SMU | Dedman School of Law

SMU Law Review

Volume 29
Issue 1 *Annual Survey of Texas Law*

Article 12

January 1975

# Conflict of Laws

A. J. Thomas Jr.

# CONFLICT OF LAWS

*by*

*A. J. Thomas, Jr.**

## I. JURISDICTION AND JUDGMENTS

*Texas Long-Arm Statute. Product Promotions, Inc. v. Cousteau*[1] presents interesting conflict of laws questions involving the application of the *Erie*[2] doctrine and long-arm jurisdiction. Plaintiff, a Texas corporation, had entered into a contract with Centre d'Etude Marines Advancees (CEMA), one of a group of Jacques Cousteau companies, to test a sonic fishing device so that the test results and the famous Cousteau name could be used in an advertising campaign to promote the product. The tests were made. Reports and film were sent to the plaintiff in Texas who used them as advertising in the packaging and on television. Attorneys for the Cousteau group objected to the use and threatened to sue television companies if the films were televised. Thereafter plaintiff sued Cousteau individually and several Cousteau companies, all non-residents of Texas, on both contract and tort theories of recovery, in the United States district court in Texas. Service of process was had upon the defendants by service upon the secretary of state for a cause of action arising out of the doing of business within the state in accord with the Texas long-arm statute, article 2031b, section 3.[3] The district court dismissed for lack of in personam jurisdiction. On appeal this decision was reversed in part.

At the outset Judge Goldberg noted the two requisites for an exercise of jurisdiction over the persons of non-resident defendants by a federal court in a diversity case: the first, a statute of the state in which the court is sitting which confers such jurisdiction; the second, an exercise of jurisdiction which is consistent with due process of law. Prior to delving into the presence or absence of these requirements, the court was faced with an initial problem as to the placing of burden of proof in defendants' motion to dismiss for want of personal jurisdiction. It was contended by the plaintiff that the *Erie* doctrine compelled a federal court to apply the burden of proof rule of the state in which it is sitting inasmuch as burden of proof is substantive or outcome determinative. The Texas rule would place the burden of

---

* B.S., Agricultural and Mechanical College of Texas; LL.B., University of Texas; LL.M., S.J.D., University of Michigan. William Hawley Atwell Professor of Constitutional Law, Southern Methodist University.

1. 495 F.2d 483 (5th Cir. 1974).
2. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
3. TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (1964), which provides in part:

> Any foreign corporation . . . that engages in business in this State, . . . and does not maintain a place of regular business in this State or a designated agent . . . the act or acts of engaging in such business within this State shall be deemed . . . [as the appointment] of the Secretary of State of Texas as agent upon whom service of process may be made in any action . . . arising out of such business . . . .

producing evidence and of persuasion as to lack of personal jurisdiction upon the defendant appearing specially to contest the jurisdiction.

After observing that burden of proof was ordinarily considered to be outcome determinative, and therefore, governed by the law of the state in which the court was sitting, the court stated that such was not the case under Texas rule 120a[4] permitting special appearance in Texas to contest jurisdiction. Although rule 120a placed the burden upon the appearing defendant to establish a want of jurisdiction, thus changing the old Texas rule which regarded any appearance as a submission to the jurisdiction,[5] this special appearance rule was called a "procedural accessory" that federal courts were not required to adopt. This course of reasoning rests upon *Hanna v. Plumer*[6] wherein the Supreme Court recognized federal authority to prescribe rules of civil procedure for the federal courts in the interests of uniformity. Where such federal rules exist the presumption is strong that they, not state law, should control, despite the *Erie* doctrine. Federal rule 12(b)(2)[7] is such a rule and it places the burden of establishing the existence of jurisdiction upon the party seeking to invoke the jurisdiction of the federal court. Thus the clash between the federal housekeeping rule and the state rule was resolved in favor of the federal rule. The plaintiff was required to shoulder the burden of proof, and this required a prima facie showing of the facts on which jurisdiction was based, not, as defendants claimed, a prima facie showing that a cause of action existed. In *Cousteau* the plaintiff was pleading and proceeding primarily on breach of contract.[8] Under the Texas long-arm statute jurisdiction exists if a contract is made with a resident of Texas and there is a prima facie showing by plaintiff that the contract is to be performed in whole or in part in Texas and that the suit arose out of the contract. A cause if action through breach is not required.

The court found judicial jurisdiction in Texas over the defendant, CEMA, both under the Texas statute[9] and under the constitutional due process minimum contacts doctrine as established by *International Shoe Co. v. Washington.*[10] However, the plaintiff failed to carry the burden of proof as to jurisdiction over Cousteau and the other Cousteau companies. CEMA was within the reach of the statute because it had entered into a contract with the plaintiff, a resident of Texas, and such contract was to be performed in part in Texas. The court enunciated the two-tiered due process test, *i.e.*, " 'there must be some minimum contact with the state which results from an affirm-

4. TEX. R. CIV. P. 120a.

5. The old Texas rule which made appearance to contest jurisdiction appearance for all purposes was upheld by the Supreme Court in York v. Texas, 137 U.S. 15 (1890).

6. 380 U.S. 460 (1965).

7. FED. R. CIV. P. 12(b)(2).

8. Although plaintiff based his case at the hearing on the motion to dismiss, and on the appeal, in contract, he initially pleaded several counts in tort. Under the Texas long-arm statute which permits an exercise of jurisdiction based in tort occurring in whole or in part in Texas, TEX. REV. CIV. STAT. ANN. art. 2031b, § 4 (1964), a prima facie showing of the fact that a tort occurred would be required.

9. The Texas long-arm statute, article 2031b, has been found to extend to the outermost limits of due process as defined by the United States Supreme Court. *See* cases cited note 22 *infra*.

10. 326 U.S. 310 (1945).

ative act of the defendant . . . ,' " and " 'it must be fair and reasonable to require the defendant to come into the state and defend the action.' "[11] CEMA contended that its contacts with Texas were not sufficient for an exercise of judicial jurisdiction since it maintained no place of business in Texas and had no representative in the state. Moreover, it did no advertising, had no bank account, and solicited no business in Texas. In short, it performed no physical acts in Texas. The court, however, found sufficient contacts in that Texas was the place of contract and that an essential part of performance of the contract was in Texas. These contacts were sufficient to show a purposeful decision to avail itself of the benefits of conducting business in Texas even though it may not have performed actual physical acts in Texas. CEMA by entering into the transaction which had substantial connection with Texas could have foreseen that consequences would occur in Texas.

The second requisite—fairness and reasonableness to require CEMA to defend in Texas—was also found to have been met. The plaintiff was a Texan, the contract was made in Texas and Texas law would be of relevance in a decision. Therefore, a rational nexus between the suit and Texas as a forum was present. Despite the fact that it might have been more convenient for CEMA to defend elsewhere, there was not sufficient hardship or inconvenience to the defendant to amount to a denial of due process.[12]

The court admitted that judicial jurisdiction under the long-arm statute might have existed over Cousteau and the other companies on the basis of an agency or parent-subsidiary relationship, but went on to say that plaintiff had offered no evidence that CEMA was a subsidiary of the Cousteau companies. Even if such relationship existed, no evidence was offered to show the type of control of the subsidiary by the parent which would make the parent subject to the judicial jurisdiction; and furthermore, there was nothing to show that the companies were alter-egos of Cousteau.[13] Finally, plaintiff failed to sustain the burden of establishing through the introduction of prima facie evidence that CEMA was indeed acting as agent of the other parties, and thus was entering into the contract on their behalf. No actual or apparent authority by the principals was established.[14] Consequently those

11. 495 F.2d at 494.

12. On the minimum contacts rule and long-arm statutes, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 35, 36, 37, 47, 49, 50 (1971) [hereinafter cited as RESTATEMENT (SECOND)]; Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

13. The RESTATEMENT (SECOND) § 52 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 so that it disregards the subsidiary's independent status. For recent Texas cases on this point compare Frito-Lay, Inc. v. Procter & Gamble Co., 364 F. Supp. 243 (N.D. Tex. 1973), disallowing jurisdiction over the non-resident parent, and Bland v. Kentucky Fried Chicken Corp., 338 F. Supp. 871 (S.D. Tex. 1971), permitting an exercise of jurisdiction over non-resident parent.

14. *Cf.* RESTATEMENT (SECOND) § 52.

parties could not be brought within the terms of the Texas statute.

Two other cases arising under the Texas long-arm statute and decided by Texas courts of civil appeals are of some interest. They both involved contracts with a Texas resident to be performed in whole or in part in Texas. In both the trial court dismissed because there were insufficient minimum contacts to justify an exercise of jurisdiction in Texas in accordance with due process of law. In *Law, Snakard, Brown & Gambill v. Brunette*[15] the California defendant, Brunette, had executed promissory notes individually and on behalf of the California corporate defendant, as its president, to one Ray Cowan. Cowan in turn assigned them to the plaintiff. The note executed by Brunette individually was payable in Texas and was signed by him in Texas. The corporation note was also payable in Texas but had been signed in California and mailed to Texas. Evidence also demonstrated that Brunette had on several occasions been in Texas discussing financial matters with Cowan, who had handled Brunette's finances for some three years. The court of civil appeals reversed and remanded the district court's decision, finding sufficient contacts to conform to due process under *International Shoe Co.* and *McGee v. International Life Insurance Co.*[16] There were contracts to be performed in Texas because the notes were payable in Texas. The issue was raised as to whether the contracts were entered into with a resident of Texas as the statute required. No pleading or proof was presented in the record to show that Cowan was a resident of the state as of the time of the execution of the note or at any other time. The court noted that special appearance to challenge the jurisdiction under Texas rule 120a was a plea in abatement, a plea not favored by the courts. The burden of proof rested upon the challenger, here the defendants, and they had failed to sustain the burden of proof of nonresidency.

*Pizza Inn, Inc. v. Lumar*[17] concerned a franchise contract whereunder the defendant, a Virginia resident, was granted by the plaintiff, a Texas corporation, a franchise to operate Pizza Inns in Virginia. Defendant allegedly breached this contract. Negotiations for the contract were carried on in Texas by the defendant. The contract was executed in Virginia and mailed to plaintiff in Texas with a check for the remaining sum owed on the franchise fee. A previous payment on this fee had been sent to plaintiff in Texas at an earlier time. The contract declared that it was binding on the defendant when signed, but not on the plaintiff until accepted by the plaintiff's officers in Texas. Moreover, the contract provided that certain other payments were to be made by the defendant to plaintiff in Texas. Under these facts the court found a doing of business in Texas within the meaning of article 2031b in that a contract was made with a Texan to be performed in part in Texas. The court further held that defendant had purposefully consummated a transaction in Texas and that sufficient contacts existed to permit an exercise of jurisdiction without offending fair play and substantial justice.

15. 509 S.W.2d 671 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).
16. 355 U.S. 220 (1957).
17. 513 S.W.2d 251 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.).

In both of these cases it would seem that the single transaction—making a contract with a Texas resident to be performed in part in Texas—would be sufficient for the exercise of judicial jurisdiction in Texas. However, it should be noted that in both cases the court emphasized that there were other contacts which the non-resident defendants had carried on in Texas so as to make it fair and reasonable to subject these defendants to suit.[18] Professor Baade in his survey of Texas conflicts cases for 1973 noted this phenomenon in his discussion of *Dorsid Trading Co. v. Du-Wald Steel Co.*[19] and stated: "It is to be hoped that this gesture of prudence will not serve to encourage those who (like the trial judge in the instant case) still find it difficult to accept that Texas may and does claim jurisdiction over out-of-state parties to single transaction contracts to be performed at least in part in Texas."[20]

The confusion as to the reach of the Texas long-arm statute has been continued. The federal court in *Cousteau* proclaimed broadly that the Texas long-arm statute reaches as far as the constitutional due process requirements permit in an exercise of judicial jurisdiction over non-resident defendants.[21] This broad language had been used in earlier cases, federal and state, construing the Texas statute.[22] Other federal and state cases, however, have regarded the Texas statute as relational, *i.e.*, the cause of action must arise from a tort committed in whole or in part in Texas or from a contract made with a Texas resident to be performed in whole or in part in Texas.[23] The Texas Supreme Court said in *O'Brien v. Lanpar Co.*: "(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."[24]

Actually in all cases noted here the cause of action which subjected the non-resident to the jurisdiction was connected with the Texas contract which was to be performed in whole or in part in Texas. Thus, broader language found in *Cousteau* and *Brunette* is dicta.[25] Nevertheless, a connection be-

18. In *Brunette* the court emphasized prior contacts of the defendant with Texas aside from those leading immediately to the notes. This, however, may be contrasted with the decision in *Pizza Inn* which, while going beyond the actual making of the contract, limited itself to contacts within the negotiation stage.

19. 492 S.W.2d 379 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

20. Baade, *Conflict of Laws, Annual Survey of Texas Law*, 28 Sw. L.J. 167, 169 (1974).

21. Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 491 (5th Cir. 1974).

22. *See, e.g.*, Jetco Electronic Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973); Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969); Geodynamics Oil & Gas Inc. v. U.S. Silver & Mining Corp., 358 F. Supp. 1345 (S.D. Tex. 1973); National Truckers Serv., Inc. v. Aero Systems Inc., 480 S.W.2d 455 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

23. 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); Tabulating Systems & Serv., Inc. v. I.O.A. Data Corp., 498 S.W.2d 690 (Tex. Civ. App.—Corpus Christi 1973, no writ).

24. 399 S.W.2d 340, 342 (Tex. 1966) (emphasis added).

25. *See* Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 491 (5th Cir. 1974); Law, Snakard, Brown & Gambill v. Brunette, 509 S.W.2d 671, 675 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).

tween the contract and the cause of action would not in all cases be required by the due process clause for an exercise of jurisdiction over a non-resident. Even though the cause of action arose out of matter unrelated to a state contract, jurisdiction has been permitted under the *International Shoe* doctrine if the constitutional requirement of minimum contacts and fair play are otherwise present.[26] Because of the conflict of authority the question of uttermost reaches of article 2031b remains unsolved.

*Full Faith and Credit—Divorce and Alimony Judgment.* A final long-arm case involved the Arizona provision[27] and the existence in Arizona of jurisdiction over a non-resident so as to make a judgment subject to full faith and credit in Texas. In *Mitchim v. Mitchim*[28] the husband and wife had been domiciled in Arizona for several years. In 1970 they visited Ozona, Texas, with a view of moving there, but returned to Arizona. Within a few days the husband moved to Ozona and entered into the practice of his profession there. Thereafter their home in Arizona was placed on the market. The wife visited the husband in Ozona, but after this visit returned to Arizona and filed suit for divorce against the husband. Such suit was filed in accord with the Arizona long-arm statute which permits suit against a non-resident defendant in instances when said defendant "has caused an event to occur in this state out of which the claim which is the subject of the complaint arose . . . ."[29] The husband did not appear in the Arizona proceeding in which a judgment of divorce was entered which also awarded the wife attorney's fees, alimony, and costs. The husband thereafter sought a declaratory judgment in a Texas court which would invalidate that part of the judgment which had awarded attorney's fees, costs, and alimony inasmuch as in personam jurisdiction over him in Arizona was lacking. He did not question the validity of the divorce, conceding that Arizona had jurisdiction to grant the divorce based upon the wife's domicile there. The wife filed a cross-action seeking full faith and credit to the judgment in toto and to a separate Arizona judgment on accrued payments. The district court refused her request and granted the husband the relief prayed for. On appeal to the court of civil appeals the judgment was affirmed. The court agreed that the Arizona stat-

---

26. *See, e.g.*, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). It must be remembered that art. 2031b has a catch-all phrase. It defines doing of business as tort and contract and connection with the state as discussed, but it also states "and without including other acts that may constitute doing business . . . ." Thode has stated:

> The wording [of article 2031b] is ambiguous, but the purpose is clear. The words 'without including other acts that may constitute doing business' could be construed to mean that no other acts are to be included within the jurisdictional reach of article 2031b. But the obvious meaning, and the one consistent with the whole purpose of the act, is that this catch-all language is intended to expand the jurisdictional scope of the statute to constitutional limits 'without including other acts' in the specific description of acts that fall within the purview of article 2031b.

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* Baade, *supra* note 20, at 168-73.

27. ARIZ. R. CIV. P. 4(e)(2).

28. 509 S.W.2d 720 (Tex. Civ. App.—Austin 1974), *rev'd*, 518 S.W.2d 362 (Tex. 1975).

29. ARIZ. R. CIV. P. 4(e)(2).

ute was of sufficient breadth to authorize service of process over a non-resident defendant in the Arizona divorce proceeding. Unfortunately, however, although events leading up to the divorce could well have occurred in Arizona, the record contained nothing of the facts pertaining to the event or events which led to the divorce decree. Thus the court concluded that it could not determine whether the long-arm statute could be utilized for obtaining jurisdiction.

Moreover, the court was of the opinion that insufficient contacts existed with Arizona to meet the fairness and reasonableness requirements of due process of law. Although certain husband contacts with Arizona were listed such as voting there, owning a home and paying taxes there, forwarding money there to pay off a mortgage, as well as sending money to the wife for the payment of daughter's dental bills, these contacts were found by the trial court to be insignificant. This finding was not specifically attacked by the husband on appeal.

Finally the court noted *May v. Anderson*,[30] in which the Supreme Court of the United States held that personal jurisdiction over a non-resident was necessary for a custody award. It was reasoned that personal jurisdiction would also be a requisite for an award of alimony. *May* would be controlling in all in personam matters arising from the marital relationship.[31]

A short dissenting opinion disagreed, primarily on the basis that the presumption of validity of a sister state judgment had not been rebutted. A further cryptic statement simply declared that the minimum contacts theory was applicable to the marital relationship and matters arising therefrom. The dissent would seem to be the better opinion. Reliance by the majority upon *May* was misplaced. The holding in that case was to the effect that a Wisconsin custody award to the father accompanying his valid *ex parte* divorce in that state did not have to be given full faith and credit in Ohio, the domicile of the ex-wife and mother, since her interest in the custody of her children was a personal right which could not be taken from her except by a court having personal jurisdiction over her. The court there did not consider whether personal jurisdiction could have been maintained on the basis of minimum contacts of the wife with Wisconsin. Furthermore, there was no Wisconsin statute authorizing service outside the state for purposes of a custody proceeding. In *Mitchim*, however, there was a statute which the court admitted was sufficient to authorize jurisdiction over a non-resident defendant in a divorce proceeding. It would seem that it would be sufficiently broad to cover a divorce suit wherein alimony is also awarded if the events which gave rise to the cause of action, the divorce and consequent alimony, took place in Arizona. Moreover as the dissent points out, since the presumption of the validity of the judgment was not rebutted, the wife should not have had the burden of proving that she could have availed her-

30. 345 U.S. 528 (1953).

31. It is quite well established that alimony is a purely personal right. Estin v. Estin, 334 U.S. 541 (1948); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 183-84 (1971).

self of the Arizona long-arm rule. The fact that events or some of them did occur in Arizona should have been presumed.

There would also appear to be sufficient contacts with Arizona to comply with the fairness and reasonableness requirements of due process in relation to making the husband defend in Arizona. The *Restatement (Second) of Conflict of Laws* states that jurisdiction over a non-resident defendant is present if he causes an act to be done within the state "unless the nature of the act and the individual relationship to the state and to other states makes the exercise of such jurisdiction unreasonable."[32] In this divorce action some or all of the acts or events leading to the divorce could have occurred in Arizona and it is presumed that they, or at least some of them, did. Thus, it could well be that defendant's relationship to Arizona was related to the cause of action, which included the costs, attorney's fees, and alimony. He also had the other relationships with the state as listed above. The plaintiff, also, had a close relationship to Arizona in that she appears to have continued her domicile there. There was some inconvenience to the defendant to force him into Arizona to defend the suit; but here a toss-up exists, for it would be equally inconvenient to force the wife to proceed to Texas. Moreover, the minimum contacts doctrine is very suitable to matrimonial support cases. When facts supporting the doctrine exist, it may alleviate certain hardships arising from the separation by granting in personam jurisdiction over a spouse who might otherwise seek to escape liability.[33]

The Supreme Court of Texas, largely in accord with the arguments expressed herein in opposition to the opinion of the court of civil appeals, reversed the judgments of the lower courts.[34] First, the supreme court agreed with the dissent that the introduction of a judgment appearing on its face to be valid and final creates a prima facie case as to validity. Thus, the party attacking the judgment must bear the burden of proof to establish invalidity for lack of jurisdiction. The court went on to say that jurisdiction under the minimum contacts doctrine could be obtained over natural persons as well as corporations. Moreover, *May* was inapposite; the Wisconsin court in *May* did not obtain personal jurisdiction over wife because Wisconsin had no statute purporting to confer jurisdiction in child custody cases. As a result, the Supreme Court of the United States did not hold that proper long-arm statutes such as that of Arizona could not confer in personam jurisdiction over non-residents. In face of an additional contention by the husband to the effect that separate judgments for alimony are not to be accorded full faith and credit even if based on proper jurisdiction, the court answered with the well-known rule that separate judgments for accrued and unpaid alimony which are final and non-modifiable according to the law of the rendering state are to be given full faith and credit by sister states.[35]

The court then stated its opinion that the husband had more than insignifi-

32. RESTATEMENT (SECOND) § 36.
33. Mizner v. Mizner, 84 Nev. 268, 439 P.2d 679 (1968), cited in Mitchim v. Mitchim, 518 S.W.2d 362, 365-66 (Tex. 1975).
34. Mitchim v. Mitchim, 518 S.W.2d 362 (Tex. 1975).
35. Barber v. Barber, 323 U.S. 77 (1944); *cf.* Sistare v. Sistare, 218 U.S. 1 (1910).

cant contacts with Arizona and listed those contacts which have been set forth previously. It then decided that they were sufficient to permit a constitutional exercise of jurisdiction. However, the court remanded the case for a new trial because it had been tried by the husband on the assumption that the wife had the burden of proof as to jurisdiction over him when in reality the husband, as the party attacking the judgment, had the burden. As a result, findings of facts had not been presented pertaining to events causing the divorce so as to permit application of the Arizona long-arm rule. Thus, in the interest of justice the cause was remanded for new trial.

*Full Faith and Credit—"Bootstrapping," Procedural Due Process. Valley Bank v. Skeen*[36] is a rather routine case of the awarding of full faith and credit in Texas by a United States district court to a default judgment rendered by a Nevada state court. The Nevada court had entered such a judgment against the defendant without a hearing after the defendant had answered, but failed to make a timely appearance at a deposition. The defendant contended such a judgment was a denial of procedural due process, inasmuch as the trial court had not considered whether his failure to appear was willful. Defendant appealed to the Supreme Court of Nevada which affirmed the entry of the default judgment, rejecting the defendant's due process contention.

In a diversity suit to enforce the Nevada judgment in Texas, the court applied the well-known "bootstrap doctrine" to the effect that a judgment of a court having jurisdiction over the parties and the subject matter becomes res judicata, if so regarded in the state of rendition, and is no longer subject to collateral attack.[37] The court held that the issue of due process had been fully litigated in Nevada, and the Nevada judgment was not subject to collateral attack. When the defendant has had the opportunity to contest a possible lack of jurisdiction then public policy demands that litigation end. The issue of lack of due process was now foreclosed and the Nevada judgment had to be given full faith and credit by the Texas courts.

Not content with this conclusion the district court went on to point out, somewhat unnecessarily in the case at hand, that in its opinion there was in any event no lack of procedural due process. The district court was of the opinion that Nevada could presume bad faith and willfulness by the fact that the defendant had failed to appear at the deposition and had failed to allege any facts to rebut the trial court's presumption. The court stipulated that due process does not always require a hearing on the merits in a civil case. A state court could grant a default judgment when after timely notice a defendant failed to appear or violated a procedural rule requiring the production of evidence. Furthermore, the right to be heard was adequately safeguarded by an appeal from the default judgment as permitted under Nevada practice. Such appeal was taken; the issue of procedural due process had

36. 366 F. Supp. 95 (N.D. Tex. 1973), *aff'd*, 495 F.2d 1371 (5th Cir. 1974).
37. *See* Morris v. Jones, 329 U.S. 545, 550-52 (1947); *cf.* RESTATEMENT OF JUDGMENTS § 4 (1942).

been raised and adjudicated. The effect of this adjudication could not be set aside.

*Jurisdiction—Decrees Affecting Foreign Land. Estabrook v. Wise*[38] raises the old problem of judicial jurisdiction of a forum court to enter a judgment or decree affecting foreign land. A divorced wife brought suit in Texas against her former husband alleging that certain mineral interests located in Alabama and Florida, which were community property, had not been divided by the court or parties at the time of the divorce. Discovering the existence of these properties after the divorce, the wife sought an order from the court requiring the husband to execute a deed to the properties so as to vest title in her to the extent of a one-half community interest. The issuance of such order was claimed proper as an exercise by the court of its equitable in personam jurisdiction over the husband. Plaintiff's petition was dismissed by the district court for lack of jurisdiction over the subject matter. This judgment was reversed by the court of civil appeals and the cause was remanded. However, after error was granted by the supreme court, the parties filed a joint motion to dismiss, which was granted, and the judgments of the lower courts were set aside.[39] As a point of interest, however, the opinion of the court of appeals might be beneficially explored.

The court of civil appeals was careful to recognize the general rule that the courts of one state have no power to issue a judgment or decree directly affecting title to immovables in another state.[40] Nevertheless the court applied the well-known and long established[41] exception to the general rule permitting a non-situs court with in personam jurisdiction over the parties to affect interests in foreign land indirectly, through an exercise of equitable in personam powers by ordering a defendant to execute a conveyance of an interest in the land.

The dissent to *Estabrook* viewed the issue as essentially one involving a determination of title to real property, reasoning that the plaintiff had no right to a conveyance of a one-half mineral interest in the absence of a resolution of the title question in her favor.[42] Resolution of any question of title was viewed as solely within the province of the situs state. However, the majority opinion seems correct and in accord with modern legal thought. Although the general rule has been that a court cannot make its decree operate directly to convey foreign land, it is also clear that a court may order the defendant who is before it to execute a deed conveying the land, even though the conveyance is made under threat of contempt proceedings.

---

38. 506 S.W.2d 248 (Tex. Civ. App.—Tyler), *writ dism'd by agr.; jdgmts below set aside*, 519 S.W.2d 632 (Tex. 1974).

39. Wise v. Estabrook, 519 S.W.2d 632 (Tex. 1974). The parties filed a joint motion to dismiss, stating that they were " 'agreeable to this cause of action being filed in the States where the real property interests at issue are situated.' " *Id.* at 632. The court ruled that the judgments below were to be set aside and the cause dismissed as moot. *Id.*

40. *See* Durfee v. Duke, 375 U.S. 106 (1963); Fall v. Eastin, 215 U.S. 1 (1909).

41. *See* Massie v. Watts, 10 U.S. (6 Cranch) 148 (1810); R. LEFLAR, AMERICAN CONFLICTS LAW 428-30 (rev. ed. 1968); G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 102-03 (3d ed. 1963).

42. 506 S.W.2d at 253.

Moreover the idea that a non-situs court's in personam judgment as to foreign land has no effect, even when it purports to affect title, has fallen into disrepute. The tendency of the courts today has been to give res judicata effect to the non-situs judgment as a determination of the issues between or equities of the parties to the suit even when enforcement is sought in the situs state.[43]

The old rule of lack of jurisdiction of non-situs states has been supported by contentions that the non-situs decree would interfere with the situs state's control of its own real property, conflict with strong interests of the situs state, and simply, be inappropriate.[44] It is particularly argued that a bona fide purchaser in a situs state might not be protected if a foreign judgment affecting title were not recorded in the state. This hardly holds water for bona fide purchasers can be protected in such a situation as they are in other instances when there is improper or no recordation.[45] It is also doubtful if there is much merit to the argument of inappropriateness. Regardless of where the property is located[46] the court having jurisdiction over the parties is the most appropriate place to adjudicate, particularly in a divorce situation wherein marital property is to be divided.

*Echols v. Wells*[47] involved three differing conflict of laws problems. The problem of jurisdiction of a non-situs court over foreign real property interests was again present, as well as choice of law problems and proof of foreign law. Plaintiff, claiming to be the owner of a certain royalty interest in a New Mexico oil lease, sued for accumulated run payments alleged to be owing to him. The payments were interpled into the court's registry by one defendant. Judgment was entered in the district court in favor of plaintiff and was generally affirmed by the court of civil appeals, then reversed on other grounds in the supreme court. The court of civil appeals set forth the general rule that a state lacks jurisdiction to adjudicate title or rights in foreign lands.[48] The court then went on to enunciate the conflict of laws rule that the validity and effect of a transaction by which an interest in land is created or transferred is governed by the law of the situs of the land,[49] here, New Mexico, the situs of the oil lease. However, no proof of the law of New Mexico was offered nor was a request made that judicial notice be taken of New Mexico law. The court, therefore, presumed the law of New Mexico to be the same as that of Texas. This is in accord with a rule that when the law of another jurisdiction is not judicially noticed or pleaded or proved, the law of the forum will be applied on the presumption that the law of the other jurisdiction is

43. *See* Durfee v. Duke, 375 U.S. 106 (1963); Weesner v. Weesner, 168 Neb. 346, 95 N.W.2d 682 (1959); McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961), *noted in* 16 SW. L.J. 516 (1962). *See also* A. EHRENZWEIG, A TREATISE ON CONFLICT OF LAWS 206-09 (1962).

44. For very interesting criticism of the old rule and the reasons advanced for the rule, see R. WEINTRAUB, *supra* note 31, at 305-10.

45. *Id.* at 305-06.

46. *Id.* at 310.

47. 508 S.W.2d 118 (Tex. Civ. App.—Houston [1st Dist.] 1973), *rev'd on other grounds*, 510 S.W.2d 916 (Tex. 1974).

48. *See* note 40 *supra* and accompanying text.

49. *See generally* RESTATEMENT (SECOND) §§ 223-43.

the same as that of the forum.[50]

Applying this presumption, the court determined that royalty interests in an oil and gas lease according to Texas law are interests in the land, which may not be adjudicated by a forum which is not the situs of the land. The court ruled, however, that when the minerals are taken from the ground they are classified as personalty under Texas law. Thus the accumulated run payments from the leases would be considered personalty which because of the interpleader action were now located in the Texas court's registry. Thus there was jurisdiction to determine title to these funds.[51]

*Legislative Jurisdiction—Escheat.* The issue as to which state has jurisdiction to effectuate the escheat of intangible property was thought to have been settled by the Supreme Court of the United States in *Texas v. New Jersey*.[52] There four states were seeking to escheat certain small debts owed by the Sun Oil Co. to over one thousand creditors who had not appeared to collect the debts. Pennsylvania claimed power of escheat because Sun's principal place of business was in that state. New Jersey claimed because Sun was incorporated there. Florida claimed because some of the debts were owed to creditors whose last known address was in that state. Texas claimed because most of the debts had arisen out of Texas transactions and as such Texas was the place of the most significant contacts. In order to prevent multiple escheats by two or more states, the Supreme Court held that the state of each creditor's last known address as shown on the company's books would be permitted to escheat. As to creditors with no known address or whose last known address was in a state having no escheat law, escheat would be permitted in the state of incorporation of the debtor. If the state of a creditor's previously known address subsequently became known or if the state of last known address enacts an escheat law, such last state may take the amount from the state of the debtor's incorporation.

In *State v. Liquidating Trustees of Republic Petroleum Co.*[53] the trial court and the court of civil appeals held in accord with this rule which would permit Texas to escheat only the small sum due the sole Texas shareholder of record from funds representing unpaid liquidating dividends owed to 208 stockholders of a defunct New Mexico corporation. Texas had sought to escheat all the moneys held by the liquidating trustees (domiciliaries of Texas) in a

50. *See* Ogletree v. Crates, 363 S.W.2d 431, 435 (Tex. 1963). *See also* Thomas, *Proof of Foreign Law in Texas*, 25 Sw. L.J. 554, 567-69 (1971).

51. *Inter vivos* transactions with respect to movables are generally governed by the law of the situs. RESTATEMENT (SECOND) §§ 244-66. The trial court had denied a plea to the jurisdiction regarding the mineral interests title, but since this fact was not requisite to the determination of the ownership of the accumulated payments the error would have been harmless. However, in its judgment, the trial court had stated that all relief not expressly granted was denied, thus impliedly ruling on the title to the mineral interests. Therefore, the court of civil appeals affirmed the judgment except as to the issue of title to realty, which was severed, reversed, and dismissed. On appeal, the supreme court reversed and remanded because certain evidence had not been admitted. 510 S.W.2d 916 (Tex. 1974).

52. 379 U.S. 674 (1965).

53. 510 S.W.2d 311 (Tex. 1974), *rev'g* 497 S.W.2d 527 (Tex. Civ. App.—Waco 1973).

Dallas bank. Since the unpaid stockholders had last known addresses in many other states, the trustees contended that an escheat judgment for Texas would deny due process because it would not relieve them of rival escheat claims of those other states.

The Supreme Court of Texas disagreed with this contention, reversed the lower courts, and remanded the cause. The court found sufficient facts in this case to distinguish it from *Texas v. New Jersey* and the rules enunciated therein. The prime distinguishing factor was the absence in this case of any other state making any active claims to escheat this property. The court would not agree with an interpretation of *Texas v. New Jersey* which would prevent escheat by Texas even though no other state was asserting this right. Such an interpretation would, in the words of the court, "allow the stakeholders to continue to hold, and in many cases dissipate, the property even though no other state ever comes forward with the assertion of a superior claim."[54] The court interpreted the former case to mean that an escheat could be effectuated by the domiciliary state of the stakeholder against the stakeholder subject to another state's coming forward at a later time with proof of a superior right to escheat, as for example, the state of a creditor's last known address. Such an interpretation would permit custody of the funds to be taken by the state treasurer "where reports and procedures would be available under the Texas Act for other states to learn of the funds and assert administratively and in our courts any superior rights which they may claim."[55] The rule announced in *Texas v. New Jersey* was said to be a rule of ease of administration and general fairness. A deviation from such a rule demanded by differing facts and made in the interests of administrative ease and general fairness as in the case at hand should certainly stand.

## II. CHOICE OF LAW

*Contracts.* The opinion in the case of *Lipschutz v. Gordon Jewelry Corp.*[56] presents several interesting conflict of laws issues in relation to the Texas choice of law rule in a contracts situation. The case concerned a theft of jewels from a Texas retail jewelry store, which carried insurance insufficient to cover all losses. Among such losses was jewelry on consignment from plaintiff, a New York wholesale dealer. This consignment had been accompanied by an "all-risk" memorandum which stated that the consignee jewelry store assumed "full and unqualified responsibility for the absolute return of the said property, or the cash proceeds . . . on demand, without any excuse or defense whatsoever."[57] Plaintiff brought suit in federal district court in Texas against the store consignee and its Texas parent corporation, claiming that defendants were responsible for all jewelry consigned to the jewelry store. Defendants contended that the recitations contained in the memorandum did not constitute the entire contract between the parties for there were trade

54. *Id.* at 315.
55. *Id.*
56. 373 F. Supp. 375 (S.D. Tex. 1974).
57. *Id.* at 378.

customs and usages which varied its terms. One such claimed usage or custom provided that in case of stolen merchandise where there is insufficient insurance coverage, the consignee would be liable only for consignor's actual cost plus five percent to cover certain expenses. Moreover, defendants contended that the consignment in reality was a bailment and by the law of bailment for the mutual benefit of the two parties, there would be no liability since the theft of the merchandise was not caused by the negligence of the bailee.

The plaintiff's first motion for summary judgment was denied by the court. Thereafter, plaintiff developed extensive evidence of the customs and usages in the diamond industry. Finding the existence of such usage, the court concluded that, with respect to this consignment, deliveries by wholesalers to retailers placed upon the latter an assumption of all risks and hazards with respect to the merchandise consigned. The extent of consignee's liability was said to be "the monetary value of the items as listed on the memorandum or its increased value if changed subsequently by the consignor . . . ,"[58] rather than the consignor's actual cost plus a small percentage, as claimed by defendants.

The court was then faced with the choice of law problem of which law governed the contract, including the question as to whether customs and usages of the diamond industry not contained in the "all-risk" memorandum were incorporated into and became a part of the contract. The United States district court held that New York law governed the contract and that the trade practices of the industry were so incorporated. The court reasoned on the conflict of laws issue in the following manner. Following *Erie Railroad Co. v. Tompkins*[59] and *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[60] the court concluded that in a diversity case it must follow the conflict of laws rule of the state in which it was sitting. It then found that Texas would characterize this contract as having been made in New York, the place where the offer by the consignee to the New York consignor was accepted. Since New York was the place of making, New York law was said to govern. According to the federal court, the Texas conflicts rule would view the effect of a contract to be controlled by the law intended by the parties, and the presumption exists that the parties intended the law of place of making (New York) to control in the absence of a contrary manifestation of intention. The court reached the correct decision under Texas law, but the Texas rule is not completely stated. Place of making governs in Texas 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,[61] where there is more than one

58. *Id.* at 381.
59. 304 U.S. 64 (1938).
60. 313 U.S. 487 (1941).
61. The defendants contended that the entire performance of the contract was to occur in Texas. This the court rejected on the ground that the facts did not support such an argument. 373 F. Supp. at 385. The facts would, however, support a conclusion that at least part of the performance was to take place in Texas, for the jewels were forwarded to the defendant in Texas to be placed on sale there by the retailer sub-

place of performance, in which case in the absence of a contrary manifestation of the intention, the place of making governs.[62] Thus in this case New York law should govern.

The court could have and really should have stopped at this point, but for some inexplicable reason went on to bolster its decision as to controlling law by a discussion of the modern most significant relationship doctrine of conflicts which it considered to be the appropriate doctrine for the solution of the issue at hand. Under this doctrine New York law would certainly govern according to the court because it was the state of the most significant relationship. After setting out some of the factors which the *Restatement (Second) of Conflict of Laws*[63] deems relevant to the choice of the proper law, but without discussion of these factors in relation to the particular case before it, the court concluded that the concentration of the diamond industry in New York clearly indicated that New York had the most significant relationship. Proceeding in this fashion would seem to imply a consideration of the number of contacts only rather than an evaluation of interests and policies of the two states with reference to the transaction and parties before the court. Such an evaluation of interests should be the aim of the court if compliance with the most significant relationship theory is sought. The fact that the diamond industry is located in New York does not necessarily mean that its policies and interests are the most important with respect to the issue at hand. Thus, the court leaves us hanging without further discussion of the relevant factors for choice of law under the most significant relationship doctrine.

Moreover, the court follows certain previous federal decisions in diversity cases where the courts sitting in Texas pronounced (quite erroneously in the author's opinion) that the Texas courts have adopted the most significant relationship doctrine.[64] The court after discussing the doctrine states: "This approach appears to have received approval by the Supreme Court of Texas."[65] The error is then compounded because the court cites as authority for this proposition *Marmon v. Mustang Aviation Inc.*,[66] a case which has

---

ject to the right of the wholesaler to demand a return. The court, however, did not concern itself with performance of the contract or the place or places of performance.

62. The Texas law was summarized in Ramirez v. Autobuses Blancos Flecha Roja, S.A., 486 F.2d 493, 496 (5th Cir. 1973). *See also* Austin Bldg. Co. v. National Union Fire Ins. Co., 432 S.W.2d 697 (Tex. 1968) (place of making); Castilleja v. Camero, 414 S.W.2d 424 (Tex. 1967) (place of performance where places of making and performance are different); Hatchett v. Williams, 437 S.W.2d 334 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.), *cert. denied*, 396 U.S. 963 (1969) (place of making when places of making and performance different and contract to be performed in more than one place).

63. RESTATEMENT (SECOND) § 6. The court listed the considerations as "the needs of the interstate and international systems of commerce; . . . the relevant policies of the forum and interested states; and . . . the need for certainty, predictability, and uniformity of result." 373 F. Supp. at 385.

64. *E.g.*, Seguros Tepeyac, S.A., Compania Mexicana v. Bostrom, 347 F.2d 168, 175 (5th Cir. 1965). Cited by the *Lipschutz* court is Teas v. Kimball, 257 F.2d 817 (5th Cir. 1958). The court in *Teas* did not speak in terms of most significant relationship, but used wording that might be equated with the doctrine, stating that the law of place of performance should govern because "the focus of the contract was . . . centered [there] in Texas." *Id.* at 824.

65. 373 F. Supp. at 385.

66. 430 S.W.2d 182 (Tex. 1968).

heretofore been interpreted as supportive of the traditional vested rights theory. Could the court not have known that the Texas Supreme Court rejected the most significant relationship doctrine in that case? The federal court apparently was impressed with the following language of the *Marmon* decision: "The circumstance that we may believe that a case such as this should be controlled by Texas law [if most significant relations applied] or that the Legislature, after the development of the 'significant contacts rule,' should have amended the statute so as to give it an extraterritorial effect, does not authorize us to enter the legislative field."[67] This hardly indicates adoption of the doctrine. Nevertheless and in all fairness, the supreme court on motion for rehearing indicated that in a proper case the court might abandon the *lex loci* doctrine. The court stated:

> This is not the . . . kind of case . . . wherein a true choice of law issue was presented and the stare decisis problem involved common law precedents. The doctrine of lex loci delicti is a court-made rule . . . and the abandonment of this rule in favor of some different one, such as a 'significant contacts' rule, while it may involve the overruling of common law precedents on policy grounds, does not necessarily involve saying that a statute had one meaning fifty years ago and a different one today.[68]

One does get some impression of futility concerning the *Lipschutz* court's musings as to the choice of law problem, *i.e.*, whether New York or Texas law should govern as to the contract and the trade usages of the industry, for the court in a footnote declares: "Under this Court's Conflict of Laws determination New York law is applied in determining the contractual relationship between the parties. This Court is satisfied that the same result would pertain under Texas law considering contracts and trade customs and usage."[69]

Finding that no limitation of defendants' liability was intended by the parties or by the customs of the industry, it was held that the plaintiff was entitled to summary judgment. The court, faced with a determination of the damages, looked to the law of New York for the standard of recovery. This is proper for measures of recovery are considered to be substantive and governed by the law which governs the contract,[70] which was, according to the court, the law of New York.

The plaintiff also sought exemplary damages, attorneys' fees and interest under Texas law. The court, as mentioned previously with respect to defendants' liability and measure of recovery, had stated that a federal court must apply the conflict of laws rules of the state in which it is sitting. As to exemplary damages, attorneys' fees and interest, however, no mention was made of the Texas conflict of laws rules. Instead the court looked directly to Texas local law as to whether such damages and costs were permissible,

67. *Id.* at 187. The *Lipschutz* court cited directly to this page of the *Marmon* case.
68. *Id.* at 194.
69. 373 F. Supp. at 386 n.17.
70. *See* R. LEFLAR, *supra* note 41, at 301-03. RESTATEMENT (SECOND) § 205.

and held that Texas law in the circumstances would not permit the award of exemplary damages, but would allow attorneys' fees and interest. Had the court bothered to look to Texas conflict of laws rules, it would have found authority indicating that Texas treats damages, attorneys' fees, and interest damages as substantive, to be controlled by the law of the state where the substantive rights occurred,[71] which in this case was New York.

*Insurance Contract—Legislative Jurisdiction. Howell v. American Live Stock Insurance Co.*[72] is another diversity case arising before a federal court sitting in Texas where the court under the rule of *Klaxon v. Stentor* is called upon to apply Texas choice of law rules. *Howell* involved a suit upon an insurance contract entered into in New Mexico between the Texas plaintiff and an out-of-state insurance company which was doing business in Texas. That which was insured was a horse owned by the plaintiff and kept by him on his farm in New Mexico. Upon the death of the horse, a dispute between the owner plaintiff and the insurance company developed as to the animal's value. Suit was brought and a judgment in the lower court awarded plaintiff the full value payable under the policy. Defendant appealed to the Fifth Circuit. Plaintiff cross-appealed claiming that his recovery should have included a statutory penalty and a reasonable attorney's fee, as permitted under the Texas Insurance Code when an insurance company failed to pay for a loss within thirty days after demand therefor.[73] New Mexico had no such provision. Therefore the problem confronting the court was whether New Mexico or Texas law was applicable.

In Texas there is a statutory conflict of laws rule which by its language would seem to control and would call for an application of Texas law to the issue at hand. Article 21.42 of the Texas Insurance Code provides: "Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby . . . ."[74]

The facts fall within the literal meaning of this language, *i.e.*, a contract of insurance payable to a Texan by a company doing business in Texas. The court of appeals, however, refused to construe the language literally, relying on earlier Texas cases, particularly *Austin Building Co. v. National Union Fire Insurance Co.*[75] There the supreme court held that article 21.42 could not be given extraterritorial effect and limited its application to instances where the contract between the Texan and a company doing business in Texas was made in the course of the company's business in Texas. This decision was influenced by the 1924 United States Supreme Court case of *Aetna Life Insurance Co. v. Dunken.*[76] In *Dunken* the Texas statute providing a

71. *E.g.*, Corrosion Rectifying Co. v. Freeport Sulphur Co., 197 F. Supp. 291 (S.D. Tex. 1961).
72. 483 F.2d 1354 (5th Cir. 1973).
73. TEX. INS. CODE ANN. art. 3.62 (1963).
74. *Id.* art. 21.42.
75. 432 S.W.2d 697 (Tex. 1968).
76. 266 U.S. 389 (1924).

penalty for failure to make prompt payment for loss was held not to control a policy issued by a Connecticut company to a resident of Tennessee who subsequently moved to Texas and died. The court was of the opinion that Texas lacked legislative jurisdiction; therefore, its statute could not be constitutionally applied extraterritorially to a Tennessee contract. Otherwise, Texas would be regulating out-of-state business and controlling contracts made by citizens of other states in disregard of their laws which did not allow recovery of penalties and attorneys' fees.

When this case was decided the Supreme Court seemed to be following a trend which required a strict adherence to particular choice of law rules.[77] More recent cases reflect the Court's preference toward balancing the interests of the states involved.[78] It would seem today that a state having a legitimate interest or policy in the application of its own law can apply it without violating constitutional provisions of due process and full faith and credit to a sister state's statute. Normally statutes imposing attorneys' fees and penalties for failure to make prompt payment have been applied only where such statutes are the existing law of the state otherwise governing the transaction. Still there would seem to be no reason today why such a statute could not be applied if a state has a legitimate interest or policy to be furthered by the application of its own local law. The policy behind the Texas law is to effect speedy collections of just claims without diminution of the claim's value and without unnecessary delay and expense. Would not Texas have a legitimate interest in safeguarding the rights of its domiciliaries to prompt and speedy payment even though the company was an out-of-state company and the risk was out-of-state? It would seem so. Constitutional problems today would seem non-existent.

Nevertheless, the Texas courts have decided that the statute is not applicable to a situation like that at hand. Thus, under the *Erie* doctrine, the federal court sitting in Texas must apply Texas law. If article 21.42 does not control, the Texas common law conflict of laws rule becomes applicable. In deciding the obligation and effect of a contract, the federal court in *Howell* determined the Texas law to be an intention of the parties rule which if not expressed is that of the place of making of the contract. As noted in the *Lipschutz* case this statement of the rule is not quite complete. If place of making and place of performance are the same then place of making governs because the parties presumably intended the law of that jurisdiction to be controlling. But if place of making and place of performance are different it is presumed that the parties intended the law of the latter jurisdiction to govern.[79] The decision is then correct if place of making and place of performance are the same. The court does not speak as to place of performance. It does say that the contract was made and executed in New Mexico. If it in fact was payable also in New Mexico, then under the Texas rule New

77. *See* R. LEFLAR, *supra* note 41, at 121-46.
78. *See, e.g.*, Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964); Watson v. Employers Liab. Co., 348 U.S. 66 (1954).
79. *See* note 62 *supra.*

Mexico law should govern. The court concluded, affirming the lower court's opinion, that attorneys' fees and the statutory damages are not allowed.

*Statutes of Limitation. Culpepper v. Daniel Industries, Inc.*[80] involved article 4678[81] which provides for the enforcement, in Texas courts and under the Texas statute of limitations, of personal injury or wrongful death claims where a right arises and exists in a foreign state. Plaintiff was injured in a valve explosion accident occurring in Louisiana. The suit was time-barred in Louisiana by that state's one-year limitation period,[82] but not by the longer Texas period of two years.[83] The trial court, believing the Louisiana statute to be applicable, dismissed. The court of civil appeals reversed and remanded.

Traditionally statutes of limitation have been treated as procedural because passage of time has been thought to destroy only the legal remedy, not the right or the cause of action. As a procedural matter the forum's law governs.[84] Thus, if the suit on the extrastate action is barred by the limitation period of the forum even though it is not barred by the limitation period of the state in which the cause of action arose, no action can be maintained. Conversely, as in the case at hand, if the cause of action is not barred by the forum, but is by the place where it arose, the cause of action can be maintained by the forum. The decision of the court of civil appeals is in accord with traditional thought.

The court did find it necessary to distinguish a previous case, *Francis v. Herrin Transportation Co.*[85] This was a damage suit brought by a widow for the injury and death of her husband in Louisiana by reason of defendant's negligence. The one-year period of Louisiana had run, but not the longer two-year period of Texas. In this case the Supreme Court of Texas held the Louisiana statute applicable. *Francis,* however, involved wrongful death, not personal injury, and the Louisiana law in creating an action for wrongful death incorporated, within the statute, an express limitation as to the time within which a wrongful death action could be brought. This then was a built-in statute of limitations. The position is taken that where the statute creates the right and in the same enactment sets forth the time limitation for the bringing of an action such limitation bars the right not merely the remedy. Consequently, suit cannot be brought under the longer period of the forum if there is no right under the law of the place of injury.[86]

Although article 4678 authorizes redress in Texas courts for injury or wrongful death occurring in another state where the suit is brought within the time prescribed by Texas statutes, and further provides that the law of the forum governs procedural matters, it goes on to say that suit for wrongful death or injury may be brought if there is a right to maintain the suit given

80. 500 S.W.2d 958 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).
81. TEX. REV. CIV. STAT. ANN. art. 4678 (1952).
82. LA. CIV. CODE ANN. art. 3536 (West 1953).
83. *See* TEX. REV. CIV. STAT. ANN. arts. 4678 (1952), 5526 (1958).
84. *See id.* art. 4678 (1952); R. WEINTRAUB, *supra* note 31, at 48-50.
85. 432 S.W.2d 710 (Tex. 1968), *noted in* Thomas, *Conflict of Laws, Annual Survey of Texas Law,* 23 SW. L.J. 159, 162-64 (1969), *and in Conflict of Laws, Annual Survey of Texas Law,* 24 SW. L.J. 166, 175 (1970).
86. *See* RESTATEMENT (SECOND) § 143 and comment.

by the law of the state where the wrong occurred. Thus if the right is proscribed or preempted in Louisiana by the Louisiana statute of limitations, no right exists in Louisiana upon which a cause can be brought in Texas. Only if a right did exist under foreign law would application of the Texas limitation period ever become pertinent. This was the reasoning of the *Francis* case, but *Culpepper* was a personal injury case. There was no built-in limitation period in Louisiana as to personal injury, and further, the limitation statute applicable was characterized by the court in *Culpepper* as prescriptive or procedural, not preemptive. Thus, a right still existed in Louisiana and suit could still be brought in Texas under article 4678 to enforce the right under the longer Texas statutory period, although admittedly a cause of action could not have been maintained in Louisiana.

The traditional view that statutes of limitation are to be treated as procedural, subject to some exceptions, has been criticized. The late Professor Stumberg has stated that upon analysis "limitation of action should be regarded as substantive and not procedural, since the operative effect of the passage of time is to preclude recovery by the plaintiff upon his original cause of action."[87] He goes on to say: "Limitation does not deal with the method of presenting the facts upon which a right depends but with the legal effect of a fact, the lapse of time, upon a right which the plaintiff claims."[88]

Today with a policy oriented and functional approach demanded by the most significant relationship theory one looks to policy and reason behind the law. It is said that a reason behind the rule that procedural matters are to be governed by the law of the forum is the difficulty in finding and applying foreign procedural law. In deciding whether a matter is procedural or substantive attention should be directed also to a consideration of a principal purpose of conflict of laws—to assure that the case will receive the same treatment under the appropriate law no matter where the forum might be. The forum should consider the outcome determinative effect of the application of the forum's rule in relation to the difficulty of finding and in applying the foreign rule. If the forum's rule has little effect on the outcome and the foreign rule is difficult to find and apply, it may well be justifiable to apply the forum's law. On the other hand if there is probability of outcome determinative effect through application of the forum's rule and the foreign rule is not difficult to find and apply, then the foreign rule should govern.[89] The latter would seem to be the case as to statutes of limitations.[90] Thus statutes of limitations should be treated as substantive. The new *Restatement*, although adopting the policy oriented most significant relationship theory, still adheres to the general rule that the statute of limitations of the forum governs and that an action cannot be maintained if barred by the statute of limitations of the forum and vice versa.[91] The comments base this conclusion on the fact that the purpose of statutes of limitations is to protect

87. G. STUMBERG, *supra* note 41, at 146.
88. *Id.*
89. *See* R. WEINTRAUB, *supra* note 31, at 48-50, for an excellent explanation.
90. *Id.*
91. RESTATEMENT (SECOND) § 142.

both the parties and the local courts against stale claims; therefore, it is within the province of each state to determine the period in which a claim can be presented to its courts.[92]

*Federal Common Law. United States v. Dubrin*[93] brings to the fore once again the question of applicability of federal common law. Here the United States Government sued for recovery of the balance due on a loan made by the Small Business Administration to a company now bankrupt, such loan being guaranteed by defendants as co-guarantors. The Government's claims against two of the co-guarantors were settled by compromise at less than the plaintiff had sought in its complaint against these two defendants. A claim for one hundred percent of the balance due was asserted against the third defendant guarantor. However, this defendant asserted that he was not liable on his guaranty. His principal contention was that he executed the guaranty relying on an SBA rule embodied in the loan authorization and agreement that the management of the corporation should not be changed without giving thirty days notice. This was violated. Moreover, he asserted that the Government compromised with the other co-guarantors and settled claims at amounts less than the percentages which they had guaranteed. The defendant cited Texas law to support his position, Texas being the state in which the federal district court was sitting. Under Texas law the rule of *strictissimi juris* applies to guaranty agreements, *i.e.*, such agreements are to be strictly construed and "may not be extended by construction or implication beyond the precise terms of . . . [the] contract."[94]

The federal court declared that the *Erie* doctrine did not apply, and held federal law to be controlling. Now certainly 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 of the conflicts as to what law should govern. There may well be instances when a particular issue is not explicitly covered by federal statute. Are such gaps to be governed by state law following *Erie* which proclaimed a theory that no federal common law existed? Or when federal rights are involved can the issue be governed by a federal rule, 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 a diversity of state rules, then the statutory lacunae are to be filled by a federal common law.[95]

In *Dubrin* the court reasoned that the obligations of the guarantors under the SBA loan create questions of federal rights and liabilities emanating from a federal program. Thus, a federal rule was applicable, which made the guaranty absolute and unlimited. This had been fixed by the contract of guaranty and could not be changed by an inapplicable state law.

---

92. *Id.*, comments *d, g.*
93. 373 F. Supp. 1123 (W.D. Tex. 1974).
94. McKnight v. Virginia Mirror Co., 473 S.W.2d 429, 430 (Tex. 1971).
95. The doctrine is set out in Bank of America Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). *See also* R. LEFLAR, *supra* note 41, at 154-56; R. WEINTRAUB, *supra* note 31, at 464-66.