

Final Exam

PROCEDURE II

Fall 1988
Professor Flint

This is a closed book examination. Please answer all questions fully and completely. The weight of each question is shown.

I. Please state whether you agree or disagree with each of the following statements. Your answer must include why you agree or disagree with each statement.

- a. (5%) Where a court of general jurisdiction, in the exercise of its ordinary judicial function renders a judgment in a case in which it has jurisdiction over the person of the defendant, and the subject matter of the controversy, such judgment is never void, no matter how erroneous it may appear from the face of the record.
- b. (5%) Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the state, that he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.
- c. (5%) While ordinarily presumptions are made in support of a judgment, including the presumptions of due service of citation when the judgment so recites, no such presumptions are made in a direct attack upon a default judgment.
- d. (5%) Defective jurisdictional allegations in the petition as well as defects in the manner or method of service may be challenged by a non-resident in a special appearance.
- e. (5%) Under Rule 329b, when the time for filing a motion for new trial has expired and relief may not be obtained by appeal, a proceeding in the nature of a bill of review is the exclusive method of vacating a default judgment rendered in a case in which the Court had jurisdictional power to render such judgment.

- f. (5%) The settled rule in this state is to the effect that under a general denial, a defendant may introduce any testimony which goes to disprove the facts alleged and proved by the plaintiff and may introduce any testimony which will avoid the legal consequences of such facts.

II. (35%)

Southern Bell ("Southern") and Robert E. Lee ("Robert") were driving their car in the state of New York when they were involved in an automobile accident with an automobile driven by Nasty Yankee ("Nasty"). Southern and Robert although not seriously injured, went to Texas and remained at a ranch in Uvalde, Texas. Nasty sustained numerous injuries, and subsequently filed a suit in Uvalde County District Court seeking to recover damages in excess of \$1,000,000.00. The clerk issued a citation directed to Southern and the sheriff personally served the citation on Southern and Robert. On the back of the citation directed to Southern in the area designated "Officers Return", the sheriff wrote that Southern and Robert were personally served on this the first day of January, 1988. Neither Southern or Lee answered and Nasty obtained a default judgment for \$1,000,000.00. The clerk pursuant to the rules, mailed a default judgment certificate to both Lee and Southern at the addresses provided by Nasty and upon receipt of the same each hired a separate lawyer. Southern explained to her lawyer that she did not know what the document was that the sheriff had delivered to her and that in any event she was not a resident of Texas, but was a resident of the state of Alabama. She further told him that she had not been driving at the time of the accident nor was she the owner of the car so she could not understand how she could have any liability in the matter. Lee went to his attorney and explained to him that he did not have a defense to the lawsuit as he had been driving the car and was kissing Southern at the time of the accident and while totally preoccupied with other matters he failed to look where he was going. He did note however, that he doesn't remember having ever been served and was not quite sure what all this meant. Before either of their lawyers had an opportunity to do anything or to make any decisions, Nasty filed another lawsuit against both Southern and Robert claiming that he also sustained property damage in the first lawsuit and was now seeking to recover that property damage. In this petition he claimed that the previous default judgment was collateral estoppel on the liability issues and the only issue for the Court to decide was damages. This time both Lee and answered asserting a general

↳ Southern

denial. Southern filed a counter-claim against Nasty trying to seek to recover for her own personal injuries. Nasty did not respond by filing any pleading to the counter-claim. During the trial of the lawsuit the court decided that Nasty's suit was in fact barred, but refused to consider the previous judgment as a "bar" to the counter-claim filed by Southern. Thus, he entered judgment by default for Southern.

You are the attorney for each of the above parties including Southern, Robert and Nasty. State each and every step that you would take to protect your client's interest in both lawsuits.

III. (35%)

Eric Bonhoffer, a resident of Baden-Baden, West Germany, was an industrial developer. He decided to take advantage of the Homeport development in Corpus Christi, Nueces County, Texas, by submitting a bid to supply concrete to the project. He wrote the general Homeport contractor in Corpus Christi, Texas, and the contractor sent him a bid form at his address in West Germany. Mr. Bonhoffer completed the form, mailed it back noting that the bid sheet had indicated that the low bid was automatically accepted as the subcontractor. When the bids were subsequently open in Corpus Christi, it was determined that Mr. Bonhoffer's bid was lowest and a telex was immediately sent to him informing him of his low bid. Mr. Bonhoffer made a trip to Corpus Christi from West Germany to sign the contract. Shortly after the signing of the contract, Mr. Bonhoffer went to Houston, Texas and to Austin, Texas, in order to find laborers to perform his job. He selected a resident of Harris County to be the Construction Superintendent and ask him to employ other people in Texas. Mr. Bonhoffer was in Texas for a total three days and left. Two weeks later, it was determined that Mr. Bonhoffer had been a member of the Nazi Party during the Hitler era and the General Contractor immediately terminated the subcontract when the Navy told him to. One day prior to the termination, the Construction Superintendent for Bonhoffer was involved in an automobile accident. As a result of the two events described above, Mr. Bonhoffer was sued. The first in Harris County, Texas by the person who had been involved in the automobile collision with Mr. Bonhoffer's alleged agent claiming that Mr. Bonhoffer as the employer was vicariously liable for the actions of his agent. Secondly, in Nueces County, Texas, the General Contractor filed a suit against Mr. Bonhoffer seeking declaratory judgment claiming that the contract was null and void as there was a federal

statute that prohibited contracts with Nazis. In the lawsuit that was filed in Harris County the District Clerk's office prepared citation pursuant to Rule 108 and mailed it Certified Mail, Return Receipt Requested, to Mr. Bonhoffer's address in West Germany. Upon receipt of the citation, Mr. Bonhoffer immediately hired a lawyer who in response to the pleading filed a Motion to Quash claiming that Mr. Bonhoffer was a citizen of a foreign country and therefore was not subject to process in Texas. In the lawsuit filed in Nueces County the District Clerk's office following the instructions in the petition complied with the Texas long-arm statute and served the Secretary of State who subsequently sent a registered letter to Mr. Bonhoffer in Germany. Mr. Bonhoffer hired another lawyer in Nueces County, and that lawyer filed a Rule 120(a) Motion.

You are the District Judge sitting in Harris County that is hearing the case involving Mr. Bonhoffer as well as the District Judge sitting in Nueces County. Please state what actions you would take with respect to each of the respective motions and how you would rule. Following your discussion of the ruling, then assume that you are Mr. Bonhoffer's lawyer in each of the respective matters and state how you would proceed.

We do have specific jurisdiction in Texas. Whether we have general jurisdiction is another matter. This question arises when we determine that the cause of action DID NOT arise from the defendant's contacts with the state. Then we must start counting contacts to determine if the defendant has invoked the protections of the state and therefore can be said to be within the state's jurisdiction. We don't quite know if Texas recognizes general jurisdiction in this situation, but a good lawyer always would argue for its recognition and implementation.

As a result, I would generally agree to the quoted statement, but with the understanding that in Texas we do apply the Nexus Test to examine the nature of the contacts the defendant has had with the forum state.

I.c. If you are speaking to the difference in presumptions in direct and collateral attacks on judgments, I agree. We see this difference in presumptions most clearly in the Writ of Error, which is a form of direct attack. We know that a Writ of Error must be filed within 6 months of final judgment, that the Defendant couldn't have participated in the trial and that there be error on the FACE of the record. Yet, if the record does not recite jurisdictional facts and is silent with regard to those facts, we cannot presume that jurisdiction did indeed exist. This is in direct contrast to the collateral attack, which requires that jurisdiction be PRESUMED even if the record is silent. You must affirmatively find jurisdictional error on the face of the record in a collateral attack.

Why is this so? First, a collateral attack requires a serious jurisdictional error. To allow a collateral attack when the record is merely silent does not assure us that the jurisdictional error is serious. Additionally, there is a public policy reason. A collateral attack is under no statute of limitations. Therefore a collateral attack may be pressed 5 years, 10 years or even 80 years down the road. Obviously, this is considerable power. We want to use it sparingly because a goal of our system of justice is to promote the stability of decisions. Obviously, if attach statutes of limitations to direct attacks - which is the only type of attack where this presumption of validity does not attach when the record is silent - then we are limiting the time frame in which a judgment is "unstable," or in which it can be declared invalid.

I.d. This statement is partially right. To challenge the assertion of jurisdiction where the defendant believes there is no jurisdictional power, one may file a 120a motion or a special appearance. A special appearance enables the defendant (D) to challenge the jurisdiction without making an appearance, that is, without subjecting himself to the jurisdiction of the court. (It should be noted, however, that if you lose a 120a motion, the court will find that you have made an appearance.) A 120a hearing concerns itself with whether the out-of-state D fulfills the requirements for the assertion of jurisdiction under the minimum contacts test (which I already have addressed supra).

In any event, the issue of jurisdiction is THE ONLY ISSUE in a 120a hearing. Defects in the manner of service are not properly - an issue in this hearing.

If the out-of-state D contends he was improperly served and doesn't mind subjecting himself to jurisdiction of the forum state, then he can file a Motion to Quash the citation, which essentially notifies the court of the defects in the citation.

All a motion to quash does is extend the time D has to answer to the petition. It also subjects him to jurisdiction of the forum state. There are times when defects in service are the equivalent of no notice, but they wouldn't be raised in a 120a hearing because IF YOU DIDN'T HAVE NOTICE YOU WOULDN'T BE AWARE OF THE LAWSUIT AND THE NEED TO FILE A SPECIAL APPEARANCE!

Therefore, defective jurisdictional allegations in the petition may be challenged in a special appearance, but not defects in the manner or method of service.

I.e. I disagree. When tim for filing a motion for new trial has expired and relief may not be obtained by appeal, AND the court had jurisdictional power, the party against whom the default judgment was rendered STILL has the option of filing for a Writ of Error. There are some requirements he has to meet: (1) he can't have participated in the earlier trial (obviously he didn't if it's a default judgment); (2) it must be within 6 months of the final default judgment; and (3) there must be error on the face of the record. The error allowed in a Writ of Error may be jurisdictional error, but it may be other error, as well. For example, if the attorney in reading the file (and a competent attorney always will read the file before doing anything in a default judgment situation), sees that there was jurisdiction but NO NOTICE (because, say, the citation wasn't delivered), then there is error on the face of the record. And, as discussed supra, silence on the face of the record in a Writ of Error/Direct Attack situation does not give the judgment a presumption of validity.

The only time in which one file for an equitable bill of review (after the time for filing a motion for new trial has expired) is when one sees that one would not win on a writ of error because there is no error apparent on the face of the record. Only in that case would the Equitable Bill of Review be the sole method of vacating a default judgment rendered by a court that had jurisdictional power.

I.f. I disagree. Under a general denial, the D generally is saying, "I deny everything," which has the effect of putting everything the plaintiff has pleaded into issue in the case. A general denial enables the defendant to put on evidence, but it does not enable the D to request special issues for the jury at deliberation time. The only time the defendant can put on evidence or testimony that will avoid the legal consequences of the P's pleaded facts is when the D first makes an affirmative defense, which is a "Yes, but" pleading. That is to say, the D admits to the facts that the P has pleaded, but states that he has an excuse that enables him to avoid the consequences of the facts P has pleaded. D has, simply, a defense. The defenses that D must plead affirmatively in Texas include the statute of limitations, discharge in bankruptcy, duress, res judicata and contributory negligence.

Thus, the way I see it is that the settled rule in this state is to the effect that under a general denial, a defendant may introduce any testimony that goes to disprove the facts alleged and proved by the plaintiff. To introduce any testimony which will avoid the legal consequences of such facts, the D must plead an affirmative defense.

P.S. In situations where the item in issue is a promissory note or a contract, the D must make a verified denial (a denial under oath) in order to put on evidence disproving his signing of the note or the contract. The Tex. R. of Civ. Proc. spell out in greater detail what sorts of statements require verified pleadings. However, the verified pleading is like the affirmative defense in that it requires the D to more than generally deny in order to introduce evidence that will avoid the legal consequences of the pleaded facts.

11. When Nasty filed his lawsuit in Uvalde County Dist. Ct., the first issue is whether the court had subject matter jurisdiction. A district court is a court of general jurisdiction, which means that it has jurisdiction over a wide variety of lawsuits as long as the amount in controversy is within the limits of the jurisdictional limits of the court. Since Nasty alleged more than \$1 million in injuries, he would appear to be within the jurisdictional amount for the district court, but one should always check the Texas Government Code to be sure. Another thing Nasty needs to file suit in Uvalde County is in personam jurisdiction over the defendants. Although he appears to be a Yankee, Nasty has subjected himself to the jurisdiction of the court by filing suit there - even though it is a Texas court. For the court to have in personam jurisdiction over Southern and Robert, they must either be residents or fulfill the Minimum Contacts Test if they are out-of-staters. They also must be given proper notice if in personam jurisdiction over Robert and Southern is to ripen.

N must plead facts establishing subject matter jurisdiction.

N's plea must also establish a cause of action. He must plead facts establishing a cause of action.

First, however, we need to see if the court will have venue over the two of them. According to Texas' venue statute, a lawsuit may be filed in the county where all or part of the tort occurred or where the defendant resides. Venue is an assertion of jurisdiction.

Residence is defined as the place where the person has an abode, lives there for a substantial period of time and intends to remain there "permanently," which has been held to mean "not transitorially." Southern claims to be a resident of Alabama, but Nasty would argue venue for Uvalde County as Southern has been "remaining" at this ranch in Uvalde County. Nasty probably would make the same argument as regards Robert. Since we have no residency facts regarding Robert, we really can't say how he would respond.

One of the first problems with the first case is that although the petition was filed against both Southern and Robert, only the citation was directed only to Southern. A pleading provides the defendant notice of the cause of action. The defendant cannot have notice of that cause of action if he is not made aware that the pleading was filed. Notice is done through service. Under Rules 103 and 106 in Tex. R. Civ. Proc., one may be served by a sheriff or any other disinterested party. Southern was served. She might be held to have notice - or at least Nasty would so argue. Robert, on the other hand, received no citation. He would argue he had no notice.

The first thing any lawyer should do in a default judgment situation is examine the file to determine what the chances are for attack. Upon examining the file, one would find that there was subject matter jurisdiction. Whether there was personal jurisdiction is another issue.

In Texas, the state has in personam jurisdiction over its residents. Southern is a resident of Alabama, but Robert is a resident of Texas.

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The first thing any lawyer should do when his client has a default judgment against him is to go to the courthouse and look at the file to determine what the time frame and chances are for attack. Upon examining the file, one would find subject matter jurisdiction. The issue of personal jurisdiction and notice, however, are in doubt.

First, Southern. She says she's not a Texas resident. In Texas, courts have jurisdiction in personam over residents. Southern says she resides in Alabama. In Texas, residency requires that one have a fixed place of abode, that one use it for a substantial period of time and that one intend to use it "permanently" not transitorially. We know Southern has lived in this ranch for a period of time, however, we also know that she considers herself an Alabama resident. Intent is very important in Texas residency questions, so as Southern's lawyer I would argue she's not a Texas resident because she doesn't intend to be one. Nasty would respond that under Texas residence rules, one can be a resident of more than one place for venue purposes. Nasty would argue that that should apply by analogy in this situation.

Nasty also would argue that there is IPJ with Southern because she was served. And, indeed, the sheriff's return states that she has been served. Southern even admits that she has been served, although she didn't understand what the citation meant. If Southern is held to be a Texas resident, this alone would subject her to IPJ in Texas. However, if she's an out-of-state resident, we would have to determine if she's subject to jurisdiction. We would determine this via the Minimum Contacts Test.

Southern also seems to have subjected herself to jurisdiction by filing a general denial - which is an appearance - in the second lawsuit. Thus, she has subjected herself to the jurisdiction of the state, or so Nasty would argue, *for the 2nd suit. It's still open as to the 1st, and we'd have to do the min. contacts test.*

As for Robert, we don't know if he is a Texas resident, but many of the same arguments for residency of Southern would also apply to him since he is living on the ranch. The problem is that he wasn't served with process. He wasn't given notice. Although the return says that he was served, the fact is that the citation only was directed to him. And, Robert's lawyer would argue that the defect of not naming him in the citation was so bad as to be misleading. That's always the question with citation defects, we must ask whether the defect was so misleading as to not give the D notice. In this case, Robert would argue that it was. Nasty would probably argue that because Southern was served and she was in the accident with Robert, Robert should have known the lawsuit applied him. Also, the petition should have been included in the citation and the petition would have shown that the lawsuit was against both Robert and Southern.

This first judgment would appear to be able to be attacked directly or collaterally.

~~Determine if the first default judgment was less than 90 days old~~

Direct Attack. If the judgment was signed less than 30 days ago, Southern and Robert could attack if they could show (1) That they intentionally failed to answer, (2) that they had a meritorious defense and (3) that the new trial wouldn't prejudice the rights of Nasty. At this point, Robert and Southern ought to offer to pay Nasty's costs for the default judgment.

Although cited, Southern can argue that she didn't understand the citation and therefore didn't appear. Robert can assert that he was not cited and therefore had no notice. Arguing a meritorious defense would be harder for Robert since he has admitted the accident was his fault, but Southern could argue that she was not driving at the time. She was just a passenger. However, Nasty could say that she was a party to the kissing and therefore was at fault. It is important to note, however, that in an Equitable Motion for New Trial, one need not PROVE a meritorious defense. One need only plead it.

If the lawyers found out about the default judgment within 6 months of it, they could also file a Writ of Error. This requires that the petitioner not have participated in the trial below, which is obviously fulfilled here since neither Southern nor Robert went. There also must be error on the face of the record. This may be easier for Robert since, although the citation's return says he was served, the citation was not directed to him. Robert would argue that the citation needed to be directed to him and that it was not. Hence, he was not cited and he did not have notice. The variance between the address on the citation and on the return might be sufficient error. Southern would have a harder time since the citation clearly shows that she received it. In fact, it would seem that a Writ of Error would be harder for her since there is no error on the face of the record as regards her.

Equitable Bill of Review must be filed within 4 years of the default judgment. It requires that (1) the petitioner exhausts all other available remedies, (2) that the failure to answer was not due to negligence, (3) that the petition PROVE a meritorious defense and that (5) failure to answer be due to fraud on the part of petitioner, reliance on a court official or failure to be served.

As regards the first requirement, Southern would have had to have filed at least the Eq. Motion for New Trial if there had been time. Since it was doubtful she would or could have won on a Writ of Error, she wouldn't have had to file that to exhaust all other available remedies. Robert, on the other hand, would have had to file both the Eq. Motion for New Trial and the Writ of Error - had there been time - before he could file the Eq. Bill of Review. As for failure to answer, Southern would have to show that her failure to understand the document was not negligent. Nasty would argue that the citation very clearly stated that a lawsuit was afoot since it does direct one to appear in court

on a certain day and therefore Southern was negligent. Robert, however, can say that because he was not served, he was not negligent. Regarding the proof of the meritorious defense, Robert has admitted - at least to his lawyer and that's privileged and confidential - that he was at fault. Unless Robert can come up with another reason, he doesn't have a meritorious defense. Southern also was a party to the kissing and may not have a meritorious defense, either. Robert can lay his failure to answer on the lack of notice, and on the fact that a court official should have issued a citation for him when Southern was cited. Southern cannot plead either fraud, reliance or failure of service.

Collateral attacks require serious jurisdictional errors. A direct attack can become collateral when the statute of limitations has run and when there is no meritorious defense. Thus, a collateral attack may be the better route for Southern since she cannot show failure of service. It might also be an option for Robert since he can't prove a meritorious defense. What's required for a collateral attack is error on the face of the record. First, we must look at the judgment and make sure it recites subject matter and in personam jurisdiction. If it does, that's as far as we can go with the attack and we're out of luck. But if the judgment is silent, then we can look at the petition and citation. Since the citation recites service as to Southern, she probably will not be able to press her collateral attack. There is no citation, however, as to Robert. So, if the judgment is silent as to the IPJ of Robert, then the citation clearly will show that only Southern is served. The problem is that if the citation for Robert is missing, we presume jurisdiction. So, even though Southern's citation recites some inconsistent facts on the return Nasty will argue this isn't enough to affirmatively show lack of jurisdiction as to either Southern or Robert.

~~As to the second lawsuit, the lawyers for Southern and Robert will argue that Nasty is barred by the doctrine of res judicata.~~

As to the second lawsuit, Southern and Robert's lawyers will argue that Nasty impermissibly split his cause of action in the first lawsuit and that he should have pleaded all causes of action logically arising from the transaction. Here, both the personal injuries and the property damage arose from the same transaction and hence they should have been pleaded in the first lawsuit. Thus, Robert and Southern's lawyers will argue that this claim is barred by the doctrine of res judicata, which is claim preclusion. Res judicata requires the cause of action to be litigated in the second lawsuit as litigated in the first and that there be the same parties, privies or parties in interest. The doctrine is designed to inject equity into the judicial process. We want to prevent dual recovery and vexacious litigation, as well as promote the stability of judgments and

R+S might also
argue res judicata
between two
claims, but this
claim won't

No.
Section

Judicial economy.

Here, we have the same parties in the second case as in the first. Robert and Southern will argue. They also will note the fact about the cause of action arising from the same transaction that necessitated the first lawsuit. Nasty, however, will note that the first claim was not competently litigated. A default judgment is not competent litigation if one party fails to appear.

They will note this will give Nasty dual recovery + subject them to vexatious litigation.

When Robert and Southern generally denied Nasty's allegations in the second suit, they served to put everything Nasty had pleaded into issue. By Southern filing the counterclaim of personal injury, she was claiming for injuries that arose from the same transaction that precipitated the property damage lawsuit. S's claim was a compulsory counterclaim since it arose from that transaction. Compulsory counterclaims must be brought or they are waived. Nasty might argue that S's claim is prevented by res judicata since she should have brought it in the first lawsuit, but S will argue that the first lawsuit did not present a competent adjudication.

Compulsory counterclaims must be against the T, must be within the subj matter jurisdiction of the court + NOT require joinder of a 3rd party. S's claim fulfilled these conditions.

A counterclaim, by the way, differs from a cross-claim since it is filed against the opposing party. A crossclaim is filed against a fellow defendant or, as the case may be, a party on the same side of the lawsuit as the cross claimer.

By not replying to S's counterclaim, Nasty has admitted it into evidence. So, he has waived this defect in his pleadings once the trial begins.

(Sorry, new typewriter!)

Nasty may try to claim collateral estoppel against S and R regarding the negligence claim for property damage, but it is doubtful whether his previous claim was competently litigated. After all, it was a default judgment. S and R will argue that it should not be considered fait accompli in the second case since they did not participate in the earlier trial. Also, they might try to argue that the issue of property damage caused by Nasty was not discussed in the first default judgment. Only personal injuries were mentioned.

Also, the 1st court didn't have jurisdiction regarding R. So, collateral estoppel can't apply to R.

This also is the problem for considering S's personal injury claim on a collateral estoppel basis. It wasn't her claim that was litigated in the first trial, it was Nasty's.

The requirements of collateral estoppel are that there be the same issue that was litigated a major issue in the earlier trial, that at least one of the parties be the same and that the issue be litigated by a court of competent ~~litigation~~ jurisdiction.

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There is error on the part of the second judgment simply because the judge gave S a default judgment. Thus, this would be subject to being overturned on appeal since there are indications that S and Nasty were at the second trial. S did not win by default.

III. The issue in the question is whether either court has in personam Jurisdiction over Mr. B. There are two aspects to in personam jurisdiction. One is whether the forum state has jurisdiction over the person, the other is whether the forum state has given the person notice.

First, we will address notice. It should be noted that just because a state can serve a defendant does not mean that state has jurisdiction over the person. The longarm statute, under which Mr. B was served in the declaratory judgment suit, enables service on an out-of-state resident when a D by mail or otherwise makes a K with a Texas resident and performs all or part of that K in Texas. The statute also applies when the D torts someone wholly or in part in Texas and when the D recruits Texas residents for employment in or out of Texas. It is obvious that Mr. B has made a K with Homeport and that an agent of his has torted someone in Texas. ~~The Nueces judge would note Mr. B's agent committed the tort. The agent's acts would be imputed to the employer, Mr. B, so the judge might say that Mr. B could be~~

The issue in this lawsuit is the K. Mr. B would argue that he only signed the K in Texas. We know from caselaw that merely signing a K is not enough to enable someone to serve you with process. However, the K was to be performed in Texas and the preparations for performance had begun, so the judge might say Mr. B could be served.

Under the Harris County lawsuit, Mr. B was served with notice via Rule 108, which basically provides methods for service for out-of-state residents. These methods are substantially the same as allowed under Rule 106. In moving to quash this citation, Mr. B's lawyer subjected Mr. B to the in personam jurisdiction of the Harris County court. If he had wanted to contest jurisdiction, Mr. B should have filed a 120a motion. As it is now, he's subject to the court's jurisdiction. One cannot contest jurisdiction with a Motion to Quash.

Back in Nueces County, since Mr. B filed a 120a, the issue is whether the court had jurisdiction over him. We should hope that Mr. B's lawyer filed an answer subject to the 120a, otherwise if it is denied, the opponent can get a default judgment against Mr. B as soon as the 120a motion is denied.

The question posed under the 120a motion is whether the D has sufficient minimum contacts with the state of Texas so as to enable the assertion of jurisdiction over the D such that it does not offend traditional notions of fair play and substantive justice. This is a due process test.

The first question we want to ask is whether the cause of action arose from D's contacts in the forum state? The opponent will argue that it did because Mr. B signed the contract in the state of Texas. However, we know that merely signing a K in a state does not subject one to jurisdiction of that state.

substantial justice to prosecute him on this K claim when he has had so comparatively few contacts with the state and when the contract has been cancelled. Due process, he would argue, would at least require that his contacts with the state be more substantial and ongoing than had occurred here. The proponent of jurisdiction would note that there's hardly a more substantial contact with the state than a multi-million dollar Homeport K. For good measure, Mr. B would argue Asahi Metals, but he would have to get around the fact that Asahi Metals was not directly doing business in California. Mr. B is directly doing business in Texas through his company and his agents.

This Nueces County case is a declaratory judgment case. Declaratory judgments are sought in trials where there is a live controversy as to the parties, but for reasons of judicial economy one of the parties asks for a declaration of the rights of the parties. Normally, courts do not give advisory opinions and declaratory judgments have been held by some commentators to be a form of advisory opinion. However, they are allowed by law. Usually, one must ask whether the case or controversy needs to be adjudicated now or later in a declaratory judgment case. If it can be adjudicated later, it's a declaratory judgment. If now, the court probably will decline to declare the rights of the parties and demand a full-scale trial. If jurisdiction is found, Mr. B. might argue for a full-scale trial because these are serious charges and they directly affect his ability to do business in Corpus. However, his opponent will argue against it because the performance on the contract has only just begun and it would be quicker to make the adjudication now before significant work is

done. A decision by the trial court to deny the request for declaratory judgment and to have a full-scale trial also will bring in issues of forum non conveniens since it is likely that many West German witnesses would be needed to establish Mr. B's Nazi connections.

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Some assorted notes on this problem: Regarding the service via Rule 108 - mail service is allowed, but it must be by certified or registered mail and the return receipt must be signed by Mr. B., otherwise there will be a defect in the citation. It's doubtful you could argue that the defect was serious enough to forestall notice, but it might be enough for a motion to quash (which we wouldn't want to file anyway since Mr. B. doesn't want to appear).

Regarding the Longarm Statute service - this was on Mr. B's corporation, therefore the citation could have been directed to the president of the corporation, the vice-president or the company's registered agent in Texas. If the company had no registered agent, the citation could have been served on the Secretary of State, who would then serve it on the pres. or vice-pres. of the corp., return receipt requested. The secretary of state would then have to file a Whitney certificate certifying he'd sent the citation.

If it can be shown that the c/a arose from Mr. B's contacts within the state, this is specific jurisdiction. We call this the Nexus test and we next look at the quality, number, nature and type of the contacts Mr. B had in the state. First, however, we can expect Mr. B to argue that the c/a didn't arise from the K because his being a Nazi has nothing to do with being in Texas. He was one in Germany and didn't become one solely by entering Texas. However, the opponent would go on to look at the other factors of the nexus test. The proponent of jurisdiction would note that Mr. B. has contracted to do business in Texas. He also has hired employees who are hiring employees. This is to say, Mr. B. has agents who are conducting Mr. B's business in Texas. The actions of an agent can be used to assert jurisdiction. Mr. B seems to have quite a number of contacts with the state if we count the activities of his agents. Mr. B. might argue that these activities took place after the K was cancelled and therefore, these activities have nothing to do with his business in the state. However, it still could be argued he's doing some business in Texas, even if it's not for the government. A good lawyer also would note that Mr. B had subjected himself to the jurisdiction of the Harris County court, and since he was subject to IPJ there, why not in Nueces County? (But that argument is not part of the Nexus Test).

If the proponent of jurisdiction could not get Mr. B's jurisdiction in on specific jurisdiction, then he might argue general jurisdiction. We look to general jurisdiction when we determine that the c/a didn't arise from the D's contacts with the state. Then we start counting contacts. Mr. B would argue against general jurisdiction in this instance because the state of Texas has not formally recognized it. The proponent of jurisdiction would use this case to get the state to recognize it. He would note that Mr. B has participated in the bidding, signed a contract, hired laborers, hired a construction superintendent. Although he was not in Texas for more than a few days, he seemed to have conducted quite a bit of work. Also, by hiring people to work in Texas, Mr. B could be said to have availed himself of the protections of the forum state since he probably will have to pay workman's compensation insurance and otherwise involve himself in the laws of the state.

After looking at general and specific jurisdiction, the court would take note of the fact that Mr. B. intentionally sought to K in Texas. No one forced him to bid on Homeport. The court also would take note of the fact that many of ~~the defendants in~~ the witnesses in the lawsuit might be in Germany. In fact, Mr. B would argue forum non conveniens, which applies when the witnesses must come from so far away, and other parties to the suit, that it is not convenient to hold the lawsuit in Texas. Basically, forum non conveniens is argued when a court has jurisdiction. What the lawyer is trying to do is get the court to exercise its discretion and decline to exercise jurisdiction.†

After all this, Mr. B probably would make a due process argument that it would not accord with the notions of fair play and

Venue - Venue for the Nueces County suit is proper because the K was signed in Corpus.
Venue is proper where all or part of the c/a accrued. Except Mr. B. would argue it accrued in West Germany since he was a Nazi.

Re: venue for the car accident. Venue is proper where the defendant resides, where all or part of the auto accident occurred. If the accident occurred in Harris County, then venue would be proper there. Also, if the driver of the car lived in Harris county, venue would be proper since if venue is proper as to one D, it is proper as to all. Also, the P in the auto accident suit might want to "persuade" the car driver to move to Harris County.

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