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Conflict of Laws

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CONFLICT OF LAWS

by

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I. CHOICE OF LAW

Most Significant Contacts. The awaited decision of the Supreme Court of Texas in the case of *Marmon v. Mustang Aviation, Inc.*[1] was handed down in May 1968. The majority of the court denied the applicability of the most significant contacts theory on these facts.[2] The action was one for wrongful death of several persons. All the deceased were residents of Texas but one who was a resident of Illinois. The negligent pilot and the defendant aviation company were also residents of Texas. The plane was returning to Texas on an interstate business journey when, after a refueling stop in Denver, it crashed in southeastern Colorado. Plaintiffs contended that Colorado had no legally significant contacts with the parties or the transaction; therefore, the wrongful death statute of the place of injury, Colorado, which limited damages to $25,000 for each wrongful death, should not be applicable. It was urged that the really significant contacts were with Texas, that Texas was the center of gravity, and, therefore, that the Texas forum should apply the Texas wrongful death statute which placed no limit on the amount of recovery.

Following the traditional conflict of laws rule that the law of place of injury governs the application of wrongful death statutes,[3] the court rejected the new significant contacts approach. It reasoned that to apply the Texas wrongful death statute[4] would give the statute extraterritorial effect. The court cited the 1884 Texas case of *Willis v. Missouri Pacific Railway*[5] which limited the enforcement of a right of action created solely by statute to the state where the statute exists *and* where the injury occurred. It was also explained that article 4678,[6] adopted several years subsequent to the wrongful death statute, had as its expressly stated object, the allowance of a right of action under the law of another state for the wrongful death of a Texas citizen and application of such law in a Texas court; and it by no means signified extraterritorial effect for the Texas wrongful death statute. It was concluded that the legislature did not intend the Texas wrongful death statute to have extraterritorial force, and that Texas courts had borne this out in their opinions. Therefore,

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[1] 430 S.W.2d 182 (Tex. 1968).

[2] This short survey of the case cannot be concerned with explanation of the significant contacts rule in the conflict of laws or with a discussion of its merits as compared with the older vested rights rule of the 1934 *Restatement of Conflict of Laws.* For leading cases on the significant contacts or relationship doctrine, see Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (Prop. Off. Draft, Pt. II, 1968).

[3] RESTATEMENT OF CONFLICT OF LAWS § 391 (1934).

[4] TEX. REV. CIV. STAT. ANN. arts. 4671, 4672 (1952).

[5] 61 Tex. 432 (1884).

[6] TEX. REV. CIV. STAT. ANN. art. 4678 (1952).

since *stare decisis* was said to have its greatest force in an area of statutory construction, any change would have to come through the legislature.[7]

A strong dissent urged that the *Willis* decision should be overruled for it had been discredited by later federal opinions which would permit a state having substantial contacts with a cause of action constitutionally to apply its own law to determine the outcome of the case even though the occurrence, for example the injury, might have taken place within the territorial bounds of another state. Quoted was the following statement of the Supreme Court of the United States in *Richards v. United States*:

> Where more than one State has sufficient substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.[8]

The dissenting opinion further reasoned that article 4671 did not by words limit its application to wrongful death occurring within the state; that it would not be logical to assume that the legislature intended to prohibit Texas citizens from recovery under the Texas Act simply because the injury occurred elsewhere; and that failure by the legislature to extend the application of the Texas Act could not be considered as acquiescence to a non-extraterritorial application in view of the fact that the judiciary in the *Willis* case and other cases had held that such extension could not constitutionally be made, a notion now changed by the Supreme Court of the United States.

Taking up article 4678 the dissent stated that this provision did not *require* application of the law of the place of injury; it merely *authorized* such application. With these points in mind the dissent believed the significant contacts doctrine could be adopted so as to permit the application of the Texas wrongful death statute where all of the important and vital operative facts of the case were related to Texas except the occurrence of the crash which caused the injury and death.

One might query the effect of this decision on the acceptance of the most significant contacts choice of law rule by Texas courts. Does the majority opinion signify complete and continued adherence to the old vested rights doctrine (*i.e.*, the law of the place of injury governs unless against the public policy of the forum[9]) with its rigid emphasis upon a one and only proper jurisdictional factor? Such a conclusion would be doubtful, for the court emphasized both in the opinion and on motion for rehearing that adoption of the significant contacts doctrine, which was admitted to have merit, was impossible in this case because the legislature and Texas courts had declared the wrongful death statute to be without extraterritorial effect and that, as noted above, when the construction of a statute was involved, *stare decisis* is most strong. Modification of a common law rule by the courts would present a different situation for it was pointed

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[7] 430 S.W.2d at 187.

[8] 369 U.S. 1, 15 (1962).

[9] On the vested rights theory as applicable to tort, and wrongful death actions, public policy and choice of law, see RESTATEMENT OF CONFLICT OF LAWS §§ 377, 378, 391, 612 (1934).

out that the common law "was the special domain of the courts."[10]

> The doctrine of *lex loci delicti* is a court-made rule. . . . [A]nd the abandonment of this rule in favor of some different one, such as a 'significant contacts' rule, while it may involve the overruling of common law precedents on policy grounds, does not necessarily involve saying that a statute had one meaning fifty years ago and a different one today.[11]

Consequently, it might be concluded that the Texas Supreme Court will adopt the significant contacts rule in choice of law cases when it involves changing a common law choice of law rule or even when a statutory rule is not considered as being as clear or as having congealed to such a degree as to set forth a contrary intention of the legislative body.

The significant contacts theory was again involved in the civil appeals case of *Brown v. Seltzer*.[12] Here the court was presented with a choice of applying the Texas Guest Statute or that of the state of New York. The defendant-operator and the deceased-passenger were travelling through Texas on an automobile sightseeing trip which apparently started in New York with a contemplated destination in Mexico, but ended in a collision with a Texas signpost. A suit for damages was brought by parents of the deceased against the operator of the automobile, which was owned by the operator's mother. The parties were all resident-domiciliaries of states other than Texas, the plaintiff-parents and their son being domiciliaries of California and the defendant-operator being domiciled in New York.

The trial court applied the Texas Guest Satute which prohibits a cause of action for damages to a guest against an owner or operator of a motor vehicle in case of accident on the public highways of the state unless the accident was intentional on the part of the owner or operator or caused by his gross negligence. On appeal contention was made that the trial court should have applied the law of New York so as to permit proof of simple negligence of the operator rather than the stricter gross negligence requirement of Texas. New York, it was claimed, had the most significant relationship to the transaction and the parties, hence, its law should govern. The court of civil appeals affirmed the trial court's judgment. It rejected the most significant contacts doctrine as the Texas rule, and cited the case of *Marmon v. Mustang Aviation, Inc.*[13] as decided by the Austin court of civil appeals. The Supreme Court of Texas had not yet handed down its opinion affirming that of the court of civil appeals in the *Marmon* case,[14] but the court in *Brown*, noting that the supreme court had granted writ of error in the *Marmon* case and apparently somewhat uneasy that the supreme court might adopt the contacts principle, rationalized that the effect of the cases applying the significant contacts doctrine in tort or wrongful death actions[15] was merely to authorize a forum to apply its

[10] 430 S.W.2d at 186.

[11] *Id.* at 194.

[12] 424 S.W.2d 671 (Tex. Civ. App. 1968), *error ref. n.r.e.*

[13] 416 S.W.2d 58 (Tex. Civ. App. 1967), *error granted.*

[14] Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968). *See* text accompanying notes 1-10 for discussion of this case.

[15] *See, e.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

own law or public policy when application of the laws of the place of injury would be against the forum's public policy. The court concluded that in the case at hand, since Texas was the place of injury (in the court's words the place where the cause of action accrued) and since Texas was also the forum, no conflict of laws problem was involved because the forum simply applied its own law to a cause of action accruing within the state of the forum.

This view is correct only under the vested rights theory. Adoption of a significant contacts theory would, however, present a changed picture so that a choice of law problem by the forum would exist. Thus, under the new proposed official draft of the *Second Restatement of Conflicts*, which adopts "significant contacts," although the law of the place of injury and the public policy of the forum are very important and the former will ordinarily be applicable to determine the rights of the parties in a death action, this is true only when no other state has a more significant relationship to the transaction and the parties. In this event, the law of the state having the most significant contacts is to be applied. Contacts for consideration would include not only place of injury and occurrence of conduct, but also domicile of the parties and the place where the relationship between the parties may be centered.[16] The center of relationship consideration has much significance with respect to a duty owed a guest passenger in an automobile, particularly if accompanied by other contacts such as domicile of the parties. A case for the centering of the relationship in New York in *Brown* would be weak. It would be much stronger if all the parties had been domiciled there and if the trip had not only commenced there but was also to end there.[17] Texas as the place of conduct and injury probably was the jurisdiction having the most significant contacts with the transaction.

Statutes of Limitations, Characterization. Article 4678 of the Texas statutes[18] was also the subject of conflicts controversy in the civil appeals case of *Francis v. Herrin Transportation Co.*,[19] in which application for writ of error has been granted by the Supreme Court of Texas. This was a damage suit brought by a widow for the injury and death of her husband in Louisiana by reason of defendant's negligence. The suit was barred in Louisiana by its one-year limitation period for wrongful death, but not by the longer Texas limitations period of two years. The trial court dismissed the plaintiff's action, holding that the Louisiana statute governed and therefore destroyed the cause of action. Upon appeal the trial court's judgment was affirmed.

Traditionally, statutes of limitation have been treated as procedural because the passage of time has been thought to destroy only the legal remedy, not the right or the cause of action.[20] As a procedural matter, the

[16] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 1, 45, 138 (Prop. Off. Draft, Pt. II, 1968).
[17] *Id.* § 145, at 14-15.
[18] TEX. REV. CIV. STAT. ANN. art. 4678 (1952).
[19] 423 S.W.2d 610 (Tex. Civ. App. 1968), *error granted*.
[20] For discussion, see G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 145-46 (3d ed. 1963).

forum's law would govern. Thus, if the suit on an extrastate action is barred by the limitation period of the forum even though it is not barred by the statute of the state under which law it arose, no action can be maintained. Conversely, as in the case at hand, if the cause is not barred by the forum, but is barred by the place where it arose, the cause of action can be maintained at the forum. Following this line of thought the decision here would appear to be out of line, but for a well-settled exception to the general rule: an action cannot be maintained in a forum state if it is barred by a statute of limitations of the state whose law would otherwise govern if that statute bars the right, not just the remedy.[21] Decisions have taken the position that where a statute creates the right and in the same enactment sets forth the time limitation for the bringing of an action, such limitation bars the right. Consequently, suit cannot be brought under the longer period of the forum if the time has elapsed under the statute of the place.[22] Since, as the court points out, Louisiana is the place where the cause arose, and, since the Louisiana statute creating the wrongful death action contains within it a built-in limitations period, the Louisiana limitation period governs.

Nothing seems amiss with the decision under conflict of laws principles, but Texas article 4678 is somewhat troublesome. This statute authorizes redress in Texas courts for injury or death where the wrongful act, neglect or default occurred in another state if "a right to maintain and recover damages" is given by the statute or law of such state. However, article 4678 further provides that the action must be brought within the time prescribed for the commencement of such actions by the statutes of Texas and that the law of the forum governs in matters of procedure. On its face this provision would seemingly permit recovery through an application of the Texas limitation period. The court reasoned, however, that article 4678 was inapplicable since it requires a *right* to maintain an action under foreign law; there was no *right* in Louisiana because of its extinguishment or destruction by the passage of time which was substantive in nature. Only if a right did exist under foreign law would application of the Texas limitation period ever become pertinent.

A final point of interest in the *Francis* case is the fact that the court characterized the Louisiana statute as substantive in the light of adjudicated cases in Louisiana.[23] Traditionally, most characterization problems in conflict of laws in the United States have been resolved by reference to the doctrinal concepts of the forum. But some cases[24] and writers[25] have,

[21] *Id.* at 147-48; RESTATEMENT OF CONFLICT OF LAWS § 604 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 143 (Prop. Off. Draft, Pt. I, 1967).

[22] The Harrisburg, 119 U.S. 199 (1886); California v. Copus, 158 Tex. 196, 309 S.W.2d 227 (1958).

[23] This involves what has been called a question of secondary characterization, *i.e.*, the making of a decision as to the nature of a statute of a foreign state as being procedural or substantive. On the problem of characterization, see McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws*, 78 U. PA. L. REV. 933 (1930); Robertson, *A Survey of the Characterization Problem in the Conflict of Laws*, 52 HARV. L. REV. 747 (1939); 31 MINN. L. REV. 492 (1947).

[24] *See, e.g.*, Anderson v. State Farm Mut. Auto. Ins. Co., 222 Minn. 428, 24 N.W.2d 836 (1946); Buhler v. Maddison, 109 Utah 267, 166 P.2d 205 (1946).

[25] Robertson, *supra* note 23, at 772.

in line with the 1934 *Restatement*, maintained that although the forum determines according to its own conflicts rule whether a given question is substance or procedure, still it will examine the entire transaction including the statute or other rule of law creating the obligation and its interpretation by the courts of the foreign state.[26] This appears to be the position of the case at hand. Whether this approach squares with the new Proposed Official Draft of the *Second Restatement of Conflicts* is doubtful. There, generally, a flexible approach to characterization and to the laws which will determine the issue is taken,[27] but it is specifically stated that in determining whether a statute of the place bars the right or only the remedy, the local law of the forum governs.[28]

Dissimilarity and Proof of Foreign Law, Characterization. In *Garza v. Greyhound Lines, Inc.*[29] the plaintiff sought recovery for an injury which occurred while travelling on a Mexican bus in Mexico on a leg of a tour from San Antonio, Texas, to Monterrey, Mexico, and back which was all arranged by defendant Greyhound Lines including provision for the Mexican carrier. The plaintiff alleged that the place of injury and the driver's negligence were both in Mexico somewhere between Nuevo Laredo, Tamaulipas and Monterrey, Nuevo Leon. Nothing appears from the reported case as to the proper law to be applied. The defendant, however, alleged that the law of place of injury governed the obligations of the parties and then entered a plea claiming that the trial court lacked jurisdiction over the cause of action because of the dissimilarity of the foreign law (either that of the State of Tamaulipas, the State of Nuevo Leon or the Republic of Mexico) to the law of Texas. The trial court sustained the defendant's plea and dismissed the case. The plaintiff appealed, contending that proper proof had not been made by the defendant of the foreign substantive law alleged to govern the case; hence, there was no evidence supporting the finding of dissimilarity and, consequently, the trial court erred in dismissing on this ground.

In the absence of pleading or proof of foreign law the Texas courts presumed such law to be the same as that of Texas,[30] and when foreign law is presented, strict proof (*i.e.*, an authenticated copy of a foreign statute or decree) is required.[31] In this case only a translation of provisions of the Mexican code was used to prove Mexican law. Moreover, the provisions set forth were applicable to Mexican federal matters and it was not shown that they were pertinent to an injury in a Mexican state. Since Mexican law was not properly proved, the court of civil appeals found error in the trial court's dismissal of the plaintiff's suit on ground of dissimilarity. The opinion went on to conclude that since the court was

[26] RESTATEMENT OF CONFLICT OF LAWS § 584, comment *b* (1934).
[27] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7 (Prop. Off. Draft, Pt. I, 1967).
[28] *Id.* § 143, comment *b*.
[29] 418 S.W.2d 595 (Tex. Civ. App. 1967).
[30] 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 99, at 132 (2d ed. 1956).
[31] *Id.* at 189. *See also* Hunter v. West, 293 S.W.2d 686 (Tex. Civ. App. 1956).

"officially ignorant of Mexican law,"[32] it could not review the lower court's ruling that the Mexican law was dissimilar.[33]

Plaintiff had one further obstacle to overcome for, although article 4678 might grant a cause of action under foreign law, the plaintiff here had not pleaded or proved a cause of action under the foreign law. However, the decision points up the fact that there is more than one way to skin a cat and permit recovery in conflict of laws cases, even when proceeding under the rigid vested rights theory. Lack of proof of the foreign law prevented its application here as the *lex loci delicti.* The court therefore turned to an alternative plea of the plaintiff that he should recover from defendant on the basis of breach of an implied contractual obligation to carry him safely. Characterization of the matter as contract instead of tort requires application of contract conflicts principles *lex loci contractus.* Thus the court said, "under applicable choice-of-law rules, this portion of his [plaintiff's] suit is governed by the laws of the State of Texas, the place where the contract was made."[34] Consequently, the trial court was said to have erred in refusing to take jurisdiction, and its judgment was reversed and the cause remanded.

By characterizing the carrier-passenger relationship as sounding in contract rather than as in tort, the law governing contracts controls and the court can thus evade the application of the traditional place-of-the-tort rule. Even under the vested rights theory, which supposedly would produce certainty and simplicity in the conflict of laws area based upon hard and fast concepts of jurisdiction for torts, contracts, property, etc., choice of law concepts were and are susceptible to manipulation and give the courts the chance, as here, to choose between laws rather than jurisdictions.[35]

II. Family Law

Divorce. The troublesome problem of recognition of extra-state divorce and jurisdiction therefor took on new dimensions in *Burleson v. Burleson.*[36] The Houston court of civil appeals gave effect to a Nevada decree of divorce rendered upon a finding and recital that the spouse bringing the suit for divorce, the wife, had been a *bona fide* resident of the state of Nevada for the required six-week period prior to the filing of suit.[37]

[32] 418 S.W.2d at 597.

[33] Thus, the court did not reach the point whether Texas would preclude enforcement of a cause of action arising under the laws of another jurisdiction if the law there was dissimilar to Texas law. Older cases did establish such a rule, some of them speaking in terms of substantial dissimilarity as a ground for no recovery under the foreign law. De Ham v. Mexican Nat'l Ry., 86 Tex. 68, 23 S.W. 381 (1893); Texas & Pac. Ry. v. Richards, 68 Tex. 375, 4 S.W. 627 (1887). Enactment of article 4678, which gives a right of action under foreign law when death or injury of a citizen of Texas has been caused by wrongful act in the foreign country, was intended to change this rule and permit recovery. Tex. Rev. Civ. Stat. Ann. art. 4678 (1952). Despite the enactment, later cases have refused to permit recovery under Mexican law on the ground of substantial dissimilarity. El Paso & Juarez Traction Co. v. Carruty, 255 S.W. 159 (Tex. Comm'n App. 1923); Carter v. Tillery, 257 S.W.2d 465 (Tex. Civ. App. 1953), *error ref. n.r.e. See also* Stumberg, *Conflict of Laws—Torts—Texas Decisions,* 9 Texas L. Rev. 21 (1930).

[34] 418 S.W.2d at 598.

[35] *See* R. Leflar, American Conflicts Law § 110, at 257-58, § 133 (students ed. 1968).

[36] 419 S.W.2d 412 (Tex. Civ. App. 1967). *See* Note, *Full Faith and Credit—Procedural Limitation Bars Collateral Attack on Jurisdiction,* 22 Sw. L.J. 662 (1968).

[37] The Nevada statutes set forth this six-week residence requirement before suit is brought to obtain a divorce in the state. New. Rev. Stat. § 125.020 (1967).

Although the husband had not appeared in the Nevada case, he had been served with citation in Texas and was notified by letter of the divorce immediately following its rendition.

In attacking the validity of this divorce in the Domestic Relations Court of Harris County, the plaintiff-husband alleged that the wife had not been a resident of Nevada for the requisite six-week period and that her pleadings and testimony to that effect in the Nevada case were false. The jury found that she had not met the six-weeks residence requirement, and upon this verdict the court declared the Nevada decree ineffective. This portion of the trial court's judgment was reversed by the court of civil appeals on the ground that rule 60(b) of Nevada Rules of Civil Procedure prevents attack upon a judgment of the courts of that state for the fraud, misrepresentation or other misconduct of an adverse party unless the attack is made before the expiration of six months. Since more than six months had elapsed, and since the husband had failed to appear after having been given fair opportunity to do so by the notice mailed to him, the Nevada decree could not have been adjudged void in Nevada. Inasmuch as the decree was not subject to attack for fraud where rendered, the court concluded it was not subject to attack in Texas on this ground.

Lost sight of in this case was a possible lack of jurisdiction because domicile might have been wanting. The marital relationship has often been referred to as a status having its *situs* as a *res* at the domicile. Matters affecting this status such as its termination are to be maintained at its *situs*, the domicile.[38] Traditionally, it has been recognized that a divorce granted in a state which is not the place of domicile of either spouse is not entitled to full faith and credit.[39] On the other hand a valid divorce which is entitled to full faith and credit in other states can be granted at the common or matrimonial domicile of the parties or at the domicile of one of the spouses if it was the last common domicile.[40] In 1942 the Supreme Court of the United States in the first case of *Williams v. North Carolina*[41] recognized that a divorce could be granted by a state in which the plaintiff spouse was domiciled even though this state was never the matrimonial domicile and the other spouse was not subject to the jurisdiction of the state or before the court. Such *ex parte* divorce decrees at the domicile of one of the spouses were considered to be valid and entitled to full faith and credit by sister states. The second case of *Williams v. North Carolina*[42] permitted domicile as a jurisdictional fact to be questioned *de novo* in a collateral proceeding in a sister state and allowed recognition of the divorce

[38] For discussion of domicile as a basis of divorce jurisdiction, see H. GOODRICH & E. SCOLES, CONFLICT OF LAWS 255-58 (4th ed. 1964); R. LEFLAR, THE LAW OF CONFLICT OF LAWS 312-16 (1959); G. STUMBERG, *supra* note 20, at 292-303.

[39] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 72 (Prop. Off. Draft, Pt. II, 1968) declares: "A state may not exercise jurisdiction to dissolve the Marriage of spouses if neither spouse is domiciled in the state and neither has such other relationship to the state as would make it reasonable for the state to dissolve the marriage."

[40] Thompson v. Thompson, 226 U.S. 551 (1913); Atherton v. Atherton, 181 U.S. 155 (1901).

[41] 317 U.S. 287 (1942).

[42] 325 U.S. 226 (1945).

decree to be refused after a determination that domicile had not in fact existed there.[43]

In the case at hand question was raised as to the wife's qualification as a six-weeks' resident of Nevada. If such doubt existed it would be fair to assume uncertainty as to her actual establishment of domicile in Nevada. According to the second *Williams* case collateral inquiry should have been permissible in Texas to determine whether the wife who secured the *ex parte* divorce was domiciled in the state of divorce. Consequently, the Texas trial court could have refused recognition of the divorce if the fact of domicile of the wife had been attacked and if the court had found domicile in Nevada to be non-existent.

If domicile is the sole basis of jurisdiction for divorce, it would follow that a state where neither spouse is domiciled lacks jurisdiction to dissolve the marriage. If in such an instance it does so, its judgment is constitutionally void as violative of the due process of laws clause of the fourteenth amendment[44] and is not entitled to full faith and credit. If the Nevada judgment were void for lack of jurisdiction of that state, then it would appear evident that Nevada could not prohibit attack on that judgment because of intrinsic fraud by invoking a rule of procedure providing against such attack after the expiration of six months. It is true that a state can grant or deny relief from a valid judgment which is obtained by fraud or misrepresentation, and another state, when called upon to enforce such a judgment, should give such effect to it as would be given by the court in which it was rendered. Thus, if relief for fraud is not permitted in the decree-rendering state and the judgment is not subject to attack there, it should not be subject to attack in a sister state.[45] This rule, however, presupposes a valid judgment as distinguished from a judgment constitutionally void because of lack of jurisdiction of the state rendering it. To apply the rule in the latter instance would prohibit the collateral attack of the jurisdictional factor of domicile which is permitted in the second *Williams* case. Foreclosure of attack by the state granting the judgment would allow a void judgment to stand unchallenged, thus making such void judgment effective.[46]

[43] The Supreme Court stated that "The fact that the Nevada Court found that they were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant. But simply because the Nevada Court found that it had power to award a divorce decree, cannot, we have seen, foreclose reexamination by another State." *Id.* at 233-34.

[44] Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), took this position by stating: "Nevertheless, if the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere." *Id.* at 677. In Williams v. North Carolina, 325 U.S. 226 (1945), Justice Frankfurter, in delivering the opinion of the Court, stated: "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile." *Id.* at 229.

The acquisition of the new domicile apparently depends upon the factors of physical presence at the place plus an intention to make that place a "home for the time at least." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 (Prop. Off. Draft, Pt. I, 1967).

[45] *See* RESTATEMENT OF JUDGMENTS § 118 (1942); RESTATEMENT OF CONFLICT OF LAWS § 440 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 115 (Prop. Off. Draft, Pt. I, 1967).

[46] The Texas Court of Civil Appeals cited two Texas cases which do not seem to be precedent for precluding attack if the judgment were void in that the state lacked jurisdiction. The first,

However, it should be noted that there is state authority to the effect that attack upon an *ex parte* divorce may be foreclosed. In *Simons v. Miami Beach First National Bank*,[47] the court barred collateral attack upon an *ex parte* divorce on the ground of lack of necessary residence in Florida by a spouse not subject to personal jurisdiction there because the spouse, having due notice of the suit, could have contested the husband's allegations of residence or domicile by defending the original suit. Again, in *Colby v. Colby*,[48] Nevada courts held that collateral attack would be precluded in Nevada on a Nevada *ex parte* divorce by a spouse not personally subject to the Nevada jurisdiction because perjury of the other spouse as to domicile was intrinsic fraud to which attack would not be allowed after six months from the entering of judgment. The Nevada court, however, was of the definite belief that there was judicial power, *i.e.*, jurisdiction of the state, and relied heavily on Mr. Justice Murphy's concurring opinion in the second *Williams* case wherein it was stated: "The State of Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give its divorce decrees absolute and binding finality within the confines of its borders."[49]

Attention should be directed to another issue. Domicile may not be the sole jurisdictional ground for divorce today. Some states have instituted a reasonable residence requirement[50] and some like Nevada would authorize a very short requirement. The Supreme Court of the United States has not yet spoken as to additional bases for jurisdiction for the grant of a valid divorce for purposes of full faith and credit or due process. Writers sanction a reasonable period of residence as a basis which could possibly be sustained by the Supreme Court, although a six-week period might not seem reasonable. If such were to be sustainable as a basis of jurisdiction,[51] a divorce granted on such a period of residence would be a valid one, and

Marsh v. Millward, 381 S.W.2d 110 (Tex. Civ. App. 1964), *error ref. n.r.e.*, was concerned with the enforcement of Colorado and Wyoming judgments in Texas. The court refused enforcement, because the Rules of Procedure of the two states prohibited attack for fraud after a period of time. Here, however, there was no question of personal jurisdiction over the defendant in the Colorado and Wyoming suits for he was personally served in each state. Thus the judgments were not void as violative of due process of law. The second case, O'Brien v. Lanpar Co., 399 S.W.2d 340 (Tex. 1966) involved the applicability of the Illinois long-arm statute for purposes of jurisdiction over an out-of-state Texas corporation. Here jurisdiction and due process under the minimum contacts theory were present, for the contact with Illinois was said to be substantial.

[47] 157 So. 2d 199 (Fla. App. 1963).

[48] 78 Nev. 150, 369 P.2d 1019 (1962).

[49] 325 U.S. 226, at 239. It should be noted, however, that in a previous case a Nevada court stressed the fact that the elements of domicile (presence within the state accompanied by an intent to remain in the state for an indefinite period of time) must coalesce within the six-week period. Lamb v. Lamb, 57 Nev. 421, 65 P.2d 873 (1937).

[50] Texas, for example, deems servicemen stationed within the state for a continuous period of twelve months to be actual and bona fide inhabitants and residents of Texas for purposes of divorce. TEX. REV. CIV. STAT. ANN. art. 4631 (1960). This was upheld in Wood v. Wood, 159 Tex. 350, 320 S.W.2d 807 (1959). *See* Comment, *The Servicemen's Dilemma: Divorce Without Domicil*, 13 SW. L.J. 233 (1959). For discussion of a reasonable period of residence for purposes of divorce jurisdiction, see H. GOODRICH & E. SCOLES, *supra* note 38, at 256; R. LEFLAR, *supra* note 35, at 315-16.

[51] The most recent utterance of the *Restatement* recognizes no jurisdiction to dissolve the marriage if neither spouse is domiciled in the state unless a relationship of a party to the state makes it reasonable for the state to grant the divorce. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 72 (Prop. Off. Draft, Pt. I, 1967).

preclusion by a state of attack for fraud on such a valid decree would be warranted. Since the judgment with a constitutional jurisdictional basis would not be subject to attack where rendered, it should not be subject to attack in other states.

Support. Way v. Fisher[52] reminds that there are many pitfalls in effectuating interstate support for dependents despite the existence of the Uniform Reciprocal Enforcement of Support Acts in the states involved.[53] Here petition was filed under the Uniform Support of Dependents Law of the state of Iowa in a court of that state praying for an order to be directed to a resident of Texas for the support of six minor children. This petition from the initiating state was forwarded to the district clerk of Harris County, Texas; citation was had on defendant who, through his attorney, filed his answer in the form of a general denial. The defendant appeared at the hearing through his attorney. The court ordered defendant to pay support in the sum of $30 per month. On appeal the court of civil appeals found that there was no evidence to support the trial court's judgment and therefore the trial court's judgment could not stand, even though objection to this lack of evidence had not been made before the trial court.

Consideration was given as to whether statements made in the certificate and other papers forwarded from the initiating state could serve as evidence. A negative conclusion was reached, the court citing a former case wherein it was stated: "The statements made in the certificate, based upon the plaintiff's petition, and without notice to the defendant, are not to be considered by the court of the responding state as evidence of the facts alleged in the plaintiff's petition."[54] Such a conclusion appears correct in view of the fact that the defendant is not before the court or subject to the jurisdiction of the initiating state, and, as it has been pointed out, the initiating state is only called upon to consider facts to determine whether a duty of support probably exists. If the initiating court finds a *probable* duty of support, it is called upon to send the verifying petition and certificate to the responding state which, after proper service of process upon the defendant, is made responsible to determine whether the duty of support *does* exist and to make the appropriate order.[55]

Custody. Spitzmiller v. Spitzmiller[56] involves the problem of recognition in Texas of a New York decree awarding custody of children to the father. Although the parties, husband and wife, had long been residents and domiciliaries of New York, the wife and mother of the children after separation from the husband, father of the children, had, without notify-

[52] 425 S.W.2d 704 (Tex. Civ. App. 1968).

[53] The Texas Act is TEX. REV. CIV. STAT. ANN. art. 2328b-4 (Supp. 1968).

[54] Neff v. Johnson, 391 S.W.2d 760, 764 (Tex. Civ. App. 1965). *See also* Schlang v. Schlang, 415 S.W.2d 28 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[55] Neff v. Johnson, 391 S.W.2d 760 (Tex. Civ. App. 1965). *See also* Brockelbank, *Uniform Reciprocal Enforcement of Support Act*, 5 ARK. L. REV. 349 (1951); Annot., 42 A.L.R.2d 768, 781 (1955).

[56] 429 S.W.2d 557 (Tex. Civ. App. 1968), *error ref. n.r.e.*

ing her husband, come to Texas with the children. Thereafter, the husband brought a separation-custody suit in a New York court. The wife had notice of the suit and an attorney was present as an observer. She, however, made no personal appearance. Judgment was rendered in default. Husband, in a habeas corpus proceeding in a Texas court challenged the detention of the children by the mother and sought their custody on the basis of the New York judgment which he claimed was entitled to full faith and credit.[57]

The trial court noted that evidence was present to support the New York court's finding that the wife was a domiciliary of New York at the time of the custody suit and that the proper forum for the award of custody of children was the place of residence and domicile. Finding further that the New York decree was res judicata at the time it was rendered and that there had been no substantial change of conditions established since, the trial court without a jury held that the New York judgment was a subsisting, valid and final judgment. Therefore, a writ of habeas corpus was granted awarding custody of the children to the father.

The wife in a cross action to the habeas corpus proceeding had asserted that the New York judgment was not based on jurisdiction; hence, it was void. It was her contention that she and the children were domiciled in Texas at the date of the New York suit and at the date of service and that the trial court should have made its own independent determination to this effect instead of relying on the finding of domicile of the New York court. On appeal her point was sustained. The court of civil appeals declared:

> The Texas court is obliged by Article IV, Section 1, of the Constitution of the United States . . . to give full faith and credit to the New York decree, provided the New York court had jurisdiction over appellant in personam . . . . It is well established that appellant had the right to impeach that decree collaterally in another state by proof that the court which entered the decree had no jurisdiction.[58]

Finding that sufficient evidence existed in the Texas record to raise a fact question as to the place of wife's domicile (New York or Texas) and that wife had not been given opportunity in the trial court to make independent findings as to her domicile, the court of civil appeals refused to grant full faith and credit to the New York judgment, reversed the trial court and remanded for a new trial.

The law has long been in an unsatisfactory state of confusion concerning the proper jurisdictional basis for the grant of a custody award and the recognition which is to be given to such an award in another state. Traditionally the view has been that the only state having jurisdiction to issue a valid custody award was the state of the child's domicile.[59] A more recent position, however, has not been so restrictive in its viewpoint, and has set forth three bases of jurisdiction. The first would find the child's

[57] The New York custody order granted custody to the mother, provided she returned with the children to New York, otherwise to the father. She failed to obey the order. *Id.* at 558.

[58] *Id.* at 560.

[59] RESTATEMENT OF CONFLICT OF LAWS §§ 117, 145-46 (1934).

domicile to be a jurisdictional basis viewing the problem as one relating to status. The second would look to jurisdiction over the parents of the child, and the third, viewing the matter as one to be controlled by considerations of the child's best interests, would place jurisdiction in the state where the child was present since that state was best qualified to make such a determination.[60]

Although the Supreme Court of the United States has not laid down definite standards for the recognition of a custody decree, it is usually accepted that such a decree is subject to full faith and credit to some extent, but only as to the facts existing at the time the decree is granted[61] and not as to changed conditions occurring after the granting of the decree.[62] But even as to recognition of the decree as to all matters up to the time of its rendition, the decree must have some jurisdictional basis and in the case at hand, since the mother and children were not present within the state at the time of suit, the state of New York could not have possessed jurisdiction under any of the three bases of jurisdiction mentioned above unless the children remained domiciled in New York in which case basis number one would be present, or unless the mother remained domiciled within the state which would accord with number two. But even had the children remained subject to New York jurisdiction because of domicile or even presence so that jurisdictional factors for the award of domicile might have been present in that state, the Supreme Court of the United States has held that a parent cannot be deprived of his or her rights as to custody of children by a court not having jurisdiction over that parent.[63] The court, being of the opinion that the parent-child relationship involved personal rights and duties, stated "that a mother's rights to custody of her children is a personal right entitled to at least as much protection as her rights to alimony."[64] In the *Spitzmiller* case if the mother was not still domiciled in the state of New York, no basis for in personam jurisdiction would appear to be present. Domicile becomes the prime jurisdictional factor, which can, according to various United States Supreme Court cases such as *Williams v. North Carolina*,[65] be subjected to collateral attack in a habeas corpus proceeding such as this and which will warrant a refusal of full faith and credit of the custody decree if it is proved that no jurisdiction existed in the state rendering the decree.

Although the facts were not such as to present a question as to recognition of a sister state judgment, the problems of jurisdiction and child custody decrees were also before the court in the case of *Staples v. Staples*.[66] The court had before it an order of the Domestic Relations Court of Taylor

[60] *See, e.g.*, Justice Traynor's opinion in Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739, 741-51 (1948). *See also* A. EHRENZWEIG, CONFLICT OF LAWS 282 (1962); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (Prop. Off. Draft, Pt. I, 1967).

[61] *See* R. LEFLAR, *supra* note 35, at 348; G. STUMBERG, *supra* note 20, at 322.

[62] Kovacs v. Brewer, 356 U.S. 604 (1958); Halvey v. Halvey, 330 U.S. 610 (1947).

[63] May v. Anderson, 345 U.S. 528 (1953). The court held that full faith and credit was not required where the mother was "neither domiciled, resident nor present" within the state. *Id.* at 533.

[64] *Id.* at 534.

[65] 325 U.S. 226 (1945).

[66] 423 S.W.2d 166 (Tex. Civ. App. 1967).

County modifying the provisions of a previous divorce judgment fixing the visitation rights of the father to his children to the extent of giving him additional visitation rights. At the time of the divorce proceeding no question of jurisdiction presented itself, for the parties were domiciliaries of Texas and personally appeared before the court. Thereafter, the mother took the children to Alabama, and at the time of the modification she and the children were located there. She had been served with process, however, and, in response to this notice and citation, appeared and testified in a hearing concerning the father's visitation rights. She did not attack the jurisdiction at this time, but subsequently filed an amended motion to set aside the order changing the visitation rights on the ground that the court had no jurisdiction to alter the first custody decree for she and the children were residents of Alabama and not before the court. The court of civil appeals disagreed, finding that the record did not conclusively show a domicile change to Alabama, but went on to hold in any event that a change and increase in visitation rights did not alter the custody provisions. This would imply that the court distinguished jurisdiction for the alteration of a custody decree (which may or may not have been present at the time of modification) from jurisdiction for the change in visitation rights which the court said existed.[67]

Under modern notions of custody jurisdiction, it would seem that differentiation between custody and visitation jurisdictional requirements is somewhat pointless, for child custody jurisdiction is now said to exist in a state if the child is domiciled or present within that state, or when the parties claiming custody are personally subject to the jurisdiction of the state.[68] Jurisdiction would be present here on the last basis, *i.e.*, personal jurisdiction over the father and mother, even though the children may be domiciled in Alabama and are physically present there rather than in Texas. Thus, even if custody was affected by the change in visitation rights, the Texas court having in personam jurisdiction over the father and mother could change the former custody decree in the light of changed circumstances.

The court's distinction between visitation and custody, however, may be warranted in the light of previous Texas cases as to jurisdiction to award custody. Texas courts have stressed two alternative prerequisites of child

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[67] *Id.* at 169:

> We conclude that the order here appealed from modified visitation rights, not custody, and that under the circumstances mentioned said court had jurisdiction to render the judgment as modifying his visitation rights and, since we have no record of the proceedings that were the basis of said modification order, in support of that judgment, we presume there was sufficient evidence of a change in conditions to support it.

The court in making a distinction between visitation rights and custody was following the previous Supreme Court of Texas case, Leithold v. Plass, 413 S.W.2d 698 (Tex. 1967), which distinguished the two, holding that a modification of visitation rights did not affect a previous award of custody. The court in *Leithold* stated:

> Custody of a child connotes the right to establish the child's domicile and includes the elements of immediate and direct care and control of the child, together with provision for its needs . . . . These rights inherent in a custody status are not held by one enjoying visitation rights as provided in the custody decree.

Id. at 700. The *Leithold* case, however, involved no jurisdictional problem.

[68] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (Prop. Off. Draft, Pt. I, 1967).

custody jurisdiction: the domicile of the child within the state or physical presence of the child within the state.[69] If these are the only bases of jurisdiction under Texas law, and if the children happened to be domiciled in Alabama (which is not conclusively shown) and not present in Texas, then the Texas court would have possessed no jurisdiction for a change of custody despite the fact that the contending parents were both before the court. In such case a change in visitation rights would have to be distinguished from a change of custody to determine whether the *in personam* jurisdiction which does exist is sufficient for the hearing of the action.

The court did not mention the basis of jurisdiction for the change in the visitation rights. It can be assumed that it was based on personal jurisdiction over the mother by reason of her appearance before the court modifying the decree after service of process and notification,[70] or on the basis of continuing jurisdiction from that acquired over her in the original divorce-custody proceeding which continues as to all necessary concomitants of the original cause until final determination.[71]

III. JURISDICTION IN PERSONAM

Carter v. G & L Tool Co.[72] involves an application of the well-settled rule that a general appearance by a defendant in a case either in person or through an authorized attorney subjects a defendant to the judicial jurisdiction of the state. Thus, if an action is commenced in a state where the defendant is not present, domiciled or otherwise subject to the jurisdiction, but the defendant thereafter makes a general appearance in the case, he is before the court and is bound by the judgment.[73] Here the plaintiff filed suit against defendants Carters (who were personally served) and other party defendants. One of these defendants filed a cross-claim against defendants Carters. The Carters were represented by an authorized attorney in Colorado who appeared in the suit on their behalf filing an answer to the plaintiff's complaint and requesting a continuance for time to file an answer to the cross-claim. Thereafter the plaintiff's suit was dismissed, but on the understanding that such dismissal did not affect or prejudice the rights of the defendant who was prosecuting the cross-claim. Judgment was rendered against the Carters on the cross-claim. This judgment was then sought to be enforced against them in Texas. The Carters contended that such judgment was not entitled to full faith and credit or enforcement in Texas because they were never served personally with the answer and cross-claim of the defendant pressing such, and further that the sum

[69] Worden v. Worden, 148 Tex. 356, 224 S.W.2d 187 (1949); Lanning v. Gregory, 100 Tex. 310, 99 S.W. 542 (1907); DeLaughter v. DeLaughter, 370 S.W.2d 207 (Tex. Civ. App. 1963), *error ref. n.r.e. See also* Note, *Parent and Child—Residence of the Child in Determining Child Custody Jurisdiction*, 1 BAYLOR L. REV. 94 (1948).

[70] For bases of jurisdiction in personam see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 27 (Prop. Off. Draft, Pt. I, 1967).

[71] Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913). For discussion as to custody awards, see A. EHRENZWEIG, *supra* note 60, at 90-92; R. LEFLAR, *supra* note 35, at 51-52.

[72] 428 S.W.2d 677 (Tex. Civ. App. 1968).

[73] *See* general texts on conflict of laws such as H. GOODRICH & E. SCOLES, *supra* note 38, at 121; G. STUMBERG, *supra* note 20, at 80. *And see* RESTATEMENT OF CONFLICT OF LAWS § 82 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 33 (Prop. Off. Draft, Pt. I, 1967).

rendered by the cross-claim judgment was in excess of that demanded and hence a violation of Colorado law.

As to the first contention the trial court and the court of civil appeals held in accord with the above-mentioned general rule. Finding that the filing of an answer by a non-resident is by Colorado law a general appearance, and further that a defendant who appears and asks for an extension of time also is believed to have appeared generally despite lack of notice, the court found jurisdiction over the Carters. The court also stated that when a defendant files his answer to the petition of plaintiff so as to constitute a general appearance, "such appearance brings him before the court for all purposes and charges him with notice of the cross-claim, whether it be filed before or after his appearance in an answer to plaintiff's demand."[74]

The latter contention to the effect that judgment was not entitled to full faith and credit because the Colorado court committed an error of law has no merit. It is well settled that an error of law or fact in the proceedings does not affect the validity of the judgment so as to permit collateral attack thereon as a denial of full faith and credit.[75]

IV. TAXATION

Enforcement of Sister-State Tax Claim. The decision in *Hamm v. Berrey*[76] is in line with the traditional and orthodox rule that a state will not enforce tax claims arising under the revenue laws of another state[77] either because such claims are considered to be penal in nature or because of the belief that obligation to pay taxes does not give rise to a personal liability or debt by the taxpayer.[78] The United States Supreme Court has, however, held in *Milwaukee County v. M. E. White Co.*[79] that a tax *judgment* of a sister-state is not to be denied full faith and credit simply because it is one for taxes. Constitutionally speaking, the enforcement of a claim for taxes unreduced to judgment is still open. In the *Hamm* case the Texas court had before it an assessment for income taxes made by the Alabama commissioner of revenue against a Texas domiciliary based on the sale of certain interests in Alabama lands. The Alabama authorities claimed that a final assessment by the Alabama Department of Revenue from which no appeal had been taken by the taxpayer was conclusive as a final judgment in Alabama, and, as a final judgment of a sister-state it was constitutionally

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[74] 428 S.W.2d at 681.

[75] Morris v. Jones, 329 U.S. 545 (1947). *See also* RESTATEMENT OF CONFLICT OF LAWS § 431 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 106 (Prop. Off. Draft, Pt. I, 1967).

[76] 419 S.W.2d 401 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[77] Moore v. Mitchell, 30 F.2d 600 (2d Cir. 1929); Holman v. Johnson, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (K.B. 1775); RESTATEMENT OF CONFLICT OF LAWS § 610 (1934).

The rule has been subjected to criticism and some courts have seen fit in more recent times to give effect to revenue laws of other states and tax claims arising thereunder. *See, e.g.*, Oklahoma Tax Comm'n v. Rodgers, 238 Mo. App. 1115, 193 S.W.2d 919 (1946). *See also* H. GOODRICH & E. SCOLES, *supra* note 38, at 99-100; R. LEFLAR, *supra* note 35, at 641-43.

[78] Colorado v. Harbeck, 232 N.Y. 71, 133 N.E. 357 (1921); Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932).

[79] 296 U.S. 268 (1935).

entitled to full faith and credit in Texas. Although the Alabama commissioner cited and set forth certain Alabama cases and laws to sustain his contention, still he did not plead nor prove such Alabama laws nor did he avail himself of rule 184a of the Texas Rules of Civil Procedure by requesting the trial judge, in accord with the rule, to take judicial notice of the law or court decisions of a sister-state. In failing to invoke rule 184a and in failing to prove Alabama law, the court presumed the law of the other state, Alabama, to be the same as that of Texas.[80] The court, therefore, concluded that this assessment was not a judgment of Alabama subject to full faith and credit, but a mere tax claim which need not under the general rule be enforced in Texas.

It is interesting to note that the Texas statute on Texas tax comity was brought into the case, as well as an Alabama law regarding the enforcement there of liability for taxes imposed by other states. The Texas law requires recognition of other states' sales and use taxes if other states extend a like comity to Texas taxes.[81] The tax claim here was based on income tax. The Texas statute was inapplicable. Moreover, the Alabama comity provision was not a subject for consideration, for it was not proved nor was rule 184a invoked. Consequently, the Alabama comity statute could not be relied on for it was not available to the trial court.

Jurisdiction To Tax. Greyhound Lines, Inc. v. Board of Equalization[82] presents a rather curious and interesting anomaly regarding jurisdiction for the taxation of tangible property and the differing rules that can be applied as to jurisdiction in the interstate or conflicts sense and jurisdiction in the local or state sense. Here the city of Fort Worth and the Fort Worth Independent School District imposed an apportioned ad valorem tax on the rolling stock, the buses, of the Greyhound Lines, a California corporation, such rolling stock being regularly engaged in travel in Texas and in the use of Texas highways in interstate commerce operations. The old rule *mobilia sequuntur personam* would permit tangible chattels to be taxed at the domicile of the owner.[83] However, this legal fiction has been subjected to modern change and supplantation by the situs rule. For example, the state of owner's domicile may not tax the chattel if it has acquired a permanent situs in another state.[84] In such a case the state of the situs may levy the tax. However, the domicile rule remains if the chattel has not obtained a permanent situs elsewhere. Thus, the problem of tax jurisdiction arises where the tangible personalty has not acquired a permanent situs elsewhere, but has a fairly continuous location in another state through use therein. In such an instance the state of domicile retains taxing jurisdiction, but the property is also taxable in the other state where a certain situs through

[80] For discussion of proving foreign law and rule 184a, see 1 C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE §§ 99, 173 (2d ed. 1956).

[81] TEX. TAX-GEN. ANN. art. 20.17 (1960).

[82] 419 S.W.2d 345 (Tex. 1967).

[83] On the *mobilia* maxim see G. CHESHIRE, PRIVATE INTERNATIONAL LAW 430-35 (4th ed. 1952). And as to tax jurisdiction see H. GOODRICH & E. SCOLES, *supra* note 38, at 66.

[84] Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905).

location or use for an appreciable period of time has come about.[85] To prevent multiple taxation by two or more states the tax must be apportioned or divided to take into account the contacts of the various states.[86]

In the case at hand Texas was not the place of owner's domicile. Thus the jurisdiction for the tax was based on a situs which was not permanent but one based on continual use within the state. Such contact, held the Supreme Court of Texas, would establish a sufficient degree of permanency as distinguished from a mere temporary or transitory situation so as to fix a tax situs which would avoid constitutional inhibitions such as burdening interstate commerce or violating due process of law.[87]

Turning from jurisdiction of the state to the jurisdiction of the city of Fort Worth and the school district, the court applied the *mobilia* rule. It could not say, however, that domicile of the corporation was in Texas or Fort Worth, inasmuch as Greyhound was incorporated and therefore domiciled in California. But the court reasoned that in a purely intrastate or local relationship the equivalent of domicile of a corporation would be the home office or principal place of business within the state. In Texas the principal place of business of Greyhound was in Fort Worth. Fort Worth as the place of owner's principal office or place of business had jurisdiction to levy the tax. Thus the local taxing situs in Texas, in the absence of contrary legislative provision, was Fort Worth.

[85] *See* Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959); Braniff Airways, Inc. v. Nebraska State Bd., 347 U.S. 590 (1954); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949).

[86] Central R.R. v. Pennsylvania, 370 U.S. 607 (1962). This case would permit the domiciliary state to tax to the full value of the property, without apportionment unless the same property may be taxed elsewhere. The burden is placed on the taxpayer to show this.

[87] 419 S.W.2d at 349: "[T]he Supreme Court of the United States has held in a long line of decisions that the legal requirement of permanency of situation and therefore tax situs of such units apart from the state of legal domicile, is established by continual use, regular or irregular, . . . in a non-domiciliary state."