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CONFLICT OF LAWS

by

*Jan P. Charmatz**

I. JUDICIAL JURISDICTION

ORIGINAL JUDGMENTS. The application of our long-arm statute in Texas, just as in most other states, presents the appellate courts each year with new problems, or at least new wrinkles of old ones. A case of first impression, where jurisdiction was not based on article 2031(b) but on article 8.24(d) of the Insurance Code, restates an important general principle applying to all statutes providing for constructive service upon a state official for nonresidents: "It is well settled that in order to obtain jurisdiction over a foreign corporation, the record must show a strict compliance with the provided method of service of process."[1] In this case service of process had been made on the Texas Insurance Commissioner instead of the Chairman of the Board of Insurance Commissioners. Since the Insurance Code article 8.24(d) provides that Mexican casualty companies can be served either on the agent for receiving process designated by them or upon the Chairman of the Board of Insurance Commissioners of Texas, the court correctly held that the default judgment in the district court had to be reversed.

Another civil appeals case presented the problem of whether a broadcast of a CBS program over various television stations throughout the state constitutes doing business.[2] The court stated that committing libel or slander in whole or in part, in Texas, constitutes doing business here under article 2031(b) and that "a broadcasting system is doing business in the states where its programs are carried."[3] However, it emphasized twice this was immaterial to the outcome of the case since the cause of action was barred by the statute of limitations.[4]

The only long-arm statute case which develops the full scope of the constitutional problems raised by its application is *Atwood Hatcheries v.*

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[1] Anglo Mexicana de Seguros, S.A. v. Elizondo, 405 S.W.2d 722, 725 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[2] Harris v. Columbia Broadcasting Sys., Inc., 405 S.W.2d 613 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[3] *Id.* at 618. The court cited, as authority, only one case, State *ex rel.* Columbia Broadcasting Co. v. Superior Court, 1 Wash. 2d 379, 96 P.2d 248 (1939). While there are many cases on what constitutes business within a state by foreign magazine, newspaper, or other publishing corporations, see Annot., 38 A.L.R.2d 747 (1954), only one other case dealing with a national broadcasting system, Hoffa v. National Broadcasting Co., 213 F. Supp. 895 (E.D. Mich. 1963) could be found.

[4] 405 S.W.2d at 616 & 618.

Heisdorf & Nelson Farms, decided by the Fifth Circuit, holding that a foreign corporation was doing business in Texas.[5] In this case service of process was not had on the Secretary of State under section 3 but on the general manager of a Washington corporation while he was attending a national convention in Texas. Section 2[6] provides that service upon a foreign corporation "not required . . . to designate or maintain an agent, . . . may be made by serving a copy of the process with the person who, at the time of the service, is in charge of any business in which the defendant or defendants are engaged in this State . . . ." It is true that article 2031,[7] which was not formally repealed by the enactment of article 2031(b), states that a foreign corporation may be served with process on the president and other officers, general managers, local or travelling agent or travelling sales-

[5] 357 F.2d 847 (5th Cir. 1966). The issue of the case is described by Judge Brown as follows:

> The broad legal question here is whether the Texas Long Arm statute tries to reach as far as the State of Washington and, concluding that Texas would hardly grope for less than its reach, whether the Federal Constitution reduces the grasp. Reduced to the biologico-legal terms of this record, the question in the *Hanson-Denckla* concept is whether the corporation has '. . . purposefully [availed] itself of the privilege of conducting activities within the . . . State' when, under the contractual relationship, in addition to a few roving human inspectors, visitors, veterinarians, or ambassadors of good will coming to Texas, its regular representatives are pure bred male chicks under a sort of fowl bare-boat charter-lease whose Texas mission is to fertilize the eggs of purchased female chicks of like lineage whose progeny is to carry on the good name of the strain to the mutual advantage of the Vendor-Lessor and Buyer-Lessee.

Id. at 849.

The footnotes of the opinion give a full list and analysis of all the important cases which have been decided by the Fifth Circuit and federal district courts in Texas as well as all the leading United States Supreme Court cases. The fact that so many more significant cases have been decided by the Fifth Circuit than by the Supreme Court of Texas should not let us forget that the state courts' concept of "doing business" must be followed by the federal courts in diversity of citizenship cases and that FED. R. CIV. P. 4(e) provides in its second sentence for service on nonresidents in the manner prescribed in a statute or rule of court of the state in which the court is held. It would be regrettable if the federal courts in Texas, for the lack of state precedents, might create the impression that they are not bound by the state law in the application of long-arm statutes.

The recent limitation imposed upon Erie R.R. v. Tompkins in Hanna v. Plumer, 380 U.S. 460 (1965) with regard to service of process in federal courts applies only to rule 4(d)(1) and not to rule 4(e).

With the exception of the Fourth Circuit, which is less explicit on this point, all the other courts of appeals have expressed the view that the amenability of foreign corporations to suit in federal courts is determined by state law. Annot., 6 A.L.R.3d 1103, 1109-29 (1966). Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960) holding that the amenability to suit should be determined in accordance with federal law has been overruled in Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963). For further discussion see VanDercreek, *Texas Civil Procedure*, this Survey at footnote 18.

[6] TEX. REV. CIV. STAT. ANN. art. 2031b, § 2 (1964).

> When any foreign corportion, . . . though not required by any Statute of this State to designate or maintain an agent, shall engage in business in this State, in any action in which such corporation, . . . is a party or is to be made a party arising out of such business, service may be made by serving a copy of the process with the person who, at the time of the service, is in charge of any business in which the defendant or defendants are engaged in this State, provided a copy of such process, together with notice of such service upon such person in charge of such business shall forthwith be sent to the defendant or to the defendant's principal place of business by registered mail, return receipt requested.

[7] TEX. REV. CIV. STAT. ANN. art. 2031 (1964).

men. The *Atwood* opinion, however, does not mention article 2031 as the basis of service of process, and it seems doubtful that a general manager coming to a convention in Texas unconnected with the specific business transactions in the state qualifies as a proper person upon whom service may be made under section 2 of article 2031(b). No Texas case interpreting this latter section could be found. The opinion concentrates on section 4—the question of doing business—and on the purpose of the long-arm statute, reaching the conclusion that "(the Texas purpose [in enacting article 2031(b)] was to exploit to the maximum the fullest permissible reach under federal constitutional restraints.)"[8] It can of course be argued that this principle also applies to the service-of-process provision and not just to the concept of doing business. It is submitted, however, that section 4 does not deal with service of process, and section 2 seems to apply to the local agent only. It is unfortunate that the opinion does not deal with this novel point of statutory construction, particularly because a Texas civil appeals court decision reaffirmed in the current period the principle that there must be strict compliance with the constructive service of process for nonresidents.[9] In another case, *Turner v. Jack Tar Grand Bahama, Ltd.*,[10] the Fifth Circuit held that the alleged contracts of the foreign corporation were insufficient in view of the due process clause to permit Texas courts to take jurisdiction. Having decided the constitutional question, the court refrained from construing article 2031(b) before the Texas courts had a chance to do so because there was no need to reach it. The question of jurisdiction over the person under long-arm statutes also arose when money judgments rendered in other states were sued upon in Texas courts. These cases are discussed in the second part dealing with full faith and credit to sister-state judgments.

Lack of jurisdiction over the person was unsuccessfully claimed when the defendant alleged that she had been fraudulently induced to enter the state solely for the purpose of being served with process.[11] A question of divorce jurisdiction arose in a case based upon article 4631, as amended in 1957, allowing members of the armed forces stationed in Texas to file a divorce. The district court dismissed the suit holding that the plaintiff was not a bona fide resident of Potter County, Texas, although he had been stationed

[8] Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847, 852 (5th Cir. 1966). (Quoting from Thode, *In Personam Jurisdiction; Article 2031b, The Texas "Long Arm" Jurisdiction Statute; and the Appearance To Challenge Jurisdiction in Texas and Elsewhere*, 42 TEXAS L. REV. 279, 307 (1964).)

[9] Anglo Mexicana de Seguros, S.A. v. Elizondo, 405 S.W.2d 722 (Tex. Civ. App. 1966) *error ref. n.r.e.* A recent example for the reluctance of a federal court of appeals to interpret a state long-arm statute can be found in Judge Medina's concurring opinion in Buckley v. New York Post Corp., No. 30757, 2d Cir., Jan. 10, 1967.

[10] 353 F.2d 954 (5th Cir. 1965).

[11] Cornell v. Cornell, 402 S.W.2d 571 (Tex. Civ. App. 1966) *error granted.*

there for more than two years. The court of civil appeals,[12] applying the leading case *Wood v. Wood*,[13] reversed. While several pre-1957 decisions insist on a bona fide domicile, the very purpose of the 1957 amendment of article 4361 was to create a fiction of domicile and to dispense with the prerequisite of domicile for divorce actions brought by military personnel stationed in Texas. Another case, where the vendor had sued an out-of-state purchaser and his local escrow agent without attachment of the purchase money by the court, reaffirmed the elementary principle that no personal obligation can be sued upon without personal service or attachment of a res in the court's jurisdiction.[14]

FULL FAITH AND CREDIT TO SISTER-STATE JUDGEMENTS. Many more cases concerning jurisdiction over the person (or the thing) arose when full faith and credit to sister-state judgments was sought.

Money Judgments. O'Brien v. Lanpar Co.[15] involved an action upon a default judgment obtained pursuant to the Illinois long-arm statute against a Texas corporation.[16] The Supreme Court of Texas recognized that the Illinois judgment satisfied the due process requirements. It emphasized that the president of the Texas corporation "purposefully went [to Illinois] to make contractual arrangements" for an attorney and that this "contact was substantial rather than casual and fortuitous," even though the defendant had apparently made only one contract there.[17] It seems regrettable that the opinion emphasized the discrepancy between the concept of "doing any business" used in the Illinois long-arm statute and that of "transacting business" used in article 8.01 of the Texas Business Corporation Act. Article 8.01 does not deal with the question of obtaining judicial jurisdiction over a foreign corporation but with an entirely different situation, namely under what circumstances a foreign corporation is required to procure a certificate of authority from the Secretary of State to transact business here. If any comparison of the Illinois statute with a Texas statute were to be made it should have been with articles 2031(b), section 4[18] or 2031.[19]

A civil appeals case involved an action based upon a default judgment obtained against a Texan in Oklahoma.[20] Service of process had been obtained in accordance with the Oklahoma nonresident service-of-process statute,[21] and the defendant was served in Texas by the local sheriff. The

[12] Miller v. Miller, 403 S.W.2d 231 (Tex. Civ. App. 1966) *error ref. n.r.e.*
[13] 159 Tex. 350, 320 S.W.2d 807 (1959), 13 Sw. L.J. 233, 37 TEXAS L. REV. 626.
[14] Henry v. Reno, 401 S.W.2d 118 (Tex. Civ. App. 1966) *error ref. n.r.e.*
[15] 399 S.W.2d 340 (Tex. 1966).
[16] 110 ILL. STAT. ANN. §§ 16, 17 (1956) (Civil Practice Act).
[17] O'Brien v. Lanpar, 399 S.W.2d 340, 343 (Tex. 1966).
[18] TEX. REV. CIV. STAT. ANN. art. 2031b, § 4 (1964).
[19] TEX. REV. CIV. STAT. ANN. art. 2031 (1964).
[20] Roberts v. Hodges, 401 S.W.2d 332 (Tex. Civ. App. 1966) *error ref. n.r.e.*
[21] 12 OKLA. STAT. ANN. § 187 (1963).

Texas district court rendered judgment for the creditor, although the defendant-appellant claimed lack of jurisdiction of the Oklahoma court in rendering a judgment. On appeal, it was held that in order to come within the full faith and credit clause a judgment must be a "final, valid, subsisting judgment not vacated or set aside in the state of rendition; and . . . conclusive on the merits,"[22] and valid on its face. The introduction of an authenticated copy made a prima facie case, and the defendant had the burden to establish that the judgment was not valid or that the court had no jurisdiction. The attack against the Oklahoma statute as being unconstitutional for violating the due process clause was unsuccessful. The court found that the minimum contact test was satisfied because the promissory note originally sued upon in Oklahoma was executed and made payable in that state. In a similar decision[23] the plaintiff had obtained a New York judgment for the amount of a bill for dental services performed in New York at a time when the defendant was a resident of New Jersey. The plaintiff sued on the judgment in Texas and was granted a summary judgment. The court of civil appeals held that the defendant-appellant had the required minimum contact with New York and affirmed.

In another case involving the enforcement of a sister-state judgment, the defendant-appellant unsuccessfully raised the novel point that two old Texas Supreme Court cases[24] allegedly require certification of a sister-state judgment by the chief justice or presiding magistrate. The court pointed out that the federal statute implementing the full faith and credit clause requires only the certificate of a "judge of the court."[25]

Foreign Custody Decrees. The Texas Supreme Court, in *Bukovich v. Bukovich*,[26] reemphasized that our courts will give full faith and credit to custody decrees of sister states and will not order a change of custody in the absence of proof of a subsequent material change of conditions. The case is an appropriate reminder of the correct treatment of foreign custody decrees. All too often courts seem to forget that "at the time it is entered, a custody judgment is res judicata of the question of the best interest of the child,"[27] and that they are not free to make a new determination of the best interest of the child unless a subsequent material change of conditions can be proven. In the case at hand the Supreme Court found that the evidence did not support the lower court's finding of a material change of conditions since the time that the original sister-state decree was rendered.

[22] Roberts v. Hodges, 401 S.W.2d 332, 334 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[23] Nyman v. Schnitzer, 405 S.W.2d 120 (Tex. Civ. App. 1966) *error dismissed.*

[24] Paschall v. Geib, 405 S.W.2d 385 (Tex. Civ. App. 1966), citing Harper v. Nichol, 13 Tex. 151 (1854) and Randall v. Burtis, 57 Tex. 362 (1882). Only the second case holds what the attacker claims it does.

[25] 28 U.S.C. § 1738 (1964).

[26] 399 S.W.2d 528 (Tex. 1966).

[27] *Id.* at 529.

Upon hearing, Judge Smith, in a concurring opinion, stated that even though there was substantial evidence showing changed circumstances, the findings of such changed conditions did not warrant holding in this case that a change of custody was in the best interest of the child. It is important to remember that not every change of conditions gives courts the right to make a readjudication of custody.

The problems of full faith and credit to custody decrees and the jurisdictional basis for such decrees were dealt with in a civil appeals case.[28] The husband and wife were originally residents of Arkansas, where they had had three children. When they separated, the husband took two children to Texas and established a domicile there. The wife then secured a divorce decree in Arkansas which granted her custody of all three children, including the two living with their father. The husband was served by publication and was represented in the proceedings only by a court-appointed attorney. In order to obtain the physical custody of the children, the mother brought a habeas corpus proceeding in Texas and presented a certified copy of the Arkansas decree. The district court rendered judgment for the mother, holding that the custody provisions of the Arkansas decree were entitled to full faith and credit. The court of civil appeals correctly reversed, holding the custody decree void. It is unfortunate, though, that the court based its decision on, and quoted extensively from, *Henthorne v. Tyler*,[29] a court of civil appeals decision rendered only about four months after the rendition of the controlling United States Supreme Court case, *May v. Anderson*,[30] which was at that time apparently still unknown to attorneys and court. The *Henthorne* case and the quotation therefrom in the case before us, although mentioning the lack of personal service or appearance, place primary emphasis upon the domicil of a child as the basis for a valid custody decree. A second case cited by the court for denying full faith and credit, decided in 1959, does not even mention the lack of jurisdiction over the defendant parent but bases its decision on the theory that a court has no jurisdiction to render a custody decree "when the physical being of the child is in another state than that in which the divorce suit is pending."[31] It seems to be high time that, in dealing with full faith and credit to custody decrees, our courts acknowledge the due process limitations on such decrees and base their decisions on the pertinent United States Supreme Court decision *May v. Anderson*[32] holding that a custody decree rendered without personal jurisdiction over the parent was not entitled to full faith and credit.

[28] Fletcher v. Fletcher, 404 S.W.2d 866 (Tex. Civ. App. 1966).

[29] 266 S.W.2d 484, 486 (Tex. Civ. App. 1953).

[30] 345 U.S. 528 (1953), 67 HARV. L. REV. 121 and many others but not in one appearing in Texas.

[31] Best v. Best, 331 S.W.2d 364, 365 (Tex. Civ. App. 1959).

[32] May v. Anderson, 345 U.S. 528 (1953), 67 HARV. L. REV. 121.

To our knowledge *May v. Anderson* has been cited only once by a Texas appellate court in a case when it was not quite in point[33] before the United States Supreme Court reversed the Texas Supreme Court in *Armstrong v. Manzo*,[34] holding that lack of notice to the natural father of a child in a Texas adoption proceeding violated the due process clause. Since then *May v. Anderson* has been cited in the civil appeals decision conforming with the United States Supreme Court mandate in the *Armstrong* case and in another adoption case.[35] It is well known that courts base their jurisdiction to adjudicate custody of children on several theories.[36] But no matter what theory the court may use, the judgment must comply with the constitutional due process provision which protects a parent from being deprived of the custody of his child when the court does not have in personam jurisdiction over such parent.[37]

Support Judgments. Full faith and credit to a sister-state child-support decree did not help the plaintiff in a proceeding based upon the pre-1965 Enforcement of Support Act.[38] A divorced wife brought the proceeding to

[33] Dowden v. Fischer, 338 S.W.2d 534, 537 (Tex. Civ. App. 1960). The court states that in May v. Anderson "it was held unnecessary to accord full faith and credit to modification orders where the court's jurisdiction in the original divorce action rested on other than personal service or appearance." May v. Anderson did not involve full faith and credit to a modification decree.

[34] 380 U.S. 545 (1965), 19 Sw. L.J. 413 (1965) and 64 MICH. L. REV. 726 (1966).

[35] *In re* Armstrong's Adoption, 394 S.W.2d 552, 555 (Tex. Civ. App. 1965); Whitehead v. Lout, 395 S.W.2d 68, 74 (1965), 18 BAYLOR L. REV. 4 (1966).

[36] See, *e.g.*, Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739, 748 (1948):

> Several theories have been advanced with respect to the correct basis for jurisdiction over the subject matter of a child custody proceeding. According to one theory jurisdiction over children's custody is based on in personam jurisdiction over the children's parents . . . . Another theory regards the question of custody as simply one of status and as such subject to the control of the courts of the state where the child is domiciled. . . . A third theory requires the child to be physically present within the state, on the ground that the basic problem before the court is to determine what the best interest of the child is, and the court most qualified to do so is the one having access to the child.

This case did not involve full faith and credit to a sister-state judgment.

[37] Vogel v. Vogel, 405 S.W.2d 87 (Tex. Civ. App. 1966). This is a case illustrative of the fact of how little our courts concern themselves with the jurisdictional bases for a custody adjudication and the constitutional limitations. A divorced woman brought a bill of review to set aside a judgment awarding custody to the father. She claimed that the personnel of the court had misplaced her answer to a complaint filed by the father which alleged changed circumstances and prayed that custody of the children be awarded to him. After the time for a motion for a new trial had expired the father took the children. The mother then filed an application for a bill of review which was granted and the court of civil appeals affirmed. The opinion expressly states that the petition makes no reference to the whereabouts of the appellant who was served personally in Ohio. An affidavit alleged that at the time when the petition of the bill of review was filed, father and children were residents of Maryland. At the time when the petition for bill of review was filed the children were neither physically present in Texas nor were they domiciled there. The court had no personal jurisdiction over the defendant and there is no indication that the divorce was adjudicated in Texas with jurisdiction over the father in which case the judgment could be upheld on the theory of continued jurisdiction. The opinion does not even state where the divorce judgment was rendered. It merely mentions that the parties had been involved in several suits in Texas, California and Maryland, involving the custody of the children. It would be interesting to know what effect such a judgment would be given in Maryland or any other state where the wife would try to enforce it.

[38] Clapp v. Clapp, 393 S.W.2d 412 (Tex. Civ. App. 1965) applying former arts. 2328b-1, 2328b-2, 2328b-3, Tex. Rev. Civ. Stat. Ann., all repealed in 1965.

recover unpaid child support payments due under an Alabama judgment (and, in the alternative, sought judgment against the defendant for the amount of delinquent child support payments). The trial court held that the plaintiff had not proved the amount claimed to be due under the Alabama decree and dismissed the suit on the merits. The court of civil appeals emphasized that the right to past-due installments under the support decree was absolute and vested.[39] The court nevertheless affirmed the judgment of the district court because the plaintiff had not pleaded and proven that the foreign judgment had become final.[40] The interpretation of the pre-1965 Enforcement of Support Act, on which the alternative prayer was based will be discussed in the second part of this survey.

The new act in its sections 32 to 37 provides for registration of foreign support orders in Texas courts. Support orders are defined in section 2(j) as "any judgment, decree or order of support whether temporary or final, whether subject to modification, revocation or remission regardless of the kind of action in which it is entered." This provision eliminates the need for bringing a new action in a Texas court and represents the first possibility to resort to a simplified method of registration of sister-state judgments similar to that which has been adopted by eight states in the Uniform Enforcement of Foreign Judgments Act for judgments entitled to full faith and credit.[41] Section 36 indicates that the procedure upon the petition for registration is governed by the same principles as that in an action on a foreign judgment.[42]

Land Decrees. Full faith and credit was refused to an Arkansas judgment in a proceeding brought by a man against his former wife to partition a tract of land.[43] They had lived in Texarkana when they acquired the land in question. A short time thereafter the plaintiff-husband went to Arkansas for the express purpose of getting a divorce which he obtained upon citation by publication. On the same day that the husband obtained his divorce the wife instituted a suit for divorce and division of the community property in the 102d Judicial District in Texas. The husband was served by publication, and she obtained the divorce and was awarded the tract of land as her separate property. Later, in 1934, the husband filed a suit in the Fifth

[39] Rumpf v. Rumpf, 150 Tex. 475, 242 S.W.2d 416 (1951). The case gives full faith and credit to an Idaho decree for accrued alimony installments.

[40] Clapp v. Clapp, 393 S.W.2d 412, 414 (Tex. Civ. App. 1965) stated that the trial court had not erred to grant judgments for "some speculative matured sum as being vested in the plaintiff."

[41] 9A UNIFORM LAWS ANN. 474 (1965).

[42] TEX. REV. CIV. STAT. ANN. art. 2328b-4, § 36 (Supp. 1966):

> The procedure to obtain jurisdiction of the person or property of the obligor shall be as provided in civil cases. The obligor may assert any defense available to a defendant in an action on a foreign judgment. If the obligor defaults, the court shall enter an order confirming the registered support order and determining the amounts remaining unpaid. If the obligor appears and a hearing is held, the court shall adjudicate the issues including the amounts remaining unpaid.

[43] Holder v. Scott, 396 S.W.2d 906 (Tex. Civ. App. 1965) *error ref. n.r.e.*

Judicial District in Texas to set aside the wife's divorce judgment and the partition of the community which succeeded. It is not clear on what basis the plaintiff in the present action claimed that the Arkansas divorce decree must be given full faith and credit. In claiming title to land in Texas, an Arkansas divorce decree could not have had any effect on the adjudication of property interests. Nevertheless, the opinion states that the Arkansas judgment "was acquired through a fraud that was perpetrated upon the court,"[44] that the plaintiff did not plead the Arkansas judgment nor res adjudicata or estoppel (apparently in the previous divorce and partition proceeding brought by the wife) and that, in the absence of pleading and proof of the laws of a sister state, the laws of that state would be presumed to be the same as those of Texas. Although the court correctly declared the Arkansas judgment void, it is difficult to understand why it did not dispose of the full-faith-and-credit argument by simply stating that the judgment of a court, not having jurisdiction over the Texas land, could not possibly have had any effect on the title question in issue. Instead, the court held that plaintiff's judgment obtained in his action in 1934 to set aside the divorce and partition was a nullity because such an attack could have been made only in the court which had rendered the divorce and the partition judgment and that the judgment obtained by the wife had become final.

A Colorado judgment adjudicating land located there posed another problem of full faith and credit in a Texas divorce proceeding. Before the husband brought his divorce action here, the wife had filed a separate maintenance suit in Colorado where the parties owned community and separate property. The Texas court granted the husband the divorce and, ignoring the prior Colorado judgment adjudicating the Colorado property as to that of the wife as her separate property, took the Colorado property into account in dividing the community. The wife appealed, claiming that this judgment denied full faith and credit to the Colorado judgment. The husband's contention that the Colorado court had had no jurisdiction correctly was found to be without merit and the court of civil appeals reversed, holding that the Colorado judgment was entitled to full faith and credit.[45]

Mexican Divorce Decree. In another divorce case involving the partition of Texas community property the court held invalid a Mexican divorce where the husband had surreptitiously gone to Mexico and prosecuted the divorce suit without notice to the wife.[46]

Judgment Based on Arbitration Awards. A New York judgment ren-

[44] *Id.* at 909.

[45] Frazier v. Frazier, 394 S.W.2d 853 (Tex. Civ. App. 1965) *error dismissed.*

[46] Risch v. Risch, 395 S.W.2d 709 (Tex. Civ. App. 1965) *error dismissed.* For validity of Mexi-

dered in confirmation of two awards made by a board of arbitration was held entitled to full faith and credit despite the claim of the losing parties that they had not been personally served within the limits of the state of New York. The court took judicial notice of New York statutes and case law providing that an agreement to arbitrate also constitutes consent to be sued in the courts of that state. It held that service of process on the defendants' attorney and his appearance in court were sufficient and affirmed the summary judgment of the district court for the plaintiff.[47]

II. CHOICE-OF-LAW

The only case which presented the Supreme Court of Texas with a novel problem and a chance to establish whether Texas would follow the traditional *lex loci delicti* doctrine or break with this rule in the field of tort liability and inter-spousal immunity had to be declared moot since the parties filed a motion to dismiss the writ of error which had already been granted. By declaring the case moot, the supreme court also vacated the decision of the court of civil appeals.[48] The husband and wife, residents of Dallas, were involved in an automobile collision in Oklahoma, and the wife sued her husband, the driver of the car, in Oklahoma to recover damages for personal injuries. While Texas law does not allow the wife to recover damages from her husband, Oklahoma law permits such actions. Prior to the rendition of an Oklahoma judgment, the husband's insurance company filed suit in Texas for a declaratory judgment against the couple to determine that the company was not obligated to pay for such accident. The district court held for the insurance company, and upon appeal, the issue presented was, "What law governs as to the right of the wife to maintain an action for personal injuries against her husband?"[49] It is unfortunate that the Texas Supreme Court was not offered a chance to rule on this point;[50] the law in some sister states is in a state of flux[51] and this is a question yet to be answered in Texas.

The other cases dealing with choice-of-law are more routine. In an action by a Michigan bank on a promissory note the defendant filed a

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can divorces in which both parties were before the court, see Note, 20 Sw. L.J. 174 (1966).

[47] Brownwood Mfg. Co. v. Tanenbaum Textile Co., 404 S.W.2d 106 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[48] United Servs. Auto. Ass'n v. Lederle, 400 S.W.2d 749 (Tex. 1966) vacating Lederle v. United Servs. Auto. Ass'n, 394 S.W.2d 31 (Tex. Civ. App. 1965).

[49] *Id.* at 33.

[50] The court based its decision upon the tentative draft of the *Second Restatement of Conflict of Laws*, an annotation in 22 A.L.R.2d 1248 (1952), and three law review articles. Comment, 18 BAYLOR L. REV. 477 (1966) started its discussion of the case with the words that the court of civil appeals had handed the supreme court "a veritable golden egg of opportunity to write on an unsettled point of law."

[51] Clark v. Clark, 222 A.2d 205 (N.H. 1966) gives an excellent description of most recent developments in this field.

cross-claim on the payment of usurious interest. The contract being executed and to be performed in Michigan, and the parties being Michigan citizens at that time, the court applied the well-established rule that the validity of the contract was to be determined by the law of that state.[52] In a case concerning land in Texas left to testator's wife another well-established rule applied. "[A]s to land situated in Texas the laws of this state will control the nature of the property rights acquired by non-resident persons."[53]

The Texas Supreme Court clarified the application of the 1951 Uniform Reciprocal Enforcement of Support Act (URESA) in *Bjorgo v. Bjorgo*.[54] Since an amended act has become effective in August 1965, some problems which have plagued our courts in the past should not occur again. The court of civil appeals decision in *Bjorgo v. Bjorgo*,[55] based on *California v. Copus*,[56] has demonstrated that the 1951 act, meant to provide speedy and efficient relief for dependents, did not achieve this purpose and needed amendment.[57] It is hoped that the URESA now in force will avoid the major problems created by the application of the 1951 act. Formerly, the obligee was given an election to demand support according to the law where either the obligor or obligee was present when the failure to support commenced[58] and had not provided for a special simplified procedure for registration of foreign support orders [judgments] as adopted by the Commissioners on Uniform State Laws in 1958. The new act will relieve support-seeking dependents from having to bring a new action in Texas in judgment situations like the *Clapp* case; when there is no sister-state judgment involved, the new act will usually relieve the obligee from pleading and proving the law of a sister-state.[59]

A potential choice-of-law problem arose in a case involving a partnership of two Texas women in a Mexican lottery ticket. One partner claimed a one-half interest in a winning ticket, and the other alleged that such ticket belonged to her son and not to the partnership. The court of civil

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[52] Doppke v. American Bank & Trust Co., 402 S.W.2d 317 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[53] Ing. v. Cannon, 398 S.W.2d 789, 791 (Tex. Civ. App. 1965) *error ref. n.r.e.*

[54] 402 S.W.2d 143 (Tex. 1966), 20 Sw. L.J. 422.

[55] Bjorgo v. Bjorgo, 391 S.W.2d 528 (Tex. Civ. App. 1965), noted in great detail in 19 Sw. L.J. 801 and 42 N.D. L. REV. 57.

[56] 158 Tex. 196, 309 S.W.2d 227 (1958), 57 MICH. L. REV. 116 (1958), 12 Sw. L.J. 508 (1958), 37 TEXAS L. REV. 773 (1959), 6 U.C.L.A. L. REV. 145 (1959).

[57] One recent case, reported during the period surveyed here, Benson v. Benson, 400 S.W.2d 340 (Tex. Civ. App. 1966) *error ref. n.r.e.*, was appealed twice, the first appeal reported in 368 S.W.2d 125 (Tex. Civ. App. 1963) *error ref. n.r.e.* The mother had filed her original petition for support for the child on July 7, 1961, in California. It apparently took five years before the right to child support was established.

[58] TEX. REV. CIV. STAT. ANN. art. 2338b-3, § 7 (1964). It was this section which created the difficulties in the *Copus* case, *supra* note 56, and the first *Bjorgo* case, 391 S.W.2d 528 (Tex. Civ. App. 1965), 19 Sw. L.J. 801.

[59] Clapp v. Clapp, 393 S.W.2d 412 (Tex. Civ. App. 1965), 19 Sw. L.J. 801.

appeals stated that the contract, even though lawful in Mexico, was illegal, against public policy, and unenforceable. But it found that the illegality of the original contract between the two women did not affect plaintiff's right against the son who had converted the money to his own use and benefit, and therefore he could not interpose the plea of illegality. The plaintiff had based her cause of action not on the illegal agreement but on her ownership of an interest in the ticket. The defendant was, therefore, considered to hold the money as an agent, trustee, or bailee implied in law.[60] The Texas Supreme Court granted error in this and a related case[61] and has heard oral arguments.[62] The court of civil appeals' approach to the case seems sounder than that of many other courts deciding similar cases by characterizing them as actions based on the original contract and applying the public policy doctrine.[63] The court found that "the wagering contract had been executed, and the fruits thereof had been paid to one who, . . . was not authorized to keep them. . . . The illegality of the original transaction between the parties thereto does not taint or vitiate the rights of the principals to sue a third party recipient of the fruits of the illegal transaction."[64]

III. Federal-State Relations

Apart from the more or less routine applications of *Erie R.R. v. Tompkins* and its progeny in the federal courts in Texas, the application of the abstention doctrine by the Fifth Circuit—referring the parties to the Texas courts for determination of the applicable state law[65]—and subsequent state court action gave rise to some noteworthy decisions in this field which should have far-reaching effect.

There are several cases in which the Fifth Circuit followed *Erie* by applying the Texas precedents.[66] However, there is also one in which the

[60] Castilleja v. Camero, 402 S.W.2d 265 (Tex. Civ. App. 1966), *aff'd*, 10 Tex. Sup. Ct. J. 340 (1967).

[61] Castilleja v. Camero, 402 S.W.2d 272 (Tex. Civ. App. 1966), *aff'd*, 10 Tex. Sup. Ct. J. 346 (1967). While the appeal was pending plaintiff brought another action for a writ of mandamus to compel the constructive trustee to deposit the funds belonging to her as co-owner of the ticket with the court clerk pending the disposition of the appeal in the first case. The district judge granted the writ and the court of appeals affirmed. Even though the trial court had no jurisdiction over the Mexican bank where the funds were deposited, it had jurisdiction over the person of the constructive trustee.

[62] 10 Tex. Sup. Ct. J. 2 (1966).

[63] See, *e.g.*, Ciampittiello v. Campitello, 134 Conn. 51, 54 A.2d 669 (1947) noted critically in 27 Neb. L. Rev. 440 (1948) and 9 U. Pitt. L. Rev. 125 (1947).

[64] Castilleja v. Camero, 402 S.W.2d 265, 269-70 (Tex. Civ. App. 1966). The court based its decision on several Texas precedents directly in point. The oldest authority is Floyd v. Patterson, 72 Tex. 202, 10 S.W. 526 (1888).

[65] It should be noted that, as Professor Wright has pointed out, there are in effect four sometimes overlapping abstention doctrines. Wright, Federal Courts 169 (1963). We are concerned here with that applied by federal courts in diversity of citizenship cases "to leave to the states the resolution of unsettled questions of state law." *Ibid.*

[66] See, *e.g.*, Eastman Kodak Co. v. Martin, 362 F.2d 684 (5th Cir. 1966) (proximate cause); Green v. Aetna Ins. Co., 349 F.2d 919 (5th Cir. 1965) (obligation of liability insurer).

court, for lack of Texas precedents in point, had to make an educated guess what the Texas law might be. In an action to collect past due rent from a bonding company which had guaranteed rent payments under a ten-year lease, the defendant claimed that the lease had been terminated because the lessor had employed brokers to find a possible purchaser or lessee for the property. The court stated that no Texas case has held that a lease was terminated by operation of law where the landlord had merely indicated an intent to consider selling or reletting. The Fifth Circuit opinion states, "[W]e think Texas requires an actual reletting before a surrender [of the lease] by operation of law can take place."[67] The scarcity or complete lack of state precedents may sometimes create the impression that the federal courts do not consider themselves bound by state law.[68] On the other hand we find cases in which the Fifth Circuit is very careful in expressing its intention not to encroach upon the state courts' prerogative to construe Texas statutes.[69]

A significant problem of federal-state relations was raised in two of three insurance cases brought in the federal courts concerning the insurance coverage of airplane pilots. In these cases the Fifth Circuit abstained, stayed the proceedings and, while retaining jurisdiction, directed the appellants to seek promptly a declaratory judgment in the Texas state courts with a review by a state court of last resort. As the majority put it in the first case, *United Servs. Life Ins. Co. v. Delaney*[70] decided *en banc*, with four judges dissenting: "The guidance of the dim light of the Texas decisions leaves meaning of the questioned clauses obscure,"[71] although in a prior case a panel of the Fifth Circuit had held a 1953 Texas Supreme Court case, *Continental Cas. Co. v. Warren*[72] to be controlling.[73] The dissenters did not feel that this was a case for the application of the abstention doctrine and pointed out that, unlike Florida, Texas had made no provision for certification of doubtful questions of the state law by the federal courts[74]

[67] South Falls Corp. v. Kalkstein, 349 F.2d 378, 385 (5th Cir. 1965). For further discussion see Larson, *Property*, this Survey at footnote 3.

[68] See, *e.g.*, the discussion of Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847 (5th Cir. 1966). See text accompanying note 5 *supra*.

[69] See Turner v. Jack Tar Grand Bahama, Ltd., 355 F.2d 954, 956 (5th Cir. 1965) discussed in text accompanying note 10 *supra*.

[70] 328 F.2d 483 (5th Cir.), *cert. denied*, 377 U.S. 935 (1964). For further discussion see VanDercreek, *Texas Civil Procedure*, this Survey at footnote 111.

[71] *Id.* at 484.

[72] Continental Cas. Co. v. Warren, 152 Tex. 164, 254 S.W.2d 762 (1953).

[73] United Servs. Life Ins. Co. v. Delaney, 308 F.2d 484 (5th Cir. 1962).

[74] United Servs. Life Ins. Co. v. Delaney, 328 F.2d 483, 485 (5th Cir.) (dissenting opinion), *cert. denied*, 377 U.S. 935 (1964). Judge Brown in a concurring opinion expressed his confidence in the Texas state judicial system and defends the application of the abstention doctrine as follows:

> It is judicial statesmanship of the highest and proper order for us to conclude that these questions, so very vital and important to these contesting litigants, should be decided by courts who either know the answer or who can write it if it has not yet been announced. Texas has a judicial system which will permit adjudication with

to the state supreme court. In the second case[75] the court followed the *Delaney* decision. The Texas Supreme Court, however, held in *United Servs. Life Ins. Co. v. Delaney*[76] that the fact that the Fifth Circuit had retained jurisdiction made the state proceedings merely advisory and refused to accept jurisdiction. All of the justices, including the dissenters, on the Texas Supreme Court felt that a Texas declaratory judgment would make the case res judicata and thereby sounded the death-knell to the exercise of the abstention doctrine by federal courts in Texas when the state law is obscure or nonexistent.[77]

After the Texas Supreme Court refused to take jurisdiction in the declaratory judgment suit, the Fifth Circuit, again sitting *en banc*, in *Paul Revere Life Ins. Co. v. First Nat'l Bank*[78] reversed and remanded the case, distinguishing the insurance clause from that involved in the *Warren* case although the two seemed similar. The dissent criticized "the lame and specious distinctions by which the majority opinion undertakes to sweep aside the decisions of these two [federal district] judges and the controlling case from the Texas Supreme Court" and considered the distinction as "unwarranted, illogical and insupportable in Texas law."[79] Judge Gewin felt that it was the duty of the court under the *Erie* doctrine to take the stand with the Texas judges on what constitutes Texas law whether or not it liked it[80] and stated that the majority "in its revolt against the law of Texas"[81] caused a grave injustice.[82]

All these cases have been noted in great detail elsewhere with regard to the substantive law involved.[83] We have considered here only the result which the supreme court decision will have on the application of the abstention doctrine in similar situations. All of these cases have received nation-wide attention.[84]

IV. Conclusion

Since the question of when a nonresident or foreign corporation is

> dispatch and speed. And its excellent Judges and Courts have a full arsenal of procedural devices which will enable the parties to have a prompt and completely sufficient determination.

Id. at 489.

[75] St. Paul Mercury Ins. Co. v. Price, 329 F.2d 687 (5th Cir. 1964).

[76] 396 S.W.2d 855 (Tex. 1965), 20 Sw. L.J. 402 (1966) and 44 Texas L. Rev. 1394 (1966). See Davis, *Insurance*, in this Survey issue.

[77] The problem that a declaratory judgment by the state court might have the effect of res judicata or collateral estoppel had been raised before. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 429 (1963) (Douglas, J. concurring).

[78] 359 F.2d 641 (5th Cir. 1966), 20 Sw. L.J. 878, 4 Houston L. Rev. 301.

[79] *Id.* at 645.

[80] *Ibid.*

[81] *Id.* at 649.

[82] *Id.* at 649. Judge Gewin expressed the hope that the defeated parties would seek "the elusive and expensive Writ of Certiorari." *Ibid.*

[83] See Davis, *Insurance*, in this Survey issue.

[84] See note 76 *supra*.

"doing business" in the forum state is one of both law and fact, the steady stream of cases dealing with the problem of jurisdiction over the person continues unabated. Apart from statutory construction problems of the various long-arm statutes almost every case in this field poses the question of what constitutes minimum contacts, the constitutional limits of their application. The Fifth Circuit and federal district courts in Texas, in situations where jurisdiction is based on a single contract or tort have emphasized as a criterion that the defendant must have "purposefully" sought out the business in Texas.[85] In the field of full faith and credit to sister-state judgments obtained by service of process under long-arm statutes no new problems were encountered. On the contrary, it seems that none of the cases decided in the last term seem to have warranted an appeal since the arguments of the appellants appear to have little merit.[86]

Although the Texas Supreme Court has correctly applied the jurisdictional bases for foreign alimony decrees,[87] some courts of appeals still seem to be unconscious of the due process requirements imposed by the United States Supreme Court upon the exercise of custody jurisdiction over non-resident parents.[88] The number of cases dealing with full faith and credit to foreign support decrees should be considerably reduced through the application of the new system of registration for foreign support orders introduced by the 1965 Uniform Reciprocal Enforcement of Support Act.[89]

The two court of civil appeals decisions dealing with foreign judgments affecting Texas land decided during the last term indicate complete unfamiliarity with the most elementary principles of the jurisdictional basis for such judgments although the Texas Supreme Court in *McElreath v. McElreath* had restated them clearly several years ago.[90]

As to choice-of-law, no important cases showing a new trend were decided. In the *Castilleja* case,[91] concerned with the claim of the luckless co-owner of a lucky ticket in the Mexican National Lottery, the court of civil appeals solved the case by characterizing the action as one by the owner of the funds against a constructive trustee. This seems to be a much more satisfactory approach than that of many other courts in characterizing the action as one based on an illegal contract which must be declared invalid as being against the public policy of the forum.

[85] Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847, 853 (5th Cir. 1966), quoting Hanson v. Denckla, 357 U.S. 235, 253 (1957). See also Hearne v. Dow Badische Chem. Co., 224 F. Supp. 90, 99 (S.D. Tex. 1963), quoting the same language.

[86] See text accompanying notes 1-14 *supra*.

[87] Rumpf v. Rumpf, 150 Tex. 475, 242 S.W.2d 416 (1951) (full faith and credit to foreign alimony decree). There seems to be no Texas Supreme Court case dealing with full faith and credit since May v. Anderson, 345 U.S. 528 (1953) was decided.

[88] See text accompanying notes 30-37 *supra*.

[89] TEX. REV. CIV. STAT. ANN. art. 2328-4, § 36 (Supp. 1966).

[90] 162 Tex. 190, 345 S.W.2d 722 (1961), 16 Sw. L.J. 516 (1962).

[91] Castilleja v. Camero, 402 S.W.2d 272 (Tex. Civ. App. 1966), *aff'd*, 10 Tex. Sup. Ct. J. 346 (1967).

The abstention doctrine, applied by federal courts in cases where the applicable state law is unsettled, has been under attack during the last few years and seems to have been eliminated for Texas since our supreme court refused to take jurisdiction in a declaratory judgment case arising from the Fifth Circuit's decision to stay the federal proceedings and refer the parties to seek a determination of an obscure point of law in the Texas courts.[92] The refusal of the Texas Supreme Court to recognize the declaratory judgment action as a "case or controversy" and characterizing it as one for an advisory opinion closes the door to the exercise of the abstention doctrine in similar cases in the future and will do away with this "highly cumbersome, expensive and time consuming" procedure.[93] The court's indirect suggestion to adopt the Florida certification practice has thus far not been heeded by the Texas legislature. The cases on the abstention doctrine have focused the attention of the law review writers on Texas[94] and may help to eliminate this doctrine which has led to many delays, particularly in the adjudication of diversity of citizenship cases in the federal courts.[95]

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[92] United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965).

[93] *Id.* at 864.

[94] See, *e.g.*, Comment, 73 YALE L.J. 850, 855 (1964) referring to "The Fifth Circuit's embellishments," and Comment, 40 TUL. L. REV. 578, 593 (1966).

[95] See Note, 20 Sw. L.J. 402, 408 (1966) quoting Justice Douglas' dissent in Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 228 (1960):

> Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled—absent unique and rare situations —to adjudication of their rights in the tribunals which Congress has empowered to act.

and mentioning the notorious Spector Motor Serv. Inc. v. McLaughlin, 323 U.S. 101 (1944) case which took nine years of litigation in five different courts as a consequence of the federal courts' abstention in a federal question jurisdiction situation. See WRIGHT, FEDERAL COURTS § 52, at 171 (1963).