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In the

Supreme Court of the United States

AMERICAN MOTORISTS INSURANCE)
COMPANY,)

Appellant)

v.)

VIRGIL B. STARNES)

No. 74-1481

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IN THE SUPREME COURT OF THE UNITED STATES

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 AMERICAN MOTORISTS INSURANCE :
 COMPANY, :
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 Appellant :
 :
 v. : No. 74-1481
 :
 VIRGIL B. STARNES :
 :
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Washington, D. C.

Monday, February 23, 1976

The above-entitled matter came on for argument at
1:30 o'clock p.m.

BEFORE:

- WARREN E. BURGER, Chief Justice of the United States
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice
- HARRY A. BLACKMUN, Associate Justice
- LEWIS F. POWELL, JR., Associate Justice
- WILLIAM H. REHNQUIST, Associate Justice
- JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOEL W. WESTBROOK, ESQ., 1910 National Bank of
 Commerce Building, San Antonio, Texas 78205
 For Appellant

W. V. DUNNAM, JR., ESQ. 4125 West Waco Drive,
 Post Office Box 8418, Waco, Texas 76710
 For Appellee

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-1481, American Motorists Insurance Company against Virgil B. Starnes.

Mr. Westbrook, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JOEL W. WESTBROOK, ESQ.

ON BEHALF OF APPELLANT

MR. WESTBROOK: Yes. Mr. Chief Justice and may it please the Court:

I am Joel Westbrook of San Antonio, Texas representing the Appellant, American Motorist.

We are aware, may it please the Court, that not very many constitutional venue questions come to this Court but I must say, I must pass on to you that it has been said that Texas probably has, within its own Appellate system, more venue appeals than all the other 49 jurisdictions combined and I believe this case will help you to see why that is. because in Texas the venue carries a great deal more encumbrance than just where the case is going to be tried.

Our client, the American Motorist, unsuccessfully challenged venue in this uninsured motorist case as brought against it in a Texas State District Court in McLennan County, Texas.

The Appellant then had no more success in the Appellate courts of Texas because the Texas Supreme Court had previously, in 1963 in its Commercial Insurance versus Adams case, against virtually the same constitutional challenge, held against the challenge virtually the same one that we are making today.

QUESTION: That was a Texas Supreme Court case, wasn't it?

MR. WESTBROOK: Yes. Actually, your Honor, the Texas procedure of refusing writ of error and choosing between two conflicting courts of civil appeals judgments on this point and in per curiam selecting one of them and when writ is refused in Texas outright, why, that is the same precedential value as a Texas Supreme Court case would have.

QUESTION: Is it possible to say that your opponent doesn't rely on Adams? He doesn't cite it in his brief.

MR. WESTBROOK: Your Honor, I felt that the Court would --

QUESTION: Maybe I should ask him that.

MR. WESTBROOK: Yes.

QUESTION: Mr. Westbrook --

MR. WESTBROOK: Yes, sir.

QUESTION: -- I take it that this same Plaintiff

could have sued a domestic corporation in McLennan County just as you were sued in McLennan County since this plaintiff resided in McLennan County so that the only distinction you claim is being made between in-state and out-of-state corporations is the necessity with respect to a domestic corporation of having to prove a prima facie case as a cause of action.

MR. WESTBROOK: Actually, having to prove a case by a preponderance of the evidence, your Honor, yes. That is the difference.

QUESTION: Do you think this is a final judgment?

MR. WESTBROOK: I beg your pardon?

QUESTION: Do you think this is a final judgment under R-20 and U.S. v. Lando?

MR. WESTBROOK: Yes, sir, it is a final judgment.

QUESTION: If you are thinking about our Lando case, where it held that -- where Congress conferred a right of -- limited the right to sue a federal bank, it would strike me that your claim here -- you are not claiming a right that Texas law gives you to be sued in a particular county. All you are really claiming is the right to be treated identically with the domestic corporation, isn't it?

MR. WESTBROOK: Yes, sir, that is correct.

QUESTION: Do you think that is the same as

Lando, for finality purposes?

MR. WESTBROOK: I do not have the familiarity with Lando on that point, your Honor but in our jurisdictional statement, the Appendix B-III, we cite a number of cases, which are Texas cases, of course, that do hold that they are final judgments and they are appealable in Texas and this Court did note probable jurisdiction before in another Texas case, Exxon versus Preston and it had been briefed by the Appellant.

QUESTION: But all the Texas Court here did was to say that the suit could proceed against your company. The suit isn't over.

MR. WESTBROOK: That is right, yes, sir.

QUESTION: Maybe you are suggesting that we should have postponed jurisdiction, rather than noted it.

MR. WESTBROOK: Well, sir, I can only say that in Preston versus Exxon, jurisdiction was noted. It was never heard by this Court because the plaintiff Appellee --

QUESTION: Wasn't it mooted out? Let me follow through with another question Mr. Justice Rehnquist intimated. Would you explain for us just what a preliminary venue hearing amounts to in Texas as far as a domestic corporation is concerned?

MR. WESTBROOK: Yes, sir. If you have a domestic corporation in Texas that challenges venue where

the plaintiff has brought the action, that domestic corporation, the defendant, files what is called a plea of privilege, a verified plea.

The Plaintiff then files what is called a "controverting plea" and it is sent down for hearing. A jury may be requested by the Defendant. If he does, however, request a jury, the trial court, in his discretion, can try on the merits at the same time but of course, he is running the risk that if he's wrong on the plea of privilege, it will be reversed and have to be tried on the merits again.

Now, most of them are tried before the judge. The judge then makes his decision, either sustaining or overruling the plea of privilege.

If it is sustained, then the case is transferred -- in our case, to Dallas County, where the principal office was of American Motorist -- it is transferred to that county unless there is an appeal from that order.

If it is overruled, it is then tried in the county in which it was originally brought unless there is an appeal from that order but either side can appeal the ruling of the trial court.

QUESTION: Well, do you feel that that affords unequal protection as between domestic and foreign corporations?

MR. WESTBROOK: In this respect, that when the domestic corporation makes its challenge to the venue, the plaintiff, in order to keep that case in that county, McLennan County, has to prove, in addition to other factors such as the residence there or there is an agent of that domestic corporation resident in McLennan County -- he has to prove his cause of action, every constituent element has to be proven by a preponderance of the evidence.

This is a very substantial burden that the Plaintiff has to bear at this early stage in the proceedings.

QUESTION: And you are saying that he doesn't have to bear that with respect to a force operation, therefore, no equal protection.

MR. WESTBROOK: That is right, your Honor. He -- in our case, we stipulated and the thing was tried on the record, stipulated facts. We stipulated American Motorist was an Illinois corporation authorized to do business in Texas and doing business in Texas and that it had an agent in McLennan County. That is what it is and the Plaintiff relied on Subdivision 27 of our general venue statute and that was sufficient under subdivision 27.

Had it been a domestic corporation, it would not have been sufficient. We would then have had to go ahead and prove the cause of action.

QUESTION: I hear what you say, but does it mean

you have a full dress trial before a jury on the merits, on the venue issue alone?

MR. WESTBROOK: If you ask for a jury, yes. But as I said, the court has the discretion to try the case on the merits at the same time it tries plea of privilege, if he does ask for a jury.

QUESTION: But if the court does not exercise that discretion, then the plaintiff has the burden of showing by a preponderance of the evidence that he is entitled to recover on the merits?

MR. WESTBROOK: Yes, sir. Every element of the cause of action except damages -- factual damage.

QUESTION: And so you might have a week's trial?

MR. WESTBROOK: Yes, sir.

QUESTION: But if you are a foreign corporation you don't have that opportunity.

MR. WESTBROOK: No, sir, just if you are a foreign corporation doing business and have an agent in that county.

QUESTION: And does the defendant put in evidence at the jury trial to controvert the evidence introduced by the plaintiff?

MR. WESTBROOK: Yes, sir.

QUESTION: So you have a full-dress trial?

MR. WESTBROOK: Could be, yes, sir. And, of

course, the --

QUESTION: What is the normal practice? Does the judge usually have two trials or does he usually consolidate?

MR. WESTBROOK: No, sir, the normal practice, I would say, is a jury is not demanded. The normal practice is that the judge hears and makes the decision and normally, it is not a full-dress trial.

QUESTION: Normally, what is it, sort of a prima facie case and just hears the plaintiff?

MR. WESTBROOK: No, sir, it has to go beyond that. In our trials court, he has to prove it by the preponderance of the evidence but of course, if a judge is the finder of facts in this kind of preponderance business, it is not likely to be upset that it was the preponderance of the evidence.

QUESTION: Mr. Westbrook, I see from the brief that you filed, the Appendix here, that there are 31 sections to the Texas venue code. There are obviously distinctions between foreign corporations and domestic corporations which you are asking us to focus on but under section 28, if your company had been a fire, marine or inland insurance company which had been subject to different regulations, then being an automobile casualty company.

Now, what is the standard that we are supposed to

apply in terms of equal protection in determining whether these 31 different provisions for venue and different kinds of suits offend the Federal Constitution?

MR. WESTBROOK: We say that the Federal Constitution is offended -- the Equal Protection Clause -- by reason of the difference in Subdivision 23 which covers domestic corporations and Subdivision 27, which covers foreign corporations other than those specified elsewhere and this case came up under Subdivision 27.

No other of the subdivisions are involved.

QUESTION: That is true. It is perfectly true, but it seems to be that any litigant in Texas, unless he happens to be a private individual sued in a particular kind of case, is going to be able to make some claim that he is treated differently than a railroad personal injury case in Section 25 of the fire and marine case in 28.

What standard do we apply?

MR. WESTBROOK: Yes, sir, as a matter of fact, Subdivision 23 was before this Court 44 years ago on the claim that corporations were discriminated against because they had to prove a cause of action and the individual did not in order to avail himself of the privilege of transfer to the county of his residence and the standard, we think, is the standard that was employed, substantially employed in Power Manufacturing versus Saunders, which this Court

decided in 1927 involving an Arkansas venue statute and that, in that case, the Arkansas statute permitted a foreign corporation to be sued anywhere in the state, any county in the state, whereas domestic corporations were limited to places where they had an agency or representative and this Court, in that Saunders case, said that the classification was not a reasonable classification. There were not any facts related to the classification which reasonably could justify it. It was arbitrary.

QUESTION: Your case isn't power, is it, because Texas refers even to a foreign corporation as if he is sued only in a county where it has an agent.

MR. WESTBROOK: Of course, as agent or its principal place of business or in the county where the cause of action arose.

In this particular case, the cause of action arose in Tarrant County. American Motorists has its home office in Texas in Dallas County and the Plaintiff sued in McLennan County, the county of his residence.

QUESTION: And he could have sued a domestic corporation.

MR. WESTBROOK: Yes, he could have sued a domestic corporation. It is -- the Arkansas statute in Saunders, we recognize that had a wider venue play than here. Ours is deeper because this matter of the burden

that a plaintiff against a domestic corporation has is a valuable right. Our courts have consistently said, this is a valuable right, this venue right and part of the reason is, I think you can readily see, is that if you are a domestic corporation, you get these things:

One, you get a look at your adversary's tactic, witnesses. You get, at the very least, a judicial appraisal of the value of the case from an evidentiary point of view and you get an appellate appraisal, perhaps as to the important procedural evidentiary matters. It is a very valuable thing that these domestic corporations have and we do not believe that there is any rational justification for having the difference between domestic corporations' right to be transferred to the county of their residence and foreign corporations. Now --

QUESTION: You are saying -- of course you are saying that it is irrational to say a domestic corporation should be sued either, (A), where the event took place or, (B), at its home base when a foreign corporation is likely to have a more pervasive presence in a state, is it not?

MR. WESTBROOK: Yes, sir, substantially so.

QUESTION: Then isn't there a rational basis for the different treatment?

MR. WESTBROOK: The domestic corporation --
I beg your pardon, sir?

QUESTION: Isn't that a rational basis for a different treatment of the two?

MR. WESTBROOK: Your Honor, I do not believe that the sole fact -- and this is what was held, I think, in the -- in Saunders, if the sole reason for discriminating under the venue statutes is residence, if that is the sole reason, that that is not sufficient to avoid a confrontation with the Equal Protection Clause.

As a matter of fact, I think an argument could be made for the proposition, looking for legislative intent, that the Texas legislature may not have even intended this result.

What happened was, before '43 they were treated alike. Then, in 1943, the legislation amended Subdivision 23 and created this requirement that the cause of action be proven against them but it did not similarly amend Subdivision 27 so you are not getting the same justice in the procedure of defending, an insurance company defending if you are a foreign corporation that you would get if you were a domestic corporation.

QUESTION: Mr. Westbrook, if I may interrupt you for just a minute, is this the requirement -- when the suit is against a domestic corporation, the requirement is that he put in his prima facie case and a little more. Is that in the statute or is that by judicial interpretations?

MR. WESTBROOK: No, sir, that is by judicial interpretations in the statute to the extent that it says, "cause of action" but establishing that it must prove a cause of action by preponderance of the evidence, it is by judicial interpretation.

QUESTION: Your objection is to the way in which the Texas courts have construed Section 23.

Has any plaintiff ever made the contention in a suit against the domestic corporation that this is an unconstitutional burden against him because he has a greater burden than if he sued a foreign corporation?

MR. WESTBROOK: Your Honor, I do not believe so.

QUESTION: It seems to me that its a greater burden on the plaintiff who has to do it than on anyone else.

MR. WESTBROOK: Yes, sir.

QUESTION: Yet you are the one who is really most excited about it.

QUESTION: Before you carry on --

MR. WESTBROOK: Yes, sir.

QUESTION: What is the justification for what, in effect, is a minitrial on a plea of privilege where the only issue is venue? What is the rationale? What prompted the Texas courts to construe Section 23 in this fashion?

MR. WESTBROOK: I think partly -- and of course,

this was before summary judgment, but I think that there are distinctions still -- this partly was to nip frivolous cases in the bud. If you couldn't show a cause of action right there at the beginning to the satisfaction of the court or a jury, then you would avoid a long trial because if it was transferred to another county under that disability, the odds are pretty good it is not going to be tried.

QUESTION: Do you now have summary judgment practice in Texas?

MR. WESTBROOK: We do have summary judgment practice.

QUESTION: That is the plan of this curious procedure?

MR. WESTBROOK: No, sir. And I think the reason why not and why we still have so much of this is that you get some things in plea of privilege that you don't get -- I'm talking about from the defense point of view --

QUESTION: Yes.

MR. WESTBROOK: -- that you don't get in summary judgment. As your Honor knows, in Texas and most states, you can beat a summary judgment motion by the Defendant just by showing there is an issue of fact but you can't beat a plea of privilege that way. You have to prove up your case.

QUESTION: You have to show a preponderance of

the evidence.

MR. WESTBROOK: Yes, that's right.

QUESTION: Mr. Westbrook?

MR. WESTBROOK: Yes?

QUESTION: Your minitrial, or whatever you want to call it, occurs in your plea of privilege cases only where the statute speaks of the cause of action having arisen in a particular place, doesn't it?

MR. WESTBROOK: Yes, sir.

QUESTION: In other words, when the venue provision doesn't depend on where the cause of action arose, then there is no minitrial.

MR. WESTBROOK: That is right. It is conceivable that you could have venue -- venue exception established without proving up a court of action, yes, sir.

QUESTION: Really, though, didn't the Texas Supreme Court just come along and read this language, "where the cause of action arose" and say that you, in effect, if you are depending in that kind of language in a venue statute, you had to show that a cause of action did arise?

MR. WESTBROOK: Mr. Justice Rehnquist, I don't know that that was the language but I could say that that is the fair effect of it, yes, sir.

QUESTION: What are you asking the Court to do?

Are you asking the Court to send it back and require the Plaintiffs, in order to support venue, to prove a prima facie case?

MR. WESTBROOK: No, sir. We are asking this Court to declare that subdivision 27, as it applied in Texas, is unconstitutional because it deprives foreign corporations of the equal protection of the law.

QUESTION: To declare that unconstitutional -- then what happens to this lawsuit?

QUESTION: Then you would get to change the venue at all. Then you couldn't attack it at all, if you wipe 27 off the books.

What would you do if you wiped 27 off the books?

MR. WESTBROOK: Your Honor, I have had, I suppose, more difficult problems than that, but we would be happy with it if you did.

QUESTION: Yes, but what happens to this lawsuit?

MR. WESTBROOK: This cause? Mr. Justice Keith wrote an opinion when this Court sent back Exxon versus Preston after the plaintiff withdrew his brief, to determine whether or not the cause was moot and I think if this Court declares Subdivision 27 is unconstitutional, that it might well have the superior option of sending it back for determination by the Court of Civil Appeals, whether the cause is moot or what further proceedings should be had.

I think that is Texas' problem as to what to do with it.

QUESTION: Well, the statute of limitations hasn't run. Could your client then be sued in Dallas?

MR. WESTBROOK: Your Honor, the question of --

QUESTION: Is that possible?

MR. WESTBROOK: I think the statute of limitations on uninsured motorist cases is probably four years. I am not sure because of the contract.

QUESTION: Well, I suggest, if there is not any statute of limitations problem, could a new suit -- if you were to prevail here and 27 was struck down, could a new suit be brought in Dallas against your client?

MR. WESTBROOK: Well, it could be brought in Dallas or it could be brought in Tarrant County, the forum where the --

QUESTION: Where the cause of action arose.

MR. WESTBROOK: Where the cause of action arose, yes, sir.

QUESTION: You wouldn't be content with a mere transfer?

MR. WESTBROOK: I'm sorry, your Honor, I didn't hear you.

QUESTION: You would not be content with a mere transfer of the case to Dallas or Tarrant County?

MR. WESTBROOK: I think mechanistically I would

have to say yes, but, of course, we are hopeful that that invidious discrimination will be declared unconstitutional.

QUESTION: Well, what you want is the advantage of the statute of limitations, though.

MR. WESTBROOK: Yes, sir.

I think that we should make it clear to the Court because I don't see how this question was missed but I think we should make it clear to the Court that we are talking about corporations that are authorized to do business in Texas, not unauthorized. That would be an entirely different story, I think and they do have a fixed place of business in Texas and do have a designated process agent.

Now, in the Saunders case, this Court decided in 1927, held that for venue purposes, there is just no constitutional basis for distinguishing between a domestic and an authorized foreign corporation.

I don't know what my time situation is except I will be advised here but I believe that it would probably be appropriate if I let my distinguished associate from Waco answer the next set of questions but before I do, let me say this:

I -- if you will pardon the personal reference -- am of a family of six generations in Texas and I really feel that I am on sound grounds in saying that this invidious

discrimination is something more than just being inhospitable to foreign corporations. It is regrettably so but it is more than that.

We think it does what Mr. Justice Brennan was talking about in Bowers, I believe, when he spoke of the disruption of federalism and we think this kind of discrimination is disruptive of federalism.

At the Army-Navy Club, you know, they changed the name of the room, the Strangers' Room, they changed to the Visitors' Room and that is somewhat more hospitable.

But we do believe it is not just a question of hospitality, that it is disruptive of federal --

QUESTION: It is still the same room at the Army-Navy Club, though.

MR. WESTBROOK: Yes, it is, sir.

MR. CHIEF JUSTICE BURGER: Mr. Dunnam.

OPAL ARGUMENT OF W. V. DUNNAM, JR., ESQ.

ON BEHALF OF APPELLEE

MR. DUNNAM: If it please the Court, I'd like to, in view of the fact that apparently the Justices are not too familiar with the localized plea of privilege of venue practiced in Texas, to give you actually a clearer viewpoint on what it actually is about, there.

In this stuff about a jury trial, the 27 years that I have practiced, just continuous trial practice over

the years, I have yet for the first time ever tried the plea of privilege before a jury and actually, I have yet to hear of one ever being tried, though there are instances during the history of the state where it has occurred.

QUESTION: How many are there -- there are, what, over two hundred counties in Texas?

MR. DUNNAM: Yes, sir.

QUESTION: And so it is at least possible the practice might vary from time to time.

MR. DUNNAM: Well, if the lawyer or defendant demanded a jury trial, then the court would put in the trial on the merits at the same time and for that reason, they never demand a jury trial because then you just try the whole case and he wouldn't get his plea of privilege trial.

QUESTION: Can either party demand a jury trial?

MR. DUNNAM: Yes, either party could demand it but --

QUESTION: I mean, on the plea of privilege?

MR. DUNNAM: I don't believe either party can. It's just the defendant. It is something that has been twenty years since they have even heard the question of the jury trial brought up in the thing.

Now, about the burden of proof, which Justice Stewart suggested possibly was a prima facie case; now,

technically, legally, according to decisions, it is preponderance of the evidence as a matter of actual truth and fact and then, in factual analysis, it was simply a matter of prima facie proof.

Actually, the way the practice goes, a man makes out a prima facie case. He doesn't show anything other than a prima facie case. The trial judge -- I have never known of one to cite it just on weighing the evidence and actual facts. If he makes out a prima facie case, the plea of privilege is overruled.

That was the law for many, many years in the State of Texas and then they changed it to preponderance of the evidence and of course, trial courts being jealous of their own jurisdiction, your Honor, if a man files a case in this Court, if he shows that there was a collision and his client says the light was green for him, the other -- the defendant takes the stand, which they never do. The defendant never puts any evidence on a plea of privilege.

It is only a rare instance, I don't believe in my 27 years I have ever had it happen.

QUESTION: Well, I gether there is no finding by the judge of liability. What did he do? He simply says, finding is part of your burden?

MR. DUNNAM: If venue is established. Now --

QUESTION: All right, he makes no finding --

MR. DUNNAM: No. No, your Honor.

QUESTION: -- and they have got a case of liability.

MR. DUNNAM: He just overrules the clear presence. Now, Mr. Justice Rehnquist brought up a question about whether or not the -- and Mr. Westbrook responded that the purpose of this, the whole clear privilege, the background purpose and objective of the state legislature in this instance is to give our defendant an opportunity to see what the cause of action is, throw out frivolous lawsuits.

Of course, that has no bearing on it whatsoever as to the purpose of the legislature for the reason that Justice Rehnquist pointed out, probably 50 percent of your grounds, your exceptions to exclusive venue in the county of one's residence are based -- have no relationship to cause of action.

In other words, any suit involving the title to real estate or remove a cloud of a title, if that is the suit by its pleadings alone, that is the suit.

You don't have to establish a cause of action whatsoever. The cause of action has no bearing on it. If I sue John Doe for running over my dog, to sue him, all I have to do -- he files a plea of privilege. All I have to do is come in and prove that he lives in the county

where the suit is. The cause of action has nothing to do with it whatsoever. All I have to do is to establish that that was the county of his residence and in regard to a corporation, any corporation, domestic or foreign, this business of a cause of action applies as to either.

Any time you sue a corporation in the State of Texas, all you have to do to establish venue in the County of your suit is to establish the fact that your cause of action or a part thereof -- this as to domestic or foreign, that your cause of action or a part thereof, which means if it is contract, that the contract was entered into or a performance or a breach occurred here, any part of that cause of action, or your damages occurred in this county, or your initial negligence.

QUESTION: Would you say there is no difference between the foreign corporation and the domestic corporation on the plea of privilege?

MR. DUNNAM: I say as to this one ground of exception of venue in the county of one's residence, that is in common, Section 23 provides as to domestic corporations, you can hold him in any county where a cause of action or a part thereof arose.

As to a foreign corporation, the same identical provision exists. Now --

QUESTION: Well, is there anything about cause of

action in 27?

MR. DUNNAM: That is what I just was speaking of.

QUESTION: Are those words in 27?

MR. DUNNAM: In other words, in 23 and 27 --

QUESTION: Are the same words --

MR. DUNNAM: -- you could hold --

QUESTION: Did they have the same words?

MR. DUNNAM: Identical, that provision and --

QUESTION: And where will I find those words?

They looked a little different to me the last time I looked at them.

QUESTION: Page 3 of the Appellant's brief.

QUESTION: Mine is on page 41 of the Appellant's brief.

QUESTION: All right, that is another place.

QUESTION: And I suppose that a plaintiff who lives in this county can sue in his own county either a domestic or a foreign corporation.

MR. DUNNAM: In a --

QUESTION: Is that right or not?

MR. DUNNAM: That is not correct.

QUESTION: Not as to a foreign corporation.

QUESTION: It is, as to a domestic corporation.

MR. DUNNAM: No, sir.

QUESTION: Isn't it?

MR. DUNNAM: No, you can't just --

QUESTION: Well, 23 says, suits against a private corporation may be brought in the county in which the plaintiff resided at the time the cause of action or part thereof arose.

MR. DUNNAM: That is if --

QUESTION: That has to be read, both the cause of action and the plaintiff?

MR. DUNNAM: That -- let me glance at that a second.

QUESTION: Twenty-three says --

QUESTION: You say it is identical, but it looks to me like 23 is twice as long as 22.

MR. DUNNAM: Well, I am speaking of this clause.

QUESTION: Oh.

MR. DUNNAM: Each one, 23 and 25 have, each one has about 23 or 24 separate clauses is what I am getting at. They have one in common, the cause of action or part thereof. That is set up a separate clause as to each.

All right, now, the --

QUESTION: That's right.

MR. DUNNAM: In our Commercial Standard versus Insurance Adams, we agree with the root of the decision in that case. However, in our brief, we feel that the court there didn't see it as concise as the actual question was. In that case

they just discussed overall question as posed here by Mr. Westbrook, simply, is it an invidious discrimination to provide that you can hold a domestic corporation by having to prove an agency and a cause of action and then, as to a foreign, just an agency but here is the way we read these two statutes.

The first, 23 as to domestic corporations. We have got the common clause. We set that away. That is in common. There can't be a complaint about that. Either one can be held wherever cause or action or part arose.

All right, set that aside. Now, let's go over to the next. Here is where Mr. Westbrook's complaint is. As to domestic corporations, the statute provides that they can be held where their principal office is.

Now, that means their principal office, in fact, or the one designated in Texas.

Now, of course -- now, we are going to this next clause. The domestic, you hold them where their principal office is.

All right, a domestic corporation, their principal office is, of course, in the State of Texas, generally. That is where their officers meet. That is where their records are kept. That is where their directors meet. That is where their officers function, their primary functioning office in the State of Texas.

There is no such thing over here to correlate as to a foreign corporation. Their office is up in Detroit, Michigan, maybe.

QUESTION: And they are legally present in the entire State of Texas in all the 200 counties.

MR. DUNNAM: Legally present in all the entire state. All right. Now, we want to treat them as equally as we can possibly do, consistent with the differences, as reasonably equal, consistent with the differences.

All right, we've got the domestic wherever it has its principal office of business. We cannot hold the foreign at its principal place of business. It is out of state.

QUESTION: That is one of the alternatives in which you can sue a foreign corporation, isn't it?

MR. DUNNAM: That is one of the alternatives --

QUESTION: I mean, your own statute indicates that foreign corporations may be sued where their principal office is in Texas.

MR. DUNNAM: We recognize that as a possibility.
? ?
A delicate wear corporation may get a charter up there -- it is a rarity, once in probably 10,000 corporations have all their meetings and functions right there in Texas. Some states permit that, but that is a rarity.

Actually, we can't duplicate -- have a duplication.

So what is the next closest thing to equality with the domestic corporation? Texas has concluded, and rightly so, that domestic has its primary principal office with all of its functions there. You hold them there. The foreign doesn't.

What is the next closest thing for a foreign corporation? It is this. Where it has an agency and representative, not just an agent or representative but one of a fixed and a permanent nature, that is the way the Texas Supreme Court has construed that provision so --

QUESTION: Well, I understand that in this one they have their main office in Dallas. Is that correct?

MR. DUNNAM: Well, that insurance company, of course, is a foreign insurance company. I am sure its main office is probably not in Dallas. It is somewhere --

QUESTION: No, but the main Texas office is in Dallas.

MR. DUNNAM: Well, the record doesn't show that, your Honor and I don't know whether it even has it. It would be a terrific element of proof to try to establish -- say some insurance company of out-of-state. They have got agencies all over Texas.

QUESTION: Well, the statute says on the county in which the principal office of such company may be situated.

MR. DUNNAM: I'm fixing to get to that, your Honor.

QUESTION: Thank you.

MR. DUNNAM: The principal office is this. What you raised there is the primary reason for this Texas statute. An insurance company has an office in Houston, say a foreign company. They have got a big office in Dallas. They have got one at Odessa, one at Lovell.

Which one is the principal office?

They have got an agency, a fixed, permanent agency operating out of all four places --

QUESTION: Well, couldn't the state --

MR. DUNNAM: -- covering large, broad areas. Which is their principal office?

QUESTION: Well, Texas could make them say which one is.

MR. DUNNAM: Well, if --

QUESTION: Couldn't the State of Texas?

MR. DUNNAM: They would have to hold it according to actual primary office instead of their designation for this reason --

QUESTION: Well, couldn't Texas say that you have to designate one office as your principal office?

MR. DUNNAM: All right, sir, and here is what would happen --

QUESTION: Just by the stroke of a pen.

MR. DUNNAM: Absolutely and here is what would happen. It would be unfair to every litigant in Texas. I'll tell you why. There are small counties in Texas where 99 percent of the population are railroad employees, like Palestine, Texas, that county.

The railroads would all designate -- they would designate that county although it is not their actual primary functioning purpose. You couldn't succeed in a judgment against them.

The insurance companies would all designate Dallas, Texas whether that was their actual main operation or not.

Some companies would designate some county and the remote Big Bend County, where it would be prohibitive for anyone to sue them. It's a far -- it's the most remote area in the State of Texas, miles of -- the equivalent of going across four or five of these states up here and it would be unfunctional. It would be unfair to assure --

QUESTION: Your domestic corporations could engage in the same tactics.

MR. DUNNAM: But Texas holds them to their principal office of operation.

QUESTION: All right, as a matter of fact they

could hold a foreign corporation to that, to whatever the facts show as to where their principal office is.

MR. DUNNAM: The principal office, in Black's Dictionary, is generally --

QUESTION: What does a foreign corporation do when it qualifies in Texas? What kind of a piece of paper does it fill out?

MR. DUNNAM: They designate an agent for service and pay a franchise tax.

QUESTION: And the agent for service is usually the corporation?

MR. DUNNAM: That is probably it. Generally most of them have CT corporations, and some building in Dallas, Texas.

QUESTION: But they don't say where their principal office is going to be in the state?

MR. DUNNAM: I don't -- they don't have to.

QUESTION: They could be required to.

MR. DUNNAM: But it would be a black day if that determined where their principal office was.

QUESTION: Well, it might not determine finally where it was, any more than it would be with a domestic corporation.

MR. DUNNAM: Well, but it is easy to determine a domestic corporation because that is the home office of

the company, generally. They have to have some home office and --

QUESTION: I was in Houston the other week and when I was down there I saw two or three huge buildings. They sure must be the home office, 20 or 30 stories high.

MR. DUNNAM: That's right. There are some that are over that.

QUESTION: Well, would they be principal offices?

MR. DUNNAM: Yes, if that was --

QUESTION: Well, it would be awful hard to move them.

MR. DUNNAM: It probably would be in that instance. But if they are putting one up in Dallas or two or three other places, it would be a similar building.

QUESTION: Well, is what you are saying that a domestic corporation's home office has certain functions associated with it like the presence of the chief executive officer, the meetings of the directors and that sort of thing that make it much more readily identifiable factually than what might be one of several relatively equally important branch offices of a foreign corporation that has its principal place of business in another state.

MR. DUNNAM: That is exactly correct and that is the way Mr. Black defines the principal office of a corporation, where they maintain their permanent records

and where the principal officers are and where their boards generally meet. Of course, sometimes they have a meeting in Vegas and stuff like this for vacation purposes.

Their primary boardroom and so forth and all the various aspects of the corporate function.

Now, the venue of -- the Texas venue statute provides a railroad can be held wherever it happens to have a track running in Texas, see?

But the final shot of the whole thing is, as stated by this Court many times, if the classification is based on some differences that reasonably apply and are pertinent to the basis for which the classification is made, then it is not arbitrary, not violative of the Fourteenth Amendment on equal protection of the laws.

QUESTION: Really, the case in this Court that bears on this most relevantly, I suppose, is the Power Company against Saunders case.

MR. DUNHAM: Yes, sir, your Honor. That was a case where they just provided in a personal injury action you can sue a foreign corporation just any place in the state.

QUESTION: Yes.

MR. DUNHAM: See? There was no -- the classification did not relate to the distinction made, to the subject of the distinction of the differences and so forth.

In other words, that would be like providing -- well, for instance, a railroad would be sued where it has got a track. That has some relationship to the function, statewide function for reasonable basis. It is familiar with those grounds. It is functioning in them. Therefore, it is reasonable basis to hold it there, though its principal -- it may have agencies various places but, of course, a much greater argument could be made on that.

You could argue that it is just like saying a trucking line is sueable wherever there is a highway in the state. It is substantially similar. But --

QUESTION: Are you making any point of the finality of the judgment here? I take it you are not.

MR. DUNNAM: Well, in Texas, a plea of privilege is an interlocutory ruling and the Supreme Court of the State of Texas doesn't have jurisdiction of an order and a plea of privilege except in certain instances where there is a conflict of decisions or where there is a dissenting opinion or on certified question because it is not -- it is an interlocutory order and --

QUESTION: Well, are you claiming that there is no jurisdiction in this Court for this review at this point? I don't read your brief that way.

MR. DUNNAM: I have not claimed that in the brief. It is a question -- there is some serious question about it. But --

QUESTION: Well, I wondered why you didn't argue it.

MR. DUNNAM: This is a matter that I feel that, as short as our brief is, that that gets to the heart of this thing and the Texas court has -- we'd like a final decision on it by this Court.

QUESTION: Well, as short as your brief is, it seems to me it doesn't touch upon it.

MR. DUNNAM: On the jurisdiction.

QUESTION: And this brings me to my other question, I take it you are not relying on the Adams case. You don't cite it here.

MR. DUNNAM: Well, he cited the Adams case enough, and attacked its rationality, which I think is accurate. However, we feel that -- I feel that -- the reason we presented this in this brief, like I said, the only question actually before this Court or on the 14th Amendment is whether or not it is a rational distinction where you give them each wherever cause of action is and then you take another clause and you say the domestic can be held where it has its principal office.

Then, in order to equalize this, they say you can hold a foreign corporation wherever it has its primary office or wherever it has an agency or representative and the Texas Supreme Court construes that to mean, a fixed,

permanent agency in the State of Texas and we say those are equivalents. They are as close to equivalency as anyone could actually bring to bear.

QUESTION: The Supreme Court also said that in interlocutory or --

MR. DUNNAM: That is what the Supreme Court of Texas has always held, that interlocutory orders are statutory.

QUESTION: Yes, but you can't give us jurisdiction. You can't waive jurisdiction.

MR. DUNNAM: No, I know we can't.

QUESTION: Do you have any case where it says we have jurisdiction?

MR. DUNNAM: None whatsoever, except the fact that the reason I didn't raise it and the fact that this Court did note probable jurisdiction back in this case one time when it was presented, there was a conflict of the Court of Civil Opinions in Texas. This Court voted probable jurisdiction.

QUESTION: Mr. Dunnam --

QUESTION: But just probable jurisdiction.

MR. DUNNAM: Yes, your Honor.

QUESTION: Probable.

QUESTION: Mr. Dunnam, you defend the classification here. Could you summarize for me exactly what you

think the state interest is that justifies this different treatment of foreign corporation and a domestic corporation, once venue is sought in the particular locale involved in this case? What is the state interest to further that?

MR. DUNNAM: Here is the state interest, your Honor. The state interest is in the Fourteenth Amendment, trying to equalize it.

I say that where a domestic corporation, the logical place to sue it is the place where its primary office is. I say you --

QUESTION: Let's assume a domestic corporation and a foreign corporation, both being sued in precisely the same county and as I understand it, one has the privilege of the minitrial and the other does not.

MR. DUNNAM: That is a --

QUESTION: Is there no situation, no county, no cause of action in which the domestic corporation does not have the minitrial or when the foreign corporation fails to have it?

I put that badly. Do you understand it or do you want me to put it again?

MR. DUNNAM: Here is what I am trying to make. I feel his brief misses the end of the whole thing and it may have thrown us all off.

do
QUESTION: But you treat the two corporations

differently under the circumstances before us here?

MR. DUNNAM: We treat the --

QUESTION: Can you answer that question please, sir?

MR. DUNNAM: We treat them differently --

QUESTION: Yes.

MR. DUNNAM: -- but as close to equally as can possibly be done.

QUESTION: Why not allow both to have the minitrial in the circumstances of this case?

MR. DUNNAM: Well, we don't allow the domestic corporation to have the minitrial on the cause of action. Where we allege its primary office is Dallas County, we sue them in Dallas County -- the primary office in fact. All we have to do is prove its primary office is in Dallas County.

All right, as to a domestic, it has no primary office generally so, the nearest thing to it is to just prove that it has a fixed, permanent agency in that county. That is what a foreign corporation will have in place of its primary voting office and so forth, and officers, a fixed, permanent place of business and we prove that, not just that it has some agent living down there but it has a fixed agency with a permanent nature in that county.

Then we have established it. There is no minitrial

required as to them. There is no minitrial required as to the domestic corporation as to cause of action as to that. That is our position.

These are the two correlatives. In other words, he has tried to take this other additional ground of venue which the domestic corporation, as His Honor, Justice Stewart, pointed out of course, awhile ago, the domestic corporation in this additional ground over here he is talking about, where you have to prove cause of action, that is an additional ground to hold a domestic corporation about where it -- in addition to these deals, it goes on and provides that you can hold a domestic corporation where the plaintiff resides and it holds that you have to hold -- to hold a foreign corporation where the plaintiff resides, you also have to prove that the cause of action occurred where the plaintiff resided or the cause of action -- you can hold it in the nearest county to which he has an agent to where the plaintiff lives.

That is initial ground -- additional ground that you have got to prove additional burden to hold a foreign corporation that you don't have to place on the domestic corporation.

QUESTION: You haven't made the argument in the terms of the Power case, but, essentially, aren't you arguing that the position of Justice Holmes and Brandeis

justifies whatever discrimination difference in treatment is accorded here by Texas to foreign and domestic corporations?

MR. DUNNAN: I think they were correct in their dissent but I don't think that case is anywhere in point. That didn't -- there was no distinction made there. There is no -- it is just wherever -- wherever you want to sue the foreign corporation. It doesn't relate to whether they have an operation going there, a fixed firm of operation or primary office or anything.

QUESTION: I am talking about the reasoning, the reasoning of Justice Holmes and Brandeis is your case, is it not?

MR. DUNNAM: I believe their reasoning is accurate, but I don't think their reason would be needed in this case because this is -- if we have Texas in this case, all they have done is provided -- gone further and placed additional grounds you can hold a domestic -- just to hold a foreign corporation in addition to proving the plaintiff lives there you have got to prove cause of action there, too and as to a domestic, just prove the plaintiff lives there.

And then the other correlatives are up here higher.

QUESTION: You still haven't told me what interest that says. What does that do for the benefit of

the State of Texas?

MR. DUNNAM: All right, it's, well, of course, the interest of the state to be that any person, firm or that corporation/is functioning within its borders have some means of access to the courts to right and redress a wrong and so everyone should be sueable in some county and it is the interest of the state to do it with reason, to provide for some protection for the person sued that he might be in an area where he is not a total foreigner, where they can't harass him by filing a suit over in Big Bend County on a man in Dallas but likewise, it is the interest of the state that litigants have a reasonable opportunity to present their case to a quorum within some reasonable relationship to the functioning company involved and as long as they restrict it to the domestic, there is no way I can think up where you could treat them more equally.

If you are going to let a domestic corporation be sued wherever its principal office is, without regard to where the wrong occurred or the claim wrong or anything of that nature, then the only way you could closely relate a foreign corporation to the same category would be to provide, as Texas has done, that it can be held wherever it has a fixed agency and representative and that those are equivalents, as close as could possibly be set out and we

think that it is reasonable; it is rational and it is the only way you could equivalently treat them.

If you provide a foreign corporation can be sued where its principal place of business is and that a domestic corporation likewise, then provide the foreign could be sued where it had an actual permanent, fixed place of business in Texas, then you would be treating the domestic corporation -- you could hold them wherever their principal place of office of business is but you couldn't touch the foreign corporation where its principal was and you couldn't touch them any place else though they have got their actual prime fixed place right there in Texas and --

QUESTION: Isn't it true that up until the forties they had the same statute for both?

MR. DUNNAM: They had what, your Honor?

QUESTION: The same statute for both domestic and foreign, it was exactly the same, domestic and foreign?

MR. DUNNAM: I believe that is correct but --

QUESTION: Why did they change it?

MR. DUNNAM: Well, I guess they wanted to treat foreign corporations on the equal as far as possible with the domestic and you don't have to prove a cause of action to hold a foreign corporation where its office is and likewise you shouldn't have to prove one to hold a -- I

mean, a domestic corporation where its office is where a foreign corporation, its office in Texas, you ought not to have to prove a cause of action to hold them at that.

QUESTION: I gather from the Petitioner that they didn't appreciate that.

QUESTION: I didn't quite understand your answer to my brother Marshall. You conceded, in response to his question, that up until sometime in 1940, domestic corporations and foreign corporations were treated precisely alike under the same statute and -- if I understood you.

And then he said, well, why do you think the legislature changed it? And your answer was, in order to treat them alike.

That doesn't -- I missed something there.

MR. DUNNAM: You could hold either one of them where a cause of action occurred and you could hold either one of them where the plaintiff resides plus you have got to prove a little more on the foreign.

And you can hold the local wherever their principal office is but the foreign doesn't have any office you can hold them at until they initiated that, in actual fact -- in truth and practice.

Theirs is out of state. They might have two or three huge offices at various places in Texas. You can't differentiate which is the biggest and which is the

volume or otherwise.

QUESTION: I see.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Westbrook?

REBUTTAL ARGUMENT OF JOEL W. WESTBROOK, ESQ.

MR. WESTBROOK: Very little, Mr. Chief Justice.

I would remark that in response to Mr. Justice Powell's question as to whether the corporations were treated differently, foreign and domestic, I understood counsel to say that they were treated differently but attempted to make it as equal as possible and I had really rather thought that the concept of separate but equal had been long since dissipated.

It must be kept in mind that the plaintiff has the right to choose, initially, not only the forum but the exception. He can pick four or five of them if he wants to and, indeed, in this case he picked two, Subdivision 23 and Subdivision 27 but in actual trial, as clear privilege, he elected to stand only on 27.

Why? Because if he had tried to stand on 23 he would have had to prove the cause of action.

It is his choice. I do feel that it would be useful to say and to establish -- I don't see, as one of the Justices remarked, the statute itself refers to a principal office in the state and it is a question of fact.

In this case, it was asserted in a verified plea that it was Dallas. That was not controverted.

There would have been no problem, would be no problem if the Court had ruled the other way, it would have gone to Dallas.

I do feel that it might be desirable -- and if the Court will give us leave, to furnish the Court with a brief on the jurisdictional question which several of the Justices asked.

QUESTION: And as to whether or not our Court has jurisdiction --

MR. WESTBROOK: Yes, sir.

QUESTION: -- which depends on whether or not this was the final judgment --

MR. WESTBROOK: Yes, sir.

QUESTION: -- of the Court of Civil Appeals of Texas.

MR. WESTBROOK: Yes, sir, that's right.

QUESTION: I'd be interested in a briefing on that question, Mr. Chief Justice.

MR. WESTBROOK: Before closing finally, your Honors --

QUESTION: Do you recollect the Exxon case? How did the Exxon case -- was it in the same procedural posture as this one?

MR. WESTBROOK: Substantially yes, sir. It was a venue question and it came up here --

QUESTION: I know it was a venue question.

MR. WESTBROOK: Yes, sir.

QUESTION: But was it in the same procedural posture?

MR. WESTBROOK: Yes, sir. Yes, sir.

QUESTION: Because the Arkansas case, the Power Company case, was not.

MR. WESTBROOK: That's right.

QUESTION: That was the final judgment --

MR. WESTBROOK: Yes, that's right.

QUESTION: -- on the plaintiff after the trial.

MR. WESTBROOK: That's right. But Exxon likewise was questioning whether the plea of privilege was overruled.

QUESTION: Exxon was never argued here then, was it?

MR. WESTBROOK: No, sir. The Appellate filed his brief.

QUESTION: And then probable jurisdiction was noted.

MR. WESTBROOK: Probable jurisdiction was noted. Appellate filed his brief and I don't think the jurisdictional question was briefed beyond what it just ordinarily is.

QUESTION: Perhaps not, no.

MR. WESTBROOK: And then the plaintiff withdrew.

I have forgotten the exact language that he used. And this Court then sent it back to the courts of appeals in Texas for a determination of whether or not it was moot. That court determined it was moot and transferred it to Harris County from Beaumont, where it was originally filed.

QUESTION: It transferred it, then. It didn't dismiss it.

MR. WESTBROOK: No, sir, it didn't dismiss it.

Mr. Justice Keith in that case, after he got it back, struggled with that problem quite a bit, wrote an opinion on it. It was a problem for him, but that is what he did.

We feel that since Wheeling versus Glander came after Saunders -- Power versus Saunders and after Bain Peanut, which expressed the philosophy of Mr. Justice Holmes, who had previously dissented, and that case, by the way, the Bain Peanut case, which came after Saunders, I don't believe Mr. Justice Holmes discussed Saunders at all in that opinion.

But Wheeling came still further and while it was not a venue case, I think it has a very considerable philosophical core and that is the statement that is made in there that once a foreign corporation has come into a

state and has become domesticated -- and let me say that this insurance corporation comes fully under the insurance code just as all other insurance companies, domestic or foreign in Texas, but once a state has chosen to domestic foreign corporations -- this is in Wheeling versus Glander, 571 of 337 U.S. -- the adopted corporations are entitled to equal protection with the state's own corporate progeny and this was a tax case and they said, at least to the extent of having the same tax basis.

But we believe the basic philosophy of that statement does govern.

QUESTION: Mr. Westbrook, you talked about the possibility of filing a written document directed to the issue of our jurisdiction. Do you have any views on it orally beyond those you have given us?

Have you thought about it since you came here?

MR. WESTBROOK: I could not give a helpful argument on that, your Honor.

QUESTION: You haven't --

MR. WESTBROOK: I can refer to Texas cases on its being a final judgment for purposes of appeal but I do not have in mind the Supreme Court cases of the United States.

QUESTION: I'd be interested in this.

MR. WESTBROOK: If the Court will grant us leave, we will undertake --

MR. CHIEF JUSTICE BURGER: How much time do you want, Mr. Westbrook, a week?

MR. WESTBROOK: Yes, sir.

MR. CHIEF JUSTICE BURGER: And then you will let your friend respond if he desires to do so.

MR. WESTBROOK: Yes, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Westbrook.

Thank you, Mr. Dunnam.

The case is submitted.

[Whereupon, at 2:31 o'clock p.m., the case was submitted.]