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(3) *Dick* purports to be based upon State law and therefore cannot be regarded as abandoning the Thayer theory when a federal court has a freedom of choice.

# SHOULD UTAH COURTS REVIEW JUDGMENTS OF ILLINOIS COURTS ON QUESTIONS OF ILLINOIS LAW?

WILFRED J. RITZ*

It would seem axiomatic that the original judicial determination of the law of a particular state is within the exclusive province of the courts of that state. In conflict of laws cases, of course, the courts of one state must ascertain what is the law of other states, and sometimes fall into error in doing so,[1] but this is a different process than declaring the law as an original proposition. Moreover, the courts of every state are obligated, when the question is properly presented, to determine whether another state's law or its application violates the Federal Constitution.[2] On occasion, in reviewing a state court decision the U. S. Supreme Court has itself declared what state law is, either because a federal constitutional question was involved[3] or because it felt that the state law involved was entirely clear.[4]

Nevertheless, the apparent basic principle that the courts of a particular state, to the exclusion of those of other states, are the only proper judicial agency to determine the law of their own state is sometimes violated, where the question presented is one of the state's jurisdiction under the state's own law.

*Conn v. Whitmore*,[5] from the Supreme Court of Utah, is illustrative. Conn raised Arabian horses in Illinois. By correspondence "in February of 1955" he offered the defendant a mare at a price of "less

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[1]Johnson v. Muelberger, 340 U.S. 581 (1951) (U.S. Supreme Court corrected Court of Appeals of New York on a question of Florida law); Barber v. Barber, 323 U.S. 77 (1944) (U.S. Supreme Court corrected Supreme Court of Tennessee on a question of North Carolina law); Adam v. Saenger, 303 U.S. 59 (1938) (U.S. Supreme Court corrected Texas Court of Civil Appeals on question of California law).

[2]Young v. Masci, 289 U.S. 253 (1933).

[3]West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951).

[4]Hanson v. Denckla, 357 U.S. 235 (1958).

[5]342 P.2d 871 (1959).

than her 1955 foal should be worth."[6] Eventually, Whitmore bought the mare, sent an employee to Illinois to get the horse, and gave Conn a check for the purchase price. Difficulty arose between the parties because "the mare was not in foal," and as a result Whitmore stopped payment on the check. Thereafter, Conn sued Whitmore in a circuit court of Illinois for the purchase price, relying on an Illinois statute that gives the courts of that state jurisdiction over controversies arising out of the transaction of any business in Illinois.[7] Whitmore did not appear and the Illinois circuit court entered judgment against him. Conn then sued upon this judgment in a district court of Utah. Whitmore defended by challenging the jurisdiction of the Illinois court. The trial court of Utah reviewed the facts and sustained this defense, because, as the Supreme Court of Utah said in affirming:

> "Upon the basis of those facts the trial court found that the defendant did not 'transact any business within the state of Illinois," within the meaning of the statute quoted [Illinois statute]."[8]

In so holding the Utah courts, for practical purposes, sat as courts of appeal reviewing the action of an Illinois trial court on a question of local Illinois law. It would seem obvious that under the Illinois Constitution and statutes the Illinois trial court was charged with full responsibility and authority in cases before it to ascertain and declare Illinois law, and that the courts of Utah did not have any authority in the premises. Yet, in *Conn v. Whitmore* the Utah courts, both trial and appellate, substituted their judgment for that of an Illinois court on a question of Illinois law.

The cases cited in the text of the opinion of the Supreme Court of Utah do not support this ground of decision. These cases will be briefly noted. *Nelson v. Miller*[9] is the leading Illinois decision from the Supreme Court of Illinois on the statute involved in the case and so is controlling in Illinois and elsewhere as to what Illinois law is. In *Conn v. Whitmore* the Utah courts, presumptuously it would seem, took the position that an Illinois trial court was not familiar with this decision or, if it was, that it did not know how to apply the decision. *International Shoe Co. v. State of Washington*[10] is relevant on the question of whether the rule of Illinois law, under which Whitmore was subjected to Illinois jurisdiction, is valid under the Federal

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[6]Id. at 872.
[7]Ill. Civil Practice Act §§ 16-17.
[8]342 P.2d at 872.
[9]11 Ill. 2d 378, 143 N.E.2d 673 (1957).
[10]326 U.S. 310 (1945).

Constitution. It does *not* authorize Utah courts to examine the jurisdiction of Illinois courts under Illinois law. *Pennoyer v. Neff*[11] and *McGee v. International Life Ins. Co.*[12] authorized the Utah courts to examine the jurisdiction of the Illinois trial court under the Federal Constitution.

As an alternative ground of decision the Supreme Court of Utah said that the exercise of jurisdiction by the Illinois court was invalid under the Federal Constitution. *Pennoyer v. Neff* and *McGee v. International Life Ins. Co.* support this ground of decision, the correctness of which is not being questioned.

Instead, the purpose here is to point out that there is a distinction between jurisdiction under a state's own law and jurisdiction under the Federal Constitution. When a state court in the position of the Illinois court in *Conn v. Whitmore* has the case, it has both questions: Does the court have jurisdiction under the state's own law? If it does, then can this jurisdiction be validly exercised under the Federal Constitution?

When the state court exercises jurisdiction by entering a judgment it must necessarily have answered both questions in the affirmative. When this judgment is challenged in another state, only the second question—validity under the Federal Constitution—is open. The first question—validity under the state's own law—has been answered by the only judicial body with authority to do so, subject to correction, of course, by a higher judicial body in the same state.

The Supreme Court of Utah is in good company in failing to distinguish between the two issues. The United States Supreme Court has itself, without any real discussion of the matter, apparently sanctioned the practice. In *Adam v. Saenger*[13] the Court did not disapprove of a Texas court's substituting its judgment for that of a California court on the question of whether the California court had jurisdiction under California law, but instead the U. S. Supreme Court found that the Texas court had erroneously interpreted California law. The most extreme example of this practice is to be found in *Treinies v. Sunshine Mining Co.*,[14] wherein the Idaho courts substituted their judgment for that of the Washington courts on a question of jurisdiction under Washington law *after* the Supreme Court of Washington had decided the issue in a prohibition proceeding.

If, as is argued here, this practice is wrong, the question may be

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[11]95 U.S. 714 (1878).
[12]355 U.S. 220 (1957).
[13]303 U.S. 59 (1938).
[14]308 U.S. 66 (1939).

asked as to why courts are misled into the error. There are two reasons, it is believed, both in the nature of tacit assumptions, upon which the courts are acting without being conscious of them.

Appellate courts have become so accustomed to affirming and reversing trial courts and "making" law that it is assumed that they—the appellate courts—are the only courts that do declare the law. In this, they overlook the fact that nearly all law is judicially determined in the first instance by trial courts, and that appellate courts only can consider such initial determinations of law as are brought to them for review.

The other reason, somewhat related to the first one, is that courts, and the legal profession generally, have come to assume that only opinion-writing courts make law. The opinion rather than the judgment is viewed as the declaration of law. Therefore, the judicial action of the Illinois trial court in entering a judgment was ignored by the Utah courts as not being a "law declaring" action. If the Illinois trial court had written an opinion flatly stating that under the Illinois decision of *Nelson v. Miller* the court did have jurisdiction, very probably the Utah courts would have seen that this was not a matter of their concern, so that they would only have undertaken to examine Illinois jurisdiction under the Federal Constitution. Absent the written opinion, however, the Utah courts ignored the Illinois judgment as being in and of itself a declaration of Illinois law on the jurisdictional point.

The concept of due process in this area of jurisdiction under the Federal Constitution is a peculiar one. Suppose Whitmore had specially appeared in the Illinois proceeding and, having lost in the Illinois courts, appealed to the U. S. Supreme Court. What result? In applying *International Shoe Co. v. State of Washington* the U. S. Supreme Court might very well find that Whitmore was subject to the jurisdiction of the Illinois courts and so the Illinois judgment would be valid and consistent with the due process clause of the fourteenth amendment. Alternatively, suppose that in *Conn v. Whitmore* itself, Conn had obtained review by the U. S. Supreme Court. What result? In applying *International Shoe* and related decisions the Court could find evidence to support the Utah determination that Whitmore was not transacting business in Illinois, so that the Utah action declaring the Illinois judgment invalid under the fourteenth amendment would be affirmed. Thus, the validity of the Illinois judgment, that is, due process of law, depends on which judgment is reviewed. The Illinois judgment reviewed directly, by appeal from the Illinois courts, is valid, because it is consistent with due process of law. The Illinois judg-

ment reviewed indirectly, by review of the Utah action declaring it invalid, is void because inconsistent with due process of law.[15]

One final comment. The Utah court in *Conn. v. Whitmore* never reached the merits of the controversy between the parties, nor are the merits clear. The gestation period in mares varies from 304 to 419 days, with the average about eleven months.[16] Therefore, it is entirely possible that in February 1955 the seller in referring to a 1955 foal did not intend to offer for sale a mare in foal while the buyer could reasonably have thought that he was being offered a mare in foal. Wherever justice lies in this particular case, the poor state of the administration of justice is clear. After a judicial proceeding in Illinois, another in Utah, including an appeal to the highest court of Utah, more than three years of time gone by, the merits of a controversy over the $750 purchase price of a mare have not yet been reached. Presumably only the U. S. Supreme Court can finally lay down the conditions under which the merits of the controversy can be litigated, and that Court's determination will depend, not on the merits, but on which judgment it is reviewing. In this way justice is enmeshed and smothered in sterile legalisms.

[15]This point is developed more fully, as it relates to conflicting determinations of domicile, in Ritz, Migratory Alimony: A Constitutional Dilemma in the Exercise of in Personam Jurisdiction, 29 Fordham L. Rev. 83 (1960).

[16]Information Please 1959 Almanac 277.

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