Volume 32
Issue 1 *Annual Survey of Texas Law*

Article 13

January 1978

Conflict of Laws

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CONFLICT OF LAWS

by

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I. JURISDICTION AND JUDGMENTS

A. *Long-Arm Statute (Contract Cases)*

Clarification of the meaning of article 2031b,[1] the Texas long-arm statute, finally emerged in *U-Anchor Advertising, Inc. v. Burt*.[2] Unfortunately, however, the court also muddied the water.

In *U-Anchor* the plaintiff, a Texas corporation, entered into a contract in Oklahoma with an Oklahoma defendant. This contract, solicited by the plaintiff's salesman, provided that plaintiff U-Anchor would place advertising signs, constructed in Texas, at highway locations in Oklahoma to advertise the defendant's business. The defendant agreed to pay U-Anchor the sum of $80 per month at the plaintiff's office in Texas for a period of thirty-six months. Six or seven monthly checks were sent by the defendant to U-Anchor. Upon breach of the contract plaintiff instituted suit in Texas, basing jurisdiction on article 2031b. The lower court, dismissing the action, held that the jurisdictional requirements of due process of law were not met, although the facts admittedly were within the wording of article 2031b. The Supreme Court of Texas affirmed.

Article 2031b permits suits in Texas against nonresidents upon causes of action arising out of doing business within the state. Service of process is made upon the secretary of state, who is directed to send a copy of the process to the nonresident defendant by registered mail. For the purpose of article 2031b doing business includes "entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State." Article 2031b has a catch-all phrase immediately preceding this definition of doing business which declares: "and without including other acts that may constitute doing business." This language has been interpreted as expanding the jurisdictional range of the statute to acts other than those specifically set forth.[3]

Despite this broadened interpretation, dispute has existed in the courts as to the reach of the statute. Does the statute's scope extend to the outer limits

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1. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).

2. 553 S.W.2d 760 (Tex. 1977).

3. *See* 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). *See also* Comment, *The Texas Long-Arm Statute, Article 2031b: A New Process Is Due*, 30 SW. L.J. 747, 751-52 (1976).

of due process of law under tests evolved in such cases as *International Shoe Co. v. Washington*[4] and *Hanson v. Denckla*,[5] or is its range more limited? Prior to the *U-Anchor* decision cases pointed in both directions, but two requisites clearly did exist for an exercise of jurisdiction over the persons of nonresident defendants: first, the existence of a state statute such as article 2031b which conferred jurisdiction; and second, an exercise of jurisdiction which was consistent with due process of law.[6] A statute could confer either a more limited jurisdiction than that permitted by due process or a jurisdiction that reached to the maximum boundaries of due process; a statute, however, could not confer a jurisdiction more extensive than due process would allow.[7]

The Supreme Court formulated the rather vague, broad, and much quoted minimum contacts doctrine as the test for due process of law in the *International Shoe* case. This test requires certain minimum contacts with the forum state so that the maintenance of the suit against the nonresident defendant will not offend "traditional notions of fair play and substantial justice."[8] In *Hanson v. Denckla* the test was later refined, permitting jurisdiction only when the defendant purposefully avails himself "of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws."[9]

In an earlier effort to interpret the constitutional requirements of jurisdiction over a nonresident under a long-arm statute, the Supreme Court of Texas announced a test by which the sufficiency of minimum contacts could be measured. In *O'Brien v. Lanpar*[10] the court stated:

> '(1) the nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice . . . .'[11]

The *O'Brien* test clearly requires that the cause of action be related to an act or transaction of the defendant in the forum state. This test is more restrictive than the test of due process applied by the Supreme Court of the United States; jurisdiction has been sustained even though a cause of action did not arise out of acts or transactions done in the state if the defendant performed acts or transactions within the state which were of such a continuous and substantial nature as to make an exercise of jurisdiction reasonable.[12] Some Texas courts, seizing upon the restrictive due process

4. 326 U.S. 310 (1945).
5. 357 U.S. 235 (1958).
6. Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 492 (5th Cir. 1974).
7. See Comment, *supra* note 3, at 752-53, for a discussion of the due process interpretation.
8. 326 U.S. at 316.
9. 357 U.S. at 253.
10. 399 S.W.2d 340 (Tex. 1966).
11. *Id.* at 342 (quoting Tyee Constr. Co. v. Dulien Steel Prods., Inc., 62 Wash. 2d 106, 381 P.2d 245, 251 (1963)).
12. *See, e.g.*, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Seymour v. Parke, Davis & Co., 423 F.2d 584 (1st Cir. 1970); Bryant v. Finnish Nat'l Airline, 15 N.Y.2d

test of *O'Brien*, have interpreted the Texas long-arm statute as requiring that a cause of action must relate to acts or transactions which have occurred in or have a connection with Texas.[13] In so doing, these courts have proclaimed that the Texas statute does not reach the maximum limits of jurisdiction permitted by constitutional due process.[14]

Other courts, however, have placed article 2031b on a plane with due process and have stated that the Texas statute permits an exercise of jurisdiction to the fullest permissible reach of constitutional minimum contacts. In *Atwood Hatcheries v. Heisdorf & Nelson Farms*[15] the court stated that the purpose of article 2031b "was to exploit to the maximum the fullest permissible reach under federal constitutional restraints."[16]

The controversy was resolved in the *U-Anchor* case which held that article 2031b extends to the maximum limits permitted by due process. The court reached this construction because "it allows the courts to focus on the constitutional limitations of due process rather than to engage in technical and abstruse attempts to consistently define 'doing business.' "[17]

Despite these clear-cut statements, confusion continues. The *U-Anchor* court quoted the two-tiered due process test developed by the Fifth Circuit in *Product Promotions, Inc. v. Cousteau*:[18] " '[T]here must be some minimum contact with the state which results from an affirmative act of the defendant [and] it must be fair and reasonable to require the defendant to come into the state and defend the action.' "[19] The criterion of whether the cause of action arises from acts and transactions within the state is not an element of this test. The court then, however, set forth the three-tiered test of *O'Brien* which does require the cause of action to be related to Texas contacts. Thus, confusion was created not with respect to the reach of the Texas statute, but with respect to the reach of due process. *Product Promo-*

426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 42, 47 (1971) [hereinafter cited as RESTATEMENT (SECOND)].

13. Interpreting the Texas statute in such a restrictive way, by application of the *O'Brien* test, is not appropriate for two reasons: first, the *O'Brien* test is a due process test and was taken from a Washington case, Tyee Constr. Co. v. Dulien Steel Prods., Inc., 62 Wash. 2d 106, 381 P.2d 245, 251 (1967), which stated three basic factors for an exercise of jurisdiction; secondly, the *O'Brien* case did not involve the interpretation of the Texas long-arm statute, but had to do with a suit in Texas to enforce an Illinois judgment. The issue involved was whether or not the Illinois court had jurisdiction over the defendant for purposes of full faith and credit in Texas.

14. In Bland v. Kentucky Fried Chicken Corp., 338 F. Supp. 871 (S.D. Tex. 1971), the court quoted the statute and the three-tiered test of *O'Brien*. Regarding the Texas long-arm statute the court stated that it "has not yet been interpreted to subject a nonresident person or corporation who conducts business in Texas to the jurisdiction of Texas courts for some claim having nothing to do with its Texas operations." *Id.* at 875. The court went on to say that the Texas statute could do so in instances and be in accord with due process. *See also* Hayes v. Caltex Petroleum Corp., 332 F. Supp. 1205 (S.D. Tex. 1971); Tabulating Sys. & Serv., Inc. v. I.O.A. Data Corp., 498 S.W.2d 690 (Tex. Civ. App.—Corpus Christi 1973, no writ); Comment, *supra* note 3, at 753.

15. 357 F.2d 847 (5th Cir. 1966).

16. *Id.* at 852. *See also* Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974); Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969); Law, Snakard, Brown & Gambill v. Brunette, 509 S.W.2d 671 (Tex. Civ. App.— Beaumont 1974, writ ref'd n.r.e.).

17. 553 S.W.2d at 762.

18. 495 F.2d 483 (5th Cir. 1974).

19. 553 S.W.2d at 762 (quoting Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 494 (5th Cir. 1974)).

tions and Supreme Court cases do not always require the cause of action to be relational to meet due process requisites, but *O'Brien* does so require the relation. If the Texas Supreme Court is still following *O'Brien*, then it is out-of-step with *Cousteau* and the Supreme Court of the United States.

Oddly enough, the *U-Anchor* court went on to find that jurisdiction could not be effected over the defendant. Due process could not be met despite the fact that the contract was related in some dgree to the State of Texas. The contract was made with a resident of Texas and was to be performed in part in Texas, facts which met the literal language of article 2031b. To have extended the express language of the statute to the facts in *U-Anchor* would, however, in the opinion of the court, not have been consistent with due process. The court stated that the defendant must "have purposefully done some act or consummated some transaction in Texas," and that an exercise of jurisdiction in Texas must not "offend traditional notions of fair play and justice."[20] As to the first requisite the court stated:

> In the instant case the contacts of Burt with Texas are minimal and fortuitous, and he cannot be said to have 'purposefully' conducted activities within the State. Burt's contacts with Texas were not grounded on any expectation or necessity of invoking the benefits and protections of Texas law, nor were they designed to result in profit from a business transaction undertaken in Texas. The contract was solicited, negotiated, and consummated in Oklahoma, and Burt did nothing to indicate or to support an inference of any purpose to exercise the privilege of doing business in Texas. Simply stated, Burt was a passive customer of a Texas corporation who neither sought, initiated, nor profited from his single and fortuitous contact with Texas.[21]

As to fair play and justice, the second requisite, the court noted that the defendant's only contacts with Texas were the payments made in Texas. This activity was minimal, according to the court, and did not constitute activity in Texas.

The court also discussed convenience to the parties of an Oklahoma or a Texas forum, and concluded that neither forum was more convenient than the other. Litigation would be more convenient for each party in its respective home state and equally inconvenient for each in a foreign state. Moreover, since the defendant could reasonably expect that the contract would be governed by Oklahoma law, Texas law would not be relevant to the decision. Thus, this nexus between Texas and the suit was not present.

U-Anchor expressly overruled *Estes Packing Co. v. Kadish & Milman Beef Co.*,[22] an earlier civil appeals case. In that case the court found that entering into a contract with a Texas resident out of which the cause of action had arisen and providing for payment in Texas were sufficient facts for the assumption of jurisdiction. The court in *U-Anchor* stressed the fact that the *Estes Packing* contract was made between the plaintiff and an independent broker, not between plaintiff and defendant. In addition, the

20. 553 S.W.2d at 762.
21. *Id.*
22. 530 S.W.2d 622 (Tex. Civ. App.—Fort Worth 1975, no writ).

defendant's only contact with Texas was the remittance of one check to the Texas plaintiff-seller. This holding was held to conflict with *U-Anchor*.

Certain other cases, decided prior to *U-Anchor*, dealing with long-arm jurisdiction in Texas are also of interest. All of the cases except *American Steel, Inc. v. Cascade Steel Rolling Mills, Inc.*[23] sustained jurisdiction in Texas. In *American Steel* a Texas corporation brought a breach of contract action against Cascade, an Oregon company. The defendant claimed that the Texas court lacked personal jurisdiction. The facts showed lengthy negotiations by telecommunications that finally led to an agreement which plaintiff accepted by telephone, telegram, and the subsequent forwarding of a purchase order from its Texas offices. The contract concerned a sale of steel from the Oregon company to the Texas company, delivery f.o.b. Oregon, the ultimate destination of which was Singapore. The Texas plaintiff was required to obtain an irrevocable letter of credit from a Corpus Christi bank, payable to an Oregon bank. The defendant sent no representatives to Texas and maintained no representatives or agents in Texas. Furthermore, the defendant had never solicited business in Texas or delivered machinery into Texas.

The plaintiff based jurisdiction on the language of article 2031b which permits jurisdiction when a contract has been made with a Texas resident to be performed partially in Texas. Partial performance, the plaintiff argued, was predicated upon the contractual provision which required a letter of credit to be obtained in Texas. The court agreed with the plaintiff that the requirements of the statute were met, and added that the Texas statute was intended to reach the boundaries of due process. Nevertheless the court denied the plaintiff Texas jurisdiction on the ground that, if the Texas statute were applied to these facts, the bounds of due process as enunciated in *Product Promotions, Inc. v. Cousteau* would be exceeded.[24] The consummation of a contract in the state by telephone or telecommunications without more was not a sufficient contact to meet the first requisite of *Product Promotions: i.e.*, a minimum contact with the forum which results from an affirmative act of the defendant. If the defendant had agreed to perform some act in the state, purposeful activity would have resulted and a stronger case could have been made for jurisdiction. Although the plaintiff was duty bound to obtain the letter of credit in Texas, this requirement was not a duty of the defendant in Texas. As to the second requisite of *Product Promotions*, the fairness and reasonableness of forcing the defendant to defend in Texas, the equities were balanced because each party would be inconvenienced to some extent if required to litigate in the home state of the other, but such inconvenience would not be great in either case. The court concluded that sufficient purposeful contacts had not been demonstrated and stated that "[t]he Court can extend its reach no further than the Constitution permits. This Plaintiff asks it to reach too far."[25]

23. 425 F. Supp. 301 (S.D. Tex. 1975).
24. 495 F.2d 483 (5th Cir. 1974).
25. *Id.* at 304.

In *DLJ Properties/73 v. Eastern Savings Bank*[26] a New York plaintiff sued a New York defendant in Texas for breach of contract. The defendant had failed to fund a loan agreement for the construction of an apartment complex in Texas. The contract, made by the defendant with one Strauss, a Texan, provided that Strauss, as owner of the land upon which apartments were to be built, would be granted a loan by the defendant for the project. Strauss later assigned his rights to the plaintiff with the consent of the defendant. The terms of article 2031b encompassed the transaction, despite the fact that the contract had been assigned to the New York plaintiff, because originally the contract had been made with a Texas resident to be performed in part in Texas.

Regarding the due process requirements, the court quoted the three-tiered *O'Brien* test and found that the defendant had purposefully engaged in acts within Texas, including the fact that the defendant's representatives made trips to Texas to inspect the project, as called for in the contract, and that the cause of action arose from such acts. Also, the real property was situated in Texas, the appraisers of the property were Texas residents, and the general construction contractor was located in Texas. The court also mentioned other acts of doing business by the defendant in Texas which were not connected with the transaction in question. Having considered all such contacts, the court held that the maintenance of the suit in Texas did not offend traditional notions of fair play and justice.

Hutchison v. Commercial Trading Co., Inc.[27] was a usury action brought against an out-of-state corporate defendant which had assumed a loan contract with a Texas corporation and a Texas individual. Repayment of the loan was to take place in Texas and the note was secured by Texas property. The defendant alleged that it had no officers or agents in Texas and that its only contacts with Texas had been an investigation made before the loan was assumed, and certain other loan transactions which had no connection with the loan transaction at issue.

The court had no difficulty finding jurisdiction under article 2031b and due process of law. The court stressed that the defendant must have foreseen that he would need to invoke the benefits and protection of Texas law in order to enforce the payment of the loan or to foreclose on property. The court also found that the defendant had engaged in other loan transactions through Texans who were in reality agents of the defendant.

Gubitosi v. Buddy Schoellkopf Products, Inc.[28] concerned collection actions brought by two Texas corporations, both payees on notes, against a nonresident of Texas who was a guarantor of the notes. An out-of-state corporation, with which the plaintiffs had done business over an extended period, became in arrears in payment of its accounts to the plaintiffs. For the purpose of clearing the delinquent accounts, the corporation gave promissory notes to the plaintiffs with the corporation's president acting as

26. 549 S.W.2d 754 (Tex. Civ. App.—Eastland 1977, no writ).
27. 427 F. Supp. 662 (N.D. Tex. 1977).
28. 545 S.W.2d 528 (Tex. Civ. App.—Tyler 1976, no writ).

guarantor. The notes were made payable in Texas, but the guaranties did not include the place of payment provisions of the notes. After the bankruptcy of the debtor corporation, the plaintiffs sued the defendant-guarantor, asserting jurisdiction under article 2031b. The defendant claimed that Texas lacked jurisdiction over him on the grounds that he was a nonresident and had never transacted any business with the plaintiffs in Texas. The defendant argued that any business transacted had occurred in New York.

The trial court based jurisdiction on the fact that plaintiffs had made a contract with a Texas resident which was to be performed in whole or in part in Texas. The court of civil appeals affirmed. Although the guaranties, unlike the notes, did not provide for payment in Texas, the court was of the opinion that liability under the guaranties was governed by the liability on the notes unless exceptions were specified, which was not the case. The guarantor, therefore, had guaranteed payment in Dallas, and thus had entered into a contract performable in Texas as required by article 2031b.

The court cited the three-tiered test of *O'Brien* for due process requisites. The cause of action arose from a transaction in Texas. Such transaction or contract had come about by the defendant's placing the guaranties in the mail in New York through his officers, servants, or employees. The fact that the defendant did not personally mail the agreements was found immaterial. As to fair play and substantial justice, the defendant, when he guaranteed the notes, had engaged in a deliberate, nonfortuitous act. The court, further more, found that defending in Texas would not greatly inconvenience the defendant and that neither party would have a real advantage under Texas law.

In the later *U-Anchor* case the Supreme Court of Texas held that merely because a contract provided for payment in Texas and the defendant mailed checks into Texas would not suffice for minimum contacts. Can this case be reconciled with *U-Anchor*? The court in *U-Anchor* approved the case of *National Truckers Service, Inc. v. Aero Systems, Inc.*[29] in which an out-of-state defendant guaranteed the Texas debts of its subsidiary through which the defendant had been doing business in Texas. The guaranties provided that payment was to be made in Texas. In speaking of *National Truckers Service, Inc.*, the supreme court noted that the defendant had purposefully agreed to guaranty the Texas debts of its Texas subsidiary and therefore, if the subsidiary defaulted, could have expected to face suit in Texas. In *Gubitosi* the guarantor defendant guaranteed the debts of the corporation of which he was president. This out-of-state corporation had conducted considerable business in Texas and the indebtedness and the guaranties had arisen from this business. When the defendant agreed to guaranty the Texas debts he could have reasonably expected to be sued in Texas.

B. *Long-Arm Statute (Tort Cases)*

Article 2031b defines doing business not only in terms of contracts made or to be performed in Texas, but also in terms of torts committed in whole or

29. 480 S.W.2d 455 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

in part in Texas. Based ostensibly on tort jurisdiction, there are two long-arm cases of some interest in this survey period. In *Wilkerson v. Fortuna Corp.*[30] the federal district court, following the three-tiered test of *O'Brien*, concluded that the New Mexico defendant's activities gave rise to a cause of action and, further, that such activities were not sufficient to fulfill the requirement of minimum contacts with Texas. The Fifth Circuit disagreed. The plaintiff in *Wilkerson* was a Texas horse trainer who instituted an action in Texas against the operator of the Sunland Park Race Track located across the border from El Paso, Texas in New Mexico. The operator was a New Mexico company. For several years the plaintiff had applied for and received stalls at the track for horses he trained, but in 1972 the number of stalls granted was considerably reduced by the defendant, and in 1973 none were granted. Upon this refusal to grant stalls, plaintiff brought suit, alleging that such refusal was a violation of the racing law of New Mexico and was a tort. New Mexico was the place of the tort because the place of tort usually is the place where the injury occurred. Following this logic, no tort would have been committed in Texas and the Texas long-arm statute should not have been applicable. The court of appeals, however, reasoned that Texas jurisdiction under the statute need not be based on a single tort or contract occurring within the state in order to permit an exercise of jurisdiction, and found that the race track purposefully was situated as close to Texas as possible in order to draw business from El Paso and the surrounding area. The defendant company advertised the races in El Paso and solicited customers from El Paso. The president of the defendant company lived in El Paso, mailed stall applications to the plaintiff and others from El Paso, and solicited entries for races at the track while in Texas. All of these activities were adjudged to be sufficient purposeful acts by the defendant with or in the forum state to meet the first tier of *O'Brien*.

Since the cause of action was connected with these activities in Texas, the second tier of *O'Brien* was satisfied. The defendant's solicitations of customers in Texas and the transactions with Texas horse trainers gave rise to the cause of action. These general activities of the defendant in Texas were an adequate basis of the plaintiff's claim, and, according to the court, alleging a specific local act was unnecessary. The court mentioned the fact that no Texas precedent specifically on point could be found.

If a tort is required to be committed in whole or in part within the state, then the court's reasoning is hard to justify under both article 2031b and the second tier of *O'Brien*. If the court had disregarded *O'Brien* and truly accepted the principle that the long-arm statute extends to the full reach of due process of law, then jurisdiction would easily have existed in Texas in this case on the basis of both the statute and due process. There is precedent from the Supreme Court of the United States that the minimum contacts doctrine permits an exercise of jurisdiction even when the cause of action does not arise out of contacts or acts performed within the forum if other contacts of the defendant with the forum are so substantial as to make it fair

30. 554 F.2d 745 (5th Cir. 1977).

and reasonable to force the defendant to defend within the state.[31] Because the Texas statute reaches to the full extent of due process, the precedent mentioned above becomes a part of the Texas statute, making unnecessary the second tier of *O'Brien*.

The court in *Wilkerson* found that traditional notions of fair play, the third element of *O'Brien*, were not violated because the defendant had purposefully availed itself of the benefits and protection of Texas law in a myriad of contacts with Texas.

The court clearly followed the United States Supreme Court's precedent that the cause of action need not arise from the defendant's contacts with Texas for a Texas court to assume jurisdiction. The court said:

> [A] non-resident may be required to defend an action in state court even though the suit bears no relation to the activities deemed necessary and sufficient to constitute minimum contacts. It is more than enough to satisfy federal constitutional due process, in the case at bar, to establish that Fortuna's fortunes were continuously and intimately linked with El Paso.[32]

Arterbury v. American Bank & Trust Co.[33] also dealt with the commission of a tort in Texas. The plaintiff had borrowed money from a Louisiana bank to purchase a car and had signed a note which was payable in installments. Included in the note was a self-help provision which permitted repossession and sale if the plaintiff defaulted on an installment. Upon delinquency the bank instructed its agent to repossess the car. The plaintiff sued the bank in Texas, alleging unauthorized and wrongful repossession without notice and hearing.

The district court refused jurisdiction despite the fact that article 2031b permits such assumption when a tort is committed in whole or in part within the state. Although the alleged wrongful conversion, the repossession, was committed in Texas, the trial court concluded that no tort had been committed because the plaintiff was in default; therefore, the defendant had not authorized its agent to take unlawful action.

The court of appeals reversed, stating that the provisions of article 2031b on doing business through the commission of a tort within the state were met. The court noted that when the defendant entered a special appearance under rule 120a[34] to contest jurisdiction, the defendant had the burden of producing evidence as well as the burden of persuasion. To satisfy the burden the lower court reasoned that the defendant must demonstrate a prima facie case of tort to justify an assumption of jurisdiction. The court of appeals disagreed, and stated that there need be only a showing of the act which serves as a basis of jurisdiction, not a prima facie showing of the existence of a cause of action.

The Fifth Circuit went on to find that by repossessing the car in Texas the defendant had purposefully advanced its own interests within the state and had enjoyed the benefits and protection of Texas law, including the right to

31. *See* authorities cited in note 12 *supra*.
32. 554 F.2d at 750.
33. 553 S.W.2d 943 (Tex. Civ. App.—Texarkana 1977, no writ).
34. TEX. R. CIV. P. 120a.

resort to Texas courts. The court held that requiring the nonresident to defend when the cause of action grew out of the act which he committed within the state was not unreasonable.

In response to an argument that the Louisiana courts would be better able to determine the rights of the parties under the note, the court answered that the action was not contract but tort, although the court did concede that the provisions of the note and the security instrument would of necessity be material in the cause of action.

C. *Long-Arm Jurisdiction (Family Code Cases)*

The final and most interesting long-arm decision reviewed in this Article is *Zeisler v. Zeisler*.[35] In 1971 a divorce decree was rendered in Texas which gave the mother custody of the child and ordered the father to make monthly support payments for this child. In 1972 the mother moved to Georgia and subsequently the father left Texas to reside in Florida, but he continued to make payments through the Dallas County support office. In 1976 the mother brought action in the domestic relations court of Dallas County for increased support payments, effecting service of process under procedural rule 108,[36] not under article 2031b. This rule permits service upon an absentee defendant or nonresident of the state in the same manner as is prescribed for a resident defendant. The father made a special appearance to contest the jurisdiction over his case. After a hearing, the judge concluded that the support payments should be increased, but dismissed the suit for want of jurisdiction.

On appeal the mother contended that jurisdiction could be predicated upon the Texas Family Code which permits in personam jurisdiction over a nonresident if, among other things: the child is conceived within the state and the nonresident is the father; the person on whom service is required has resided within the state with the child; or when any other basis of personal jurisdiction exists within the state under the Texas or United States Constitutions which would permit an assumption of jurisdiction.[37] The father claimed that there were not sufficient contacts with the state to permit an exercise of jurisdiction over him; he had not resided in Texas for some years, and had done no purposeful act in Texas. The court of civil appeals found jurisdiction to be present and reversed the lower court.

Although on the facts of this case the jurisdictional question is a close one, a good argument can be maintained that the last matrimonial domicile of the spouses as husband and wife retains an interest in the family and its protection, at least with respect to causes of action that arose at the time the parties were domiciled therein. One can argue forcefully that the mobility of Americans and the American family demands that one state retain an interest, and that the last matrimonial domicile qualifies because of its nexus with the family.[38] Such reasoning should permit the state of the matrimonial

35. 553 S.W.2d 927 (Tex. Civ. App.—Dallas 1977, writ dism'd).
36. TEX. R. CIV. P. 108.
37. TEX. FAM. CODE ANN. § 10.051 (Vernon Supp. 1978).
38. *See* Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 COLUM. L. REV. 289 (1973).

domicile to exercise jurisdiction over a nonresident defendant-husband in order to require him to provide support if the defendant was under a duty to provide support when he was a resident of the state. The *Restatement (Second)* supports this view but permits jurisdiction over the nonresident husband only as long as the plaintiff-spouse continues to be domiciled in the matrimonial domicile in which jurisdiction is sought.[39] The court was most preoccupied, in the case at hand, with the fact that neither the mother nor the child had a present connection with Texas, having changed their place of domicile to Georgia. Despite this fact the court found jurisdiction to exist.

The relationship between the plaintiff and the forum state is material to the question of jurisdiction. If the plaintiff's relationship to the forum is infinitesimal or nonexistent, then the defendant's contacts must be substantial to give the state a sufficient interest for an assumption of jurisdiction; if, however, the plaintiff is domiciled in the forum, then jurisdiction over the defendant may be achieved, notwithstanding minimal contacts by the defendant with the forum.[40] The *Zeisler* court was of the opinion that the defendant's relationship with his family in Texas, the last place of matrimonial domicile, did satisfy the *Hanson v. Denckla* requirement of a purposeful act within the forum by which the benefits and protection of its laws are invoked. Moreover, the court relied on the second requirement of *O'Brien* that the cause of action must arise from an act or transaction within the forum. The court noted that the father's obligation to support the child arose from his relationship with the mother in Texas, and from a decree granted by a Texas court.

Concerning the fairness and justice of requiring the defendant to litigate in Texas, the court stressed the relative convenience to the parties of a suit within the state. The court admitted that convenience alone would not support jurisdiction, but when other contacts were considered in light of the fact that no other place connected with the parties and the case was more convenient for suit, the court concluded that jurisdiction could be exercised. On these facts traditional notions of fair play and substantial justice were not offended, and, accordingly, the requirements of due process of law were met.

By weighing and balancing the relevant considerations the *Zeisler* court presented a valid argument for an exercise of jurisdiction. Perhaps the court could have saved itself the trouble of such weighing and balancing under the minimum contacts doctrine by resorting to the old principle of continuing jurisdiction set forth in *Michigan Trust Co. v. Ferry*.[41] This doctrine recognizes that once jurisdiction has been obtained over the person of the defendant, it continues with respect to all subsequent proceedings arising out of the original suit. Support cases are not dismissed, but are kept on the docket for future modification if changed circumstances so demand and the jurisdiction continues for all necessary procedures stemming from the original cause of

39. RESTATEMENT (SECOND), *supra* note 12, § 77, comment on subsection (1)c.
40. *Id.* § 36(2), comment on subsection (2)e.
41. 228 U.S. 346 (1913).

action.[42] In a footnote the court pointed out that the mother did not rely on the continuing jurisdiction concept provided for in section 11.05 of the Texas Family Code[43] because the divorce decree was rendered prior to the enactment of the Code. It would seem, however, that the case could have been decided on the uncodified principle of continuing jurisdiction which antedates the Code by many years.

D. *Full Faith and Credit (The Bootstrap Doctrine)*

Elkins v. West[44] is another example of what has come to be known as the bootstrap doctrine. In this case a judgment was rendered in Louisiana against the defendant in a personal injury suit arising out of an automobile accident in that state. The collision involved an automobile owned by the defendant, and driven by a person alleged to have been the defendant's agent. Service of process was made upon the nonresident defendant through the Louisiana secretary of state as provided for by the Louisiana statute. The defendant appeared specially to contest the jurisdiction, claiming that the driver was an independent contractor, not his agent. The judge found that the defendant had not met the burden of showing that the driver was not his agent; since the defendant did not appear further in the cause or contest the merits thereof, the court then rendered judgment for the plaintiff.

Thereafter the plaintiff brought the judgment to Texas, asking for full faith and credit. The defendant claimed that he was entitled to raise once again the issue of jurisdiction in a collateral attack. The court of civil appeals, affirming the decision of the lower court, found that the Louisiana proceeding was res judicata because the matter had been heard and determined, and gave full faith and credit to the Louisiana judgment.

The appellate court applied the well-known bootstrap doctrine. Although a judgment granted without jurisdiction may usually be subjected to collateral attack and refused enforcement under full faith and credit, such an attack is not always possible. Even if the Louisiana court was wrong in exercising jurisdiction over the defendant in Louisiana, the defendant's appearance in the Louisiana proceeding and his unsuccessful litigation of the jurisdiction issue barred him from relitigation in a collateral attack under the bootstrap doctrine. Stated in general terms, when a question of jurisdiction exists, if the defendant appears in the action and litigates the issue or had opportunity to do so, then the judgment is not subject to collateral attack in other states[45] if the jurisdictional issue is res judicata in the state where the issue was originally litigated.

A further issue in the case is of importance. The defendant claimed that the Louisiana statute was not in accord with due process of law because the statute contained no provision which made it reasonably probable that the defendant, once service was made on the secretary of state, would receive

42. *See* RESTATEMENT (SECOND), *supra* note 12, § 26.
43. TEX. FAM. CODE ANN., § 11.05 (Vernon Supp. 1978).
44. 554 S.W.2d 821 (Tex. Civ. App.—Texarkana 1977, no writ).
45. For further discussion of the bootstrap doctrine see Durfee v. Duke, 375 U.S. 106 (1963); Sherrer v. Sherrer, 334 U.S. 343 (1948); R. LEFLAR, AMERICAN CONFLICTS LAW 185-87, 541-43 (rev. ed. 1968).

notice through the forwarding of a copy of the citation. This argument is substantiated by *Wuchter v. Pizzutti*,[46] in which the Supreme Court of the United States held that a nonresident motorist statute which did not require the forwarding of notice to the defendant violated due process of law and that the judgment based thereon was invalid. The statute was deficient even though notice in that case was actually served on the nonresident defendant. In *Elkins* the court of civil appeals differentiated *Wuchter*, citing *American Power & Light Co. v. SEC*,[47] on the ground that a statute which did not contain an express provision for notice could only be attacked by a person *who had suffered injury* because of a lack of notice or opportunity for a hearing. Apparently no injury was suffered in *Power & Light* because the parties were notified and actually participated in the hearings, but in *Wuchter* the defendant did not appear. The *Elkins* decision on this point rested upon the ground that a defendant may not properly raise the notice deficiency of a statute if defendant had appeared to contest jurisdiction in the original action.

E. *Full Faith and Credit (Default Judgment Cases)*

Jackson v. Randal[48] concerned a New York default judgment upon which full faith and credit was sought in Texas. The judicial jurisdiction of New York was based upon the New York long-arm statute and minimum contacts with the state. The defendants, seeking to prevent the enforcement of the judgment, collaterally attacked jurisdiction based on a lack of in personam jurisdiction in New York. Defendants' affidavits, which refuted the applicability of each element of the New York long-arm statute, were presented to the court, but a summary judgment was entered for the plaintiff.

The court of civil appeals cited the well-known rule that despite the full faith and credit clause a sister state may examine the jurisdictional facts to determine whether the state rendering judgment had jurisdiction.[49] Also utilized was the rule that when a valid final judgment is introduced into evidence, a prima facie case is made out in favor of the parties seeking enforcement and the burden of going forward with the evidence rests upon the party resisting the judgment's enforcement.[50] Despite this latter rule, the court stated that Texas courts do not indulge in presumptions favoring a default judgment.[51] Nevertheless, if the jurisdiction to grant such judgment appears affirmatively on the face of the record, the burden of refuting the decree's validity remains on the resisting party. In the instant case the court of civil appeals found that the jurisdictional facts necessary for the application of the New York long-arm statute were present. As a result the burden shifted to the defendant-appellants, a burden which they met. A fact issue was therefore raised and refuted, thus precluding the summary judgment.

46. 276 U.S. 13 (1928).
47. 329 U.S. 90, 107 (1946).
48. 544 S.W.2d 439 (Tex. Civ. App.—Texarkana 1976, no writ).
49. *See* Hanson v. Denckla, 357 U.S. 235 (1958); R. LEFLAR, *supra* note 45, at 184-85.
50. Mitchim v. Mitchim, 518 S.W.2d 362, 364 (Tex. 1975).
51. Country Clubs, Inc. v. Ward, 461 S.W.2d 651, 655 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.).

F. *Full Faith and Credit (Alimony Decrees)*

Wilder v. Wilder[52] and *Cutler v. Cutler*[53] both involved enforcement in Texas of sister-state alimony decrees. The Constitution of the United States and a federal law based thereon demand that full faith and credit be given to the judicial proceedings or judgments of a sister state according to the law and custom of that state.[54] Those judgments, however, must be final judgments which are not subject to modification by the courts of the rendering state.[55] Since alimony judgments are often not final, particularly as to unaccrued payments, a problem of their enforcement by the courts of another state arises.[56] In *Wilder* the contention was that past due alimony installments were not final until such payments were themselves reduced to judgment. The trial court and the appellate court did not agree with this contention, reasoning that under Florida law past due installments were no longer subject to modification. Such arrearages were final and, therefore, had to be granted full faith and credit.

The *Cutler* case presents a similar problem. *Cutler* involved the finality of Ohio alimony payments which were in arrears. The issue was whether the arrearage could be considered final so that full faith and credit could be given by Texas. The plaintiff, seeking recovery of the arrearages, introduced the Ohio divorce judgment and a separation agreement incorporated therein at a summary judgment hearing. Defendant contested on the ground that the plaintiff had failed to prove the finality of the judgment under Ohio law. The motion for summary judgment was denied. At the trial on the merits the plaintiff unsuccessfully requested the court to take judicial notice of the Ohio law under Texas rule 184a.[57] After presentation of the plaintiff's case, a motion was again made for judicial notice, but was overruled. A take-nothing judgment was rendered because there was no evidence that the judgment was final, vested, and not subject to modification under Ohio law. Because Texas law does not permit permanent alimony judgments, the judge could not resort to the usual Texas rule that if judicial notice of a sister state's law is not properly requested, then Texas courts will presume that law to be the same as that of Texas.[58]

The court of civil appeals reversed and remanded, holding that judicial notice should have been taken of the Ohio law, and that the trial court had abused its discretion by failing to do so. Although the request for judicial notice might have been somewhat late, the appellate court was of the opinion that time was not of the essence and that no prejudice resulted to the other party as a result of the failure to file formal notice under rule 184a until the day of trial.

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52. 543 S.W.2d 689 (Tex. Civ. App.—El Paso 1976, no writ).
53. 543 S.W.2d 1 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).
54. U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1970).
55. On the finality of judgments see Note, *The Finality of Judgments in the Conflict of Laws*, 41 COLUM. L. REV. 878 (1941); RESTATEMENT (SECOND), *supra* note 12, §§ 107, 109.
56. On modifiability of support orders see Barber v. Barber, 323 U.S. 77 (1944); Lynde v. Lynde, 181 U.S. 183 (1901).
57. TEX. R. CIV. P. 184a.
58. *See* Thomas, *Proof of Foreign Law in Texas*, 25 SW. L.J. 554, 567-70 (1971).

G. *Full Faith and Credit (Probate)*

In re Estate of Bills[59] adhered to the traditional views on the jurisdiction to probate a will disposing of movables and the effect to be given such a proceeding in a sister state. A probate proceeding in the state of domicile is followed by courts in other states to the extent that the judgment is concerned with movables. Probate at the domicile, therefore, is permissible even if personal property is located elsewhere; consequently, a will admitted to probate in the domicile state should be conclusively recognized as valid in all states because the domiciliary state had jurisdiction. Nevertheless, the full faith and credit clause apparently has not been construed to demand such recognition, although a probate at the domicile must be accorded full faith and credit as to the assets in that state. On the other hand, probate within a jurisdiction which is not the domicile of the decedent at death will be refused recognition by other states, unless the movable assets were located at the place of probate.Thus, a collateral attack on the jurisdictional fact of domicile can be made unless the party was personally before the foreign court and bound by the proceeding.[60]

In *In re Estate of Bills* the petitioner instituted an application to probate the will of his deceased mother in a Texas court. The brother of the decedent sought to have the proceeding dismissed based on a lack of jurisdiction in Texas. The brother contended that a probate court in Arkansas had jurisdiction, since a later will of the decedent, which revoked the former will introduced by the petitioner, had been probated there. The Arkansas court, the brother argued, had jurisdiction to determine which was the true last will and had so determined. The petitioner argued that the jurisdictional fact of domicile in Arkansas could be collaterally attacked in the probate court in Texas. He alleged that his mother had not been domiciled in Arkansas, but in Texas, and, although she had died in Arkansas, she had been only temporarily residing in Arkansas.

Agreeing with Bills, the court of civil appeals reversed the lower court and remanded. The court stated: "When raised as a jurisdictional fact in a proceeding such as this, the courts of Texas are free to determine the issue of the domicile of a testator in a local proceeding, that is, a Texas court having probate jurisdiction."[61] Only if the Arkansas court had obtained personal jurisdiction over the nonresident Bills would the Texas court be precluded. Since personal jurisdiction was not shown in the Arkansas proceedings which had become final, the court recognized the rule that as to Texas assets the Arkansas determination of the jurisdictional fact could not bind the nonresident unless he had been a party or privy to the Arkansas proceeding. The issue of decedent's domicile, therefore, could be relitigated in Texas.

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59. 542 S.W.2d 943 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).

60. *See* H. GOODRICH & E. SCOLES, CONFLICT OF LAWS 340-42 (4th ed. 1964); R. LEFLAR, *supra* note 45, at 490-92; RESTATEMENT OF CONFLICT OF LAWS § 470(1) (1934); Hopkins, *The Extraterritorial Effect of Probate Decrees*, 53 YALE L.J. 221 (1944).

61. 542 S.W.2d at 945.

II. CHOICE OF LAW

A. *Contracts and Public Policy*

M.I.I. v. E.F.I., Inc.[62] involved a suit brought by a Florida corporation against a Texas corporation to enforce a distribution contract which granted to the Texas corporation an exclusive dealership for the marketing of certain products. The plaintiff contended that the legality of the distributorship agreement should be governed by the federal antitrust laws rather than the antitrust laws of Texas because the activities to be carried on in Texas were limited, and both the execution and performance of the contract were interstate.

The court of civil appeals disagreed. Jury findings demonstrated that only ten percent of the sales of the products were made in Texas; therefore, under the contract, there was a sufficient amount of performance which was to occur in Texas to permit application of the Texas antitrust law even though there was also a direct relationship to interstate commerce. Such a contract calling for an exclusive distributorship would violate the Texas antitrust law, and, thus, even though the contract might be valid in another state, it could not be enforced in Texas.

B. *Law in Federal Courts (Conflict of Laws)*

In *Erie Railroad Co. v. Tompkins*[63] and *Klaxon Co. v. Stentor Electric Manufacturing Co.*[64] the Supreme Court of the United States held that a federal district court in a diversity action must apply the substantive law, including conflict of laws principles, of the state in which it is sitting. *Aetna Life & Casualty Co. v. Spain*[65] applied this rule in a case involving a dispute between decedent's first wife from whom he had been divorced and his second wife to whom he was married at the time of his death. The dispute centered around the recovery upon a life insurance policy of the decedent in which he did not designate a beneficiary. The second wife claimed the proceeds, based upon a provision of the policy which declared that if a beneficiary had not been designated in the policy the proceeds should be paid to the insured's widow. The first wife relied on a property settlement which had been incorporated into a New Jersey divorce judgment making the first wife the irrevocable beneficiary of the insurance policy.

In deciding the case, the court admitted that Texas conflict of laws rules must be applied in the controversy. Although there was little Texas law on the point, the court decided that Texas would apply the law of the state in which the property settlement agreement was made, New Jersey.[66] Looking to New Jersey law the court concluded that the terms of the property settlement would be enforced. The first wife, therefore, was entitled to the proceeds.

62. 550 S.W.2d 401 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).
63. 304 U.S. 64 (1938).
64. 313 U.S. 487 (1941).
65. 556 F.2d 747 (5th Cir. 1977).
66. *Id.* at 749 (citing Murphy v. Travelers Ins. Co., 534 F.2d 1155, 1160 (5th Cir. 1976)).

C. *Law in Federal Courts (Procedure and Substance)*

Conway v. Chemical Leaman Tank Lines, Inc.[67] highlights another aspect of the *Erie Railroad* decision. As mentioned above, federal courts must apply the substantive or outcome-determinative law of the state in which they are sitting. The twin goals of the *Erie* doctrine were to prevent forum shopping and to avoid inequitable administration of the laws.[68] With respect to the former, the problem which would arise if federal and state courts applied different common law rules on a particular issue can easily be seen. In an instance where suit could be brought in either a state or federal forum, that court would be selected which would be likely to give a favorable decision. Moreover, rights would vary under the unwritten general law depending upon the forum selected and would create an equal protection problem.

Although the twin goals were not mentioned in *Conway*, the problem was before the court. *Conway* involved a wrongful death action brought by the widow, the sons, and the employer of the deceased in a United States District Court. Jurisdiction was based on diversity of citizenship. Article 4675a[69] of the Texas wrongful death statute permits the introduction of evidence of an actual ceremonial marriage of the surviving spouse in actions brought for wrongful death. Since evidentiary matters are considered to be procedural, not outcome determinative, the Federal Rules of Evidence are usually considered applicable. Under the Federal Rules of Evidence testimony regarding the surviving spouse's remarriage, here the widow's, may be admitted or excluded on the basis of a balancing test,[70] and the admission is reviewed under the harmless error rubric.[71] In reviewing the differences between the prevailing rule in federal court and the Texas rule, the court said that the Texas rule always permits evidence of the ceremonial marriage and never considers a disregard thereof as harmless error. Since this Texas view is in marked contrast to the federal rule, differing results are possible depending upon which forum is chosen. The federal forum is much more attractive than the state forum for suit by the remarried spouse.

The court went on to note another aspect of the case which is often considered in reaching the conclusion that a rule regarded as evidentiary or procedural is in reality outcome-determinative. Article 4675a, permitting the introduction into evidence of the remarriage, is part of the wrongful death statute of Texas which creates a cause of action for wrongful death. When evidentiary rules are built into the statute creating the cause of action, they become so bound up with the cause of action that the rules become substantive. A federal court must, therefore, give effect to the substantive policy of the state.

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67. 540 F.2d 837 (5th Cir. 1976).
68. *See* Hanna v. Plumer, 380 U.S. 460, 467-68 (1965).
69. TEX. REV. CIV. STAT. ANN. art. 4675a (Vernon Supp. 1978).
70. FED. R. EVID. 403.
71. FED. R. CIV. P. 61.

D. *Federal Common Law*

Under *Erie* the federal courts in diversity cases were to apply the law of the state in which they sat because there was no federal common law. Later cases have eased this standard and today, when a question is governed by federal statute, the supremacy clause of the United States Constitution clearly governs and makes federal, not state, law applicable. Consequently, congressional legislation does away with many potential conflicts as to what law shall govern. There are instances, however, when a particular issue is not explicitly covered by a federal statute. The problem then becomes whether such gaps are to be governed by state law, following *Erie*'s proclamation that no federal common law exists, or whether the issue is to be governed by a federal common law rule when federal rights are involved. The Supreme Court of the United States has determined that if the matter should not be governed by state law, then lacunae are to be filled by a federal common law, particularly when federal policy is to be effectuated or when a uniform federal law is necessary to protect the United States Government in the exercise of functions which should not be subject to conflicting state law.[72]

Miller v. Smith[73] is an interesting application of a federal rule. The plaintiff, a state prisoner, brought a civil rights suit against police officers to recover damages for unlawful arrest. Jurisdiction rested on a federal question as suit was brought under various federal civil rights statutes.

The courts have long held in diversity cases that the limitation periods as prescribed by the state statute of limitations should be applied by a federal court. In *Guaranty Trust Co. v. York*[74] the Supreme Court held that a federal district court could not try a case barred by the state statute of limitations because limitations was regarded as outcome-determinative. In *Holmberg v. Armbrecht*[75] the Supreme Court stated: "Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation."[76] The court in the present case did not disregard the language of these cases. Although the Texas two-year limitation period was applied, this was not the real issue in the case because Texas had another provision which tolled the usual limitation period of imprisoned persons such as the plaintiff.[77] The issue then before the court was whether the state tolling provision should control, permitting the plaintiff to maintain his suit even though he had delayed more than nine years in filing his suit. The Fifth Circuit stated that a federal court was not absolutely bound to apply such a tolling provision even in a diversity case. Two decisions had to be made by the court:

72. The federal common law doctrine is set out in Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); *see* R. LEFLAR, *supra* note 45, at 154-56.
73. 431 F. Supp. 821 (N.D. Tex. 1977).
74. 326 U.S. 99 (1945).
75. 327 U.S. 392 (1946).
76. *Id.* at 395.
77. TEX. REV. CIV. STAT. ANN., art. 5535 (Vernon Supp. 1978).

whether the state tolling provision was reasonably applicable to the matter at hand, here a federal civil rights action; and, whether it would conform to federal policies under the civil rights acts.

Considering the first, the court stated that the reason behind the Texas act was the protection of persons, such as prisoners, who were incapable of protecting themselves. The court then recited the reasons upon which special protection should be predicated. One reason was to overcome the common law idea that a prisoner had no legal capacity to prosecute suit. Thus the statute of limitations should be tolled until he was freed. This reason carries no weight in federal civil rights cases where prisoners have full legal capacity to prosecute such actions.

The second reason was based upon the indigency of prisoners which often prevented them from prosecuting civil suits. These persons were unable to pay court fees and costs or obtain a lawyer. Civil rights statutes, however, permit proceeding *in forma pauperis* which eliminates the indigency disability. Moreover, federal courts can request attorneys to represent the prisoner in *in forma pauperis* proceedings and printed forms and instructions are available so that prisoners themselves can prepare civil rights complaints. Incarceration was also said to hinder the prisoner in gathering evidence and attending trial, but liberal discovery rules and the fact that the federal courts can order prisoners to court remedied this situation. The court concluded that imprisonment would not bar the prosecution of federal causes of action; therefore, the tolling provision did not reasonably apply and would not effectuate any state purpose.

The court found further that the application of the tolling provision which would permit plaintiffs to sue for alleged civil rights violations occurring years before would not be consistent with the federal policy behind the civil rights acts of encouraging plaintiffs to file claims expeditiously. Application of the Texas two-year statute would advance this policy, but the tolling provision would not. Since the application of the latter would advance neither Texas nor federal policy, the Fifth Circuit held that federal courts were not bound to apply it.

Kimbell Foods, Inc. v. Republic National Bank[78] was another case in which the federal courts faced an issue pertaining to the application of federal common law. In the district court[79] the federal common law reasoning prevailed in a suit brought to quiet title and foreclose liens on personal property in which an interest was claimed by the United States as a result of a lien arising from the default of a creditor whose loan was guaranteed by the Small Business Administration (SBA). The lower court observed that jurisdiction was based upon a federal statute and concluded that federal law applies when a debt owed to the United States is in issue. The court stated that the reason for this conclusion was that a uniform federal law was necessary to protect the United States Government in the

78. 557 F.2d 491 (5th Cir. 1977).
79. Kimbell Foods, Inc. v. Republic Nat'l Bank, 401 F. Supp. 316 (N.D. Tex. 1975).

exercise of its governmental functions and that such functions should not be subject to conflicting laws.

The rule of "first in time, first in right" fixes priority between a federal and state created lien. Certain federal cases, however, have held that in order to be entitled to priority the nonfederal 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: The lienor must have reduced the claim to judgment, or the lien must be enforceable by 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 it was argued that even if the purchases and charges 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 as there was still judicial opportunity to question the lien until it was reduced to judgment. Such reduction did not occur until after the attachment of the SBA lien.

The Fifth Circuit disagreed and reversed, holding that the choateness principle did not apply to federal contractual liens. Choateness might be a part of the federal law in some contexts but, in the context of a contractual lien, the choateness doctrine did not apply to give priority to the federal SBA lien.

Nevertheless, the question remained whether the federal or state lien was first in time under the first in time, first in right rule. The court stated that in the context of competing state security interests the Uniform Commercial Code should set the standard. Thus, perfection of the security interest as required by the UCC would provide priority against later perfected security interests. The court noted that adoption of the UCC standards would not subject federal contractual liens to inconsistent state laws because all states except Louisiana had adopted the UCC. In a footnote the court cautioned that it had in no way adopted state law because federal law must control: "[We] rather adopt portions of state law in order to fashion a proper federal rule."[80]

The court was faced with still another problem because Kimbell had yet to establish that its lien was first in time. Although Kimbell had a perfected lien on the collateral, the indebtedness which the lien secured resulted from advances made after the SBA's lien arose. According to Texas law this lien, which secured the future advances, would date from Kimbell's previous security interest. The court adopted this rule, not because it was applying state law, but because the trend of law in all the states was in accord with the Texas rule: Advances relate back to the original security interests. This principle was recognized as federal common law.

80. 557 F.2d at 503 n.16.