauretta was awarded custody of their son, Scott. She then moved to Illinois and married Williamson. In 1969 the Williamsons filed a petition in Chicago for the adoption of Scott. Ronald Rodgers, the natural father, appeared both in person and by counsel, but then agreed to consent to the adoption on the basis of a stipulation reciting that he had the "right of visitation" with Scott at certain designated times and places. This stipulation was incorporated into the order of the Illinois court approving the adoption. The Williamsons later moved to Dallas, and Rodgers, who lived near Arlington, sought an order enforcing his rights and setting up a new visitation schedule in view of the proximity of the parties. The Williamsons cross-claimed for a judgment declaring the visitation agreement to be unenforceable.

One ground urged in support of this latter position was that a visitation agreement between a natural parent and an adopted child was contrary to

452. 491 S.W.2d at 448-49, citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971).

453. May v. Anderson, 345 U.S. 528 (1952); *see* R. WEINTRAUB, *supra* note 199, at 188-90.

454. *See* text accompanying notes 80-99 *supra*.

455. "For the convenience of the parties and witnesses and in the interest of justice, the court, on the timely motion of any party, may transfer the proceeding to a proper court in any other county in the state." TEX. FAM. CODE ANN. §§ 11.06(c) (Supp. 1973).

456. *See* text accompanying note 452 *supra*.

457. 154 S.W.2d 143 (Tex. Civ. App.—El Paso 1941), *error ref.*; *see* text accompanying notes 87-99 *supra*.

458. 489 S.W.2d 558 (Tex. 1973).

Texas public policy. This argument was rejected by the court for the reasons discussed above.[459] The Williamsons also claimed, and the lower courts held, that the visitation provision was a private agreement rather than a court order.[460] The supreme court arrived at the opposite conclusion in view of the language of the stipulation, and held that "[t]he Illinois order did decree visitation for the natural father and that this feature of the order is entitled to full faith and credit as would be given a child custody decree of another state."[461]

Somewhat surprisingly, the court went on to state that if contrary to public policy, the Illinois stipulation could nevertheless be refused effect in Texas. "This," Mr. Justice Reavley wrote, "is a decision we are at liberty to make since the Supreme Court of the United States has not held that an equitable decree of one state must be given full faith and credit by a sister state."[462] This language appears to be somewhat unguarded, and likely to draw into question the steadfast and commendable recognition of sister-state equity and custody decrees by the Supreme Court of Texas.[463] Fortunately, as the court found that Texas public policy had not been violated, the passage just quoted appears to be a dictum.

The matter of visitation itself, Judge Reavley held, had to be reexamined "according to the welfare of the child under present circumstances."[464] He immediately went on to add, however, that it is "not necessary for either party to show the change of circumstances required for a change of custody," and that if the prior order is "unworkable and inappropriate, the trial court may modify it."[465] It thus appears that visitation rights decreed by sister states are entitled to much less weight in Texas than are sister-state custody decrees. Especially in cases like *Rodgers* where the natural father irrevocably gave up his most valuable right as a parent in exchange for a court-ordered visitation agreement, the logic of this distinction is not so readily apparent.

### D. *Marital Property*

As Texas continues to attract prosperous new residents who have accumulated part of their wealth while living in common-law jurisdictions, the integration of such previously-acquired property rights into the marital property and succession scheme of this state is becoming increasingly important.[466] In *Parson v. United States* (an estate tax case) the Fifth Circuit held that "[u]nder Texas law, property acquired by a husband and wife in another

459. *See* text accompanying notes 228-33 *supra.*

460. This earlier phase of the litigation is discussed by Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 27 SW. L.J. 165, 170-71 (1973).

461. 489 S.W.2d at 560, citing Bukovich v. Bukovich, 399 S.W.2d 528 (Tex. 1966).

462. 489 S.W.2d at 560, citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, comment *c* (1971).

463. *See* McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961). *See also* Meucci v. Meucci, 457 S.W.2d 48 (Tex. 1970); Bukovich v. Bukovich, 399 S.W.2d 528 (Tex. 1966).

464. 489 S.W.2d at 561.

465. *Id.*

466. *See generally* Comment, *Rights of a Surviving Spouse in Texas in Marital Property Acquired with Domicile Elsewhere*, 45 TEXAS L. REV. 321 (1966).

state prior to their moving to Texas will retain the character of ownership it had in the state from which it was removed," and that property which was characterized as separate at the time of acquisition "remains separate, although subsequently paid for with community funds, subject to the community's right of reimbursement."[467]

The second rule laid down in *Parson* is of eminent significance in terms of estate planning for couples who move to Texas from a common-law state. Life insurance policies typically will constitute a major part of the movable assets of solvent estates. In *Parson* the Fifth Circuit held that Texas would adopt the so-called "inception-of-title" approach, with the result that the insurance policies acquired by the decedent while domiciled on the Arkansas side of Texarkana continued to be his separate property even after the family had moved to the Texas side, and despite the fact that subsequent to this move the premiums were paid out of community funds.[468]

Employee retirement benefits comprise the one type of asset for which the Texas courts follow a proration or apportionment approach in classifying the separate or community character of the pension benefits. This stems from recognition that the employer's contributions to the plan are a form of indirect compensation to the employee, and that the income earned by either spouse during marriage is community property.[469] Thus if a husband accumulates pension plans while married and domiciled in Kentucky, and thereafter moves to Texas, the pension plan benefits are part separate property and part community property, in proportion to the contributions or years of service in the common law state vis-à-vis the community property state. If the issue of the separate or community character of employee benefits is raised in the context of a divorce, however, the importance of an accurate classification of the benefits is diminished by the new "just and right" partition power authorized by section 3.63 of the Family Code.[470] These principles are illustrated by *Gaulding v. Gaulding*.[471] United States civil service pension benefits had been accumulated while the husband was domiciled in common-law states (17.667 years) and, later, in Texas (19.667 years). The Eastland court of civil appeals properly held that the trial court had erred in classifying the entire pension benefits as community property, but then held that the error was harmless because "[t]he Court was authorized in awarding Mrs. Gaulding a portion of Mr. Gaulding's separate property in bringing about a fair and just division of the property [under section 3.63]."[472]

## VIII. PUBLIC AND PENAL LAW

Mention has already been made of cases involving escheat,[473] the proof

467. 460 F.2d 228, 233 (5th Cir. 1972).
468. *Id.* at 234.
469. Mora v. Mora, 429 S.W.2d 660 (Tex. Civ. App.—San Antonio 1968), *error dismissed.*
470. *Id.* at 663; *see* TEX. FAM. CODE ANN. § 3.63 (Supp. 1973).
471. 503 S.W.2d 617 (Tex. Civ. App.—Eastland 1973).
472. *Id.* at 618.
473. State v. Liquidating Trustees of Republic Petroleum Co., 497 S.W.2d 527 (Tex. Civ. App.—Waco 1973), *error granted*; *see* text accompanying notes 154-56 *supra.*

and the counting of prior convictions in sister states for the purpose of establishing multiple-offender status under Texas law,[474] and the application of the Texas antitrust laws to contracts in intrastate and interstate commerce.[475] The escheat and recidivism cases illustrate the danger inherent in the blanket assertion that one state does not enforce the public, penal, or revenue laws of another. As regards revenue claims, mention might also be made of article 20.17 of the Texas Tax Code, which prescribes that Texas courts "shall recognize and enforce liabilities for sales and use taxes lawfully imposed by any other state, provided that such other state extends a like comity to this State."[476] Since there is no state income tax in Texas, this provision is, however, of limited utility. The extent of Texas state interest in the application of state antitrust law in interstate situations is apparent from a curious proviso in the Bill of Rights in the current state constitution, to the effect that "when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide."[477]

As illustrated by this constitutional provision, it is nevertheless true that Texas is concerned primarily not with the enforcement of foreign public law within this state, but with the application of Texas public law, especially of penal law, to acts and transactions with foreign elements and local impact. The 1973 Penal Code marks the first attempt by the legislature to address itself to this issue in a systematic manner.

Section 1.04 of the 1973 Penal Code, which is entitled, "Territorial Jurisdiction," generally regulates the spatial and the personal scope of Texas penal law. The State of Texas is defined, for this purpose, as including "the land and water (and the air space above the land and water) over which this state has power to define offenses."[478] Texas criminal jurisdiction is asserted if "(1) either the conduct or a result that is an element of the offense occurs inside this state; (2) the conduct outside this state constitutes an attempt to commit an offense inside this state; (3) the conduct outside this state constitutes a conspiracy to commit an offense inside this state, and an act in furtherance of the conspiracy occurs inside this state; or (4) the conduct inside this state constitutes an attempt, solicitation, or conspiracy to commit, or establishes criminal responsibility for the commission of, an offense in another jurisdiction that is also an offense under the laws of this state."[479] Furthermore, "an offense based on an omission to perform a duty

474. Norris v. State, 488 S.W.2d 84 (Tex. Crim. App. 1972); *see* text accompanying notes 157-60 *supra.*

475. E.F.I., Inc. v. Marketers Int'l, Inc., 492 S.W.2d 302 (Tex. Civ. App.—Houston [1st Dist.] 1973), *discussed at* text accompanying notes 284-91 *supra.*

476. TEX. TAX.-GEN. ANN. art. 20.17 (1969).

477. TEX. CONST. art. I, § 10. Oddly enough, the pertinent legislation was enacted before the constitution was amended. Ch. 12, [1907] Tex. Laws 16 (now codified at TEX. BUS. & COMM. CODE ANN. §§ 15.16-.19 (1968)). Neither this statute nor its predecessors appear to have been judicially construed in a published decision.

478. TEX. PEN. CODE ANN. § 1.04(d) (1974).

479. *Id.* § 1.04(a).

imposed on an actor by a Texas statute is committed inside this state regardless of the location of the actor at the time of the offense."[480] In homicide cases, a "result" within the meaning of section 1.04(a)(1) includes either the physical impact causing death or the death itself. If the body of a criminal homicide victim is found in Texas, it is presumed that the death occurred here. If death alone is the basis for jurisdiction, it is a defense to the exercise of Texas jurisdiction that the conduct that constitutes the offense is not made criminal in the jurisdiction where the conduct occurred.[481]

This section is a carefully drawn *general* delimitation of the spatial and personal reach of Texas penal law. Pursuant to section 1.03(b) it applies to Texas penal legislation outside of the Penal Code "unless the statute defining the offense provides otherwise." Some of the wording of section 1.04 is borrowed from the 1962 Permanent Official Draft of the Model Penal Code, but the final version is (but for a stylistic modification) the work of the Texas State Bar Committee on Revision of the Penal Code, which submitted its draft in 1970.[482]

The Committee Comment states that section 1.04 departs from existing law, and establishes "a broad jurisdictional base for the prosecution in Texas of offenses involving persons, property, and public interests in this state."[483] The "primary policy considerations" underlying this section are articulated as follows: "(1) the state seeking to prosecute for an offense should have a substantial interest in or connection with the criminal event, and (2) law enforcement should be facilitated by plugging gaps in the existing law when a course of conduct goes beyond the boundaries of a single state."[484] It is further said to be a basic tenet of section 1.04 that "an actor's location within or without the state when the offense is committed and his legal relation to the offense (perpetrator, nonperpetrating party, or facilitator) are immaterial for jurisdictional purposes if the formal requisites of the statute are met."[485]

Generally speaking, the section combines what the Committee terms the subjective and the objective territorial principles: jurisdiction is conferred "over offenses commenced within the state but completed without (subjective) and for offenses commenced without the state but consummated within (objective)."[486]

A detailed examination of the manifestations of these two principles in the various clauses of section 1.04 seems unnecessary for present purposes. It should be noted, however, that as regards the assertion of Texas jurisdiction over offenses based on the omission of a duty imposed by Texas law regardless of the location of the actor at the time of the offense, the Commit-

480. *Id.* § 1.04(c).
481. *Id.* § 1.04(b).
482. STATE BAR COMMITTEE ON THE REVISION OF THE PENAL CODE, TEXAS PENAL CODE, A PROPOSED REVISION § 1.04 (Final Draft 1970); *cf.* ALI MODEL PENAL CODE § 1.03 (Proposed Official Draft 1962).
483. STATE BAR COMMITTEE ON THE REVISION OF THE PENAL CODE, *supra* note 482, at 8.
484. *Id.* at 9.
485. *Id.*
486. *Id.* at 8-9.

tee commented that the "usual application" of that subsection would probably be in the field of domestic relations (*e.g.*, nonsupport), but that it was not so limited.[487]

As already mentioned, the delimitation of the spatial and the personal scope of Texas penal law is generally regulated by section 1.04, even as to matters not covered by the Penal Code itself. That is, however, not so if the statute defining the offense provides otherwise; and two such exceptions can be found in the Penal Code itself. One of them, relating to the removal of children from the state, has already been discussed and requires no further comment. In that case, the territorial element is really part of the definition of the offense itself, which is the frustration of the effective and direct enforcement of Texas custody jurisdiction.[488]

Not so, however, with the definition of bigamy in section 25.01. Pursuant to that section, an individual commits bigamy if, although legally married, he "purports to marry or does marry a person other than his spouse in this state, *or any other state or foreign country*, under circumstances that would, but for the actor's prior marriage, constitute a marriage," or if, knowing another person to be legally married, he "purports to marry or does marry that person in this state, *or any other state or foreign country*," under like circumstances.[489] Since the same section makes bigamous cohabitation "in this state under the appearance of being married" a separate offense,[490] it would appear that the language underlined above must be read to signify that even in the absence of such subsequent cohabitation in Texas, out-of-state bigamous marriage ceremonies are criminal offenses under Texas law.

This seeming adoption of the principle of universality for, of all things, an offense that in the opinion of many carries its own punishment, seems almost bizarre. Obviously, Texas could not, consistently with international law, punish the polygamous marriages of Moslems in Sri Lanka;[491] obviously again, it could not, consistently with the Constitution of the United States, punish the bigamous marriages of Californians in Nevada without regard to Nevada and perhaps to California law.[492] The Bar Committee draft does not contain this aberration.[493] It is to be hoped that judicial construction in line with constitutional and international law constraints will keep the territorial and personal application of the bigamy section within reasonable bounds. On the positive side, it should be noted that reasonable belief that one's own prior marriage is void, or had been dissolved by death, divorce,

487. *Id.* at 10.

488. TEX. PEN. CODE ANN. § 25.03 (Supp. 1973); *see* text accompanying note 443 *supra*.

489. TEX. PEN. CODE ANN. §§ 25.01(a)(1)(A), (a)(2)(A) (Supp. 1973) (emphasis added). This language is not contained in the State Bar Committee draft.

490. *Id.* §§ 25.01(a)(1)(B), (a)(2)(B).

491. *See* Attorney-General of Ceylon v. Reid, [1965] A.C. 720 (Ceylon); Hodgson v. Union de Permisarios Circulo Rojo, S. de R.L., 331 F. Supp. 1119, 1121 (S.D. Tex. 1971); Volkswagenwerk Aktiengesellschaft v. Superior Court, 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (1973).

492. Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 181-82 (1964). *See generally* George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 621-28 (1966); *cf.* Skiriotes v. Florida, 313 U.S. 69, 74-79 (1940).

493. STATE BAR COMMITTEE ON THE REVISION OF THE PENAL CODE, *supra* note 482, § 25.01.

or annulment, is a defense to bigamy prosecutions, and that under the Family Code, a bigamous marriage is convalidated by cohabitation as husband and wife subsequent to the dissolution of the prior marriage that constituted the impediment.[494]

There is a public law subject which deserves brief mention for the sake of completeness and because of its great importance to this state. In *Texas v. Louisiana*[495] the United States Supreme Court adopted a Special Master's report, fixing the boundary between these two states in the geographic middle of the Sabine Pass, Lake, and River. The Court deferred, pending further proceedings in which the United States was invited to participate, the question of title to islands in the west half of the Sabine. In this connection, it should be noted that more recently, in *Bonelli Cattle Co. v. Arizona*,[496] the Court has held that the acquisition and the loss of title to land by riparians due to the surfacing or the submerging of land by navigable rivers is governed not by state law, but by federal common law.[497] This rule will now be applicable to Texas riparians of the Sabine river.

## IX. CONCLUSION

This *Survey* has been much too long; the conclusion can be brief. Three points deserve special mention. First, the "Texas convention" is waning, and the conflict of laws is here to stay.[498] We have covered some three dozen Texas federal and state court decisions. Even allowing for the slightly expanded time span, this output is impressive when compared with California where state trial court decisions are not reported, and still respectable when compared with New York where they are.[499] Texas, by the way, may soon rank directly between these two states in population. Of course, to quote Chafee, all cases are not created equal. This is not say that significance has a price tag; the $6,020 in child support arrears are as important to Mrs. Brazeal and as important to fatherless children in Texas as is the $3.5 million loss of the Chaparral to Zapata and its Texas shareholders. But the quality of performance and the interest of the bar have a way of improving in relation to the object in controversy. The lessons of the PPG-Continental donnybrook (with $200 million in possible damages at stake) and of CDC's

494. TEX. PEN. CODE ANN. § 25.01(c) (Supp. 1973); TEX. FAM. CODE ANN. § 2.22 (Supp. 1973). *See also* the declaration of state policy thereat: "When two or more marriages of a person to different spouses are alleged, the most recent marriage is presumed to be valid as against each marriage that precedes it until one who asserts the validity of a prior marriage proves its validity." TEX. FAM. CODE ANN. § 2.22 (Supp. 1973).

495. 410 U.S. 702 (1973).

496. 94 S. Ct. 517, 38 L. Ed. 2d 526 (1973).

497. *Id.* at 523-28, 38 L. Ed. 2d at 534.

498. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) has been cited as authority by the Texas Supreme Court, by the Fifth Circuit in a Texas appeal, and by two Texas courts of civil appeals within the survey period. Dailey v. Transitron Electronic Corp., 475 F.2d 12, 14 (5th Cir. 1973); Rodgers v. Williamson, 489 S.W.2d 558, 560 (Tex. 1973); Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634, 637 (Tex. Civ. App.—Dallas 1973); Hinds v. Hinds, 491 S.W.2d 448, 449 (Tex. Civ. App.—San Antonio 1973).

499. The current New York Survey, Herzog, *Conflict of Laws*, 25 SYRACUSE L. REV. 11 (1974), is based on some forty-five cases and five statutes.

$290 million cash tender offer to Texasgulf shareholders are reasonably clear. Nor is the Texas lawyer's role limited to the Lone Star State: *Zapata*, involving a Texas party with Texas counsel, has already been before the English Court of Appeal and the United States Supreme Court, where it generated one of the most important transnational conflicts opinions of recent years. It may eventually reach the House of Lords as well, where (with respect) it may generate as many as five more.

Secondly, Texas conflicts law is largely statutory. This almost goes without saying for long-arm jurisdiction including service of process, and even applies to a lesser extent to the proof of foreign law. What is most remarkable, however, is that choice-of-law, too, is rapidly becoming statutory or even codified. There are statutory choice-of-law rules for insurance contracts; for transactions subject to the Uniform Commercial Code; for workmen's compensation; for out-of-state injury and wrongful death and their prescription; for materialman's liens; for the perfection of security interests in goods, commercial paper, title certificates, accounts, and minerals; and for penal law in general and for bigamy in particular. Even in the area of the enforcement of foreign judgments, the question is no longer concluded by the full faith and credit clause plus "comity" as judicially developed; there are now specific provisions for the enforcement of foreign support orders and custody decrees. This list is not exhaustive, and counsel will ignore pertinent Texas statutes at client's peril. (It would be indelicate to single out illustrative cases during the current Survey period.)

Thirdly, finally, and most importantly, this statutory mass of Texas conflicts law is beginning to emerge as a coherent framework capable of organic expansion. This is most directly apparent in the case of the two Codes. The Uniform Commercial Code is, as we know, applicable to all transactions bearing an "appropriate" relation to this state, but the parties may, subject to several exceptions, choose the law of another jurisdiction to which the transaction has a "reasonable" connection. The Penal Code, we are told by the Bar Committee which drafted it, is to permit the vindication of a "substantial (Texas) interest in or connection with the criminal event." As Elliott Cheatham put it so eloquently:

> With a broad code drafted so carefully, there is all the more reason to do what many have urged for important statutes—to treat the statutory policy and principle as a source of law no less than common-law policy and principle. Justice Harlan Stone made the point in his Harvard Tercentary address: 'I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and source of law, and as a premise for legal reasoning.'[500]

The Supreme Court of the United States has recently had occasion to demonstrate the utility of this approach, and its example is likely to be fol-

500. Cheatham, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1229, 1233 (1963).

lowed.[501] The determination of the spatial and the personal reach of Texas law through the construction of Texas legislation in the light of its purpose and of general choice-of-law policies adopted by the legislature for cognate areas is the first step in the direction of the development of a rational choice-of-law system. The time has come for a return to this basic "premise for legal reasoning," and thus aided, for taking that first step.

501. Morange v. State Marine Lines, 398 U.S. 375, 390-93 (1970), *noted in* 82 YALE L.J. 258 (1972); Barclay's Bank DCO v. Mercantile National Bank, 481 F.2d 1224, 1230-32 (5th Cir. 1973).