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Roy Mitchell Moreland

University of Kentucky

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Conflict of Laws--A Rationale of Jurisdiction

By Roy Moreland*

Editor's Note: This article is the second in a series, the first being published in 54 Ky. L.J. 5 (1965), concerning the subject of jurisdiction in the area of Conflict of Laws. In this installment, the writer discusses domicile, nationality, appearance and consent as jurisdictional factors. The third article in this series is now in the writing stage and will appear in Volume 55 of the Kentucky Law Journal.

(2.) Domicile

Domicile may serve as a basis of jurisdiction,46 although there are numerous objectionable features in its use. The Restatement discusses "home"47 as relating to domicile. Home is not a basis of jurisdiction; there is no basis for its use in case law or in text discussions. It may be doubted whether it is even a legal word, although it has strong emotional connotations. The Restatement also discusses "residence" as relating to domicile.48 Residence is a legal word and it might well be urged that it should serve as a basis of jurisdiction instead of domicile. If domicile should continue as a basis then residence might be, or should be, added as an additional basis, perhaps in place of presence. There will be some consideration of residence in the subsequent discussion in this paper.

One objection to the use of domicile as a basis of jurisdiction is its ambiguity. It is almost impossible to frame a definite and satisfactory definition of the term. To say, as the Restatement does, that one's domicile is "generally in the place where he has his home,"49 is very misleading, if for no other reason than that it

* Professor of Law, University of Kentucky College of Law; LL.B., University of Kentucky; J.D., University of Chicago; S.J.D., Harvard University Law School.

46 Restatement (Second), Conflict of Laws § 79 (1956).
47 Id. at § 9, comment j.
48 Id. at §§ 12, 13 (1954).
49 Id. at § 9.
is an over-simplification, not true in so many instances as to make it very inaccurate and untrustworthy. In fact, if it were realistically true there would be much less objection to the domicile concept as a basis of jurisdiction. One is often more apt to consider his residence as his home than his domicile. It is easy to establish a domicile in Florida where one does not visit more than once a year, if that often, while his home and residence and presence remain in the North. Thus his Florida domicile is a poor situs to serve as a basis of jurisdiction for service of process, or as a place to defend a suit.

Various wordings may be suggested for an inclusive, accurate definition of the word domicile. One of the better is that domicile is where one has his legal residence with no present intention of changing it. Even that is defective for if he has a present intention to change it but has not yet established a new domicile, his old one is still in existence. One always has to have a domicile someplace where he can be held responsible to receive his "greetings" to serve in the armed services and to receive his tax notices, if for no other reasons.

What is the definition of domicile? The writer has never found a satisfactory one; the term is so unsettled and vague. It is true that it may be an individual's "home" if his roots remain where he was born or he has settled permanently in one place, where he has his family and his work. But under modern conditions such an individual has become almost the exception rather than the rule. People move around and technical domicile may be a place with which there is little actual contact or presence.

A reasonably inclusive definition of domicile might be "where one has his home, or a fixed place other than his home, which he has chosen as his official residence with no present intention of changing it." Sometimes the phrase "legal residence" is used as the equivalent of domicile and in many ways this is perhaps the most inclusive and best description of the term. However, while one must be present to establish a domicile, continued presence or residence is not necessary. All these attempts at defi-

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50 See McDonald v. Mabee, 243 U.S. 90 (1917) where the defendant had left Texas with the intention of establishing a domicile elsewhere but his domicile was still in Texas.
51 Restatement, Conflict of Laws § 11, comments a, b (1954).
52 Restatement, Conflict of Laws § 9, comment j (1954).
53 Id. at § 13, comment d, illustration 3.
nition point up the various shadings of the term and its general ambiguity. Perhaps this cannot be helped, but it results in a concept of much uncertainty and too many meanings.

Aside from the unsatisfactory meaning of the term itself and its uncertainty and ambiguity, two reasons have served to make domicile a questionable and debatable basis of jurisdiction: a state has jurisdiction although the domiciliary is absent from its territory; and service reasonably calculated to reach the defendant is sufficient, although it never reaches him in fact.

The rule that a state continues to have jurisdiction although a domiciliary is absent from its territory is questionable under many circumstances. The leading case on the proposition is Milliken v. Meyer. In that case the defendant was domiciled in Wyoming but was temporarily present in Colorado, where he was personally served in an action in personam instituted in Wyoming, based upon a Wyoming statute allowing jurisdiction over a Wyoming domiciliary outside the state if the defendant was evading service within the state. He made no appearance in the Wyoming cause and judgment was rendered against him. There was no evidence that he was evading service in Wyoming. He brought suit in Colorado alleging that the Wyoming court had no jurisdiction over him, but the Supreme Court of the United States ultimately held that the Wyoming court did have jurisdiction based upon his domicile. There can be no objection to service in the case as the defendant was personally served. The issue of jurisdiction over one outside the state but domiciled therein was thus squarely presented and squarely decided. The case represents the law on its facts, although a question arises in regard to the opinion's gratuitous dictum that service reasonably calculated to reach the out of state domiciliary is due process today, if the service does not reach him in fact.

This brings directly into the discussion the second reason for questioning domicile as a basis of jurisdiction. Should service reasonably calculated to reach the out of state domiciliary, but which does not in fact do so, satisfy the requirements of due process under the fourteenth amendment? Of course, if such service does reach the defendant, there is no problem, as to

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54 311 U.S. 457 (1940).
55 Id. at 463.
service, unless one wants to quibble about the technicalities of some ambiguous phrase like "substituted service."

It is submitted that service which does not actually give notice in such cases does not satisfy the qualities of "fair play" that the Supreme Court constantly expounds. It cannot result in anything other than a default judgment. Default judgments are always somewhat unsatisfactory since they never are the result of a decision on the merits of the case. But a default judgment, occasioned by the fact that the defendant did not know he was being sued, is not only unsatisfactory, but it may be doubted that it has enough redeeming features to offset the arguments against it.

The rule that service reasonably calculated to reach the defendant is sufficient, is of ancient origin; it is old and established. To say that the defendant is entitled to the best type of service under the circumstances and that this type of service is only permissible when personal or actual service is impossible, is so unpersuasive as to almost be "gibberish." The ethical issue is flatly: "Is a service which does not reach the defendant in accord with reasonable standards of fair play?" The answer would seem to be an emphatic no. And the trend in professional literature and current cases is decidedly in that direction.

Those who argue that service reasonably calculated to reach should satisfy the requisites of due process invariably cite *McDonald v. Mabee* in support of their position. In that case the defendant was out of the state of Texas, where he was domiciled, seeking a domicile elsewhere, but not as yet having selected one, when he was served in Texas in an action in personam. His family remained in Texas; he was served by publication. It was held that the service was insufficient. Justice Holmes said by way of dictum that a service left with his family at his last place of abode in Texas would perhaps have been sufficient. It is believed that Holmes' dictum represents the law; furthermore, that it is unobjectionable law as to service in the *Mabee* case since the notice would be placed in the hands of his family at his last place of abode, and so should surely reach him. Under the circumstances of that case service "reasonably calculated to reach" seems satisfactory process but the phrase has been employed in other cases where the rule reached a result far from satisfactory. This

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56 243 U.S. 90 (1917).
is more proof that the phrase is an extremely dangerous one, resulting in something less than fair play in so many cases that it should be used but rarely.

The objection to the ambiguity of the word “domicile” itself and to the policy of requiring an out of state domiciliary to stand trial in the state where he is domiciled, plus the objection so often found to something less than actual service in such cases causes the suggestion that the time has come for a re-examination of domicile as a basis of jurisdiction.

The domicile basis is an historical one, based largely upon historical concepts of nationalism and duty to respond when the “state” calls. In support of the rule it is often said that domiciliaries have lived within the state and have accepted its services and protection. Special rights and privileges such as the right to vote or hold office often depend upon domicile. In return for these things it seems fair, it is said, to allow the state’s courts to have jurisdiction. This smacks too much of ancient attitudes of nationalism and feudalistic sovereignty. They are considered, it is believed, somewhat spurious today, in defense of domicile. At any rate, and more directly to the point, the plaintiff in the action, and not the state, is the interested party and the one who is benefited by the rule in most of these cases.

However, there are instances where the government is the plaintiff in domicile cases and where the domicile rule still, today, has benefit to the state. This class of cases brings to mind the suggestion by Rosanna Blake that there is a relation between domicile and nationality as bases of jurisdiction. For example, domicile as well as nationality is seized upon as a jurisdictional factor in tax cases. Taxes, like military service are somewhat an anomaly in the law. An excellent lawyer once said to this writer: “A tax case is not authority for anything except another tax situation.” The government does about as it pleases as to taxes and military service as a matter of so-called expediency. In any event taxes and military service are anomalies in the law, and perhaps it is necessary that they remain so. On the other hand, it is believed that all such cases should rest on nationality, and on the state level on citizenship, rather than domicile as a basis of juris-

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57 Note, 41 Colum. L. Rev. 724, 725 (1941).
58 Note, 34 Ky. L.J. 139, 140 (1946).
diction, with venue perhaps playing a part as to where the na-
tional (citizen) is served.

If all cases in which the government is the plaintiff were taken
out of the domicile category, there would still remain many situa-
tions where the plaintiff is a private person and the basis of
jurisdiction is domicile. For example, bona fide domicile is the
basis of jurisdiction for divorce, and there is no other, since
Williams v. North Carolina. This is unquestionably the current
law. Domicile determines the devolution of property if the owner
dies intestate. There are many miscellaneous cases in which
domicile has served as the basis of jurisdiction in ordinary actions
in personam. Examples are McDonald v. Mabee and Milliken v.
Meyer, discussed supra in this paper.

However, there are a number of state decisions holding that
domicile does not confer jurisdiction. The leading case taking
the negative view is Raher v. Raher. That case is particularly
negative since there was actual service on the defendant outside
the state. The issue therefore rested squarely on jurisdiction over
one outside the state, but domiciled in the state.

In conclusion, the uncertainty in the meaning of the term
itself and the unsatisfactory results as it is applied in numerous
cases cause one to suggest that the time has come for a re-exam-
ination of domicile as a basis of jurisdiction. First, we must ex-
amine the soundness of the rule itself. The mere statement of
that phase of the rule that a domiciliary who is out of the state
can be forced to return to defend a local suit raises a certain
mental opposition. Of course, the local state is apt to be the most
convenient forum. The injury may have occurred there and it is
no farther for the defendant to return than it would be for the
plaintiff to go if he were asked to sue where the defendant ac-
tually is. Witnesses are apt to be in the local state. However,
that phase of the domicile rule that jurisdiction may be obtained
on an out of state (or even in state) domiciliary by service

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60 325 U.S. 226 (1945).
62 Milliken v. Meyer, 311 U.S. 457 (1940); McDonald v. Mabee, 243 U.S.
63 See, Stumberg, Principles of Conflict of Laws 75, n.38 (3d. ed. 1963),
citing several cases.
64 150 Iowa 511, 129 N.W. 494 (1911).
reasonably calculated to reach him, but which does not\textsuperscript{65} undoubtedly should be repudiated, since it is out of line with recent trends and decisions as to fair play, and results in a default judgment, which is not in accord with current conceptions of due process.

It may well be argued that in cases where the government, state or federal, is the plaintiff that nationality rather than domicile serves better as a basis of jurisdiction. As Ehrenzweig points out, there is a relationship between domicile and nationality and in many situations the nationality (citizenship) principle is more appropriate as a basis than the domicile one\textsuperscript{66}. Where the defendant is without the state, jurisdiction is based not upon "physical power of control," but upon "allegiance." Although he is beyond the state to control, his nationality (citizenship) places a duty upon him to come back into the state or nation to answer a suit where the jurisdiction is based upon nationality or citizenship. There is no question about the law as to this class of cases, and there is no question but that nationality should be continued in certain cases where the state is plaintiff. The only question is what are the situations that should be included in the classification. Military cases, some tax cases at least, and perhaps some other cases where the government is the plaintiff and the duty to respond is based necessarily upon allegiance rather than upon some other principle, necessitate a retention of the principle of nationality as a basis of jurisdiction. In such cases it serves the purpose better than domicile.

This leads to the tentative conclusion that there is probably little need for a retention of domicile as a basis of jurisdiction. Most, if not all of the domicile cases might well fall into other recognized and more acceptable categories, for example, presence, the doing of an act, and nationality. There is no reason why these bases of jurisdiction would not be as effective to catch "the elusive defendant" who attempts to flee a suit as well as domicile.

Ehrenzweig and Rabel\textsuperscript{67} mention "residence," especially "ha-
biutional residence" as a substitute for domicile as a basis of juris-
diction. Residence has its attractions, particularly as to improve-
ment in the quality of service upon an absent defendant, but it
would be a new basis of jurisdiction, certainly not recognized at
present, and it may be doubted whether recognized bases like
presence, doing of an act, and nationality (citizenship) would
not be as efficient and effective. It is suggested that "residence"
is also a weasel word, difficult to put the finger upon, and not
nearly as satisfactory in a number of ways as presence, or the
doing of an act, for example.

If the suggestions in this conclusion were followed, a residuum
of cases based upon domicile would still remain. Some anomalous
situations such as divorce, where jurisdiction is currently definitely
based upon domicile, would survive the suggested changes. Per-
haps, in time, these too might receive a new alignment as a search
for more rational bases of jurisdiction continues.

(3) National (Citizenship)

Nationality (citizenship) may serve as a basis of jurisdiction.
In such cases the "power of control" concept of Holmes as the
fundamental basis of jurisdiction breaks down. Jurisdiction is
based upon "allegiance," which raises a duty to return to answer
the summons to a suit. Such duty arises out of citizenship in the
state or nation, as the case may be. Thus, under our system of
dual citizenship, American citizenship may serve as a basis of
jurisdiction in a federal case and state citizenship may serve the
same purpose in a suit in a state court.

One owes allegiance both to the Nation and to the particular
state, based upon citizenship in each instance. The fourteenth
amendment to the Constitution provides, "All persons born or
naturalized in the United States, and subject to the jurisdiction
thereof, are citizens of the United States and of the State wherein
they reside." However, while one may be a citizen of the United
States and yet domiciled elsewhere, one must be domiciled in a
state of the United States in order to be a citizen of that state.

68 See Reese and Greene, That Elusive Word, "Residence," 6 Vand. L. Rev. 561 (1953); note the conclusion at 579-80.
69 McDonald v. Mabee, 243 U.S. 90, 91 (1916).
70 Restatement (Second), Conflict of Laws § 80, comment a (1957). Apparently the requirement of domicile rather than residence is a later development.
Willoughby, in his discussion of state citizenship, speaks of "residence" not
If one is domiciled outside of the United States, he is not a citizen of any state, although he may be a citizen or national of the United States. It follows then that citizenship does not provide a state of the United States with a basis of jurisdiction unless the person is domiciled therein. This is so because the word "resides" in the fourteenth amendment above has been interpreted as equivalent to domicile.

Stumberg states the proposition complexly, if not confusingly. He says, "State citizenship in the United States is the result, not of allegiance, but of domicile." In a sense he has the cart before the horse. He is correct in that it takes domicile within the state to create citizenship therein. Then, out of the citizenship thus created, arises the law-imposed allegiance, which creates the duty to return to defend a suit filed in the state. Thus, citizenship serves as the basis of jurisdiction in the state suit.

It is, of course, true that one's primary allegiance is to the Nation in case of conflict between allegiances, but that does not prevent an allegiance to the state also, based upon the fact that his person and property and other privileges are under the protection of the state. In an analogous way the national owes an allegiance to the Nation, based upon similar protections and privileges, which the national government provides. Each of these citizenships furnishes a basis of jurisdiction for suit, state or national, as the case may be.

This writer is no friend of domicile as a basis of jurisdiction, as indicated in the preceding discussion and would not use it as a basis except when it appears unavoidable. Furthermore, he is most unwilling to base jurisdiction in an action properly based upon citizenship, national or state, upon anything other than allegiance. So, he does not want any confusion of words or language to give any indication that domicile serves as the basis of jurisdiction in a state case based upon citizenship. The point is that while it takes domicile to create state citizenship in a particular state, it is the citizenship so created that raises the duty, arising out of allegiance, to respond to the state suit, not domicile.

Turning now to the type of cases that should be included in the category of decisions based upon citizenship as the basis of jurisdiction, as indicated in the preceding discussion and would not use it as a basis except when it appears unavoidable.
jurisdiction, this writer strongly favors the view of Rosanna Blake that citizenship as a basis of judicial jurisdiction is proper only when a state or the Nation in its sovereign capacity has an interest in the suit. In other words, it is hard to conceive of a case where the plaintiff is other than a state or the Nation, where the duty to return to defend the suit is properly based upon an allegiance arising, as a matter of law, out of citizenship. To state it differently, suits between private persons should never be permitted in this category. This proposition will be developed as the discussion progresses.

Probably the clearest instance and the leading case on judicial jurisdiction based on nationality is Blackmer v. United States. Blackmer was a citizen of the United States, resident in Paris. As provided by a statute, he was personally served by the American consul with a subpoena to appear as a witness in a criminal trial in the District of Columbia. Upon his failure to appear, a large amount of his property in this country was seized, out of which was realized a 60,000 dollar fine for contempt. The United States Supreme Court, in affirming the lower court, said, "nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it. . . ."

In England, Douglas v. Forrest held in 1828, that nationality is a valid basis of jurisdiction. The absent national owned land in the jurisdiction and the court based its decision partly on that fact. The general theory of the case, however, was that a sovereign may require a subject to attend its courts in return for protection of his person and his property. Subsequent English cases support the rule by dicta, and these English cases involve suits between private persons.

In addition to Blackmer, several other American courts have recognized nationality as a basis of judicial jurisdiction, in the

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74 Note, 34 Ky. L.J. 139 (1946).
75 284 U.S. 431 (1932).
76 Id. at 437.
absence of unusual circumstances. On the other hand, in Smith v. Grady, the court refused to recognize a judgment recovered in a court in Canada against a Canadian residing in Wisconsin, who was personally served with process in that state. So the cases based on nationality are not all in accord in this country; Stumberg says they are divided. Of special interest is Grubel v. Nas sauer, a case of special circumstances, in which the New York court refused to enforce a Bavarian judgment against one domiciled in this country and who had no notice of the suit. In 1933, two Fort Knox soldiers refused to answer the call of their country, the Netherlands, to return for military service. They had applied for American citizenship but would not become citizens of the United States until thirty days after the Netherlands call. This, of course, was a summons from a national government, not a suit by a private person. Such proceedings asking for return for military service are practically impossible to enforce in the absence of the granting of extradition by the nation where the foreign citizen resides.

Turning to the problem on the state level, it is found that individual states often have statutes placing a duty upon their citizens to return as witnesses or defendants in criminal proceedings or to appear before legislative committees. For example, a New York statute similar to that involved in the Blackmer case authorizes the issuance of an order upon any New York citizen to appear as a witness before the legislature, any legislative committee, or any commission appointed by the governor, if his presence is desired. As to suits between private persons on the state level, several cases have held that a state of the United States has judicial jurisdiction over its absent citizens. In Matter of Denick it was held that a divorce granted in Michigan, of which both parties were citizens, was valid, although the defendant was absent serving a sentence of imprisonment in another state. Simi-
larly, in *Hamill v. Talbott*\(^{87}\) it was found that since the defendant was a citizen of Ohio, an Ohio court had jurisdiction to render a decree of divorce. In each of these cases the defendant was domiciled in the state and while that was made clear in the decisions, the courts stressed citizenship in the state in each instance as affording jurisdiction, for what that is worth, since these were divorce cases, and such a basis of jurisdiction is now dated, current jurisdiction for divorce now rests on domicile alone. In a third case, *Henderson v. Stanford*,\(^ {88}\) the defendant, in a suit on a promissory note, was a citizen of and domiciled in California. Massachusetts gave full faith and credit to the judgment arising out of that action.

In conclusion, it is astonishing that most of the cases wherein jurisdiction is based upon citizenship or nationality, state or national, involve suits or proceedings between private persons. To state it differently, the cases in which jurisdiction is based upon nationality or citizenship do not get into a discussion of a division based upon whether the plaintiff in the case is the sovereign or a private person.

This probably accounts for the uncertainty in the United States, pointed out by Stumberg,\(^ {89}\) as to nationality or citizenship as a basis of jurisdiction. All the cases taking a negative position on the matter are suits between private persons. There seems to be no doubt on the matter where the suit or proceeding is brought *in the interest of the sovereign*. These negative cases fortify the writer's position that suits between private persons should not be based upon this jurisdictional factor. Of course, it may well be argued that a court is the creature of the state or nation and if it entertains a suit brought by a private person against another private person, who is a citizen, the *power* to force the absent defendant to return to defend is inherent in the court. The matter may be thus rationalized. The question is whether it is wise to base jurisdiction on "allegiance" in the case of private suits rather than upon more acceptable and rational bases, such as presence, the doing of an act within the jurisdiction, or even domicile.

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\(^{87}\) 72 Mo. App. 22 (1897).
\(^{88}\) 105 Mass. 504 (1870).
\(^{89}\) Stumberg, Conflict of Laws 77 (3d ed. 1963).
(4.) Appearance

Both Stumberg and Goodrich treat appearance under the head of consent. It is true that when a defendant makes a general appearance he consents to the jurisdiction of the court. It is suggested, however, following the thinking of Rosanna Blake, that presence rather than consent is a better rationalization for appearance as a basis of jurisdiction. The rule that appearance confers jurisdiction subjects the plaintiff, who brings suit, and thus appears, to an adjudication of the claim in its entirety, including a counterclaim, or set-off. As Chief Justice Stone said in Adam v. Saenger, "The plaintiff having by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence."

The most interesting problem in the cases in the appearance category involves the special appearance to question jurisdiction. It is obvious that this is not a consent to appearance for jurisdictional purposes; in fact, it is quite the contrary. Yet a state by statute may provide that a special appearance for the sole purpose of testing jurisdiction may subject the one who appears to all the consequences of a general appearance. The special appearance becomes a general appearance by operation of law.

This, it is submitted, is erroneous. Almost all states permit the defendant to make a "special appearance" by which he can raise the defense of lack of jurisdiction of his person without suffering a determination of the case on its merits. What could be more logical, technically and practically? A court without jurisdiction has no authority or power to render a valid judgment. The matter of jurisdiction then should be permitted to be determined specifically without trying the case on its merits and later attempting to reach the problem by trying to find a way to keep the invalid judgment from being enforced. To turn a

90 Id. at 80.
91 Goodrich, Conflict of Laws 197 (3d ed. 1949).
92 Note, 33 Ky. L.J. 126, 128 (1945).
93 303 U.S. 59 (1938).
94 Id. at 67.
95 Restatement (Second), Conflict of Laws § 117b, comment a (1957).
special appearance for that purpose into a general appearance by "hocus pocus" is preposterous.

The leading case on special appearance to test jurisdiction is *York v. Texas.* That case held that a statute making a special appearance a general appearance does not violate the due process clause of the Constitution because a *judgment* does not deprive a person of his property; it is only on *execution* that property is taken. Although there is a certain amount of technical truth in this, it is suggested that a judgment in itself presupposes that property may be taken to satisfy it. What could the defendant do to prevent execution on the judgment? Ask for an injunction? Would the court that took jurisdiction under such circumstances and rendered the judgment grant the injunction? Certainly not. The reasoning of the Court is not persuasive.

The *Restatement* agrees that a statute may turn a special appearance into a general appearance but states that Texas is perhaps the only state to exercise such constitutional prerogative. Beale says that at common law it is settled that a court has no jurisdiction over the defendant's person under such a procedure, but that a statute may make such an appearance a general one and that a judgment under such circumstances is valid and entitled to full faith and credit. It is believed that such a statute *should* be unconstitutional under fundamental principles of jurisdiction, that one should be able to test specially the jurisdiction of the court to entertain the action and that it is unfortunate that Texas has such a rule. But it is more unfortunate that the Supreme Court has held that it is constitutional.

(5.) Consent

A prelitigation contract to submit to the jurisdiction of a particular court is generally regarded as a sufficient basis of jurisdiction when such jurisdiction is reasonable and convenient for the parties. It is always relevant to ask why the place of such

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96 137 U.S. 15 (1890).
97 Note, 33 Ky. L.J. 126, 128 (1945).
98 *Restatement (Second), Conflict of Laws,* § 117b, comment d (1957).
100 *But see,* Stumberg, *Principles of Conflict of Laws* 81, n. 60 (3d ed. 1963), citing rule 120(a), Texas Rules of Civil Procedure, a proposed rule subject to legislative approval, permitting, to a limited extent, special appearance to test jurisdiction.
jurisdiction was chosen. Did one of the parties suggest it because it would be more advantageous to him than other and perhaps more normal bases of jurisdiction? Does the jurisdiction to which the other party has consented give the party who suggested it an unfair advantage? Such questions are pertinent to the issue of whether jurisdiction by consent will be accepted by the court in the particular case.

Gilbert v. Burnstine and Copin v. Adamson are helpful in discussing these questions. In Gilbert v. Burnstine the defendants were residents and citizens of New York. They contracted with the plaintiff for the sale and delivery in the United States of zinc concentrates. By a clause in the contract the parties contracted in writing that all differences arising thereunder should be arbitrated in London. Differences arose over the alleged failure of the defendant to deliver in accordance with the terms of the agreement. Notice was served on the defendant in New York but he did not appear in London to arbitrate and the arbitrator rendered an award against him. The New York Court held that consent to English jurisdiction was implied from the contract to arbitrate in London and the award was valid. By subsequent New York cases, however, it is uncertain whether consent to jurisdiction will be implied from consent to arbitrate.

In the Copin case the defendant was a British subject who became a stockholder in a French corporation whose articles of incorporation provided that all disputes arising during liquidation should be submitted to a tribunal in the department of the Seine; that every shareholder must elect a domicile in Paris; and that in the absence of such an election he should be deemed domiciled at the office of the official procurator for service of process. It was held that if the defendant did not elect a domicile one could be selected for him under the agreement and that notice of intent of this could be implied from purchase of the shares. However, it was held that service on the French procurator, without knowledge on the defendant’s part, was not a valid notice of the suit. The only question would seem to be

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103 255 N.Y. 348, 174 N.E. 706 (1931).
104 L. R. 9 Exch. 345 (1874).
105 Note, 73 Harv. L. Rev. 909, 944 n.219 (1960).
whether mere purchase of the stock should bind him on a provision in the articles of incorporation that such purchase should give consent to Paris domicile. Was such implied consent fair under the circumstances? It is submitted that it was not.

These cases may also serve to introduce the question whether the parties can consent to a jurisdiction which would not have been applicable under normal circumstances and fundamental principles. To this question it can be said definitely that the parties cannot by consent confer jurisdiction over the subject matter, if the court would not have had such jurisdiction without such consent.\(^{106}\) An instance in which the courts have failed to apply this rule, however, may be found in the cases involving res adjudicata in divorce actions, where the courts have held in a number of cases that where the defendant appeared personally the court had jurisdiction to grant the divorce, although it is clear from the facts that the court did not have jurisdiction of the subject matter. Such a case (and there are others) is Sherrer v. Sherrer,\(^{107}\) where, in a divorce action there was jurisdiction of the person of the defendant by appearance but no jurisdiction of the subject matter, the divorce, since the plaintiff on the record failed to satisfy the ninety-day residence requirement. The decisions on res judicata in divorce actions are a “black page” in Conflict of Laws law.

Jurisdiction by consent over the person is a much more flexible matter. Naturally, objections such as that the forum chosen by the parties is an inconvenient one, or places an unfair burden on the court system and taxpayers of a jurisdiction which has no connection with the suit, or that the place chosen by the parties is one not normally acceptable under fundamental principles of jurisdiction, are issues that may have to be met and determined by the judge in deciding whether the place chosen by the parties will be accepted by the court when suit is brought there. However, there is often a decided advantage in allowing the parties to select the jurisdiction for a trial of the case, if the place is reasonable under the circumstances and neither party gains an advantage because of the consent. Sometimes there are several


\(^{107}\) 334 U.S. 343 (1948).
places where the case *might* be tried. It is advantageous if the parties, in advance, can determine the situs by consent. Whether they will be permitted to do so depends upon balancing these various factors and a judicial determination by the court after they are weighed against each other.

*Grubel v. Nassauer*\(^{108}\) and *Gilbert v. Burnstein*,\(^{109}\) will serve to illustrate the advantage of permitting the parties to select in advance, by consent, the jurisdiction where the trial shall be held if a suit between the contracting parties should arise. In the *Grubel* case the defendant was a subject of Germany. He came to New York where he filed notice of his intention to become a citizen of the United States. Subsequently the plaintiff, a subject of Germany filed suit in Germany on an obligation alleged to have occurred before the defendant's departure from that country. Service was by publication and judgment by default was rendered. The New York court refused to enforce the judgment. The case is easy, in view of the inadequacy of service by publication. But if the defendant had received notice, would it follow that the German judgment would then have been enforced in this country? It is problematical.

In a complex situation such as the one in the *Grubel* case, it is very advantageous if the parties themselves weigh the conflicting jurisdictional possibilities and determine by consent in advance where a suit, if one should be brought, would be filed. In the *Grubel* case should Germany have had jurisdiction? Should suit have been brought in New York? There is support for either location. It is best if the parties themselves can decide the matter.

*Gilbert v. Burnstein*\(^{110}\) shows how such a problem can be handled by consent to jurisdiction in advance. In that case there was a contract for delivery of zinc concentrates between the defendants, residents and citizens of New York, and plaintiff, with an agreement that any controversy should be referred to an arbitrator in London. The court held that London had jurisdiction by implied consent. The case has its difficulties but serves to make the point that the parties, in a situation where either New York or London *might* have jurisdiction, *can* determine for them-

\(^{108}\) 210 N.Y. 149, 103 N.E. 1113 (1913).
\(^{109}\) 255 N.Y. 348, 174 N.E. 706 (1931).
\(^{110}\) *Ibid.*
selves in advance which place it is to be. This may not work out successfully in a particular case, but consent jurisdiction will often be the best way to fix jurisdiction where there are several possible choices.

There remains to be discussed one of the most interesting and frustrating situations in jurisdiction by consent. Frequently, stipulations in a promissory note authorize an attorney or justice of the peace to enter or confess judgment against the maker upon default of payment. When such an agreement is made in a state where it is valid, it has been held that such judgment is entitled to full faith and credit elsewhere. This is the cognovit note. The question is, why would the maker of a note be so foolish as to execute such an instrument? There must be some good reason or expediency for such consent but this writer has never been able to justify it.

The leading case is *Egley v. Bennett & Co.* The plaintiff, a corporation, having its principal office in Illinois, recovered a judgment against the maker on a note executed in Indiana but made payable in Illinois. The note contained a provision giving a warrant of attorney for the confession of judgment, waiving all process. In fact, no process was issued, but an attorney confessed judgment. This would not have been valid under the law of Indiana (some states do not allow the procedure), but was valid under the law of Illinois. The Indiana Court in a suit upon the judgment held that the warrant of attorney to confess judgment was a matter connected with the performance of the contract and not with its validity, and since the confession of judgment was valid where made, the judgment was valid and entitled to full faith and credit. This, of course, is a type of consent in advance.

This writer has no particular objection to holding that technically this is a matter of performance. It can be argued just as persuasively that it is technically a matter of essential validity of the note; therefore a different result would be altogether possible in the *Egley* case, technically, since under the law of Indiana such a provision was invalid and matters of essential validity are decided according to the law of the place where the instrument was “made.” But since this writer objects to the cognovit note
strongly as a matter of policy, he prefers to disagree with the case and hang the decision upon the ground that this (all things considered) is best taken as a matter of essential validity and the Egley case is not the better result. The decisions are in conflict.\textsuperscript{113} The best way to handle the problem, it is submitted is to take a direct approach and hold consent to confess judgment on a note invalid, as a matter of policy. This is what many states do.

\textit{Ed. Note: The third installment of this article will appear in Vol. 55 of the Kentucky Law Journal.}

\textsuperscript{113} Note, 23 Mich. L. Rev. 908 (1925).