Full Faith and Credit - Procedural Limitation Bars Sister State's Collateral Attack on Jurisdiction

W. T. Minick

Supreme Court and thus remains unanswered.

When interpleader is used to protect the insurer from multiple liability, his duty to defend should continue until judgments are *rendered* in the amount of the policy coverage. Thus, the insured would still receive the benefits of his insurance contract, and the insurer would still be protected against a multiplicity of suits by judgment creditors of the insured. More importantly, the intended purposes of the interpleader statute would be furthered: the race to judgment aspects of mass torts would be diminished and the judgment creditors of the insured would receive a non-discriminatory pro rata distribution of the insurance proceeds.

T. Winston Weeks

Full Faith and Credit — Procedural Limitation Bars Sister State's Collateral Attack on Jurisdiction

Jeff Burleson filed for divorce from Mary Burleson in Harris County, Texas. Later, but before the Texas suit could come to trial, Mary filed suit for divorce in Nevada, alleging that she had been a bona fide resident of that state for the requisite six-week period.[1] Jeff was personally served in Houston, pursuant to the Nevada long-arm statute.[2] He filed no answer and made no appearance in the Nevada proceeding, and a default judgment granting Mary a divorce was rendered in Nevada. The judgment specifically recited that Mary Burleson had been a bona fide resident of Nevada for a period of six weeks before filing suit.

In the Texas action, Mary filed an amended answer setting up the Nevada decree as a defense, but Jeff attacked the validity of the Nevada divorce, alleging that the Nevada court lacked jurisdiction because Mary never intended to become a bona fide resident of Nevada. Mary argued that Nevada Rule of Civil Procedure 60(b)[3] foreclosed such an attack in Texas because: (1) rule 60(b) limits attack for "intrinsic fraud" to within six months of the judgment; (2) the Nevada Supreme Court has defined "intrinsic fraud" as including an attack based on fradulent domicile;[4] (3) more than six months had passed since Mary's Nevada divorce decree; and (4) the full faith and credit clause[5] requires the Texas court to apply the

maximum policy coverage. The insurer then has a duty to pay judgment creditors up to the policy limits, and this is accomplished in the interpleader action.

[1] NEV. REV. STAT. § 125.020 (1967) in part provides:

> 2. Unless the cause of action shall have accrued within the county while plaintiff and defendant were actually domiciled therein, no court shall have jurisdiction to grant a divorce unless either the plaintiff or defendant shall have been resident of the state for a period of no less than 6 weeks preceding the commencement of the action.

[2] NEV. R. CIV. P. 4(2).

[3] *Id.* 60(b).

[4] Colby v. Colby, 78 Nev. 150, 369 P.2d 1019 (1962).

[5] U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1964), in part, provides: "Such act, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

six months proscription of rule 60(b). Upon a finding that Mary Burleson was not a bona fide resident of Nevada,[6] the trial judge declared that the Nevada divorce was ineffective for want of jurisdiction by the Nevada court and that the parties were still husband and wife. *Held, reversed*: A procedural rule placing a six-month limitation upon a collateral attack for intrinsic fraud bars an examination of the jurisdictional fact issue of residence[7] in the courts of a sister state. *Burleson v. Burleson*, 419 S.W.2d 412 (Tex. Civ. App. 1967).

I. Full Faith and Credit and Divorce Jurisdiction

The United States Constitution requires that the states give "full faith and credit" to judgments of sister-state courts.[8] However, as the courts have construed this clause, full faith and credit applies only when the jurisdiction of the rendering court is unimpeachable.[9] Because jurisdiction is always open to attack, the application of full faith and credit to divorce, an area of the law with confused jurisdictional concepts, presents some extremely complex problems.

Divorce Jurisdiction in General. The courts have considered divorce jurisdiction in terms of both of the traditional types of actions, in rem and in personam.[10] The earliest approach was the in rem theory, typified by the case of *Ditson v. Ditson*.[11] There the court concluded that the wife's domicile in Rhode Island gave that state sufficient interest in the marital relationship to grant a divorce even though the husband received no notice or service. The marital relationship—brought to Rhode Island by the wife's status as a domiciliary—constituted the *res* necessary to confer jurisdiction.

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[6] On appeal, Mary Burleson conceded the sufficiency of the evidence to support this finding. However, she contended, and the court agreed, that the evidence would have supported a contrary finding also. Residence was defined by the Nevada Supreme Court in Lamb v. Lamb, 57 Nev. 421, 65 P.2d 872, 875 (1937): "[I]t was necessary for plaintiff to convince the jury that his physical presence in this state for the whole statutory period preceding and including the date of commencement of this action was *accompanied by the intent to make Nevada his home, and to remain here permanently, or at least for an indefinite time.*" (Emphasis added.)

The intent to make the forum state the home of the party distinguishes domicile from residence; the latter is characterized by mere physical presence. One may have at any given moment several states of residence, but only one of domicile—that residence which he subjectively intends to make his permanent home.

[7] The court apparently uses "residence" in the sense meant by the Nevada statutes as interpreted in Lamb v. Lamb, 57 Nev. 421, 65 P.2d 873, 875 (1937). *See* note 6 *supra*.

[8] *See* note 5 *supra*.

[9] During the early nineteenth century, the United States Supreme Court applied the full faith and credit clause quite literally, without any qualifications. *See* Mills v. Duryee, 12 U.S. (7 Cranch) 481 (1813). The judgment of one state was conclusively valid when considered by the courts of a sister state. The Court, however, enunciated in Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873), the view that obtains today. In that case the Court said that jurisdiction is always open to inquiry, and only when jurisdiction is unimpeachable does full faith and credit apply. Subsequent treatment of the clause may be summed up in the words of Chief Justice Stone in Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201, 210 (1941), that "the full faith and credit clause is not an inexorable and unqualified command." Clearly, jurisdiction is a prerequisite to full faith and credit.

[10] In rem jurisdiction is obtained by the presence of the *res* (the marital relationship) within the forum state. In personam jurisdiction is obtained by personal service or appearance. *See* White v. Glover, 138 App. Div. 797, 123 N.Y.S. 482 (1910), *aff'g* 116 N.Y.S. 1059 (Sup. Ct. 1909).

[11] 4 R.I. 87 (1856). *See also* Williams v. North Carolina, 317 U.S. 287 (1942); Alton v. Alton, 207 F.2d 667 (3d Cir. 1953).

Later courts, however, moved away from the the in rem concept. In *Felt v. Felt*[12] it was held that a foreign divorce decree was entitled to full faith and credit in New Jersey only if substituted service had been made on the defendant. Under this view, notice, but not actual service within the rendering state, was a requisite to divorce jurisdiction.[13]

The treatment of divorce as an in personam matter apparently arose with the decision of the United States Supreme Court in *Haddock v. Haddock*.[14] In that case the Court held that New York was not required to recognize a divorce granted to a husband domiciled in Connecticut, because the wife's domicile and the last matrimonial domicile were in New York and the wife had not been within the personal jurisdiction of the Connecticut court.

However, in *Williams v. North Carolina*[15] the United States Supreme Court overruled *Haddock* and returned to the in rem theory. In *Williams* the husband left North Carolina, the matrimonial domicile, and went to Nevada where he stayed the requisite six weeks and obtained an *ex parte* divorce. His wife was not served in Nevada and did not appear in the suit. Williams remarried in Nevada, and upon his return to North Carolina was convicted of bigamous cohabitation, with North Carolina simply refusing to recognize the Nevada divorce decree.[16] The United States Supreme Court reversed, holding that since the husband, under Nevada law, was apparently a domiciliary[17] of that state when the decree was granted, the divorce was equally binding on the wife. In the Court's view, the domicile of the husband created the *res* necessary to give Nevada jurisdiction over the divorce action.

Domicile as a Requisite for Divorce Jurisdiction. Williams was retried in North Carolina for bigamous cohabitation, and this time the state attacked the jurisdiction of the Nevada court on the ground that Williams was, in fact, not a domiciliary of that state. In affirming the North Carolina conviction, the United States Supreme Court held that, because Nevada law required domicile as a jurisdictional element,[18] the jurisdiction of the Nevada court was open to attack in North Carolina.[19]

Although this second *Williams* case remains the touchstone in the area of divorce jurisdiction, there is still some question as to whether domicile is actually required for extra-territorial validity, absent any state law requiring it.[20] In dicta the *Williams* majority noted that "under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—

[12] 59 N.J. Eq. 606, 45 A. 105 (Ct. Err. & App. 1899).

[13] This case has been characterized as quasi in personam. G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 294 (3d ed. 1963).

[14] 201 U.S. 562 (1906).

[15] 317 U.S. 287 (1942).

[16] State v. Williams, 220 N.C. 445, 17 S.E.2d 769 (1941), *rev'd*, 317 U.S. 287 (1942).

[17] Domicile had not been contested by North Carolina.

[18] Domicile is the jurisdictional fact as required by Nevada law. *See* note 6 *supra.*

[19] Williams v. North Carolina, 325 U.S. 226 (1945).

[20] *Id.* at 244 (dissenting opinion). In Andrews v. Andrews, 188 U.S. 14 (1903), the United States Supreme Court invalidated a South Dakota divorce holding that, regardless of the South Dakota requirements for residence, domicile in that state was essential to grant a divorce with extra-territorial effect and that the appearance of both parties was insufficient to confer jurisdiction

is founded on domicile."[21] Later, in *Alton v. Alton*,[22] the Third Circuit struck down a Virgin Islands statute which eliminated the requirement of domicile, observing that "domestic relations are a matter of concern to the state where a person is domiciled."[23]

In contrast to the federal judiciary, state courts have been less insistent upon domicile as an element of jurisdiction, particularly with regard to servicemen's divorce statutes. Although these statutes, which require only residence, have never been tested before the United States Supreme Court, they are generally considered to be valid.[24] The highest courts of several states, including Texas,[25] have upheld them.[26] The New Mexico Supreme Court's statement in *Wallace v. Wallace*[27] is indicative of the state court position:

> Where domicile is a statutory jurisdictional prerequisite it is quite correct to say that jurisdiction for divorce is founded on this concept. It is quite another matter to flatly declare that there may be no other relationship between a state and an individual which will create sufficient interest in the

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over the subject matter when it was wanting for lack of domicile. *Andrews* appears to require domicile, but the impact of the case was lessened when Haddock v. Haddock, 201 U.S. 562 (1906), was decided three years later. Also, the *Andrews* case would be decided differently today because the wife appeared and contested jurisdiction, and under the doctrine enunciated in Sherrer v. Sherrer, 334 U.S. 343 (1947), res judicata would preclude such an attack. *See* note 21 *infra*. As to whether domicile is required, *see also* Alton v. Alton, 207 F.2d 667, 678 (3d Cir. 1953) (dissenting opinion); Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020, 1022 (1958).

As pointed out in the *Alton* dissenting opinion and in Cook, *Is Haddock v. Haddock Overruled?*, 18 IND. L.J. 165 (1943), domicile as the basis of divorce jurisdiction was evidently a creation of nineteenth century judges who accepted Dean Storey's view expressed in J. STOREY, COMMENTARIES ON CONFLICTS OF LAWS § 228 (1834). The continental requirement of nationality for divorce jurisdiction clearly would not work in the United States, since divorce was a state, not a federal, matter. Storey's view that only the courts where the parties lived had jurisdiction won widespread general support. For a somewhat different view, see Rodgers & Rodgers, *The Disparity Between Due Process and Full Faith and Credit: The Problem of the Somewhere Wife*, 67 COLUM. L. REV. 1363 (1967).

[21] Williams v. North Carolina, 325 U.S. 226, 229 (1945). The federal courts have often resolved the full faith and credit and jurisdictional problem as it pertains to divorce through the application of the principle of res judicata. That is, if both parties have been given full opportunity to litigate the issue of jurisdiction, then the matter becomes res judicata and cannot serve as the basis of a collateral attack in another state. In Sherrer v. Sherrer, 334 U.S. 343 (1947), the United States Supreme Court articulated three criteria which determine when res judicata applies. Where there has been (1) participation by the defendant, (2) full opportunity to litigate the issue of jurisdiction, and (3) where the decree cannot be attacked in the courts of the rendering state, res judicata bars a collateral attack in a sister state. *See also* Cook v. Cook, 342 U.S. 126 (1951) (collateral attack would be allowed where the defendant spouse had neither been served nor appeared in the rendering state); Coe v. Coe, 334 U.S. 378 (1948) (defendant's collateral attack on jurisdiction barred because of his participation in the divorce proceeding); Davis v. Davis, 305 U.S. 59 (1938) (where the defendant contests the issue of domicile in a divorce proceeding, the issue will be res judicata); *cf.* Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).

[22] 207 F.2d 667 (3d Cir. 1953).

[23] There was, however, a very strong dissent in this case.

[24] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Reporter's Note § 72, comment *c* at 275 (Proposed Official Draft 1967); Comment, *The Serviceman's Dilemma: Divorce Without Domicile*, 13 SW. L.J. 233 (1959).

[25] Wood v. Wood, 149 Tex. 350, 320 S.W.2d 807 (1959).

[26] Lauterbach v. Lauterbach, 392 P.2d 24 (Alas. 1964); Schaeffer v. Schaeffer, 175 Kan. 629, 266 P.2d 282 (1954); Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958). Significantly, all but one of the states having servicemen's divorce statutes require one year's residence. Oklahoma requires six months. Obviously the period required creates substantially greater interest in the state than the six-weeks "domicile" required by Nevada. Still, the above decisions upholding such statutes are solely concerned with the state's power to grant a divorce with internal validity, with only passing attention paid to the extra-territorial effect.

[27] 63 N.M. 414, 320 P.2d 1020 (1958).

state under the due process clause to give the power to decree divorces.[28]

However, such views are by no means universal. In *Jennings v. Jennings*[29] the Alabama Supreme Court held that the legislature did not have the power to do away with the domicile requirement.

Texas Treatment of Foreign Divorces. Texas courts have approached the problem of foreign judgments with a view consistent with that of the United States Supreme Court in the second *Williams* case. Since 1855, collateral attacks on foreign divorces have been allowed on the basis of an examination for jurisdiction.[30] Typical of the numerous Texas cases in point is *Burk v. Burk.*[31] There the husband, as a defense to his wife's divorce action, argued that his prior Nevada divorce was entitled to full faith and credit. The court summed up the Texas view when it said that the husband's divorce "fell among that well-marked class of such proceedings which may be attacked collaterally, by showing that the court issuing them had no jurisdiction, notwithstanding the full faith and credit clause."[32]

Callicoate v. Callicoate,[33] cited in the *Burleson* opinion, is implied authority for the proposition that a foreign divorce may be attacked in Texas on the ground that the divorcing spouse was not a domiciliary of the state granting the divorce. There one spouse obtained a Nevada divorce and the decree specifically recited that she had been a resident of Nevada for six weeks, although this in fact was not true. Three years later, the husband attacked the Nevada divorce, alleging lack of jurisdiction of the Nevada court. The court in *Callicoate* refused to give full faith and credit to the Nevada decision because of lack of jurisdiction, presumably because it found that the wife was not a domiciliary of Nevada.

II. BURLESON v. BURLESON

In *Burleson v. Burleson*[34] the issue of the application of full faith and credit to the *ex parte* divorce was clouded by the Nevada Rules of Civil Procedure. The Texas Court of Civil Appeals reasoned that since Nevada Rule of Civil Procedure 60(b) foreclosed attack upon a judgment for intrinsic fraud, and Nevada defined intrinsic fraud as including fraudulent domicile, the Nevada divorce was not subject to examination for jurisdiction in Texas. As authority, the court cited two Texas cases.[35] In *Marsh v. Millward*[36] Millward sued in Texas on a Colorado default judgment. Marsh

[28] 320 P.2d at 1022.

[29] 251 Ala. 73, 36 So. 2d 236 (1948).

[30] Chunn v. Gray, 51 Tex. 112 (1879); Norwood v. Cobb, 24 Tex. 551 (1859); Norwood v. Cobb, 15 Tex. 500 (1855); Reed v. State, 148 Tex. Crim. 409, 187 S.W.2d 660 (1944); Callicoate v. Callicoate, 324 S.W.2d 81 (Tex. Civ. App. 1959), *error ref. n.r.e.*; Carr v. Carr, 279 S.W.2d 146 (Tex. Civ. App. 1954); Burk v. Burk, 255 S.W.2d 908 (Tex. Civ. App. 1953); *In re* Keen's Estate, 77 S.W.2d 588 (Tex. Civ. App. 1934); Richmond v. Sangster, 217 S.W. 723 (Tex. Civ. App. 1919), *error ref.*; Givens v. Givens, 195 S.W. 877 (Tex. Civ. App. 1917); Stuart v. Cole, 92 S.W. 1040 (Tex. Civ. App. 1906); Morgan v. Morgan, 21 S.W. 154 (Tex. Civ. App. 1892).

[31] 255 S.W.2d 908 (Tex. Civ. App. 1953).

[32] *Id.* at 910.

[33] 324 S.W.2d 81 (Tex. Civ. App. 1959), *error ref. n.r.e.*

[34] 419 S.W.2d 412 (Tex. Civ. App. 1967).

[35] O'Brien v. Lanpar Co., 399 S.W.2d 340 (Tex. 1966); Marsh v. Millward, 381 S.W.2d 110 (Tex. Civ. App. 1964), *error ref. n.r.e.*

[36] 381 S.W.2d 110 (Tex. Civ. App. 1964), *error ref. n.r.e.*

had been personally served in the Colorado suit but defended the Texas action on the ground that his attorneys did not notify him as to the time and place of the final Colorado hearing. However, Colorado Rules of Civil Procedure limit a motion to set aside a judgment for fraud to within six months of the date of the judgment, and the Texas court correctly ruled that the Colorado judgment could not be attacked in Texas when more than six months had elapsed. But in *Marsh* there was no issue of jurisdiction. Marsh had been personally served within Colorado, so the Colorado court, unlike the Nevada court in *Burleson*, had jurisdiction over both the person and the subject matter. Only then did full faith and credit come into play.[37]

O'Brien v. Lanpar,[38] the other decision cited by the *Burleson* court, was a Texas suit on a personal money judgment rendered in Illinois against a Texas resident. There the issues were whether the Illinois long arm statute was constitutional,[39] and whether the defendant's contacts with the forum state were sufficient to meet due process standards under the "minimum contacts" doctrine.[40] The Supreme Court of Texas correctly stated that the law of Illinois and not Texas law was in point.

In *Burleson* the court, following *O'Brien*, concluded that the law of Nevada was in point. However, the Nevada law the court should have been concerned with was not the Nevada Rules of Civil Procedure but the statutory and case law establishing domicile as the basis of jurisdiction for divorce.

Much can be read into the *Burleson* court's failure to allow an examination for jurisdiction. The case could mean that a judgment that cannot be attacked in the rendering state cannot be attacked in Texas, even on jurisdictional grounds. This is surely contrary to the United States Supreme Court's view of the full faith and credit clause[41] and is opposed to previous Texas case law.[42] Alternatively, *Burleson* could mean that domicile is not a jurisdictional fact issue in divorce cases. However, this is not likely for two reasons. First, the opinion indicates that the court did not clearly see this issue.[43] Secondly, the court in fact did not have the option to hold that domicile was not a jurisdictional fact issue, because the Nevada Supreme Court has expressly held that the residence required by statute for divorce jurisdiction is the equivalent of domicile.[44] Thus, if Mary Burleson was not a bona fide resident (domiciliary) of Nevada, that state could not have rendered a divorce with even internal validity. With this fact in mind, the apparent nonavailability of a remedy in Nevada, upon which the *Burleson* decision turned, was actually of no moment. The *Burleson* court

[37] Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873). *See* note 9 *supra*.

[38] 399 S.W.2d 340 (Tex. 1966).

[39] VanDercreek, *Texas Civil Procedure, Annual Survey of Texas Law*, 22 Sw. L.J. 173, 178 (1968).

[40] *Id.*

[41] Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873).

[42] *See* cases cited note 30 *supra*.

[43] The court writes in terms of intrinsic fraud, as distinguished from jurisdiction. Burleson v. Burleson, 419 S.W.2d 412, 415 (Tex. Civ. App. 1967).

[44] *See* note 6 *supra*.

allowed a procedural rule to cut off a collateral attack on jurisdiction, when, in fact, the rendering state may not have had jurisdiction.[45] Thus, *Burleson* harks back to the literal interpretation given to the full faith and credit clause over a century ago.[46]

Burleson, however, offered some extenuating circumstances which might have influenced the decision. Mary Burleson had remarried six months after the Nevada divorce, and Jeff Burleson died before the Texas case went up on appeal. The court might have been reluctant to reach a decision which would have tainted Mary Burleson's second marriage when the opposing party had no further interest in her marital status.[47]

III. Conclusion

Since the *Burleson* court failed to treat the issue of whether domicile is constitutionally required for extra-territorial validity of divorce decrees, this question remains unanswered. In the second *Williams* case the United States Supreme Court flatly stated, in dicta, that domicile is the basis of jurisdiction for divorce.[48] However, the *Restatement* view is that other jurisdictional bases, such as residence by a spouse for one year in the divorce state, will suffice for full faith and credit purposes.[49]

With the divorce rate continuing to rise and the increased mobility of American society, this area of the law should be relieved of unnecessary confusion and uncertainty. Clearly, the highly subjective concept of domicile as a jurisdictional basis is of little value in this regard.[50] A much more workable and equitable principle might be the concept of "substantial interest" by the rendering state.[51] Substantial interest would follow physical habitation in the forum state of a minimum duration, *i.e.*, one year. Only decrees rendered by a state having substantial interest in *one* of the parties would be entitled to extra-territorial validity. One writer has suggested that this be accomplished by a federal proviso to the full faith and credit implementing statute.[52] This would eliminate "quickie" divorces, or at least deny them extra-territorial recognition, while sanctioning divorces that are now unnecessarily suspect. A person would not be likely to spend one year in another state solely for the purpose of obtaining a divorce on grounds not available in his home state. Even if he did, the resident state would have

[45] *Id.*

[46] Mills v. Duryee, 12 U.S. (7 Cranch) 481 (1813). *See* note 9 *supra.*

[47] Brief for Appellee at 6, Burleson v. Burleson, 419 S.W.2d 412 (Tex. Civ. App. 1967): "[T]he propriety of the Trial Court's judgment in this case is a matter of concern only for Appellant."

[48] Williams v. North Carolina, 325 U.S. 226 (1945). "Under our system of law, judicial power to grant a divorce—jurisdiction strictly speaking—is founded on domicile." *Id.* at 229.

[49] Restatement (Second) of Conflict of Laws, Reporter's Note § 72c, at 275 (Proposed Official Draft 1967).

[50] Williams v. North Carolina, 325 U.S. 226, 244 (1945) (dissenting opinion). "The Constitution does not mention domicile. Nowhere does it posit the powers of the state or the nation upon that amorphous, highly variable common-law conception. Judges have imported it. The importation, it should be clear by now, has failed in creating a workable constitutional criterion in this delicate region." *Id.* at 255.

[51] Restatement (Second) of Conflict of Laws, Reporter's Note § 72c, at 275 (Proposed Official Draft 1967).

[52] Rodgers & Rodgers, *The Disparity between Due Process and Full Faith and Credit: The Problem of the Somewhere Wife*, 67 Colum. L. Rev. 1363 (1967).

sufficient interest in him to have the power of adjudicating his marital status. Such a move would eliminate much of the sham now surrounding *ex parte* divorces and would allow the courts to resolve equitably any conflicts in traditional legal terms.

W. T. Minick

Mental Suffering — Texas Stands Firm — No "New" Tort

Plaintiff Fisher entered the dining club of the defendant Carrousel Motor Hotel for a luncheon engagement. As he entered the serving line and picked up his plate, defendant's manager approached Fisher and snatched the plate from his hands. The manager informed Fisher in a loud and offensive manner that Fisher could not be served in the club because he was a Negro. Fisher brought an action for assault,[1] seeking special damages for the great humiliation and indignity[2] allegedly suffered as a result of the manager's conduct. The court of civil appeals, affirming the trial court, held that as a matter of law no assault had been committed and that absent a physical touching, assault, or resulting physical injury, Fisher could not recover for embarrassment or humiliation.[3] *Held, reversed and rendered*: Snatching an article from the hands of another is sufficient invasion of the inviolability of the person to constitute a battery[4] and entitles the plaintiff to compensation[5] for the mental disturbance inflicted upon him as a result of such invasion. *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967).

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[1] Fisher brought an action for assault in the trial court and appealed on the theory that the trial court was in error for not finding as a matter of law that an assault had been committed. The supreme court found no assault, but held that a battery had been committed.

[2] Fisher testified that he suffered no fear or apprehension.

[3] Fisher v. Carrousel Motor Hotel, Inc., 414 S.W.2d 774 (Tex. Civ. App. 1967).

[4] A battery is the use of any unlawful violence on the person of another with the intent to injure him, whatever the means or degree of violence used. The action of battery protects the rights of each individual to be free of intentional and unpermitted physical contact, and the element of personal dignity involved allows compensation for trivial contacts which do no physical harm but are offensive or insulting. Knocking or snatching anything from the plaintiff's hand or touching anything connected with his person when done in a rude or insolent manner is sufficient to constitute a battery. To be a battery, the touching must be offensive to an ordinary person and not one unduly sensitive about his personal dignity. The normal person is said to consent to the usual and common touchings encountered in everyday activities. *See* Schmitt v. Kurrus, 234 Ill. 578, 85 N.E. 261 (1908); Morgan v. Loyacomo, 190 Miss. 656, 1 So. 2d 510 (1941); TEX. PEN. CODE ANN. art. 1138 (1953); W. PROSSER, THE LAW OF TORTS § 9 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS §§ 18, 19 (1964).

[5] If a battery has been committed and defendant can show no defense or privilege, plaintiff is at least entitled to nominal damages for the infraction of a legal right. Compensatory damages can be recovered for any injury directly flowing from the battery on the plaintiff. Exemplary or punitive damages are allowed for a battery committed wantonly, maliciously, or under circumstances of aggravation and are awarded to punish defendant for his wrongful act and to deter others from committing the same type of unpermitted invasion of plaintiff's right. *See* Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948); McChristian v. Popkin, 75 Cal. App. 2d 249, 171 P.2d 85 (1946); Kast v. Link, 90 Neb. 25, 132 N.W. 717 (1911); Walker v. L.B. Price Mercantile Co., 203 N.C. 511, 166 S.E. 391 (1932); Texas Coal & Fuel Co. v. Arenstein, 55 S.W. 127 (Tex. Civ. App. 1900). *See generally* C. MCCORMICK, DAMAGES § 81 (1935).