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WHAT IS HAPPENING IN THE CONFLICT OF LAWS: THREE SUPREME COURT CASES

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An answer to the topical inquiry is "A great deal" but full explanation of the general answer to a very big question cannot be attempted in a single article. Instead, attention will be directed primarily to the opinions in three cases decided on the same day by the Supreme Court of the United States. These cases present problems in the segments of conflict of laws dealing with principles of *forum non conveniens* and full faith to a statute,[1] jurisdiction over a foreign corporation[2] and a combination of choice of laws rules and judicial recognition of an alimony award.[3] These cases arise from complex problems and illustrate the way in which the Court gradually works out rules constituting a progression or recession from the way in which established principles were formerly applied. The cases show the limitations necessarily imposed upon any court in deciding only issues actually raised by the record; but they also show that beneath the veil of a new decision may lie a variety of other problems which, in a piece-meal fashion, will sometime be uncovered and decided. The opinions also illustrate the judicial process in choosing between two basic and otherwise accepted legal premises, the application of which leads to opposite conclusions. Whichever view one takes, support for it may be found in either the majority or dissenting opinions. Consideration of each of these cases requires some presentation of background although space limitations preclude details. The approaches taken by the Supreme Court in respect to the three divergent problems, especially as related to some cases in other areas, may be taken as indicative of the extent to which freedom of choice of action by a state court under conflict of laws rules is to become limited by principles of constitutional law.[4] In that aspect emphasis may be placed upon the question marks as to other problems which are implicit in the cases.

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1. First Nat'l Bank of Chicago v. United Air Lines, Inc., 342 U.S. 396, 72 Sup. Ct. 421, 96 L. Ed. 360 (1952). This case was based upon Hughes v. Fetter, 341 U.S. 609, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951), discussed *infra*.
2. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 72 Sup. Ct. 413, 96 L. Ed. 335 (1952).
3. Sutton v. Leib, 342 U.S. 402, 72 Sup. Ct. 398, 96 L. Ed. 448 (1952).
4. A quaere which continues was raised by Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?* 15 MINN. L. REV. 161 (1931).

I

The decision in *First Nat. Bank of Chicago v. United Air Lines, Inc.*[5] was based upon a suit brought in a federal district court in Illinois by the Bank, as executor of a resident of Illinois, to recover damages for death by wrongful act occurring in Utah; the defendant was a Delaware corporation doing business in Utah and Illinois. A Utah statute provided a cause of action for death by wrongful act. An Illinois statute provided: "no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place." A summary judgment of dismissal was reversed by the Supreme Court of the United States which held that Illinois courts would be required to take jurisdiction of the case since application of the statute would violate principles of full faith and credit to a sister-state statute. The case involves issues as to jurisdiction of courts, *forum non conveniens* and full faith and credit; and notice is first to be taken as to some rules relative to them.

Historically the chief basis for judicial jurisdiction in personam has been that of physical power, originally resting upon the writs of *capias ad respondendum* and *capias ad satisfaciendum*[6] emphasizing power of enforcement of a judgment. In time, power of enforcement yielded to propriety of facts, usually resting on personal service, as a basis for adjudication of rights between the parties, and, when the latter existed, a court entertained the case.[7] Otherwise it was said not to have jurisdiction as, in modern terminology, lacking in due process of law.[8]

As social and economic situations changed, implications of physical power inherent in personal service led many courts and legislatures to make new approaches to the question of jurisdiction in personam. These approaches took two opposite forms — bases for extension of jurisdiction and refusal to exercise jurisdiction existing under former rules. The concept of jurisdiction was extended by some states when

5. 342 U.S. 396, 72 Sup. Ct. 421, 96 L. Ed. 360 (1952).

6. See Dodd, *Jurisdiction in Personal Actions*, 23 ILL. L. REV. 427 (1929); Foster, *The Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217, 44 HARV. L. REV. 41 (1930).

7. See Sunderland, *The Problem of Jurisdiction*, 4 TEXAS L. REV. 429 (1926).

8. The term "due process of law" may be used in either the constitutional law sense of the Fourteenth Amendment or in a common law sense. In each the meaning is that of "fairness and justice in the circumstances." In Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565 (1877), action was taken by a state court under common law principles prior to adoption of the Fourteenth Amendment; the case reached the Supreme Court from collateral proceedings in a federal district court. It is not entirely clear whether the Supreme Court decided the case on the basis of common law or constitutional compulsion.

an absent defendant was domiciled in the forum,[9] or had done certain kinds of acts as illustrated by the "nonresident motorist" statutes,[10] violation of "blue-sky laws"[11] and liability of a foreign corporation for tort although it was not otherwise doing business within the forum.[12]

As a limitation, rather than extension, of jurisdiction, sometimes courts refused to proceed with cases which, although within their jurisdiction in other senses, they thought more appropriately subject to trial elsewhere. Factors considered included the important contacts between the place where the operative facts occurred and the forum, problems raised by application of foreign rules of law, relative fairness to the parties in selecting the place of trial of the case, difficulties of proof through witnesses or documentary evidence[13] and, not least, the burden upon citizens of the forum by reason of tax expense and delays resulting from dockets crowded with claims arising elsewhere.[14] The

9. The general idea that domicil could constitutionally be used as a base for jurisdiction was implicit in McDonald v. Mabee, 243 U.S. 90, 37 Sup. Ct. 343, 61 L. Ed. 608 (1917), although the judgment involved was held to violate the due process clause by reason of deficiencies in respect to giving of notice. The Supreme Court was much more explicit in Milliken v. Meyer, 311 U.S. 457, 61 Sup. Ct. 339, 85 L. Ed. 278 (1940), although that case also does not constitute a square holding upon domicil as a base. Blackmer v. United States, 284 U.S. 421, 52, Sup. Ct. 252, 76 L. Ed. 375 (1931), upheld the validity of a congressional act basing jurisdiction upon *citizenship* in the United States. *Cf.* Skiriotes v. Florida, 313 U.S. 69, 61 Sup. Ct. 924, 85 L. Ed. 1193 (1941).

10. See Hess v. Pawloski, 274 U.S. 352, 47 Sup. Ct. 632, 71 L. Ed. 1091 (1927). Wuchter v. Pizutti, 276 U.S. 13, 48 Sup. Ct. 259, 72 L. Ed. 446 (1928), indicated approval of the jurisdictional base but held the statute invalid because of insufficient provisions for giving notice.

11. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 55 Sup. Ct. 553, 79 L. Ed. 1097 (1935). See Dubin v. Philadelphia, 34 Pa. D. & C. 61 (1938), upholding validity of a statute conferring jurisdiction in personam on constructive notice to a nonresident when injury had arisen from a defective condition of his property within the forum state.

12. Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951), upheld the validity of a statute providing that if a foreign corporation should do an act within the state constituting a tort to a resident of the state, this should be taken as "doing business" and the Secretary of State taken as its agent for receipt of process.

13. Heime v. New York Life Ins. Co., 45 F.2d 426 (D. Ore. 1930), was one of a series of suits brought by assignees of citizens of Germany on two hundred forty life insurance policies issued by American companies doing business in Germany. The forum had no connection with the operative facts. In dismissing the suit, the Court stated: "To require the defendants to defend the actions in this district would impose upon them great and unnecessary inconvenience and expense, and probably compel them to produce here [three thousand miles from their home office] numerous records, books, and papers, all of which are in daily use by it in taking care of current business. In addition it would no doubt consume months of the time of this court to try and dispose of these cases, thus necessarily disarranging the calendar, resulting in delay, inconvenience, and expense to other litigants who are entitled to invoke its jurisdiction." *Id.* at 426.

14. In Davis v. Farmers Co-operative Equity Co., 262 U.S. 312, 43 Sup. Ct. 556, 67 L. Ed. 996 (1923), the opinion contained this note: "A message, dated February 2, 1923, by the Governor of Minnesota to its Legislature, recites that a recent examination of the calendars of the district courts in 67 of the 87 counties of the State disclosed that in these counties there were then pending 1,028 personal injury cases in which nonresident plaintiffs seek damages ag-

principle under which refusal of jurisdiction was made is expressed in the term *forum non conveniens.*[15] Until the Supreme Court should decide, important questions were: Whether state refusal of jurisdiction would be valid under the privileges and immunities and due process clauses? Whether the principle would apply in federal courts? Whether its use might be proper in some types of cases but not in others as, for example, claims arising under the Federal Employers' Liability Act?[16] What effects might flow from a dismissal as, for example, having the claim barred in the "proper" state due to running of the statute of limitations of the latter?

The decision by the Supreme Court in *Gulf Oil Co. v. Gilbert*[17] indicated answers to some of the questions. In that case suit was brought on diversity jurisdiction in a federal court in New York by a resident of Virginia to recover more than $365,000 from a corporation organized in Pennsylvania and doing business in Virginia and New York. The claim was for damages occasioned by explosion and fire destroying plaintiff's warehouse in Virginia; there were no operative facts connected with New York. The questions were whether the district court had power to dismiss under the doctrine of *forum non conveniens* and whether its dismissal was proper in this case. The opinion discussed a number of cases bearing upon dismissal of an action[18] and gave an affirmative answer to both questions. A dissenting opinion expressed

gregating nearly $26,000,000 from foreign railroad corporations which do not operate any line within Minnesota." 262 U.S. at 316.

15. Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 COL. L. REV. 1 (1929), pointed out the merits of the principle, that it was not new, had long been applied by various courts although usually without a name and that right of access of a nonresident to courts of a state was not *per se* within the privileges and immunities clause of the Fourteenth Amendment. An abuse of the principles, when the operative facts had a sufficient nexus with the forum, might, however, constitute a violation of the due process clause. Barrett, *The Doctrine of Forum Non Conveniens,* 35 CALIF. L. REV. 380, 388 (1947), points out that most states have not even considered the doctrine and that it is in operation in barely half a dozen states. See also Dainow, *The Inappropriate Forum,* 29 ILL. L. REV. 867 (1935).

16. 53 STAT. 1404 (1939), 45 U.S.C.A. §§ 51 *et seq.* (1943).

17. 330 U.S. 501, 67 Sup. Ct. 839, 91 L. Ed. 1055 (1947). See also Koster v. Lumbermens Mutual Casualty Corp., 330 U.S. 518, 67 Sup. Ct. 828, 91 L. Ed. 1067 (1947); Braucher, *The Inconvenient Federal Forum,* 60 HARV. L. REV. 908 (1947).

18. There are distinct bases of dismissal, such as lack of jurisdiction and refusal to interfere with the internal affairs of a foreign corporation, but the Court has often subsumed these under the phrase *forum non conveniens.* See Williams v. Green Bay & W.R.R., 326 U.S. 549, 66 Sup. Ct. 284, 90 L. Ed. 311 (1945); Koster v. Lumbermens Mutual Casualty Co., *supra* note 17.

While the opinion in Douglas v. New York, N.H. & H. Ry., 279 U.S. 377, 49 Sup. Ct. 355, 73 L. Ed. 747 (1929), in passing upon the validity of a New York statute, spoke of dismissal of suit as not violating the privileges and immunities clause, it is not clear whether this is a square holding, since the Court had, in Anglo-American Provision Co. v. Davis Provision Co., 191 U.S. 373, 24 Sup. Ct. 92, 48 L. Ed. 225 (1903), upheld a dismissal under the same statute on the ground that it deprived the New York courts of *jurisdiction.* As to jurisdiction, see Kenney v. Supreme Lodge, 252 U.S. 411, 40 Sup. Ct. 371, 64 L. Ed. 638 (1920); Fauntleroy v. Lum, 210 U.S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039 (1908). The opinions in each of the last three cases were written by Justice Holmes.

the view that such a rule should come through a congressional statute. While the opinions did not discuss and the case, coming up from a lower federal court, could not squarely hold that application of the principle of *forum non conveniens* did not *per se* violate the privileges and immunities clause of the Fourteenth Amendment, that result would be inferential.[19]

Congress also was aware of these problems and in 1948 passed an act[20] providing: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." There is, as yet, no effective provision for transfer of cases, as distinguished from re-filing, from one state to another. If transfer were possible, it probably would be taken as a continuation of the suit to avoid problems connected with the running of the statute of limitations. In many instances a ruling upon dismissal could be made early enough to permit re-filing in another state within the period limited by the latter.[21] Also discretionary dismissal might be conditioned upon the defendant waiving the bar of limitations.

The chain of decisions regarding dismissal or injunction of suits brought under terms of the Federal Employers' Liability Act[22] constitutes a strong source of inference as to propriety of state action under the doctrine of *forum non conveniens* in the less difficult situations where no federal statute is involved. The provisions for venue under that act have raised many issues concerning compulsory jurisdiction in state courts. Problems of dismissal or injunction of suits brought under the act have been particularly acute because of the facts of the cases involved, the theory of supremacy of federal statutes and operation of the privileges and immunities clause. The act provides for concurrent jurisdiction in the state and federal courts. By *Mondou v. New York, N.H. & H. Ry.*[23] it was decided that the provisions of the act were mandatory upon the states in that they could not generally refuse to accept jurisdiction of this exceptional type of case.

Doubt was cast upon this proposition, however, in *Douglas v. New*

19. A decision by the Supreme Court regarding rules not therein directly applicable to state action may nevertheless be taken as encouragement to the states to follow similar lines. See Whitney v. Madden, 400 Ill. 185, 79 N.E.2d 593 (1948) (dismissing suit); State *ex rel.* Southern Ry. v. Mayfield, 362 Mo. 101, 240 S.W.2d 106 (1951) (retaining jurisdiction).

20. Judicial Code, 62 STAT. 937 (1948), 28 U.S.C.A. § 1404(a) (1948).

21. Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 939 (1947), suggests that legislation for transfer between state courts might be upheld under the full faith and credit clause.

22. 53 STAT. 1404 (1939), 45 U.S.C.A. §§ 51 *et seq.* (1943).

23. 223 U.S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327 (1912). As to venue the act provides: "Under this Act an action may be brought in a Circuit Court of the United States, in the district of residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action . . . ." apparently disregarding lack of connection between the forum and other operative facts.

York, N.H. & H. Ry.[24] Additional questions were raised by the decisions in *Baltimore & Ohio Ry. v. Kepner*[25] and *Miles v. Illinois Central Ry.*[26] In the *Miles* case, Tennessee had enjoined one of its residents from maintaining suit in Missouri. The Supreme Court held this improper and parts of the opinion could be interpreted as meaning that a state must retain jurisdiction of a F.E.L.A. case. But in the *Gulf Oil* case[27] the Court referred to the *Miles* and other cases:

> "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*. But this was because the special venue act under which these cases are brought was believed to require it. . . . Those decisions do not purport to modify the doctrine as to other cases governed by the general venue statutes."[28]

In *State of Missouri* ex rel. *Southern Ry. v. Mayfield*,[29] the question was whether a Missouri court might dismiss an action brought under the F.E.L.A. Mr. Justice Frankfurter, speaking for the Court, said:

> "A decision by the highest court of a State determining that the doctrine of forum non conveniens cannot bar an action based on the Federal Employers' Liability Act, in the circumstances before us, may rest on one of three theories. (1) According to its own notions of procedural policy, a State may reject, as it may accept, the doctrine for all causes of action begun in its courts. If denial of a motion to dismiss an action under the Federal Employers' Liability Act is rested on such a general local practice, no federal issue comes into play. (It is assumed of course that the State has acquired jurisdiction over the defendant.) (2) By reason of the Privileges-and-Immunities Clause of the Constitution, a State may not discriminate against citizens of sister States. Art. IV, § 2. Therefore Missouri cannot allow suits by non-resident Missourians or liability under the Federal Employers' Liability Act arising out of conduct outside that State and discriminatorily deny access to its courts to a non-resident who is a citizen of another State. But if a State chooses to '[prefer] residents in access to often overcrowded Courts' and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control. This is true also of actions for personal injuries under the Employers' Liability Act. . . . Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of forum non conveniens, a question of State law not open to review here."[30]

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24. 279 U.S. 377, 49 Sup. Ct. 355, 73 L. Ed. 747 (1929). The opinion stated: "As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse." 279 U.S. at 387.
25. 314 U.S. 44, 62 Sup. Ct. 6, 86 L. Ed. 314 (1941).
26. 315 U.S. 698, 62 Sup. Ct. 827, 86 L. Ed. 1129 (1942).
27. Gulf Oil Co. v. Gilbert, 330 U.S. 501, 67 Sup. Ct. 839, 91 L. Ed. 1055 (1947).
28. 330 U.S. at 505.
29. 340 U.S. 1, 71 Sup. Ct. 1, 95 L. Ed. 3 (1950).
30. 340 U.S. at 3.

It thus appears that the doctrine of *forum non conveniens* may be applied by state courts — even to F.E.L.A. cases — provided that there is no discrimination against citizens of other states. That is, the opportunity of a nonresident to bring suit is not *per se* one of the privileges protected by the Constitution. Misapplication of the principle in some particular situations might, however, violate the due process clause.

Before considering the effect of the decisions in *First Nat. Bank of Chicago v. United Air Lines, Inc.*[31] and *Hughes v. Fetter*[32] on which it was based, in reference to application of the principles expressed above relating to dismissals, it is necessary to notice some of the rules and some of the cases relating to full faith and credit.

The full faith and credit clause of Article IV of the Constitution involved a delegation of sovereign power by the states and under it the provision that "the Congress shall have the power by appropriate legislation to prescribe the mode of authentication of the same" was early implemented by Congress in respect to *judgments* but not as to statutes. It was first thought that in some exceptional circumstances strong local policy would permit a state to deny recognition of a judgment rendered in another state, but in time possible exceptions have been materially reduced.[33]

Kenney v. Supreme Lodge,[34] like the *Hughes* and *Air Lines* cases, required recognition of rights arising under a "death by wrongful act" statute. In the *Kenney* case a resident of Illinois had caused death in Alabama by operation of his automobile. The administrator procured a judgment in Alabama but, being unable to collect, brought suit in Illinois upon the judgment. An Illinois statute at that time provided that claims for death by wrongful act be limited to injuries occurring within that state. An order dismissing the suit upon the judgment was reversed by the Supreme Court of the United States under the full faith and credit clause. To that extent the policy of Illinois must yield. Otherwise it would be possible for a resident of Illinois to go outside of that state, negligently kill some person, have a judgment rendered against him uncollectable in the state where the tort occurred and

31. 342 U.S. 396, 72 Sup. Ct. 421, 96 L. Ed. 360 (1952).
32. 341 U.S. 609, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951).
33. See, *e.g.*, Williams v. North Carolina, 317 U.S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279 (1942), and 325 U.S. 226, 65 Sup. Ct. 1092, 89 L. Ed. 1577 (1945) (divorce); Milwaukee County v. M. E. White Co., 296 U.S. 268, 56 Sup. Ct. 229, 80 L. Ed. 220 (1935) (revenue law); Yarborough v. Yarborough, 290 U.S. 202, 54 Sup. Ct. 181, 78 L. Ed. 269 (1933) (support of child); Fauntleroy v. Lum, 210 U.S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039 (1905); Haddock v. Haddock, 201 U.S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867 (1906); Atherton v. Atherton, 181 U.S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794 (1901); Huntington v. Atrill, 146 U.S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892) (penal law). See also Hughes v. Fetter, 341 U.S. 609, 614, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951) (dissenting opinion).
34. 252 U.S. 411, 40 Sup. Ct. 371, 64 L. Ed. 638 (1920).

then have the Illinois law protect him from suit on the judgment because no act had occurred in that state.

Until recently the provisions of Article IV as to statutes had not been implemented by Congress and consequently there were questions whether the provision was self-executing and, if so, whether there would be wider play for state policy than in respect to judgments. The first question was answered in *Bradford Electric Co. v. Clapper*,[35] in 1932, where Mr. Justice Brandeis spoke for the Court in holding that Vermont was required to give full faith and credit to a workmen's compensation statute of New Hampshire. The clause was self-executing. In 1935 Mr. Justice Stone wrote for the Court in what was the next[36] of a series of cases which started delineation of the scope of compulsory recognition of sister-state statutes. It appeared that, in comparison with full faith to *judgments*, there might exist a more substantial but incompletely defined area within which policy of the forum state could prevail over a conflicting policy expressed in the statute of another state.[37]

It would seem that these principles would not necessarily be changed by action of Congress[38] amending the act on authentication by including state statutes. But limitations of the general principles, even before the statute, were strongly expressed in *Magnolia Petroleum Co. v. Hunt*.[39] In that case a resident of Louisiana was there hired by a corporation and sent into Texas where he received injury. Application was made to a workmen's compensation board in Texas and an award

35. 286 U.S. 145, 52 Sup. Ct. 571, 76 L. Ed. 1026 (1932).

36. Alaska Packers Ass'n v. Industrial Accident Comm'n of California, 294 U.S. 532, 55 Sup. Ct. 518, 79 L. Ed. 1044 (1935). Other compensation cases include Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 59 Sup. Ct. 629, 83 L. Ed. 940 (1939); Ohio v. Chattanooga Boiler & Tank Co., 289 U.S. 439, 53 Sup. Ct. 663, 77 L. Ed. 1307 (1933).

37. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 Sup. Ct. 1020, 85 L. Ed. 1477 (1941), considered full faith and credit in Delaware to a statute of New York providing for interest as a part of damages. The Court stated: "Nothing in the Constitution ensures unlimited extraterritorial recognition of all statutes or of any statute under all circumstances. . . . The full faith and credit clause does not go so far as to compel Delaware to apply § 480 [of the New York Civil Practice Act] if such application would interfere with its local policy." 313 U.S. at 498.

The majority opinion in the *Hughes* case stated: "We have recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for this Court to choose in each case between the competing public policies involved." Hughes v. Fetter, 341 U.S. 609, 611, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951). See also Comment, 51 MICH. L. REV. 267 (1952), which discusses full faith to statutes as applied to particular types of transactions, such as workmen's compensation.

38. 62 STAT. 947 (1948) as amended, 28 U.S.C.A. § 1738 (1950).

39. 320 U.S. 430, 64 Sup. Ct. 208, 88 L. Ed. 149 (1943). And see Cheatham, *Res Judicata and the Full Faith and Credit Clause, Magnolia Petroleum v. Hunt*, 44 COL. L. REV. 330 (1944); Holt, *Reflections on Magnolia Petroleum Co. v. Hunt*, 30 CORNELL L.Q. 160 (1944); Wolkin, *Workmen's Compensation Award — Commonplace or Anomaly in Full Faith and Credit Pattern?* 92 U. OF PA. L. REV. 401 (1944).

given under its law. The amount provided for injury by the Texas statute was less than that to which one would be entitled by the Louisiana law. Under this statute any amount awarded was to be taken as final. On his return, the employee petitioned for and received an additional award being the difference between that allowed under the Texas law and that provided in Louisiana but this was reversed by the Supreme Court on the ground that the Texas award was intended as final.

There were present differing social and economic policies in Texas and Louisiana; there were also present legal policy factors roughly expressed in the phrase "res judicata." Principles of res judicata as applied to the result in an administrative proceeding[40] were sufficiently important to override the more liberal policy of Louisiana where the injured employee contracted, resided at the time of injury, now resides and will there need the additional funds claimed from his employer or an insurance carrier.

Then some question marks appear. Suppose that the Texas statute sought to avoid the rule in the *Magnolia* case and provided that the award should not be final; the employee should be entitled to receive anything additional which Louisiana statutes might afford had the proceeding been brought in the latter state. Would Louisiana be *permitted* or *compelled* to increase the award under the benign expression of Texas policy *authorizing* Louisiana to effectuate its own statutory rule? On the basis that the Texas award is not final, it would seem that Louisiana would be *permitted* to proceed.

Suppose, however, that Louisiana decides that it will not permit any increase; the amount determined by the Texas administrative tribunal is to be taken as final so far as Louisiana is concerned. Some questions are apparent. Would the decision by the Louisiana court violate the due process clause? Would it violate the full faith and credit clause? If the answer to either question is affirmative, to what extent would Texas effectually be adopting for Louisiana or forcing upon it a rule of policy in the conflict of laws?[41] While this issue has not yet been decided, it is possible that some of the answers are supplied in *Industrial Commission of Wisconsin v. McCartin*,[42] although the relationship of the parties to the places of contract and injury were the reverse of those in the *Magnolia* case. In the *McCartin* case the employee and employer were residents of Illinois where the contract was made; injury occurred in Wisconsin under whose law a higher

40. See Broderick v. Rosner, 294 U.S. 629, 55 Sup. Ct. 589, 79 L. Ed. 1100 (1935); Abel, *Administrative Determinations and Full Faith and Credit*, 22 IOWA L. REV. 461 (1937).

41. See Notes, 47 COL. L. REV. 846 (1947), 33 CORNELL L.Q. 310 (1947), 36 GEO. L.J. 278 (1948), 60 HARV. L. REV. 993 (1947), 23 IND. L.J. 214 (1948).

42. 330 U.S. 622, 67 Sup. Ct. 886, 91 L. Ed. 1140 (1947).

award would be given than in Illinois. A compensation award was first entered in Illinois for the amount provided by its statute but, recognizing that Wisconsin provided for a higher amount, the award expressly reserved to the employee the right to pursue a further remedy in Wisconsin. Application was then made; the commissioner, over objection by the employer and his insurance carrier, treated the Illinois award as not being final and ordered additional payment. The Wisconsin Supreme Court set aside the award on the authority of the *Magnolia* case. This was reversed under the full faith and credit clause by the Supreme Court of the United States which found that the Illinois statute was not "designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment." The opinion stated in part:

> "But when the reservation in this award is read against the background of the Illinois Workmen's Compensation Act, it becomes clear that the reservation spells out what we believe to be implied in that Act — namely, that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state. And in the setting of this case, that fact is of decisive significance.
>
> "Since this Illinois award is final and conclusive only as to rights arising in Illinois, Wisconsin is free under the full faith and credit clause to grant an award of compensation in accord with its own laws. *Magnolia Petroleum Co. v. Hunt* . . . thus does not control this case."[43]

There are manifest differences between a state being denied power to act, being permitted to act and being compelled to do so in respect to a compensation award. In the *Magnolia* and *McCartin* cases the policies of Louisiana and Wisconsin as to the application of their own statutes in relation to those of Texas and Illinois were subordinated.

Hughes v. Fetter[44] arose from dismissal of a suit in Wisconsin based upon death by wrongful act occurring in Illinois. The defendant was a resident of Wisconsin, and both Illinois and Wisconsin had "death by wrongful act" statutes. Illinois also had a "nonresident motorist" statute under which it would have been possible to procure a judgment against an absent defendant by constructive service. The Wisconsin death statute provided that no suit should be brought in its courts when the cause of action arose outside of that state. Under the rule in *Kenney v. Supreme Lodge*[45] Wisconsin would be required to retain a suit upon an Illinois *judgment* but the claim was filed upon the original cause of action. The question was whether Wisconsin courts

43. Industrial Comm'n of Wisconsin v. McCartin, 330 U.S. 622, 630, 67 Sup. Ct. 886, 91 L. Ed. 1140 (1947).
44. 341 U.S. 609, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951).
45. 252 U.S. 411, 40 Sup. Ct. 371, 64 L. Ed. 638 (1920).

must entertain the suit based upon the Illinois statute. The Wisconsin court dismissed the suit and this was reversed by the Supreme Court of the United States, holding that full faith and credit must be given to the Illinois statute. The majority opinion stated:

> "We hold that Wisconsin's policy must give way. That state has no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature, the exclusionary rule extending only so far as to bar actions for death not caused locally. The Wisconsin policy, moreover, cannot be considered as an application of the *forum non conveniens* doctrine, whatever effect that doctrine might be given if its use resulted in denying enforcement to public acts of other states."[46]

It is to be noted, however, that the Wisconsin statute contained no reference to whether suit could be maintained in another state. The majority opinion indicated that, as in the *Kenney* case, a claimant might otherwise have had no forum in which suit could be maintained. It was not clear that convenience or fairness to the defendant or the burden upon the forum state outweighed the injurious consequences to plaintiff of a contrary ruling. The dissenting opinion expressed the following points as to these propositions:

> "In the tort action before us, there is little reason to impose a 'state of vassalage' on the forum. The liability here imposed does not rest on a pre-existing relationship between the plaintiff and defendant. There is consequently no need for fixed rules which would enable parties, at the time they enter into a transaction, to predict its consequences. . . .
>
> "This Court should certainly not require that the forum deny its own law and follow the tort law of another State where there is a reasonable basis for the forum to close its courts to the foreign cause of action. The decision of Wisconsin to open its courts to actions for wrongful deaths within the State but close them to actions for deaths outside the State may not satisfy everyone's notion of wise policy. See *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918). But it is neither novel nor without reason. Compare the similar Illinois statute which was before this Court in *Kenney v. Supreme Lodge, supra.* Wisconsin may be willing to grant a right of action where witnesses will be available in Wisconsin and the courts are acquainted with a detailed local statute and cases construing it. It may not wish to subject residents to suit where out-of-state witnesses will be difficult to bring before the court, and where the court will be faced with the alternative of applying a complex foreign statute—perhaps inconsistent with that of Wisconsin on important issues — or fitting the statute to the Wisconsin pattern. The legislature may well feel that it is better to allow the courts of the State where the accident occurred to construe and apply its own statute, and that the exceptional case where the defendant cannot be served in the State where the accident occurred does not warrant a general statute allowing suit in the Wisconsin courts. The

46. Hughes v. Fetter, 341 U.S. 609, 612-13, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951).

various wrongful death statutes are inconsistent on such issues as beneficiaries, the party who may bring suit, limitations on liability, comparative negligence, and the measure of damages."[47]

The next step was taken in *First Nat. Bank of Chicago v. United Air Lines, Inc.*,[48] one of the cases indicated at the beginning of this article. There the lower federal courts followed the Illinois statute providing for dismissal when a suit for death by wrongful act could be maintained in the place where the tort occurred, doing so under the rule in *Erie R.R. v. Tompkins*.[49] This was reversed by the Supreme Court as denying full faith and credit to the Utah death statute. The majority opinion written by Mr. Justice Black stated:

"The Wisconsin statute invalidated in *Hughes v. Fetter*, barred suit in the Wisconsin courts for any wrongful death caused outside the state. The Illinois statute before us today is the exact duplicate of the Wisconsin statute with the single exception that suit is permitted in Illinois under another state's wrongful death statute if service of process cannot be had on the defendant in the state where the death was brought about. That Illinois is willing for its courts to try some out-of-state death actions is no reason for its refusal to grant full faith and credit as to others. The reasons supporting our invalidation of Wisconsin's statute apply with equal force to that of Illinois. This is true although Illinois agrees to try cases where service cannot be obtained in another state. While we said in *Hughes v. Fetter* that it was relevant that Wisconsin might be the only state in which service could be had on one of the defendants, we were careful to point out that this fact was not crucial. Nor is it crucial here that Illinois only excludes cases that can be tried in other states. We hold again that the Full Faith and Credit Clause forbids such conclusion. The District Court should not have dismissed this case."[50]

Justices Reed and Frankfurter dissented on the ground, expressed in their dissenting opinion in the *Hughes* case, that the policy of the forum should be paramount.[51] Justices Jackson and Minton concurred

47. 341 U.S. at 618-19 (dissenting opinion).
48. 342 U.S. 396, 72 Sup. Ct. 421, 96 L. Ed. 360 (1952).
49. 304 U.S. 84, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938).
50. First Nat. Bank of Chicago v. United Air Lines, Inc., 342 U.S. 396, 398, 72 Sup. Ct. 421, 96 L. Ed. 360 (1952).
51. "No claim is made that Wisconsin has discriminated against the citizens of other States and thus violated Art. IV, § 2 of the Constitution. . . . Nor is a claim made that the lack of a forum in Wisconsin deprives the plaintiff of due process. . . . Nor is it argued that Wisconsin is flouting a federal statute. . . . The only question before us is how far the Full Faith and Credit Clause undercuts the purpose of the Constitution, made explicit by the Tenth Amendment, to leave the conduct of domestic affairs to the States. Few interests are of more dominant local concern than matters governing the administration of law. This vital interest of the States should not be sacrificed in the interest of a merely literal reading of the Full Faith and Credit Clause.

"There is no support, either in reason or in the cases, for holding that this Court is to make a *de novo* choice between the policies underlying the laws of Wisconsin and Illinois. I cannot believe that the Full Faith and Credit Clause provided a 'writer's inkhorn' so that this Court might separate right from wrong. '*Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force

specially in the *Air Lines* case on the reason that the rule of the *Erie* case did not apply to this situation.

The special opinion went further, however, and also considered constitutional compulsion in application of choice of laws rules to some very important situations not dealt with by the majority of the Court. The special opinion stated:

> "The establishment of jurisdiction is, however, the beginning and not the end of the decision of the case in the trial court. What law must be applied in adjudicating the substantive rights of these parties? The opinion of the Court is silent on this point, but its line of reasoning seems to imply that the federal trial court must look to Illinois law for the conflicts rule which would govern this kind of case if brought in Illinois courts. Since Illinois has, pursuant to statute, refused to entertain such actions as this, it might be supposed that such law would be hard to find.
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> "In my view, the federal court no more derives substantive law for this case from Illinois than it does its jurisdiction. For regardless of what Illinois might say on this subject, the Constitution has 'otherwise provided.' I believe, as expressed in *Hughes v. Fetter* that the State was free to refuse this case a forum, but, if it undertook to adjudicate the rights of the parties, the Constitution would require it to apply the law of Utah, because all elements of the wrong alleged here occurred in Utah. For the essence of the Full Faith and Credit Clause is that certain transactions, wherever in the United States they may be litigated, shall have the same legal consequences as they would have in the place where they occurred....
>
> "There is undoubtedly some area of freedom for state conflicts law outside the requirements of the Full Faith and Credit Clause. In such matters, unreached by constitutional law, the state rule would prevail in a diversity court . . . but if a transaction is so associated with one jurisdiction that the Constitution compels any forum in which the transaction is litigated to apply the law of that jurisdiction is it not the Constitution instead of the state conflicts law which determines what law the federal court shall apply?
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> ". . . Since as a matter of constitutional provision liability for this alleged tort must be adjudicated under Utah law and, the case being within the statutory jurisdiction of the District Court, it may ascertain and apply the law of Utah without straining it through the Illinois sieve."[52]

Most state statutes are drafted in terms applicable only to events occurring within the state of enactment and procedures to be followed in its own courts. "Death by wrongful act" statutes, for example, fall within this type. Relatively few state statutes are drafted in terms

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given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum.' Mr. Justice Stone, in Alaska Packers Assn. v. Commission. . . ." Hughes v. Fetter, 341 U.S. 609, 619-20, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951) (dissenting opinion).

52. First Nat. Bank of Chicago v. United Air Lines, 342 U.S. 396, 400-01, 72 Sup. Ct. 421, 96 L. Ed. 441 (1952) (concurring opinion).

designed to express policy in problems raised by conflict of laws; and, even when so done, the wording of a statute is as to rules to be applied by courts within the state. Only rarely would there be a statute *expressly* worded to declare that another state shall take jurisdiction of a case or apply a particular rule. One of the problems of a state court is that of determining whether its own statute couched in general terms expresses a rule of policy which should and could constitutionally be applied in a conflict of laws case before it. Another phase is the problem of a court in a second state in determining whether a sister-state statute was intended to include a conflict of laws rule which another state should follow; if so, whether that rule should or constitutionally could be adopted; and, if there is a statute of its own state, in general or specific terms bearing upon the issue, whether any rules of policy of the forum state should and constitutionally may be paramount. Gradually the decisions by the Supreme Court are giving answers — restriction of forum policy here, there and there. Majority and dissenting opinions show that new cases will arise calling for application, extension or limitation of the principle which is basic in the current case.

One question is as to circumstances in which a court may decline to hear a case otherwise within its jurisdiction. The impact of full faith and credit upon the doctrine of *forum non conveniens*, as expressed in the *Air Lines* case, prevents application of the latter principle when the plaintiff's right is based upon a statute and the forum is, in effect, compelled to exercise physical power. The Illinois statute being unconstitutional as to dismissal in the circumstances, these questions arise: How could Illinois have more clearly set forth the principle of *forum non conveniens* than by this statute? Of what significance is it that the statute makes no discrimination against nonresidents? That in this particular case it was applied when the decedent had been a resident of the forum? Is it an unreasonable burden in these, or what other, circumstances to require a claimant to sue in the state where the injury and death occurred? And where, presumably, the witnesses and other sources of information could easily be furnished? And where, from anything that appears, the plaintiff could collect on the judgment?

There have been numerous cases applying the full faith and credit clause to *judgments* when the state of rendition had *jurisdiction over the parties*. Also an area has been developed of Supreme Court control over choice of laws rules through the due process clause and the full faith and credit clause as applied to statutes,[53] the latter being used when the due process clause might also have been available to

53. See CARNAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS 41-63 (full faith), 63-84 (due process) (1942).

reach the same results. The opinions in the *Air Lines* case, insofar as they relate to choice of laws rules, suggest some additional questions as to what is left outside the scope of the full faith clause. As the due process clause has been used to correct state application of "an improper" choice of laws rule *not* based upon a statute, to what extent will the full faith and credit clause now also be used to achieve the same result? Will that clause, as indicated in the special opinion in the *Air Lines* case, be used only within limited areas, such as the relationship under workmen's compensation laws? Or will it be extended broadly? To what extent is interplay of state policy still permissible under the full faith and due process clauses? As of now, *common law rules* appear to be outside the full faith clause. To what extent would that interplay be eliminated by a state casting present common law rules into statutory forms?

What is happening in the conflict of laws? To what extent is application of its principles which permit exercise of forum policy to be subject to principles of constitutional law which may achieve uniformity of result as to jurisdiction and as to choice of law rules?

II.

Questions of judicial jurisdiction over foreign corporations were presented in *Perkins v. Benguet Consolidated Mining Co.*[54] A nonresident brought two suits in Ohio against a Philippine corporation, doing business in Ohio, for failure to issue stock certificates and for dividends connected with them. The claims arose from activities outside Ohio. Service of process was made upon the president of the corporation in Ohio.[55] Additional facts and some of the problems were indicated by the Court:

> "This case calls for an answer to the question whether the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States precludes Ohio from subjecting a foreign corporation to the jurisdiction of its courts in this action in personam. The corporation has been carrying on in Ohio a continuous and systematic, but limited, part of its general business. Its president, while engaged in doing such business in Ohio, has been served with summons in this proceeding. The cause of action sued upon did not arise in Ohio and does not relate to the corpora-

54. 342 U.S. 437, 72 Sup. Ct. 413, 96 L. Ed. 335 (1952).

55. A note to the opinion is as follows regarding the Ohio statutes: "Ohio requires a foreign corporation to secure a license to transact 'business' in that State, Throckmorton's Ohio Code, 1940, § 8625-4, and to appoint a 'designated agent' upon whom process may be served, §§ 8625-2, 8625-5. The mining company has neither secured such a license nor designated such an agent. While this may make it subject to penalties and handicaps, this does not prevent it from transacting business or being sued. § 8625-25. If it has a 'managing agent' in Ohio, service may be made upon him. § 11290. Such service is a permissive alternative to service on the corporation through its president or other chief officer. § 11288. Lively v. Picton, 218 F. 401, 406-07 (C.A. 6th Cir.)." 342 U.S. at 439, n.2.

> tion's activities there. For the reasons hereafter stated, we hold that the Fourteenth Amendment leaves Ohio free to take or decline jurisdiction over the corporation."[56]

The case is significant as the most recent one dealing with jurisdiction over a foreign corporation and for its holding that Ohio was free to take or reject such suits. While this particular claim did not present issues of interstate commerce, an important question is whether the principles expressed in the opinion will extend to them.

There are often strong reasons for a state taking jurisdiction over a foreign corporation; however, there must be a balance of fairness as to the defendant in subjecting it to suit there. Divergent factors bear upon this problem. The corporate activities may or may not be sufficient to constitute "doing business" within the state. It may be engaged in local or interstate business. The cause of action may have arisen within or without the state. The corporation may have withdrawn from the state before the suit was filed. The basis of jurisdiction is statutory, and there are important variations and differences of inclusion in statutory types. Statutory provisions as to agency for receipt of process fall into three main types, with partial recognition that the corporation may or may not make a specific designation as called for: The corporation shall designate an agent on whom process may be served; an indicated state official, such as the Secretary of State, shall be considered its agent without specific appointment; the corporation shall designate an agent but, if it fails to do so or withdraws the appointment, then service may be made upon a substitute such as the Secretary of State or any agent of the corporation. A statute may provide for designation of an agent to receive process on causes of action arising within or without the state[57] and

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56. 342 U.S. at 438. In a note the Court gave the following quotation from the opinion of the Ohio Court: "However, the doing of business in a state by a foreign corporation, which has not appointed a statutory agent upon whom service of process against the corporation can be made in that state or otherwise consented to service of summons upon it in actions brought in that state, will not make the corporation subject to service of summons in an action in personam brought in the courts of that state to enforce a cause of action in no way related to the business or activities of the corporation in that state. *Old Wayne Mutual Life Assn. of Indianapolis v. McDonough*, 204 U.S., 8, 22, 23, 51 L. Ed. 345, 27 S. Ct., 236; *Simon v. Southern Ry. Co.*, 236 U.S., 115, 129, 130 and 132, 59 L. Ed., 492, 35 S. Ct., 255. See, also, *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S., 93, 95 and 96, 61 L. Ed., 610, 37 S. Ct., 344; *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*, 257 U.S., 213, 215 and 216, 66 L. Ed., 201, 42 S. Ct., 84; *International Shoe Co. v. Washington*, 326 U.S., 310, 319 and 320, 90 L. Ed., 95, 66 S. Ct., 154.

"An examination of the opinions of the Supreme Court of the United States in the foregoing cases will clearly disclose that service of summons in such an instance would be void as wanting in due process of law." 155 Ohio St. 116, 119-20, 98 N.E.2d 33, 35.

57. These statutes are usually construed strictly and, for example, jurisdiction over a cause of action arising outside the state will not be implied. For construction see Hunter v. Mutual Reserve Life Ins. Co., 218 U.S. 573, 31 Sup.

may provide that the agency shall continue even though the corporation otherwise withdraws from business within the state.[58]

The Supreme Court has, on occasion, upheld jurisdiction in cases presenting combinations of facts and types of statutes mentioned above. These have included corporations engaged in local and interstate business, causes of action arising within and without the state, suits brought after the corporation has withdrawn and with service of process upon different types of agents.[59] The constitutional bases for jurisdiction in the circumstances, however, have not been clearly defined. Uncertainty has resulted because of a shift, from time to time, of reasons on which jurisdiction is to be predicated. Opinions have stated that the corporation has "submitted," or is subject to suit because it was "present" or that it had "consented" to jurisdiction. These phrases may be only legal conclusions derived from the facts and "consent" may be fictitious as well as actual. Sometimes an opinion has combined several reasons.[60] The fact that the Court has given different reasons shows that none has been satisfactory as an explanation or applicable in all types of factual and statutory elements.[61]

Ct. 127, 54 L. Ed. 1155 (1910); Old Wayne Life Ass'n v. McDonough, 204 U.S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345 (1907).

58. See, *e.g.*, Washington v. Superior Court, 289 U.S. 361, 53 Sup. Ct. 624, 77 L. Ed. 1256 (1933); International Harvester Co. v. Kentucky, 234 U.S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479 (1914); Hunter v. Mutual Reserve Life Ins. Co., *supra* note 57; Mutual Reserve Fund Life Ass'n v. Phelps, 190 U.S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987 (1903).

59. See, e.g., *Ex parte* Schollenberger, 96 U.S. 369, 24 L. Ed. 853 (1877) (intrastate business, cause of action arose within forum and an agent had been appointed); Connecticut Mutual Life Ins. Co. v. Spratley, 172 U.S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569 (1899) (intrastate business, cause of action arose within forum, statute provided for service upon any corporate agent and the corporation had withdrawn before service); Mutual Reserve Fund Life Ass'n v. Phelps, *supra* note 58 (intrastate business, cause of action arose within forum, statute provided for actual appointment or alternative service on official and appointment made which was valid after withdrawal); Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining and Milling Co., 243 U.S. 93, 37 Sup. Ct. 344, 61 L. Ed. 610 (1917) (intrastate business, cause of action arose without forum and an official had been appointed as agent); Hunter v. Mutual Reserve Life Ins. Co., 218 U.S. 573, 31 Sup. Ct. 127, 54 L. Ed. 1155 (1910) (intrastate business, suit on five policies of insurance, only one of which was issued in forum, appointment of official had been revoked, the corporation withdrew and it was held jurisdiction extended only to the one policy); St. Louis, S.W. Ry. v. Robert Alexander, 227 U.S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486 (1913) (interstate business, cause of action arose within forum, no appointment had been made and service was upon an alternative agent); International Harvester Co. v. Kentucky, *supra* note 58 (interstate business, cause of action arose within forum, designation of an agent had been revoked and service was made upon an alternative agent); Ohio River Contract Co. v. Gordon, 244 U.S. 68, 37 Sup. Ct. 599, 61 L. Ed. 997 (1917) (interstate business, cause of action arose without forum, and service was upon a designated agent); Louisville & Nashville R.R. v. Chatters, 279 U.S. 320, 49 Sup. Ct. 329, 73 L. Ed. 711 (1929) (interstate business, cause of action arose without forum, and service was upon a designated agent).

60. Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140, 43 Sup. Ct. 293, 67 L. Ed. 573 (1923).

61. For discussion, see HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918); Feed, *Jurisdiction Over Foreign*

Furthermore, the term "jurisdiction" in respect to a foreign corporation may relate to requirements for qualification to do business, for the imposition of taxes and for judicial jurisdiction. It is not always true that the content of principles, such as "doing business," expressed in one type of case would or should be the same for determination of jurisdiction for a different purpose. Here only a few questions of judicial jurisdiction are considered, with emphasis upon interstate commerce and with exclusion of requirements for adequate notice as imposed by the due process clause.[62]

The opinion by Chief Justice Taney in *Bank of Augusta v. Earle*[63] stressed the point that, although a corporation was localized in the state of its organization, it might nevertheless engage in business in another state through its agents. In many cases the idea that a corporation could act through agents has apparently been used to treat it in a manner analogous to suit against an individual who could be served with process within the state. It was, however, early held that mere presence of a corporate officer was not sufficient.[64] The corporation must have done such acts as would indicate that it, like a natural person, was in the state. An evaluation of the various factors is summarized in the phrase "doing business." The *Perkins* case stressed this point:

> "The essence of the issue here, at the constitutional level, is like one of general fairness to the corporation. Appropriate tests for that are discussed in International Shoe Co. v. Washington, supra, 326 U.S. at pages 317-320, 66 S.Ct. at pages 158, 160. The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case. The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide a helpful but not a conclusive test."[65]

If "doing business" is sufficient, as by analogy to the presence of an individual, it would seem that the rules would be the same as to corporations engaged in local or interstate business and whether the cause of action arose within or without the state. Under this view the scope

Corporations, 24 MICH. L. REV. 633 (1926); Farrier, *Jurisdiction Over Foreign Corporations*, 17 MINN. L. REV. 270 (1922).

62. As to circumstances in which a minimum of notice may be given, even when the corporation has withdrawn from the state, see Washington v. Superior Court, 289 U.S. 361, 53 Sup. Ct. 624, 77 L. Ed. 1256 (1933).

63. 13 Pet. 519, 10 L. Ed. 274 (U.S. 1839).

64. Goldey v. Morning News, 156 U.S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517 (1895). See also Rosenberg Brothers & Co. v. Curtis Brown Co., 260 U.S. 516, 43 Sup. Ct. 170, 67 L. Ed. 372 (1923); Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140, 43 Sup. Ct. 293, 67 L. Ed. 573 (1923) (service on public official).

65. 342 U.S. 437, 445, 72 Sup. Ct. 413, 96 L. Ed. 335 (1952).

of statutory provisions for jurisdiction could be extensive, and opinions often fail to indicate any difference in result whether the corporation was engaged in interstate or intrastate business. *Tauza v. Susquehanna Coal Co.*[66] squarely held, on its facts, that the result would be the same. That case is important because opinions by the Supreme Court have referred to it apparently with approval.[67] Suit had been brought by a resident of New York in that state against a Pennsylvania corporation, doing interstate business in both states, upon a cause of action arising outside of New York. A statute provided that a foreign corporation should appoint an agent and if it failed to do so service might be had upon any corporate agent; no express appointment had been made. It was held that, doing business in New York, the defendant corporation was there subject to suit on this cause of action. Judge Cardozo wrote:

> "It is not a problem of statutory construction. It is one of jurisdiction, of private international law. We are to say, not whether the business is such that the corporation may be prevented from being here, but whether its business is such that it is here. If in fact it is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its business is inter-state or local, it is within the jurisdiction of our courts."[68]

While the *Perkins* case did not present the precise issue, it does raise the question whether the Court would now go that far. Bearing upon this, a passage in the opinion referred to the fact that by earlier law the Court had felt that the due process clause prevented service of process upon a state official as agent of the foreign corporation upon a cause of action arising outside of the state. As to a change from this point of view, the opinion stated:

> "Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process upon that representative. This has been squarely held to be so in a proceeding in personam against such a corporation, *at least in relation to a cause of action arising out of the corporation's activities within the state of the forum.*"[69]

The opinion further stated:

> "On the other hand, if the same corporation carries on, in that state, other continuous and systematic corporate activities as it did here . . .

66. 220 N.Y. 259, 115 N.E. 915 (1917).
67. The *Perkins* case quoted from the opinion in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95 (1945), which quoted from the *Tauza* case, apparently with approval.
68. Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915, 917 (1917).
69. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 444, 72 Sup. Ct. 413, 96 L. Ed. 335 (1952) (italics added).

> those activities are enough to make it fair and reasonable to subject that corporation to proceedings in personam in that state, *at least insofar as the procedings in personam seek to enforce causes of action relating to those very activities or to other activities of the corporation within the state.*"[70]

Instead of treating the factors amounting to "doing business" as themselves constituting a base for jurisdiction, it is possible to treat them as a prerequisite for the exercise of state power on additional grounds. Then other criteria can be utilized to reflect a fair balance between interests of the claimant and the foreign corporation. Some of these have been expressed in various opinions and, it is believed, will explain most of the decisions. The principles are these: (1) The power of a state to impose reasonable conditions upon a foreign corporation, derived from the principle as earlier expressed of power to exclude. (2) Actual consent by the corporation to the scope of jurisdiction expressed in the statute. (3) The exercise of police power in respect to activities of the corporation within the state. Under each of these, notice need be taken whether the corporation was doing interstate or only intrastate business.

Numerous cases after *Bank of Augusta v. Earle*[71] predicated jurisdiction upon the principle of power to exclude or to admit upon condition.[72] In time some limitations were imposed. Certain types of conditions, such as restricting access to federal courts[73] and unreasonable tax burdens could not be imposed even when the corporation was doing only intrastate business; nor could some other type of burdens be imposed unless also applicable to domestic corporations.[74] In addition, a corporation engaged in interstate business could not be excluded.[75] It was undoubtedly due to these limitations, at least in part, that later cases gave explanations other than that of power to exclude.

As to corporations doing only local business, a statute may direct it to designate an agent or may provide originally, or alternatively upon failure to name an agent, that a public official shall be deemed its agent to receive process. In the latter two situations control can be based upon the power to impose reasonable conditions, without adopt-

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70. 342 U.S. at 445 (italics added).
71. 13 Pet. 519, 10 L. Ed. 274 (U.S. 1839).
72. See, *e.g.*, Hooper v. California, 155 U.S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297 (1895); Philadelphia Fire Ass'n v. New York, 119 U.S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342 (1886); Doyle v. Continental Ins. Co., 94 U.S. 535, 24 L. Ed. 148 (1877); Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357 (U.S. 1869). See HENDERSON, *op. cit. supra* note 61, Chap. VI.
73. Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. Ed. 265 (U.S. 1874); Doyle v. Continental Ins. Co., *supra* note 72; Terral v. Burke Const. Co., 257 U.S. 529, 42 Sup. Ct. 188, 66 L. Ed. 352 (1922) (reversing the rule of the *Doyle* case).
74. See HENDERSON, *op. cit. supra* note 61, Chaps. VII and VIII; Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COL. L. REV. 321 (1935); Merrill, *Unconstitutional Conditions*, 77 U. OF PA. L. REV. 879 (1929).
75. See HENDERSON, *op. cit. supra* note 61, Chap. VII.

ing completely the power to exclude. If the corporation complies by designating an agent, this may be taken as "actual consent." That consent could extend to further provisions of the statute relating to causes of action within or without the state. When no appointment is made, similar extension can come under the power to impose reasonable conditions derived from the power to exclude, even as it has become limited.

As to corporations engaged in interstate business, the theory of power to exclude does not apply and a state may not *unreasonably* burden its activities. If the statute requires designation of an agent and it complies, this may be taken as an actual consent not only to suit upon acts done within the state but also on foreign-based transactions if the statute so provides. It is believed that the corporation should be permitted so to judge that this is not an unreasonable burden upon it.

A corporation doing interstate business may fail or refuse to designate an agent, as required by the statute. To subject it to suit there, through service upon one of its agents or a public official, upon causes of action arising *without* the state, might constitute an unreasonable burden and therefore should not be imposed.

The failure to designate a specific agent as required by the statute is indicative of a lack of "consent" or a definite refusal to submit.[76] In respect to a corporation which is engaged in interstate business and does not designate an agent, it would be necessary to provide for service upon an alternative agent. The need for control in balancing interests of a claimant and of the foreign corporation indicates that the police power of a state should constitute a basis of jurisdiction in respect to activities *within* its borders. This would not constitute an unreasonable burden. The principle of police power would constitute an additional base for jurisdiction over a foreign corporation doing local business upon causes of action arising within the forum, with service upon a statutory agent.

In saying that Ohio *might* take jurisdiction, it is believed that the Court in the *Perkins* case was speaking generally. It is repeated that, to the extent issues were not raised, the Court did not pass upon possible validity of statutory provisions as dependent upon whether the corporation was engaged in interstate or intrastate commerce or the limitations and theory upon which a result would be reached. On that basis the *Perkins* case does not mean that Ohio could take jurisdiction indiscriminately if its statute were sufficiently comprehensive.

Until the Supreme Court has further delineated the proper inter-

76. The refusal was definite in International Harvester Co. v. Kentucky, 234 U.S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479 (1914), and the corporation was engaged in interstate commerce.

relationship of facts and statutes, What could be the conflict of laws rules as to jurisdiction over foreign corporations?

III.

The change of rules on jurisdiction for divorce has given rise to new problems in respect to marital difficulties as illustrated by *Sutton v. Leib*[77] wherein the thrice-married Mrs. Sutton endeavored to collect alimony payments from her first husband, from whom she became divorced in Illinois in 1939. The decree awarded to her $125 per month "for so long as plaintiff shall remain unmarried, or for so long as this decree remains in full force and effect." In July, 1944, Walter Henzel secured in Nevada a divorce from his wife, a resident of New York, based upon constructive service and without an appearance by her. On the same day Henzel and the present petitioner were married in Nevada and proceeded to New York where the first Mrs. Henzel soon obtained a decree for separate maintenance on the basis that the Nevada decree of divorce was invalid. Thereafter petitioner secured in New York an annulment of her marriage with Henzel, upon the ground that he had had another living wife. Some time later, petitioner married Sutton. On the basis of diversity, she brought suit in a federal court in Illinois to recover from Leib alimony not paid by him during the period between her marriages to Henzel and to Sutton. The Supreme Court stated the issue: "This controversy presents, fundamentally, a problem of Illinois law, to wit, the Illinois rule as to the effect of a subsequently annulled second marriage on the alimony provisions of an Illinois divorce awarding support until remarriage."[78] Neither Nevada nor New York courts had passed upon this issue in respect to any of these parties nor did it appear in the record what the law of Illinois would be upon the point.

To what proceedings, to what extent and upon what basis would an Illinois court or a federal court therein be required to extend recognition? The lower courts held that the Nevada marriage terminated liability but this was reversed by the Supreme Court which held that the full faith and credit clause did not preclude Illinois from deciding when Leib's duty of payment terminated.

Whether the rules as to recognition of divorce decrees based upon constructive service as expressed in the *Atherton*[79] and *Haddock*[80] cases were otherwise good or bad, their predication upon the principle that the petitioner must be domiciled in the state of "matrimonial

77. 342 U.S. 402, 72 Sup. Ct. 398, 96 L. Ed. 448 (1952).
78. Sutton v. Leib, 342 U.S. 402, 406, 72 Sup. Ct. 398, 96 L. Ed. 448 (1952).
79. Atherton v. Atherton, 181 U.S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794 (1901).
80. Haddock v. Haddock, 201 U.S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867 (1906).

domicil"[81] had two distinct advantages. First, it was not difficult to ascertain which state was the matrimonial domicil — the one in which the parties last lived together as husband and wife. Second, when state policy was to deny recognition to an *ex parte* divorce, it was not necessary to inquire into the bona fides of the petitioner's domicil.[82] Although the state of divorce was not that of matrimonial domicil, another state was not compelled to treat it as void.

The rule of matrimonial domicil was a basis of prediction for 37 years until the two decisions in *Williams v. North Carolina*[83] abrogated the requirement of matrimonial domicil, emphasized bona fide domicil by the petitioner as jurisdictional and allowed collateral attack upon existence of a legal concept arising from a combination of physical facts and psychological attitudes.[84]

Under the rule of the *Williams* cases, there was question whether any obligation for support could survive a divorce which was valid. *Estin v. Estin*[85] held that it could. The parties had been domiciled in New York where the wife had secured an order for support. Next, the husband was granted an *ex parte* divorce in Nevada. Thereafter the

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81. See Goodrich, *Matrimonial Domicile*, 27 YALE L.J. 49 (1917). See also McClintock, *Fault as an Element of Divorce Jurisdiction*, 37 YALE L.J. 564 (1928); Parks, *Some Problems in Jurisdiction to Divorce*, 13 MINN. L. REV. 525 (1929).

82. An attack on this ground, however, was made in Andrews v. Andrews, 188 U.S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366 (1903), although the divorcing state was not that of matrimonial domicil.

83. 317 U.S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279 (1942).

84. Justice Rutledge, dissenting in *Williams II*: "The Constitution does not mention domicil. Nowhere does it posit the powers of the states or the nation upon that amorphous, highly variable common-law conception. Judges have imported it. The importation, it should be clear by now, has failed in creating a workable constitutional criterion for this delicate region. . . .

"Domicil, as a substantive concept, steadily reflects neither a policy of permanence nor one of transiency. It rather reflects both inconstantly. The very name gives forth the idea of home with all its ancient associations of permanence. But 'home' in the modern world is often a trailer or a tourist camp. Automobiles, nationwide business and multiple family dwelling units have deprived the institution, though not the idea, of its former general fixation to soil and locality. But, beyond this, 'home' in the domiciliary sense can be changed in the twinkling of an eye, the time it takes a man to make up his mind to remain where he is when he is away from home. He need do no more than decide, by a flash of thought, to stay 'either permanently or for an indefinite or unlimited length of time.' No other connection of permanence is required. All of his belongings, his business, his family, his established interests and intimate relations may remain where they have always been. Yet if he is but physically present elsewhere, without even bag or baggage, and undergoes the mental flash, in a moment he has created a new domicil though hardly a new home.

"Domicil thus combines the essentially contradictory elements of permanence and instantaneous change. No legal conception, save possibly 'jurisdiction,' of which it is an elusive substratum, affords such possibilities for uncertain application. . . ." Williams v. North Carolina, 325 U.S. 226, 255, 257, 65 Sup. Ct. 1092, 89 L. Ed. 1577 (1945).

85. 334 U.S. 541, 68 Sup. Ct. 1213, 92 L. Ed. 1561 (1948). And see Esenwein v. Esenwein, 325 U.S. 279, 65 Sup. Ct. 1118, 89 L. Ed. 1608 (1945), permitting a wife to attack a Nevada divorce when the husband sought to set aside a Pennsylvania support order.

wife sought to collect arrears since the date of the Nevada decree. Despite a finding that the husband was domiciled in Nevada and therefore the divorce was valid within the rule in the *Williams* cases and that under the law of Nevada a duty of support did not survive a divorce, New York nevertheless applied its own rule to the contrary and entered a decree in favor of the wife. The Supreme Court of the United States held that this did not violate requirements of full faith and credit to the Nevada judgment. Not only were incidents of a marital statutes severable but also the wife had "property rights" not reached by the Nevada law.[86] This is, of course, a conclusion that policy of the defendant's state in regard to support is superior to interests of the state of divorce.

It is here emphasized that the wife was *defendant* in the divorce proceeding. If interests in support be classified as "property," that property can be given a situs. The conception of "property" contains a considerable degree of flexibility as applied to a variety of situations.[87] With this flexibility, as will be indicated below, it is possible that the "property" right in the *Sutton* case could be subject to the law of New York rather than that of Illinois. Before considering this, notice will be taken of some of the possible legal consequences which

86. Mr. Justice Douglas, writing for the majority said, "But the fact that marital capacity was changed does not mean that every other legal incidence of the marriage was necessarily affected.

"An absolutist might quarrel with the result and demand a rule that once a divorce is granted, the whole of the marriage relation is dissolved, leaving no roots or tendrils of any kind. . . .

"New York was rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge. . . . But the question is whether Nevada could under any circumstances adjudicate rights of respondent under the New York judgment when she was not personally served or did not appear in the proceeding. . . .

"The New York judgment is a property interest of respondent, created by New York in a proceeding in which both parties were present. It imposed obligations on petitioner and granted rights to respondent. The property interest which it created was an intangible, jurisdiction over which cannot be exerted through control over a physical thing. Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations. . . .

"But we are aware of no power which the state of domicil of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding. . . .

"Since Nevada had no power to adjudicate respondent's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment. . . .

"The result in this situation is to make the divorce divisible — to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each state to the matters of her dominant concern." Estin v. Estin, 334 U.S. 541, 545, 547-49, 68 Sup. Ct. 1213, 92 L. Ed. 1561 (1948).

87. Shifting criteria are illustrated by Harris v. Balk, 198 U.S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023 (1905) (garnishment); New York Life Ins. Co. v. Dunlevy, 241 U.S. 518, 36 Sup. Ct. 613, 60 L. Ed. 1140 (1916) (interpleader); New England Mutual Life Ins. Co. v. Spence, 104 F.2d 665 (2d Cir. 1939) (rights of beneficiary in a life insurance policy); and, generally, ability to deal with rights embodied in a document.

are implicit and might attach to the facts in the chronological sequence of events.

It may be assumed that the Nevada court found Henzel to be domiciled within that state according to Nevada's conception of domicil. Stopping the clock at that point, Walter Henzel was a divorced man in New York as well as Nevada under the rule in *Williams I.* Also New York could change its rule on domicil as it apparently did in respect to support orders in the *Estin* case.

Henzel and the former Mrs. Leib were parties to a marriage ceremony in Nevada. Henzel was there domiciled according to the divorce decree and Illinois had imposed no restrictions upon remarriage by the former Mrs. Leib, and hence the ceremony resulted in the status of marriage, at least in Nevada and Illinois. The marriage was valid because the Henzel divorce upon which it depended was valid. The duty of Leib to make payments would terminate because the facts came within the terms of the Illinois decree. This position was taken by the court of appeals.[88] Upon the return of Henzel to New York with his second wife, some of the legal problems implicit in the preceding circumstances appear. Under the rule in *Williams II* New York could and did apply the constitutionl right to attack the legal conclusions expressed in "domicil," using its own definition and refused to accept some of the legal consequences which would in Nevada flow from the decree. Had an appearance been entered by the nonresident defendant in the divorce proceeding, however, it would preclude collateral attack upon jurisdiction of the court for lack of "domicil" by the petitioner.[89] New York could and did grant separate maintenance to the first Mrs. Henzel, to that extent holding that she and Walter were still married — but to what further extent could New York go in relation to other states as well as to its own? Other states must recognize the decree as to installments which have become final.[90] In respect to his first wife, is Henzel divorced or isn't he? New York ordered Henzel to support his first wife. Would that decree which was entered without the second wife being a party have the effect that the latter would not also be entitled to support? What about criminal sanctions if she and Henzel had continued to live together? What would be the effect in Illinois as to the duty of Leib, the right of Henzel and his second wife to live together in Illinois and his duty there to support her?

88. See Sutton v. Leib, 188 F.2d 766, 768 (7th Cir. 1951).

89. Sherrer v. Sherrer, 334 U.S. 343, 68 Sup. Ct. 1087, 92 L. Ed. 1429 (1948). See Carey and MacChesney, *Divorces by the Consent of the Parties and Divisible Divorce Decrees,* 43 ILL. L. REV. 608 (1948); Harper, *The Myth of the Void Divorce,* 2 LAW & CONTEMP. PROB. 335 (1935); Harper, *Effect of Foreign Divorce upon Dower and Similar Property Interests,* 26 ILL. L. REV. 397 (1931); Jacobs, *Attack Upon Divorce Decrees,* 34 MICH. L. REV. 749 (1936).

90. Barber v. Barber, 323 U.S. 77, 65 Sup. Ct. 137, 89 L. Ed. 82 (1944); Sistare v. Sistare, 218 U.S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905 (1910).

New York could regulate transfer inter vivos or by succession of property within its borders but is subject to limitations in respect to property localized in other states. Does New York's collateral attack upon the Nevada divorce mean that Henzel is not divorced in Nevada and Illinois — or is he? The court of appeals stated:

> "We have searched the numerous cases decided by the Supreme Court of the United States on the subject of migratory divorce for a definitive holding as to the judicial status of such divorce in the state that decreed it. It appears to be assumed that the decree is valid and binding in the state where it is rendered. Thus Mr. Justice Frankfurter remarks in his concurring opinion, Williams v. North Carolina . . . 'It is indisputable that the Nevada decrees here, like the Connecticut decree in the Haddock v. Haddock case . . . were valid and binding in the state where they were rendered.' And Mr. Justice Murphy, concurring in Williams v. State of North Carolina, 325 U.S. 226, 239, 65 S.Ct. 1092, 1099, 89 L.Ed. 1577, states that '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 to its divorce decrees absolute and binding finality within the confines of its borders.' And Mr. Justice Rutledge, dissenting in the same case . . . comments on the fact that the Nevada judgment was not voided by the decision. 'It could not be, if the same test applies to sustain it as upholds the North Carolina convictions. It stands, with the marriages founded upon it, unimpeached.' He and Mr. Justice Black, also dissenting, both call attention to the fact that the Court, in its decision, does not hold that the Nevada judgment is invalid in Nevada. Hence, in spite of the absence of a clear-cut statement in any of the main opinions of the Court as to the status of the Nevada decree in Nevada after a successful extraterritorial challenge of it, we think we may spell out authority for our assumption that it survives such challenge and remains in full force and effect within the confines of the state of Nevada until and unless it is set aside upon review in that state."[91]

The court of appeals looked to Nevada law, rather than to the New York decree and, in reversing, the opinion by the Supreme Court stated: "This leads us to hold that the conclusion of the Court of Appeals . . . is incorrect under the facts of this case. The marriage ceremony performed for petitioner and Henzel in Nevada must be held invalid because then Henzel had a living wife. The New York annulment held the Nevada marriage void. Nevada declares bigamous marriages void."[92]

The next link in the chain of circumstances was the annulment decree in New York. "Annulment" carries connotations of "void *ab initio*" and these terms contain a variety of implications, only some of which were raised. Problems include jurisdiction of the subject matter, effect under New York law upon each of the various rights

91. Sutton v. Leib, 188 F.2d 766, 768 (7th Cir. 1951).
92. Sutton v. Leib, 342 U.S. 402, 409, 72 Sup. Ct. 398, 96 L. Ed. 448 (1952).

associated with valid marriages and the effect which other states must accord to the "annulment" decree.

Did New York have jurisdiction to annul the Nevada marriage? To what extent would the rule of the *Williams* cases on jurisdiction to divorce also apply to annulment? The following are possible rules: (1) The state in which the ceremony of marriage was performed, requiring or not requiring domicil therein of the petitioner; (2) the state of domicil immediately preceding the ceremony, if in a different state (of course, the parties could then have had different domicils); (3) a state in which both parties are domiciled, although not that of the state of celebration; (4) a state in which petitioner is domiciled even though the defendant not be domiciled therein; (5) any state in which petitioner can obtain personal service upon the defendant. In these situations question would also arise as to the character of the necessary service upon a defendant. There has not been agreement upon these points.[93] In the *Henzel* annulment, the defendant was before the court and New York was undoubtedly the domicil of both parties. As to these points the Supreme Court stated:

> "The jurisdiction of the New York courts to enter the judgments is unquestioned. . . . Petitioner and Henzel subjected themselves to the jurisdiction of the New York court and its decree annulling their Nevada marriage was entered with jurisdiction, so far as this record shows, of the parties and the subject matter. . . . As both parties were before the New York court, its decree of annulment of their Nevada marriage ceremony is effective to determine that the marriage relationship of petitioner and Henzel did not exist at the time of the filing the present complaint in Illinois for unpaid alimony. . . . The New York annulment determines the marriage relationship that is the marital status of petitioner and Henzel, just as any divorce judgment determines such relationship. . . . So as to the New York decree annulling the marriage, New York had such jurisdiction of the parties and its decree is entitled to full faith throughout the Nation, in Nevada as well as in Illinois."[94]

When the hurdle of jurisdiction to annul is passed new questions arise as to the effects of the decree within and without the state, similar to those regarding the separate maintenance order. Only the one in the *Sutton* case will be considered here — whether the rule of the annulling state in respect to support orders must be followed in another state. The Supreme Court stated:

> "Although the federal courts must give the same force and effect to the New York decrees as Illinois does, a question of state law remains. Does Illinois give the marriage ceremony of an annulled marriage sufficient

93. See McMurray and Cunningham, *Jurisdiction to Pronounce Null a Marriage Celebrated in Another State or Foreign Country,* 18 CALIF. L. REV. 105 (1930).

94. Sutton v. Leib, 342 U. S. 402, 406, 408, 72 Sup. Ct. 398, 96 L. Ed. 448 (1952).

vitality to release Leib, the respondent, from his obligation to pay alimony subsequently due? . . .

"The force of that rule, however, does not require that the effect of the New York annulment on rights incident to this declaration of the invalidity of the Nevada marriage ceremony shall be the same in all states. Annulment is, in respect to its effect, analogous to divorce. A valid divorce, one spouse appearing only by constructive service, that frees the parties from the bonds of matrimony throughout the United States does not require a second state to accord its terms the same result in litigation over separable legal rights as the decree would have in the courts of the state entering the decree. Without reference to the effect of a divorce on incidents of the marriage relation where both spouses are actually before the court, we think it equally clear, as a matter of constitutional law, that Illinois is free to decide for itself the effect of New York's declaration of annulment on the obligations of respondent, a stranger to that decree."[95]

In the *Estin*[96] case sums due under a support order were called "property," and it was held that an otherwise valid Nevada decree of divorce need not be followed by New York to the extent of cutting off that "property" of the nonresident and nonappearing wife. The coin of "property," however, has two sides and it is possible that a court might apply the general principle but reach entirely different conclusions when *the wife* begins proceedings for divorce; if so, the consequences should be the same on annulment.

If a wife brings suit for divorce the court has jurisdiction to declare that specified property settlements shall be final and in lieu of future support. This order could be entered when property of a nonresident husband was attached or when he was personally before the court. The order curtailing the interests of the wife should be effective even in respect to property located in another state. This is possible as to property in another state which *could* have been considered in the settlement.[97]

The bill may fail to raise any question of alimony, and the law in the divorcing state may be that the question is thereby left open, a rule which might then be followed by other states. The opposite rule might obtain that any right of the wife to future support is cut off by her invoking the jurisdiction of the court and failing to raise this issue. It may be a conflict of laws rule of the divorcing state that, if another state has entered a support order, the effect of the divorce shall be according to the rule in such other state. Similar diversities exist between the states as to the effect of annulment upon a duty of support.[98] It would seem that diversities among the states regarding these

95. 342 U.S. at 409.
96. Estin v. Estin, 334 U.S. 541, 68 Sup. Ct. 1213, 92 L. Ed. 1516 (1948).
97. Bates v. Bodie, 245 U.S. 520, 38 Sup. Ct. 182, 62 L. Ed. 444 (1918).
98. The majority opinion in the *Sutton* case stated: "It is frequently said, as a legal fiction, that annulment makes the annulled marriage ceremony as though it had never occurred. That fiction is variously treated in different

rules would not only be permissible but also, in respect to one invoking jurisdiction of the court, the consequences could be that either the full faith clause as applied to judgments or the due process clause would prevent another state from disregarding them. By this approach, to the extent that "property" may be said to be involved, it is property within the state of the decree and subject to its law.

The opinions by the court of appeals and the Supreme Court in the *Sutton* case show that when a court has before it an issue of the extent to which an annulment decree may affect a duty of support in another state, it may view the problem from either of two angles, that is, status or property. First considering the various proceedings in the *Sutton* case from the point of status, how far should the three states be free to go their several, inconsistent ways? Would Nevada be required to give full faith and credit to the New York adjudication in favor of the first Mrs. Henzell to the extent of holding that its own divorce decree was invalid? Or are those parties still divorced so that the second marriage was still valid in Nevada? Suppose that the answer is that Henzel was validly divorced and remarried in Nevada. Suppose also that the annulment decree would constitute a binding adjudication, at least in New York, although based upon the premise that Henzel is not divorced in Nevada. Then should Illinois be required to give full faith and credit to the Nevada divorce or to the New York annulment? Or should it be permitted to follow its own rule, independent of full faith? Problems whose answers center upon status can become somewhat involved!

If, however, the issue of right to support is treated as primarily one of property, in the sense used in the *Estin* case, then a further choice is necessary. Is the right to be determined by the law of Illinois or by the law of New York? Is any distinction to be made between cases in which the wife was the moving party or otherwise before the court in judicial proceedings which might affect it, as in the New York annulment suit by the second Mrs. Henzel and in *Bates v. Bodie*,[99] and cases where she was not before the court as in the *Estin* case? The *Sutton* case held that Illinois may use its own rule.

The final point is whether the federal courts should ascertain and apply the Illinois law under the principle of *Erie R.R. v. Tompkins*.[100]

jurisdictions. For example in New York, the petitioner apparently would recover alimony after annulment but not for the period between the remarriage ceremony and the annulment . . ." and referred to Schleicher v. Schleicher, 251 N.Y. 366, 167 N.E. 501 (1929). 342 U.S. at 410. The parties had made a settlement providing that, in the event of divorce, the terms of the settlement should be incorporated into the decree. Thereafter the wife secured a divorce in Nevada and the settlement terms were included in the decree. Later she remarried but the second marriage was annulled in New York as having been induced by fraud.

99. 245 U.S. 520, 38 Sup. Ct. 182, 62 L. Ed. 444 (1918).

100. 304 U.S. 84, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938).

Here the interesting circumstance appears that there is no showing that Illinois has passed upon the question. On these points the majority opinion stated:

> "Illinois law as to respondent's liability governs the federal court's decision of this case. . . . [As this present proceeding in the United States District Court rests on the diversity jurisdiction, it is not a state issue suitable for separation and determination by the state courts. It is a matter of state law for the decision of the federal courts, primarily those District Courts and the Court of Appeals with jurisdiction in the state whose law is in question. Application of this procedure is called for here, since the Illinois rule is not clear.]
>
> "Where there had been a valid foreign marriage, followed by an annulment, — based partly on issues not here involved, Illinois has held the obligation of a former husband to pay alimony until the wife 'remarry' is terminated by the remarriage. What the Illinois rule is when the foreign (Nevada) marriage is judicially declared invalid, under present circumstances, or whether respondent, if liable at all, is liable for the period during which Henzel may have owed support under a rule such as that of Sleicher v. Sleicher, 251 N.Y. 366, 167 N.E. 501, has not, so far as we know, been determined."[101]

There is thus open the possibility that, after the federal courts have ascertained the Illinois rule (?), the Supreme Court of Illinois might shortly decide the other way. In a special opinion Mr. Justice Frankfurter pointed out this factor and urged that the procedure of a declaratory judgment be used to avoid such an unfortunate consequence.[102]

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101. Sutton v. Leib, 342 U.S. 402, 411, 72 Sup. Ct. 378, 96 L. Ed. 448 (1952).

102. Mr. Justice Frankfurter wrote: "The issue in this case is whether the obligation imposed by an Illinois divorce decree to pay alimony 'for so long as plaintiff shall remain unmarried' ceases under Illnois law when the plaintiff goes through the form of another marriage ceremony regardless of the binding validity of such a ceremony. Illinois is free to consult solely her own will whether such a provision in a decree relates merely to ceremony or requires a union with a spouse legally free to marry. On that crucial issue, we are told, there is no Illinois law.

"By what seems to me undesirable judicial administration, the ascertainment — for all I know the formulation — of Illinois law is committed to a federal court which in the very nature of things can render only a tentative and indecisive judgment.

"Tentative and indecisive, because whatever view the Court of Appeals for the Seventh Circuit takes on this question may be authoritatively supplanted by the only court that can finally settle the issue, namely, the Supreme Court of Illinois. Such a decision from the Illinois Supreme Court can readily be solicited by the plaintiff through the Illinois declaratory judgment procedure. It is precisely the kind of controversy for which the utility of the device of a declaratory judgment has been so fulsomely acclaimed. Instead of availing itself of this modern procedure the Court makes itself a party to a discord which passeth understanding.

"No doubt the Court of Appeals may tentatively answer this question of Illinois law so far as the immediate parties are concerned. But it is not conducive to the interests of law in general that this Court should compel a decision in a federal court which tomorrow or the day after may be definitely contradicted by the State court with the final say. I would remand the case to the Court of Appeals to be held by it until the plaintiff seeks with all deliberate speed a decision on the crucial question of the case in the Illinois courts." 342 U.S. at 413.

The Supreme Court could not go into issues implicit in the three decrees which were not raised by the record. Nevertheless problems are there, waiting for decision in future cases. What will happen in the conflict of laws?