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Conflict of Laws

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CONFLICT OF LAWS

by

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THERE were many interesting cases in the conflict of laws field during the course of this survey period, although no major developments occurred. To this author, however, with a great interest in the discipline of conflict of laws, it is most disheartening to note the many cases reviewed herein where either improper motion or no motion at all was made for judicial notice of the applicable law of a sister state or where proper proof and pleading of the applicable law of a foreign state was lacking. Are the lawyers of Texas unprepared in the field of conflict of laws? Do they fail to realize the possibility that the law of a jurisdiction other than the Texas forum may well be governing when a foreign fact element enters the case? Because Texas courts presume the controlling law of other jurisdictions to be the same as that of Texas in instances of absence of a motion for judicial notice of sister state law or proof and pleading of foreign law, cases are being lost by failure to bring those laws to the attention of the court.

I. JURISDICTION AND JUDGMENTS

Full Faith and Credit—Limitations. Olson v. Success Motivation Institute, Inc.[1] involved a Wisconsin default judgment obtained by Olson against a Texas corporation. Upon nonpayment Olson sought enforcement in a Texas court. Defendant claimed that the judgment was void for lack of judicial jurisdiction in Wisconsin and also that the judgment was barred by the Wisconsin statute of limitation. The trial court agreed with these contentions, but its decision was reversed upon appeal. The court of civil appeals set forth the well-known presumption of the validity of a foreign judgment once it is introduced into evidence, that is, that the plaintiff thereby establishes a prima facie case which places upon the defendant the burden of rebutting the validity of the judgment as void for want of jurisdiction.[2] This the defendant had failed to do. Moreover, the record contained no indication of lack of jurisdiction but, to the contrary, showed compliance with the Wisconsin long-arm statute.

As to the second point in issue, the Wisconsin statute of limitations provides that execution may issue on a judgment within five years after rendition. Thereafter execution is permitted only upon leave and discretion of the court. Further, prior notice to the judgment debtor is required.[3] Because execution had not issued on the foreign judgment within the five-year period, the trial judge found the judgment barred, dormant, and unenforceable.

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1. 528 S.W.2d 111 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).
2. *See* R. LEFLAR, AMERICAN CONFLICT OF LAWS 185 (1968).
3. WIS. STAT. ANN. § 272.04 (West 1958).

A general rule of conflict of laws is that statutes of limitation are regarded as procedural, and procedural matters are governed by the law of the forum.[4] Under this rule, since Texas was the forum for the enforcement of the judgment, its limitations period would govern. Texas has a borrowing statute, however, which bars action upon a foreign judgment in Texas if the judgment is barred by the laws of the state where the judgment was rendered.[5] This statute is concerned with the time of bringing suit in Texas, not with the time of the Texas court's hearing or rendition of judgment. In *Olson* it was found that the Wisconsin judgment was rendered in 1965. Suit on the judgment was brought in Texas in 1967 and six days later the defendant filed its answer. At the time of bringing the suit in Texas the judgment was less than seventeen months old and, therefore, was not barred under the Wisconsin statute. In Texas the bringing of suit before the end of the statutory period interrupts the running of that period. The record contained neither a motion for the taking of judicial notice of Wisconsin law nor proof of Wisconsin law on whether or not the running of the Wisconsin statute would be tolled upon bringing of suit.[6] Texas law would thus govern because in the absence of proof or motion for judicial notice of the sister state law, which should govern the issue, Texas courts presume the sister state law to be the same as that of Texas.[7] Hence, the Wisconsin five-year period was tolled with the filing of the suit in Texas and the Wisconsin judgment was not barred or unenforceable.

Full Faith and Credit—Irregularities in Rendition of Judgment. A collateral attack in a Texas court was made on a Nebraska judgment in *Hungate v. Hungate*.[8] The Nebraska decree had determined that the widow and two brothers of a deceased were his sole heirs. At the time of the decedent's death proceedings to adopt a minor child by the deceased and his wife were underway. After her husband's death the widow proceeded with the adoption which was later granted. In the probate proceedings no guardian ad litem was appointed to represent the child. As noted, the decree recognized the widow and brothers as the only heirs. Thereafter, Mobil Oil Company commenced an interpleader action in Texas and tendered into court certain Texas oil interests which were the separate property of the husband. The widow, the brothers, and the minor child were made parties. The widow and brothers sought summary judgment grounded on the recognition of the Nebraska decree and placed an authenticated copy of the decree in the record. The attorney ad litem representing the child in the Texas proceeding claimed that the child was not bound by the Nebraska decree and further claimed that an equitable adoption existed so as to make the child an heir. The trial court granted the motion for summary judgment. Upon appeal this judgment was affirmed.

4. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 122, 142 (1971) [hereinafter cited as RESTATEMENT (SECOND)].
5. TEX. REV. CIV. STAT. ANN. art. 5530 (Vernon 1958).
6. *See* TEX. R. CIV. P. 184a.
7. For discussion of this presumption see Thomas, *Proof of Foreign Law in Texas*, 25 SW. L.J. 554, 567-70 (1971).
8. 531 S.W.2d 650 (Tex. Civ. App.—El Paso 1975, no writ).

The appellate court determined that the case involved two issues. The first was whether a minor could make a collateral attack upon a sister state judgment affecting his interest when no guardian ad litem had been appointed to represent him. Here the court expounded the rule that irregularities or errors in the rendition of a judgment do not make the judgment subject to collateral attack and unenforceable when recognition is sought in a sister state.[9] A collateral attack and denial of full faith and credit is possible only when the judgment is void.[10] The court then went on to hold that in Texas failure to appoint a guardian ad litem for a minor child whose interests are involved in a case makes the judgment voidable, not void. A voidable judgment may be attacked directly on appeal but not collaterally.[11] The full faith and credit clause of the United States Constitution requires, however, that the same conclusive effect be given a judgment as is given by the law of the state in which it was rendered.[12] Consequently, Texas courts must look to Nebraska law to determine whether a judgment is regarded there as voidable and subject to direct attack or whether it is void and thus subject to collateral attack. Once again the law of the place of rendition of the judgment was not brought to the attention of the court either by a proper motion for judicial notice of Nebraska law or by pleading such law. As previously noted, in such instances the law of the place is presumed to be the same as that of Texas, which does not permit collateral attack.[13]

The second issue in *Hungate* concerned the burden of proof in an attack upon a foreign judgment for lack of jurisdiction over a person claimed to be bound thereby. In this instance there was a question as to whether the Nebraska court had jurisdiction over the person of the minor child. The record failed to show publication of the citation for three successive weeks prior to the rendering of the final decree as required by Nebraska law.[14] As in the *Olson* case discussed previously, the court of civil appeals set forth the rule that an authenticated judgment of a sister state when offered into evidence creates a prima facie case, placing the burden upon the one collaterally attacking the judgment to come forward with the evidence that the judgment was void for lack of jurisdiction over his person because of improper service.[15] Since evidence of this kind had not been offered, the foreign judgment entitled the widow and the brothers to an instructed verdict.

Full Faith and Credit—Finality of Authentication of Sister State Judgment. In *Schwartz v. Vecchiotti*[16] suit was brought in Texas to enforce a judgment of the State of New York. Summary judgment was granted in favor of the judgment creditors. The judgment debtors appealed, asserting that the New

9. *See, e.g.*, Aldrich v. Aldrich, 375 U.S. 75 (1963).
10. *See* R. LEFLAR, *supra* note 2, at 184-85.
11. Wallis v. Stuart, 92 TEX. 568, 50 S.W. 567 (1899).
12. The United States Code requires that judicial proceedings of a state shall have the same full faith and credit in the courts of other states as they have by law or usage in the courts of the state rendering them. 28 U.S.C. § 1738 (1970). *See also* RESTATEMENT (SECOND), *supra* note 4, § 105, Comment b.
13. *See* note 7 *supra* and accompanying text.
14. NEB. REV. STAT. §§ 30-1709, -1710 (1943).
15. *See* note 2 *supra* and accompanying text.
16. 529 S.W.2d 603 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

York judgment was not properly proved in that there was no certified copy or other admissible evidence of the judgment to support the summary judgment. In this case there was no certificate by a judge of a New York court of record to the effect that the attesting officer had legal custody of the judgment as required by article 3731a of the Texas statutes.[17] Section 6 of this article permits other forms of proof of official recording such as is authorized by any applicable statute or by the rules of evidence at common law. Thus the court pointed out that a sister state judgment may be authenticated not only as prescribed by the specific statutory method, but also by a witness who has compared the copy of the judgment placed in evidence with the original entry of the judgment. When so proven the examined copy is sufficient prima facie proof. There was an affidavit filed by such a witness among the papers of the trial court and the court found that the New York judgment was thus properly a part of the summary judgment evidence before the trial court. Moreover, one of the defendants, acting as representative of both defendants, attached an affidavit which showed an appeal from the New York judgment in New York. The court of civil appeals was of the opinion that the statements made in this affidavit constituted a judicial admission of the accuracy of the essential elements of the New York judgment and, therefore, the affidavit also was a proper part of the evidence for summary judgment.

It was also claimed by the defendant judgment debtors that the New York judgment was not a final, valid, and subsisting judgment in New York for purposes of full faith and credit[18] in that there was no allegation or proof of New York law as to the judgment's validity or finality. The defendants then set forth the Texas rule which presumes the law of the place to be that of Texas in the absence of proper motion for judicial notice or proof of sister state law.[19] Under Texas law a judgment must be signed by the judge.

In this case, unlike the two previous cases considered, a motion for judicial notice of New York law had been filed and New York law had been presented to the trial court in a memorandum. It was found that New York would recognize this judgment as final even if subject to appeal unless the defendant had filed a bond in the amount of judgment. The same rule was said to prevail in Texas and, therefore, the judgment was final for purposes of full faith and credit since no bond in the amount of judgment had been filed. Because the question of regularity of judgment had not been raised at the trial level, it was presumed that the trial judge had taken judicial notice of the fact that under New York law there was a proper signing of the judgment.

Enforcement of Foreign Judgment. A summary judgment by the trial court which had failed to recognize a Lebanese judgment was before the Houston court of civil appeals in *Enterprises & Contracting Co. v. Plicoflex, Inc.*[20]

17. TEX. REV. CIV. STAT. ANN. art. 3731a (Vernon Supp. 1976-77).

18. The traditional view is that a judgment of a state must be final for enforcement in other states. *See* H. GOODRICH & E. SCOLES, CONFLICT OF LAWS 404 (4th ed. 1964). *See also* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943).

19. *See* note 7 *supra* and accompanying text.

20. 529 S.W.2d 805 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

Here the plaintiff-appellant sought to collect a judgment in Texas which had been rendered in its favor against the defendant-appellee in Lebanon. Defendant Plicoflex answered in the trial court by contending that the Lebanese court had no personal jurisdiction over it. In support of its answer Plicoflex submitted the affidavit of each of its officers which stated a lack of knowledge of service of process upon any officer or agent of the company in Lebanon or in the United States for purposes of this suit. The court of civil appeals reversed and remanded the summary judgment of the trial court which had been granted in favor of Plicoflex, stating that Plicoflex had not sustained the burden of proving that it had not been properly served and, therefore, as movant for the summary judgment it had not established the non-existence of a material fact to entitle it to a judgment as a matter of law.

In order to reach this conclusion the Texas court applied the Texas long-arm statute[21] to determine requisites for service of process to support Lebanese jurisdiction and a Lebanese judgment. This was a highly unusual procedure at best, but Lebanese law was neither pleaded nor proved, and in the absence of proper proof of the otherwise applicable law of the foreign state, the law of that state is presumed by Texas law to be the same as that of Texas.[22] In this instance Texas article 2031a, which requires a foreign corporation to appoint a resident of Texas to be its agent for service of process in all suits brought against it in Texas, would apply. In the case at hand the defendant-appellee did not deny that it did business in Lebanon, nor did it deny that it had designated a resident agent for service of process. Furthermore, it did not show clearly that such an agent was not served with process in Lebanon. A fact issue existed as to whether there was a designated agent and also whether he was served. In the presence of such issues the trial court was held to have erred in granting the summary judgment.

Custody Decrees. Lehmann v. Lehmann[23] and *Follak v. Brown*[24] are both concerned with the problem of enforcing sister state custody decrees. It has become accepted that such decrees are subject to full faith and credit except as to matters showing changed circumstances since the date of such decree, provided also, of course, that the court issuing the decree possesses the proper jurisdictional basis.[25] Generally speaking, the state of the child's domicile, or the state where the child or parents are personally present, are recognized as having jurisdictional power for purposes of custody awards.[26] In the two cases at hand there was no question that judicial jurisdiction was present at the time the custody award was rendered. The problem in these cases centered around the fact that the court which had granted the original decree had changed the custody of the children from one spouse to another.

21. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).
22. *See* note 7 *supra* and accompanying text.
23. 537 S.W.2d 131 (Tex. Civ. App.—Fort Worth 1976, no writ).
24. 530 S.W.2d 882 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).
25. Kovacks v. Brewer, 356 U.S. 604 (1958); Halvey v. Halvey, 330 U.S. 610 (1947). *See also* R. LEFLAR, *supra* note 2, at 348; G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 322 (3d ed. 1963).
26. *See, e.g.*, Justice Traynor's decision in Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948). *See also* RESTATEMENT (SECOND), *supra* note 4, § 79.

In each instance the children and the spouse against whom the custody change was directed were no longer resident in the state the court of which was ordering the change. Proper notice would appear to have been given in each proceeding for change of custody. The courts of civil appeals applied the usual rule that a court of a state rendering a custody decree retains jurisdiction over the case so that the decree may be changed upon a showing of changed condition. This would mean that a party effectively brought before a court and subject to its jurisdiction remains subject to all further proceedings necessarily concomitant of the case.[27] A continuing jurisdiction ensues, and full faith and credit must be given to the change of custody order.

In the *Follak* case the parties failed to invoke the law of South Carolina, the state rendering the judgment. Thus, the question arose whether South Carolina law provided for an exercise of continuing jurisdiction for purposes of effectuating a changed custody decree. The Texas courts presumed, in the absence of pleading or proof of South Carolina law or of a motion for judicial notice of such law, that the law of South Carolina was the same as that of Texas.[28] Section 11.05(a) of the Texas Family Code[29] recognizes that a court acquiring jurisdiction of a suit affecting the parent-child relationship may exercise a continuing jurisdiction as to all concomitant matters. Citation of this section creates another problem, however, in that the statute calls for the exclusive jurisdiction of such court. In other words, subject to certain limited exceptions, no other court would appear to have jurisdiction to affect the parent-child relationship. Usually courts of other states possessing jurisdiction can effectuate a change of custody, despite an earlier award, upon a showing that changed conditions demand a change of custody of the child.[30] The court of civil appeals held that the pleadings in this case raised no issue as to change of conditions subsequent to the judgment of the South Carolina court. It then stated: "We are not holding that the jurisdiction of the South Carolina court is exclusive."[31] In other words, according to the court section 11.05(a) is not to be given an extraterritorial application but is to be applied in Texas child custody proceedings only.

The concurring opinion in the *Follak* case is of interest. Justice Keith would hold that reliance upon the continuing jurisdiction concept was not necessary to affirm the trial court's judgment. He would argue that actual in personam jurisdiction existed over the nonresident father at the time of the second custody decree in accordance with South Carolina long-arm procedures and the theory proclaimed in *Mitchim v. Mitchim*.[32] The *Mitchim* case involved an Arizona long-arm statute which permitted suit against a nonresident defendant where the defendant had caused an event to occur in

27. Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913); Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948).
28. *See* note 7 *supra* and accompanying text.
29. TEX. FAM. CODE ANN. § 11.05(a) (Vernon 1975).
30. Plass v. Liethold, 454 S.W.2d 444 (Tex. Civ. App.—Texarkana 1966, no writ); *see* H. GOODRICH & E. SCOLES, *supra* note 18, at 273.
31. 530 S.W.2d at 885.
32. 518 S.W.2d 362 (Tex. 1975).

Arizona out of which the claim arose. The case was a divorce suit and events in the state leading up to the divorce were considered sufficient contacts with the state for purposes of the statute. Possibly the same could be said as to the custody decree here, although no real facts were shown bearing upon the matter and the South Carolina long-arm statute was not quoted or cited although South Carolina law providing for service by registered mail was introduced. Justice Keith did set forth the rule that the introduction of the sister state judgment creates a prima facie case for the one relying thereon, and the other party bears the burden to establish lack of jurisdiction in the rendering state.[33] Perhaps this rule, coupled with the *Mitchim* theory, was the basis of the concurring opinion.

Support Judgment—"Bootstrap" Doctrine. Layton v. Layton[34] is an example of the last-in-time rule for inconsistent, conflicting judgments. According to this principle, the judgment rendered last in time is to be accorded full faith and credit despite the fact that an inconsistent judgment has previously been rendered which should have been accorded full faith and credit by the court rendering the later judgment.[35] In *Layton* the husband obtained a divorce in Texas. By its judgment the Texas court also divided the property, awarded child custody, and ordered the husband to make support payments for the child. The wife, after receipt of out-of-state notice in Maryland, appeared specially to challenge the jurisdiction. Her challenge was overruled. Thereafter she filed no further pleadings and did not enter her appearance in person or through an attorney.

Prior to receipt of notice of the Texas suit the wife brought suit in Maryland for divorce *a mensa et thoro*, custody of children, child support, and alimony. After the Texas decree had been rendered she amended the complaint in Maryland seeking the same relief except for a change from divorce *a mensa et thoro* to divorce *a vinculo*. The husband answered the amended complaint stating that he was a resident of Texas and that service of process had been made upon him by a serving of the summons on his father, rather than the husband, while they were temporarily in Maryland. It was claimed that such defective service was insufficient to obtain jurisdiction over his person. It was further stated that the Texas divorce proceedings were determinative of all issues of alimony, support, custody, and property. His objections were overruled by the Maryland court with a finding by the court that in personam jurisdiction had been obtained over him. The Maryland decree contained an identical statement and a recital that the court had considered the previous Texas decree. The Maryland decree awarded custody of the children, payment by husband of child support and permanent weekly alimony. It also ordered the husband to pay all arrearages of child support, of alimony pendente lite, and attorney's fees. A divorce decree was not entered. The husband failed to appeal from this decree.

Thereafter, in the same cause the wife filed a petition in the Maryland

33. *See* note 2 *supra* and accompanying text.
34. 538 S.W.2d 642 (Tex. Civ. App.—San Antonio 1976, no writ).
35. Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Southard v. Southard, 305 F.2d 730 (2d Cir. 1962); RESTATEMENT (SECOND), supra note 4, § 114.

court for a determination of alimony and support arrearages and the reduction of the amounts so determined to a money judgment. Such judgment was rendered. This judgment recited that the husband had personal notice of the wife's petition and that the court had acquired in personam jurisdiction. This judgment was then brought to Texas for enforcement. The district court refused to enforce the judgment. On appeal, the court of civil appeals reversed, being of the opinion that full faith and credit must be given to the Maryland judgment for unpaid installments and child support.

The United States Constitution requires that full faith and credit be given to a sister state judgment if the rendering court had jurisdiction over the parties and the subject matter.[36] Such judgment is to be given the same credit, validity, and effect as given by the state rendering it.[37] Thus, it seems clear that the Maryland court failed to give full faith and credit to the Texas judgment of support. Consequently, the Constitution of the United States was violated. If, of course, the Texas court had no jurisdiction, full faith and credit need not have been given. The Texas court of civil appeals, however, found no reason to reject the finding of the trial court in the Texas divorce proceeding that it had jurisdiction. Thus, the Maryland court failed to give full faith and credit to the Texas judgment which should have been determinative of the support rights of the wife after the divorce. The question remained, however, whether the Texas courts could refuse to give full faith and credit to this later Maryland judgment. The court's answer was in the negative. The Texas court could by collateral attack inquire into the jurisdiction of the Maryland court, and if the Maryland court lacked jurisdiction, full faith and credit to the Maryland judgment would be denied.[38] But a failure of the Maryland court to give full faith and credit to the prior Texas judgment did not deprive the Maryland court of jurisdiction, no matter how erroneous the Maryland judgment might have been. Moreover, the husband failed to raise in his pleadings the issue of a lack of in personam jurisdiction over him. Even if Maryland lacked judicial jurisdiction, the husband's appearance in the Maryland proceeding and his unsuccessful litigation of the issue of jurisdiction barred him from relitigation in a collateral attack. This is known as the "bootstrap" doctrine: When a question of jurisdiction exists, if the defendant appears in the action and litigates the issue or had opportunity to do so, the issue is res judicata in the state where the court sits and is not subject to collateral attack in other states.[39]

The court went on to say that the husband should have raised the failure of the Maryland court to give full faith and credit to the prior Texas judgment by way of appeal. An appeal, rather than a collateral attack, was

36. U.S. CONST. art. IV, § 1.
37. Hanson v. Denckla, 357 U.S. 235 (1958); Williams v. North Carolina, 325 U.S. 226 (1945).
38. Gunther v. Gunther, 478 S.W.2d 821 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).
39. Durfee v. Duke, 375 U.S. 106 (1963); Sherrer v. Sherrer, 334 U.S. 343 (1948); R. LEFLAR, *supra* note 2, at 185-86.

the correct way to remedy the constitutional error of the Maryland court. Failure of that court to give full faith and credit to the prior Texas judgment, in the words of the court, "does not justify retaliatory action by the Texas courts."[40]

This case follows the general rule and doctrine established by the United States Supreme Court that if conflicting judgments are involved, the later final judgment controls, even though the latter is one which could itself have been reversed on appeal for violation of the full faith and credit clause.[41] It should be noted, however, that cases in other states do exist whereby courts have refused to accord controlling effect and full faith and credit to the latest final adjudication.[42]

One further point is noteworthy in the *Layton* case. The district court reasoned that full faith and credit should not be given to the Maryland decree because it would be contrary to Texas public policy to permit permanent alimony. Inasmuch as the public policy of a state is no defense against the enforcement of a sister state judgment,[43] the appellate court declared that when arrearages of alimony have been reduced to a final judgment by the court granting the alimony, full faith and credit must be given to that judgment.[44]

Texas Long-Arm Statute. Estes Packing Co. v. Kadish & Milman Beef Co.[45] is concerned with the Texas long-arm statute and the question of an exercise of in personam jurisdiction over a foreign corporation. The plaintiff was a Texas corporation which sold beef to a Massachusetts corporation through a broker. The beef was sent by truck for delivery to the Massachusetts company in Boston. Upon arrival of the beef the latter company rejected a certain amount of the meat on the ground that it was not in good condition but mailed its check to the Texas company in payment for the meat accepted with an endorsement that the check was in full payment for all debts incurred between the two companies. The Texas company refused to accept the check with such endorsement and returned it. Suit was then brought against the Massachusetts defendant under article 2031b.[46] The trial court found a lack of jurisdiction. Upon appeal this decision was reversed and remanded.

The court of civil appeals first inquired as to whether the terms of article 2031b were met. In order to satisfy the statutory requirements the nonresident defendant must be deemed to have been doing business in Texas by entering into a contract with a resident of Texas to be performed in whole or in part in Texas. The court concluded that these requirements had been met because the invoice, the shipping manifest, and the bill of lading which

40. 538 S.W.2d at 647.
41. *See* note 35 *supra* and accompanying text.
42. Porter v. Porter, 101 Ariz. 131, 416 P.2d 564 (1966), *cert. denied*, 386 U.S. 957 (1967); Colby v. Colby, 78 Nev. 150, 369 P.2d 1019, *cert. denied*, 371 U.S. 888 (1962).
43. Fauntleroy v. Lum, 210 U.S. 230 (1908).
44. 538 S.W.2d at 645; *accord*, Barber v. Barber, 323 U.S. 77 (1944); Sistare v. Sistare, 218 U.S. 1 (1910).
45. 530 S.W.2d 622 (Tex. Civ. App.—Fort Worth 1975, no writ).
46. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).

accompanied the shipment of meat showed that the meat belonged to the plaintiff and that the plaintiff was offering the meat for sale to the defendant at a certain specified price, and that the defendant accepted such price and accepted part of the shipment. All the accepted meat was then resold by the defendant, who sent a check to Texas for that part of the truckload. Thus, a contract was entered into between the parties by which the defendant agreed to buy from the plaintiff at plaintiff's price that part of the meat which the defendant kept. This contract was the basis of the lawsuit, the plaintiff Texas company desiring to recover from the nonresident defendant at least the part of the price that the parties had agreed upon for the meat actually purchased. The court noted that the shipping manifest which accompanied the meat provided that all bills would be payable in Fort Worth. The court held that this became a part of the contract. From these facts it was determined that a contract had been made between the defendant, a nonresident, and plaintiff, a Texas resident, for at least a part of the meat, and this contract was to be partly performed in Texas by the agreement to pay in Fort Worth.

Assuming that the terms of the Texas long-arm statute were fulfilled, a second determination became requisite. It was necessary to conclude whether or not minimum contacts were present in Texas so that the maintenance of the suit would not offend "traditional notions of fair play and justice," and would thereby meet the due process requirements of *International Shoe Co. v. Washington*.[47] Here the court set out the three-tiered test of the Supreme Court of Texas in *O'Brien v. Lanpar*.[48] According to this test, three basic factors exist for an exercise of jurisdiction. The first such factor is that the nonresident defendant must purposefully do some act or consummate some transaction in the state. Under the second factor, the cause of action must arise from or be connected with the said act or transaction, and the third requirement is that the assumption of jurisdiction by the forum must not offend traditional notions of fair play and substantial justice. From the evidence the court found that the defendant had no contacts with Texas other than this transaction. The court nevertheless held that these minimum contacts were sufficient to make the defendant amenable to the jurisdiction of the Texas court. By citing other cases where the contract between the Texas resident and the foreign corporation provided for payment in Texas, the court found that the first two factors of the three-tiered test were met. The defendant, by entering into the contract out of which the cause of action had arisen and providing for payment in Texas, had purposefully consummated a transaction within the state. Since the first two factors were satisfied, the court found that the third was automatically met. The presence of the first two requirements determines that there is nothing unfair about forcing the defendant to litigate in Texas.[49]

The United States District Court for the Northern District of Texas in

47. 326 U.S. 310 (1945).
48. 399 S.W.2d 340 (Tex. 1966).
49. National Truckers Serv., Inc. v. Aero Systems, Inc., 480 S.W.2d 455, 459 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

Murdock v. Volvo of America Corp.[50] had before it the interesting problem of whether jurisdiction over a subsidiary corporation is sufficient to confer jurisdiction over the parent under the Texas long-arm statute. The case involved a products liability action for damages against Volvo, a Swedish automobile manufacturer, and its wholly owned American subsidiary, Volvo of America Corporation, over which in personam jurisdiction existed. It was claimed by the plaintiffs that jurisdiction existed over Volvo because it was doing business in Texas through its subsidiary, thus meeting the provisions of the Texas statute. Article 2031b permits service of process upon foreign corporations which do business in Texas but have not designated an agent for such service through the secretary of state. Acts described by the statute as the doing of business within the state are the commission of a tort in whole or in part within Texas or the entering into a contract with a resident of the state to be performed in whole or in part in Texas. Inasmuch as defendant Volvo did not commit such a tort or enter into such a contract, it could not be considered within the reach of the Texas statute unless it was otherwise doing business in the state. Volvo claimed that it was not, therefore, within the reach of the statute. Consequently, any exercise of jurisdiction would not comport with due process of law as demanded by the minimum contacts rule of *International Shoe Co. v. Washington*.

The *Restatement (Second) of Conflict of Laws*[51] would permit an exercise of jurisdiction by a state over a foreign corporation in situations where the corporation has a relationship to the state which makes an exercise of jurisdiction reasonable. As to jurisdiction over a foreign parent corporation, it is stated that if the subsidiary does an act in the state at the direction of the parent, the state has jurisdiction over the foreign parent. Moreover, jurisdiction over the subsidiary will establish jurisdiction over the foreign parent if the foreign parent controls and dominates the subsidiary to such an extent that it disregards the subsidiary's independent status. The court here adopted this rule, following Judge Goldberg's language in *Product Promotions, Inc. v. Cousteau*.[52] There it was stated that "the alleged agency and parent-subsidiary relationships were facts on which jurisdiction was predicated . . . ,"[53] and further, that the plaintiff bears the burden of proof to establish such facts. In the case at hand the plaintiffs did not present or offer evidence concerning the degree of domination or control which Volvo exercised over Volvo of America, nor was proof offered to show whether or not Volvo of America was the alter-ego of Volvo. Moreover, the burden of establishing an agency relationship with Volvo as the principal and Volvo of America as the agent was not met. Therefore, Volvo was not subject to the reach of the Texas long-arm statute and was not subject to jurisdiction under the provisions of the statute. The question of lack of due process thus became immaterial. In the absence of meeting the burden of proof as to

50. 403 F. Supp. 55 (N.D. Tex. 1975).
51. RESTATEMENT (SECOND), *supra* note 4, § 52.
52. 495 F.2d 483 (5th Cir. 1974).
53. *Id.* at 492.

control or agency, the old case of *Cannon Manufacturing Co. v. Cudahy Packing Co.*[54] controls. In that case the Supreme Court of the United States maintained the corporate fiction and held that jurisdiction over the subsidiary did not confer jurisdiction over the parent.

Reich v. Signal Oil & Gas Co.[55] is the most interesting opinion rendered by the courts during this survey period involving the Texas long-arm statute and the minimum contacts doctrine of *International Shoe Co. v. Washington*. A resident of Louisiana and a resident of Texas who were working on an oil drilling project off the coast of Ghana were killed when a helicopter in which they were being transported from the drilling rig to Ghana crashed. The administratrices of their estates brought actions for their deaths against several defendants, including an Italian company, Agusta, which had manufactured the helicopter under license from Bell Helicopter following a design owned by defendant Bell Helicopter. Bell clearly does business in Texas and was found subject to jurisdiction. The helicopter had been sold by Agusta to a British company, Bristow, such sale and delivery having taken place in either England or Italy. Following the sale the helicopter had been leased by Bristow to defendant Mayflower Company, a company subject to Texas judicial jurisdiction. The fact that the helicopter had never been in Texas should be noted, although after its crash some metallurgical testing apparently was carried out by Bell in Texas. Under these facts Agusta and Bristow claimed that long-arm jurisdiction in Texas could not be maintained against them, and they sought dismissal from the suit on the ground of lack of jurisdiction. These motions for dismissal were granted.

At the outset the court stated the requisites for an exercise of jurisdiction over the persons of nonresident defendants by a federal court: A statute of the state in which the court is sitting must confer jurisdiction, and an exercise of jurisdiction in accordance with the statute must also be consistent with due process of law. As to jurisdiction over Bristow, the court was of the opinion that the action arose under the tort provision of article 2031b, requiring the commission of a tort in whole or in part in Texas. Since the tort occurred outside of Texas, jurisdiction under the statute did not exist. The court was also of the opinion that Bristow had made no contract with the plaintiffs and, therefore, the part of the Texas statute which permits an exercise of jurisdiction over a nonresident who makes a contract with a Texas resident to be performed in whole or in part in Texas was not met. Further, even if there were a contract, its existence had not been pleaded by the plaintiffs.

Previous product liability cases were discussed wherein products defectively manufactured outside the state had been sent into the state and had caused injury in Texas.[56] In these cases the tort had occurred in the state so as to be in accord with article 2031b. The courts also had bolstered the

54. 267 U.S. 333 (1925).
55. 409 F. Supp. 846 (S.D. Tex. 1974).
56. *See, e.g.*, Coulter v. Sears, Roebuck & Co., 426 F.2d 1315 (5th Cir. 1970); Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969).

mere fact of the commission of the tort in the state with other connections by the defendant with Texas so as to make it fair and reasonable to require the defendant to defend within the state. Among the various connections considered was the fact that the defendant had placed the product in the stream of interstate commerce and could have foreseen that the product could have caused injury in Texas. Other activities of the defendant in Texas were discussed, which, although unrelated to the tort in Texas, added to the reasonableness and fairness in making the defendant come to the state to be sued. The court concluded that in the case at hand foreseeability could not be considered because the product had been placed into the stream of international commerce and was never used in the United States. Therefore, Bristow was not found to be doing business in Texas for purposes of article 2031b.

At this point the court discussed the due process element of the case, citing the two-tiered test of *Product Promotions, Inc. v. Cousteau* which requires that there must be minimum contacts within the state resulting from affirmative acts of the defendant and, further, that it must be fair and reasonable to require the defendant to come into the state and defend.[57] To determine if the first condition of the test had been met, the court circuitously referred to the earlier determination that Bristow was not doing business in the state. Since the defendant was not doing business for purposes of the Texas statute it was concluded that there were no minimum contacts. This conclusion was reached despite a previous statement by the court that Bristow had substantial contacts with Texas through its dealings with Bell Helicopter.

The court's consideration of the second aspect of the test, fairness and reasonableness to force the nonresident to defend in Texas, was influenced by two basic factors in long-arm jurisdiction cases set forth in *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*[58] These two factors are the special interest of the forum in granting relief and the convenience of the parties. In regard to the first factor the court quoted a cryptic statement in the *Lone Star Motor Import* case which concluded that Texas has no special interest to grant relief in suits against foreign defendants where the cause of action arose under the laws of another country for conduct outside the United States. Texas was also found to be no more convenient a forum than others simply because Bristow had certain contacts with Texas, particularly after the court considered that actions were already pending in Ghana and in England, that the crash had occurred in Ghana, and that the helicopter was manufactured in Italy. Even if it were convenient to bring suit in Texas, that factor alone was not a sufficient basis for jurisdiction when considered with all the other findings in the case.

Agusta, the Italian manufacturer of the helicopter, was also held not subject to Texas judicial jurisdiction. Agusta's cause of action sounded in tort and for purposes of the Texas statute no tort was committed in whole or

57. 495 F.2d at 489.
58. 185 F. Supp. 48 (S.D. Tex. 1960), *rev'd on other grounds*, 288 F.2d 69 (5th Cir. 1961).

in part in Texas. Further, since the helicopter was never located in Texas and since the licensing agreement with Bell forbade competition in the United States, foreseeability of a tort in Texas could not be imparted to Agusta. It was acknowledged that a licensing contract had been made by Agusta with Bell, but this could not meet the contractual aspect of article 2031b, for the plaintiffs were not a party to this contract or a third party beneficiary of the contract. Moreover, the plaintiffs did not base their case on a contract action.

In its discussion the court cited the previously mentioned Texas case of *O'Brien v. Lanpar*[59] and the three-tiered test set forth by the Texas Supreme Court. Inasmuch as the cause of action against Agusta did not arise from or was not connected with a Texas act or transaction, the second part of the *O'Brien* test was not met. The court further concluded that since Agusta's relations with Texas were not sufficiently compelling to require it to defend itself in Texas in a case where the accident occurred in Ghana and the alleged negligence occurred in Italy, an assumption of jurisdiction by a Texas court over Agusta would not constitute fair play and substantial justice.

The court in *Reich* probably reached the proper decision, but its opinion is somewhat prolix and seemingly based upon a theory not really applicable to the facts. The line of products liability cases relied upon by the court does not seem appropriate to the relevant fact situation. In these cases a cause of action, the tort, occurred within Texas, but arose out of negligent acts of the defendant done elsewhere. The authors of the *Restatement (Second)* determined that in products liability cases where an act is done in one state which produces consequences in another, the latter state may exercise jurisdiction over causes of action arising from those consequences if it is reasonable to do so.[60] The reasonableness of such jurisdiction depends upon whether the defendant, who had no intention to cause effects in the state, could reasonably expect or foresee that they might occur, as well as upon other factors relating to the convenience of the defendant if forced to stand suit in the state where the tort occurred. In the case at hand the defendants did no acts outside the state which had the effect of bringing about a cause of action in Texas. The acts done outside the state had effects in Ghana. The placing of the helicopter in a stream of international commerce would make foreseeable the occurrence of a tort in places where the helicopter was used. Since the helicopter was used in Ghana, that country could probably exercise jurisdiction over the cause of action, that is, the tort which occurred there. Jurisdiction in Texas obviously would be outside the pale under such reasoning.

Nevertheless, this is not the end of the story, for in some instances it is clear that a state can constitutionally exercise jurisdiction over a defendant even when the cause of action did not arise within the state.[61] It is true that a cause of action arising out of the state could never permit an exercise of

59. 399 S.W.2d 340 (Tex. 1966).

60. RESTATEMENT (SECOND), *supra* note 4, §§ 37, 50.

61. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

jurisdiction under article 2031b if the statute is confined to a tort committed in whole or in part within the state or to a contract made with a resident of Texas to be performed in whole or in part within the state. Article 2031b, however, also speaks of long-arm jurisdiction over nonresidents who do business within the state, and doing business is not thought to be confined only to the tort or contract situations set forth in the statute. The term includes other acts of doing business. Moreover, although there are conflicting opinions, courts have stated that the Texas statute permits an exercise of jurisdiction to the fullest possible reach under the constitutional due process minimum contacts rule.[62] The Supreme Court of the United States as well as other courts have stated that the minimum contacts rule is satisfied and jurisdiction can be exercised over a nonresident defendant even when the cause of action does not arise out of business done within the state if the business that is done is of such a continuous and substantial nature as to make an exercise of jurisdiction reasonable.[63] In *Reich* the court admitted that both Bristow and Agusta had "numerous and substantial" business contacts with Texas,[64] and it would seem that both companies were doing business in the state. If the Texas statute is as broad as the constitutional standard, then the court should have contented itself with a determination of whether the defendants were engaged in such continuous and substantial business activities within the state so as to make it fair to force the defendants to defend themselves in Texas on a cause of action not arising from or connected with those acts or transactions. The contacts of the defendants with Texas here probably were not so extensive as to require the defendants to defend in Texas, but a consideration of these Texas contacts as doing sufficiently substantial business in Texas should have been the principal thrust of the court's opinion.

II. CHOICE OF LAW

Tort, Warranties, Uniform Commercial Code. The United States District Court for the Southern District of Texas in *Morton v. Texas Welding & Manufacturing Co.*[65] was faced with a cause of action sounding in tort and contract. Specifically, the defendant had sold a truck which had been delivered for use to a subsidiary of the buyer. Plaintiffs, who were employees of the subsidiary, were injured on June 19, 1969, when the truck exploded. On June 8, 1971, they sued to recover for these injuries, complaining of negligence by the manufacturers of the truck as well as breach of express and implied warranties. Defendant Pat and Chuck Supply

62. Eyerly Aircraft Co. v. Killian, 414 F.2d 591, 592 (5th Cir. 1969); National Truckers Serv., Inc. v. Aero Systems, Inc., 480 S.W.2d 455, 459 (Tex. Civ.App.—Fort Worth 1972, writ ref'd n.r.e.). *See also* Thode, *In Personam Jurisdiction; Article 2031b, the Texas "Long Arm" Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEXAS L. REV. 279, 308 (1964). *But see* Bland v. Kentucky Fried Chicken Corp., 338 F. Supp. 871 (S.D. Tex. 1971); Hayes v. Caltex Petroleum Corp., 332 F. Supp. 1205 (S.D. Tex. 1971); Baade, *Conflict of Laws, Annual Survey of Texas Law*, 28 Sw. L.J. 167, 168-73 (1974).

63. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

64. 409 F. Supp. at 851.

65. 408 F. Supp. 7 (S.D. Tex. 1976).

Company, the retailer, was made a party by an amended complaint of April 15, 1973, and was served with process on April 27, 1973. This defendant made a motion to dismiss on the ground that the cause of action was barred by the statute of limitations.

Applying the rule of *Klaxon Co. v. Stentor Electric Manufacturing Co.*[66] that a federal court in a diversity action must apply the substantive or outcome-determinative law, including the conflict of laws rule, of the state in which it is sitting, the court determined that Texas law should apply.[67] The tort claim was held to be barred by the Texas statute of limitations requiring personal injury actions based on negligence to be brought within two years. Texas law usually characterizes general statutes of limitations as procedural,[68] and, as to procedure, the law of the forum governs. Therefore, the Texas limitations period, as that of the forum, was applicable.

A more difficult question was presented by the breach of implied warranties claim. Prior to the adoption of the Uniform Commercial Code (UCC) Texas had classified a personal injury claim based on such a breach as a tort rather than a contract for statute of limitation purposes. A two-year period would apply instead of the four-year period prescribed for contract actions in general. The UCC incorporated in section 2.725 a specific limitation provision of four years for commencement of suit following the accrual of the cause of action. The court was, therefore, faced with a case of first impression as to whether a personal injury action for breach of implied warranty continued to be governed by the tort limitations period or by the UCC provision. A federal court in such a case where clear authority does not exist must through "reason and judicial analysis" determine the case as a court of the state in which it is sitting would determine it.[69] The court concluded that the injury complained of arose out of a commercial transaction and in such transactions the Code was created to apply to all aspects thereof and to provide for uniform rules nationwide governing commercial transactions. Moreover, the language of the Code specifically includes and applies to recovery for injuries resulting from breach of warranty.

Inasmuch as the Code period was held applicable, it became necessary to determine when the four-year period began to run against defendant Pat and Chuck Supply Company. The Code requires the commencement of an action for breach within four years after the cause of action accrued. The court noted that under the Code a breach of warranty occurs at the time of tender of goods except for warranties which explicitly extend to the future performance of the goods. Despite this language the court held that the old Texas rule was still applicable to the effect that the running of the statute begins when the buyer discovers, or in the exercise of ordinary care should discover, the injury. Thus, in an action for personal injury grounded upon breach of implied warranty the period begins to run from the date of injury.

With respect to the claims based on breach of warranty, the court was

66. 313 U.S. 487 (1941).
67. 408 F. Supp. at 9.
68. Home Ins. Co. v. Dick, 15 S.W.2d 1028 (Tex. Comm'n App. 1929), *rev'd on other grounds*, 281 U.S. 397 (1930).
69. 408 F. Supp. at 10.

of the opinion that a four-year period applied either under pre-Code law regarding express warranties as contractual or under UCC provisions covering express warranties, making section 2.725 applicable. Thus, the cause could proceed only in contract based on breach of warranties.

A most interesting decision in the field of conflict of laws during this survey period is that of Judge Carl O. Bue in the case of *Continental Oil Co. v. General American Transportation Co.*[70] The plaintiffs sought damages for defects in forty-six railroad cars which had been purchased from the defendant manufacturers. Their causes of action were grounded on negligence, strict liability in tort, breach of express and implied warranties, and breach of contract. The facts demonstrate that the cars were all manufactured in Ohio. They were then delivered in Pennsylvania, Ohio, and Texas. The contracts of purchase were made in Oklahoma.

The opinion of the court first dealt with the breach of warranties and breach of contract aspects of the plaintiffs' asserted cause of action. Since this was a diversity suit the court applied Texas conflict of laws rules.[71] Texas has adopted the Uniform Commercial Code which requires the application of Texas law "to transactions bearing an appropriate relation to this state"[72] in causes of action based on breach of contract. Although no Texas cases have interpreted the meaning of this language, the court was of the opinion that the facts of the case and the decisions of other jurisdictions indicated that a Texas court would decide that the transaction involved here did not bear an appropriate relation to Texas calling for application of Texas law. It is true that Texas was one of the three states where partial delivery of the cars was made and that certain repairs of the cars were made in Texas. These contacts were not sufficient, however, to create a proper nexus between the events of the case and Texas to warrant the application of Texas law, particularly when the parties did not have their principal place of business in Texas at the time of the performance of the contract.

In order to determine the law which Texas would apply, the court looked to general conflict of laws principles in contract cases and found that in instances where the contract is to be performed in more than one state the Texas courts look to the place where the contract was made for the controlling law. Because the contract was made in Oklahoma the court determined that the laws of that state would govern.[73] The UCC as adopted in Oklahoma provides for a five-year limitation period after the cause of action has accrued. In breach of warranty cases the cause of action begins to run at the time of delivery, unless a warranty explicitly extends to future performance. Since there was a seven-year period after the delivery of the cars and the filing of suit, a suit on breach of implied warranties was barred.

70. 409 F. Supp. 288 (S.D. Tex. 1976).
71. *See* note 66 *supra* and accompanying text.
72. TEX. BUS. & COMM. CODE ANN. § 1.105a (Vernon 1968).
73. 409 F. Supp. at 291. The Texas conflicts rule as to contracts seems to be as follows: place of making governs in an instance where place of making and place of performance are the same; otherwise place of performance governs unless a different intention is manifested, except, as would seem to be the case here, where there is more than one place of performance, in which case in the absence of a contrary manifestation of intention, the place of making governs. The Texas law is summarized in Ramirez v. Autobuses Blancos Flecha Roja, S.A. de C.V., 486 F.2d 493, 496 (5th Cir. 1973).

As to the breach of contract claim, the Oklahoma statute requires suit to be brought within five years from the date the breach occurs. The court had not been provided with the relevant Oklahoma law defining date of breach for purposes of the commencement of the running of the period. In the absence of knowledge of the relevant law the court refused to consider whether the contract action was barred until such information was supplied. The usual manner in which the Texas courts deal with absence of proof of foreign law or a request for judicial notice of sister state law and a proper showing of such law is to presume the law of the other state to be the same as that of Texas.[74] It would appear that the federal court failed to follow Texas law on this point.

Plaintiffs also claimed that an express warranty had been made which was explicitly extended to future performance. If such were true, and following the Oklahoma Commercial Code, the cause of action did not accrue until such time when the breach was or should have been discovered. Inasmuch as there was an issue of material fact as to whether or not there existed an express warranty covering future performance, summary judgment on this issue was precluded.

It should be noted that a divergence exists between Judge Bue's opinion here and Judge Singleton's opinion in the *Morton* case discussed above. Judge Singleton treated the statute of limitations as procedural because Texas courts would so characterize it, and thus applied the law of the forum. He assumed that the limitations provisions of the UCC were also procedural. Judge Bue, however, treated those limitations provisions as substantive, thereby calling for the application of the Texas conflict of laws principle applicable to substance, not procedure. In this case Oklahoma law would be applied as the law of the place where the contract was made.[75] Texas, as noted in the previous case, has a four-year limitation period in breach of implied warranty cases under the UCC and a four-year period for breach of contract actions. It would seem to make little difference here whether the Texas four-year period were applied or the Oklahoma five-year period, for the period would have run in either instance. A difference might exist as to the breach of contract clause, for the Texas statute is a year shorter than that of Oklahoma and whether the statute had run would depend upon when it began to run.[76] Thus, a four-year Texas statute could have run, whereas a five-year statute in Oklahoma might not have.

The court then turned its attention to the tort aspects of the complaint. It will be remembered that the plaintiffs' complaint set forth causes of action based not only upon breach of contract and of warranty, but also upon

74. *See* note 7 *supra* and accompanying text.

75. It would seem that courts construing the statute of limitations of the United States have believed it to be procedural in that the Code did not create a new cause of action. Thus, the statute of limitation of the forum is applicable. *See* Mahalsky v. Salem Tool Co., 461 F.2d 581 (5th Cir. 1972); Lewis v. Food Mach. & Chem. Corp., John Bean Div., 245 F. Supp. 195 (W.D. Mich. 1965); Natale v. Upjohn Co., 236 F. Supp. 37 (D. Del. 1964); Air Prods. & Chem., Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

76. The limitation period as noted was from the time of the breach according to the UCC, but authority seems nonexistent in a case such as this to aid in determination of when the breach occurred—at the time of delivery or at the time after delivery when the defect could have reasonably been discovered.

negligence and strict liability. The court, stating that under conflict of laws principles characterization is a task for the forum court[77] and that a federal court must follow the characterization of the state in which it is sitting,[78] concluded that a Texas court would characterize an action in strict liability as a tort, and since Texas still applies the law of place of injury to all substantive tort issues, the federal court must look to the law of the place of injury, the lex loci delicti.[79] The problem here is locating the place of injury or damage. The design and manufacture of the cars took place in Ohio, the contract for such cars was entered into in Oklahoma, and the cars were delivered to plaintiffs in Pennsylvania, Texas, and Ohio. The defects in the cars, cracks which developed, took place over several years so that it would be impossible to point to a particular place where the damage occurred. Thus, the place of wrong or injury demanded by Texas law could not really be discovered. The federal court was uncertain as to which state's law would be chosen by a Texas court, but still it had to choose the law which a Texas court would be most likely to adopt. It was pointed out that the court had been urged to follow a choice of law rule which would include within the meaning of place of injury the place where the wrongful act or omission had taken place.[80] It was this approach that was followed, and although no Texas case was found where a Texas court had been unable to determine the place of injury, it was believed that Texas in a case such as that at hand would characterize the wrongful act or omission as having occurred in Ohio, the place of manufacture. The court noted that a few Texas cases had defined the lex loci delicti to include the place where the wrongful act or neglect had occurred, although in the cases relied upon by the court the injury had also occurred there. Ohio law was held applicable, therefore, and recovery was permitted upon a theory of strict liability. The court said that Pennsylvania would also permit recovery, but that Texas would probably deny it on commercial loss, and that the issue had not been resolved in Oklahoma.

The parties had also urged alternatively that the court resort to a most significant relationship or interest analysis choice of law rule. Use of the law of the forum as the better reasoned majority view was further suggested. These requests were rejected on the ground that Texas had not adopted such approaches[81] and that the federal court must apply Texas choice of law principles as demanded by the Supreme Court of the United States.[82]

It was opined that there was a substantial possibility that Texas might in the future and in the proper case adopt the most significant contacts rule rather than a mere application of the lex loci delicti. If such were the rule in this case it was determined that Ohio law would govern because that state had the most significant interest in imposing strict liability upon manufac-

77. The general rule in conflict of laws is that characterization of conflict of laws concepts is determined by the law of the forum. *See* RESTATEMENT (SECOND), *supra* note 4, § 7(2).

78. *See* note 66 *supra* and accompanying text.

79. 409 F. Supp. at 294; *see* Click v. Thuron Indus., Inc., 475 S.W.2d 715, 716 (Tex. 1972); Brown v. Seltzer, 424 S.W.2d 671 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.).

80. The court cited among other cases Lee v. Howard, 483 S.W.2d 922, 923 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

81. *See* Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968); Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 29 SW. L.J. 244, 258-59 (1975).

82. 409 F. Supp. at 296; *see* Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3 (1975).

turers domiciled and doing business in Ohio. The other states where the deliveries occurred or where the contract was entered into would have inferior interests to those of the state of manufacture.

Wrongful Death—Statute of Limitations. Penry v. Wm. Barr, Inc.[83] involved a wrongful death action brought in a United States district court sitting in Texas for injury and death which had occurred in Louisiana. The suit was time-barred by the Louisiana one-year limitation period which was built into the Louisiana wrongful death statute. It was not time-barred by the longer Texas statutory period of two years. The court noted the opinion of the Supreme Court of the United States in *Day Zimmerman, Inc. v. Challoner*[84] to the effect that under the *Erie Railway*[85] and *Klaxon*[86] doctrines the federal court must apply the conflict of laws principles of the state in which it is sitting. Therefore, Texas conflict of laws principles were applicable. If Texas were a lex loci delicti jurisdiction Texas courts would apply the Louisiana wrongful death statutes, including the built-in litigation period of Louisiana, because the Louisiana statute was considered to be peremptive of the right, and thus substantive rather than procedural in nature.

It was argued that, despite the Texas Supreme Court decision in *Marmon v. Mustang Aviation, Inc.*,[87] the Texas wrongful death statute and its two-year limitation period should apply. The court in *Marmon* had stated that the Texas wrongful death statute could not be applied extraterritorially to an injury or wrong occurring outside the state because the legislature had written into the statute words which required the application of the wrongful death statute of the lex loci delicti, the place of the wrong or injury. The plaintiffs, however, pointed to the fact that the Texas wrongful death statute had been amended and that it now permits recovery if a right of action is given by a wrongful death statute of the foreign state *or of Texas*.[88] This amendment would, it was argued, permit Texas courts to adopt the most significant relationship theory as to wrongful death actions and to apply the law of the place having the most significant relationship. In this case the place would be Texas, because the plaintiffs were Texas residents at the time of the death of the deceased and were presently residents of Texas. As a result, the Texas two-year limitation should control. The court noted the amendment and was of the opinion that the Texas wrongful death statute can now be given extraterritorial effect, but after analysis of the wrongful death provisions and the amendment the court stated: "[I]t is not clear in a case such as this whether to apply the law of the state where the cause of action occurred or the state with the most significant contacts."[89]

In the *Survey* of last year this author was of the opinion that the amendment's wording was unclear and that it seemingly was an act of

83. 415 F. Supp. 126 (E.D. Tex. 1976).
84. *See* note 82 *supra* and accompanying text.
85. Erie R.R. v. Tompkins, 304 U.S. 84 (1938).
86. *See* note 66 *supra* and accompanying text.
87. 430 S.W.2d 182 (Tex. 1968); *see* Thomas, *supra* note 81, at 258-59.
88. TEX. REV. CIV. STAT ANN. art. 4678 (Vernon Supp. 1976-77).
89. 415 F. Supp. at 128.

legislative improvisation giving the Texas courts wide leeway and freeing them from the legislative straitjacket imposed prior to the amendment.[90] The federal district court in the case at hand was able to escape deciding how a Texas court would rule under the amendment because it was held that the amendment did not become effective until September 1, 1975, while the cause of action accrued upon the death of the decedent December 18, 1974. Thus, the Louisiana limitation period and the cause of action had expired under Louisiana law eight months before the amendment became effective. Since Texas has a strict provision against retroactive laws[91] which disturb vested rights, and since the defendant had a vested right to rely on the statute of limitations as a defense after the cause of action had become barred thereby, the state legislature could not divest the defendant of his right. Alternatively the plaintiff contended that the Louisiana limitation period should be tolled as to the minor children who were also plaintiffs in the case in accordance with the rule that such period was interrupted during minority status. The court disagreed, stating that the Louisiana statute was one of peremption, and that rights under the statute must be exercised in one year, otherwise they no longer existed even for minors.[92]

Marriage. Durr v. Newman[93] illustrates once again the pitfalls of a failure to request the judge to take judicial notice of sister state law and the further failure to furnish him information to permit compliance with the request as required by Texas Rule of Civil Procedure 184a. Here there was a contested hearing in an application for appointment as administratrix by a wife. A judgment was entered which found that the woman was the common law wife of the deceased and granted her application. Upon appeal a remand was sought so that Nevada law could be presented properly to the court. Appellant claimed that the marriage was celebrated in Nevada, that common law marriages were invalid in Nevada, and under the well-known choice of law rule that the law of the place of celebration of the marriage controls the validity of the marriage, the marriage was invalid.[94] Appellant had sought to call the trial court's attention to Nevada law by filing a written

90. This author stated the following in Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 30 Sw. L.J. 268, 292 (1976):

> The amendment now permits recovery if a right of action is given by the law of the foreign state or country or Texas. Would this require the Texas courts to apply Texas law in any instance where the law of the foreign state did not provide a cause of action, or the law of the foreign state in any instance when that law granted a cause of action and Texas did not? For example, what if Texas did adopt the interest analysis approach? Would the courts be forced to apply Texas law in a case simply because Texas gave a cause of action and the foreign law did not when Texas contacts were minimal and Texas had little or no interest in the application of its law to the transaction? Alternatively, would Texas be forced to apply the foreign law when the foreign place's interests were minimal because that jurisdiction gave a cause of action and Texas did not? Such a construction of the statute would be a dubious one. It would seem that the amendment allows Texas courts some discretion in deciding to apply Texas substantive law to injuries which occur outside the state. To guide that discretion, the choice-of-law rules followed by the courts of Texas would be relevant.

91. TEX. CONST. art. I, § 16.

92. For discussion of the Louisiana wrongful death statute and its limitation period see Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 25 Sw. L.J. 159, 162-64 (1969).

93. 537 S.W.2d 323 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

94. *See In re* May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953). For discussion see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 168-73 (1971).

brief, but this was not placed in the record. In the absence of proper motion for judicial notice as called for by rule 184a, the court refused to take judicial notice of sister state law. In such instances the Texas courts presume the law of the state which should govern to be the same as that of Texas.[95] Common law marriages are valid in Texas. The court of civil appeals noted that a reversal and remand would only be appropriate in this case if there were reversible error present. Since there was no error in the lower court's judgment, no reversal or remand was appropriate.

Antenuptial Agreements. In *Frey v. Estate of George S. Sargent*[96] the court of civil appeals had before it a rather rare type of contract. The contract was executed in Oklahoma and by its terms the husband agreed to execute a will bequeathing $30,000 to the wife in consideration for her care of him at her home in Texas or at a home that they might acquire in Texas. Following the marriage the husband executed in Oklahoma a will bequeathing the money to the wife. The wife died at their home in Texas some years later. By the terms of Texas law the bequest lapsed. Thereafter, the husband executed another will revoking prior wills. He failed to include the bequest previously made to the wife. At his death lineal descendants of the wife filed claim for the $30,000. The trial court denied the claim and the court of civil appeals affirmed.

It was contended that the law of the place of making of the prenuptial contract, Oklahoma, should govern. Oklahoma law would sanction recovery under the agreement. The court, however, applied what appears to be the Texas conflicts rule that where place of making and place of performance are different, the law of the place of performance governs if, as here, there is only one place of performance.[97] Such a conclusion is reinforced in the case like the one at hand where a place of performance was designated in the contract. It was noted that the consideration for the bequest was the performance of services by the wife which were all to take place in Texas. Therefore, the law of Texas, as the place of performance, governed, and the contract was not enforced.

Federal Common Law. Kimbell Foods, Inc. v. Republic National Bank[98] brings to the fore once again the question of federal common law. In *Erie Railroad v. Tompkins*,[99] a diversity case, the Supreme Court of the United States held that there was no federal general common law and, thus, the federal courts were required to apply the law of the state in which they were sitting. Later cases, however, have softened this absolute negative. Today, when a matter is governed by a federal statute it is quite clear that the supremacy clause of the United States Constitution governs and makes the federal, not state, law applicable. Consequently, congressional legislation does away with many conflicts as to what law should govern. There may well be instances, however, when a particular issue is not explicitly covered

95. *See* note 7 *supra* and accompanying text.
96. 533 S.W.2d 142 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.).
97. For discussion of the Texas choice-of-law rule in contract situations see note 73 *supra*.
98. 401 F. Supp. 316 (N.D. Tex. 1975).
99. *See* note 85 *supra* and accompanying text.

by federal statute. The problem then becomes whether such gaps are to be governed by state law, following *Erie*'s proclamation that no federal general common law exists, or whether, when federal rights are involved, the issue is to be governed by a federal common law rule. The Supreme Court of the United States has determined that if the matter is such that it should not be governed by rules followed in diversity cases, then the statutory lacunae are to be filled by a federal common law.[100]

This federal common law reasoning prevailed in the case at hand where suit was brought to quiet title and foreclose liens on personal property in which an interest by the United States was claimed as a result of a lien arising from the default of a creditor whose loan was guaranteed by the Small Business Administration (SBA). The federal court observed that jurisdiction was based upon a federal statute and concluded that it was established that federal law is applicable when a debt owed to the United States is in issue. The court stated that the reason for its conclusion was that a uniform federal law was necessary to protect the United States Government in the exercise of its governmental functions and that such functions should not be subject to conflicting state laws.[101]

The rule of first in time first in right fixes priority between a federal and a state created lien. In order to be entitled to priority, however, the non-federal lien must be choate at the time the federal lien arises; this requirement is met only if the identity of the lienor, the property subject to the lien, and the amount of the lien are established. The last condition is met only when there is no further opportunity to contest the amount. This means that the lienor must have reduced the claim to judgment or the lien must be enforceable by a summary judgment.

The claims of the Kimbell Food Company rested upon charges for goods sold on open account to the food store chain which had defaulted on its guaranteed SBA loan. The purchases and charges were made after the security interest of the SBA attached, but the court said that even if they had been made previous to the SBA attachment, the Kimbell lien would not have been choate prior to the governmental interest because the amount was not certain in that there was still judicial opportunity to question the lien until it was reduced to judgment. Such reduction did not come to pass until after the attachment of the SBA lien. Moreover, the court felt that Texas law would not recognize these claims as choate despite the contention of Kimbell that future advance clauses found in certain earlier security and financing agreements with the defaulting food store applied also to secure purchases on open account. The court disagreed with Kimbell and said that under Texas law an agreement securing all other indebtedness of any kind arising between parties means future indebtedness of the same nature as that previously described in the agreement and the later purchases on open account were not of the same class as the previous indebtedness represented by the agreements.

100. This doctrine is set out in Bank of America Nat'l Trust & Sav. Ass'n v. Powell, 352 U.S. 29 (1956); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). *See also* R. LEFLAR, *supra* note 2, at 154-56; R. WEINTRAUB, *supra* note 94, at 464-66.

101. 401 F. Supp. at 321.

As to priority of certain tax liens of the State of Texas and the city of Dallas, their priority was based upon federal statute, not federal common law.[102] This statute, as interpreted, does not apply to state sales taxes but does include ad valorem taxes. Liens were sought for both types. The court held that in any event such liens could not prevail against the SBA claim. The sale of the defaulted supermarket's three stores had been made to obtain funds for settlement, to the extent possible, of all claims. Since the city's lien and the state's lien were not destroyed by the bulk sale of the collateral and they could pursue their liens against the purchasers of the collateral, their liens were not destroyed and they had no right to pursue the proceeds of the sale which had been placed in escrow.

III. LEGITIMATION

Extra-state Consequences. A situation not often before the courts of Texas arose in *Wickware v. Session*[103] and involved the consequences of the legitimation by the father of children born out of wedlock. The children were born and domiciled in California. The father also was domiciled in California before and after the birth of the children. Pursuant to a suit in that state by the mother for the support of the children the father acknowledged paternity, which according to California law made the illegitimate children the heirs of the father. After the father's death a California court ordered the assignment of his estate to the children. The California suit made no mention of Texas real property, the subject matter of the Texas suit in a trespass to try title action by the children claiming rights of inheritance in the land owned by the deceased father. The trial court in Texas gave full faith and credit to the California proceeding and considered the children legitimate upon proper acknowledgment by the father in accordance with California law. The court of civil appeals affirmed to the extent of recognition of the status of the children as legitimate under California law for purposes of inheriting Texas land.

It is well known that legitimacy for purposes of land inheritance is ultimately to be determined by the law of the situs of the land.[104] Nevertheless, the *Restatement (Second) of Conflict of Laws* declares that the *status* of legitimacy is subject to the law of the state which has the most significant relationship with the parent. It is interesting to note that the court of civil appeals refers to the *Restatement (Second)* rule and adopts for Texas the most significant relationship principle of conflict of laws for legitimation even though this choice of law principle has not officially been accepted by the Supreme Court of Texas.[105]

The more difficult question of determining the state with the most significant relationship remained. Without attempting an interest analysis, the court simply stated that California was the place where the parent and child were domiciled at the time the act took place which created the status

102. 15 U.S.C. § 646 (1970).
103. 538 S.W.2d 466 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).
104. RESTATEMENT (SECOND), *supra* note 4, § 237(1).
105. *See* note 81 *supra* and accompanying text.

of legitimation, and where the parent and child are domiciled in the same state at the time of legitimation, only that state has an interest in imposing legitimation on the father and in creating the status for the child.[106] Therefore, its law governs.

The court of civil appeals sidestepped the issue as to whether full faith and credit should be given to the judicial proceedings in California, stating in a footnote that the recognition of the status of legitimacy was only a matter of comity, not of constitutional law and full faith and credit. In the next sentence, however, the court cited an Ohio case[107] which had found it proper to give full faith and credit to a sister state judgment which established a status of legitimacy. Generally, recognition of the status of legitimacy depends upon whether a sister state's law views certain acts of the parents as acknowledgment, and it has been held that full faith and credit need not be given to a sister state statute conferring legitimacy. When the status is established by a sister state judgment, however, much stricter full faith and credit requirements are demanded by doctrine of the Supreme Court of the United States. If the judgment is based upon jurisdiction, it must be accorded full faith and credit subject to a limited number of exceptions. Thus, if domicile is the basis of jurisdiction for determination of status, then a judgment based thereon should be granted full faith and credit by another state.[108]

It is refreshing to note in this case that the parties relying on California law took the proper steps to meet the provisions of Texas rule 184a so that judicial notice could be taken by the Texas court of the sister state law. That rule requires that a motion be made to the judge to take judicial notice of the law of another state and that sufficient information be given to the judge concerning the law so that he is able to comply. Sufficient notice must also be given to the adverse party so that the latter can prepare to meet the request. An attack was made in the case at hand upon the fact that the judge took judicial notice of the sister state law, the contention being made that such law must be pleaded and proved as fact. The court correctly pointed out that pleading and proof as to sister state law was no longer required after the adoption of the judicial notice rule. Here, the motion had been made to the judge and a copy of the California law was submitted. The adverse parties also argued that they did not have sufficient notice. It was true that objection was made as to lack of proper notice when the judge was requested to take judicial notice. These parties did not require a recess or continuance to give them time to prepare for the action, however, despite the fact that a ten-day recess was offered so that a proper copy of the California statute could be obtained. Under these conditions it was believed that the parties were not denied an opportunity to meet the request for judicial notice.

IV. FOREIGN EXECUTOR

Suit Outside State of Appointment. At common law the rule emerged that an

106. RESTATEMENT (SECOND), *supra* note 4, § 287.
107. Howells v. Limbeck, 172 Ohio St. 297, 175 N.E.2d 517 (1961).
108. On full faith and credit to a judgment see note 12 *supra*.

administrator could neither sue nor be sued in his official capacity outside the state of his appointment.[109] This traditional rule has for the most part been the rule in Texas where it has been recognized that a foreign representative is an officer of the court appointing him, deriving his authority from that court, and, therefore, is empowered to administer the assets only within the jurisdiction of the appointing court.[110] The prime reason for the rule was well stated in the old Texas case of *Terrell v. Crane*:[111]

> This is based upon the principle that one state should not have extraterritorial jurisdiction over assets of a deceased person; otherwise these assets might be exhausted or withdrawn to the detriment of domestic creditors, who have the right to have them administered under the laws of their own state, and to whose jurisdiction they are naturally subjected . . . .[112]

The court of civil appeals in *Eikel v. Bristow Corp.*[113] substantiated this rule with some exception. Suit was instituted by the Houston National Bank as payee of certain promissory notes against one Bristow and others who had endorsed and guaranteed the notes. While the action was pending, Bristow died. Eikel qualified as testamentary executor in Louisiana. The cause of action, the notes, and the guarantee agreements were assigned to the executor by the bank upon a payment of $25,000. Following Bristow's death, a suggestion of death was filed in the suit against him and others. The executor then voluntarily answered for the deceased. After assignment of the cause of action to him by the bank, the trial court permitted him to substitute as plaintiff in the case which proceeded to trial on the bank's pleading. Judgment was entered by the trial court which, among other things, decreed that the plaintiff take nothing as to Bristow, the deceased.

The court of civil appeals recognized the general rule that a foreign executor cannot maintain suit in his representative capacity in Texas, but affirmed the right of the executor to maintain the suit despite the fact that he was a foreign executor and no ancillary administration had been obtained in Texas. The court quoted from the Texas Supreme Court opinion in *Terrell v. Crane* which recognized an exception to the general rule where title has been directly vested into the administrator, as when made payable to him, or when judgment has been previously recovered in his name.[114] Therefore, Eikel was "asserting his own right rather than one of the deceased and the notes in question were assets in his hands for which he was entitled to sue in his personal capacity."[115]

Eikel's defense of the suit in Texas as executor of the deceased was not, however, permitted. The court noted the Texas rule[116] that where there are two or more plaintiffs or defendants in a suit and one or more of them dies,

109. H. GOODRICH & E. SCOLES, *supra* note 18, at 366.
110. Faulkner v. Reed, 241 S.W. 1002 (Tex. Comm'n App. 1922, holding approved).
111. 55 Tex. 81 (1881).
112. *Id.* at 82.
113. 529 S.W.2d 795 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).
114. 55 Tex. at 82.
115. 529 S.W.2d at 801.
116. TEX. R. CIV. P. 155.

the suit may proceed in the name of the surviving plaintiffs or against the surviving defendants. Bristow's death removed him as a party, and Eikel as a foreign executor had no standing to continue the suit as representative of the decedent.