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Conflict of Laws

CONFLICT OF LAWS

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I. SISTER-STATE JUDGMENTS

Divorce Judgments. In *Fyke v. Fyke*[1] an action was brought in the Texas court to recover accrued alimony payments due under a Colorado divorce decree. The trial court dismissed the action holding that the Colorado decree was void since it had been rendered before the lapse of the ninety-day statutory cooling-off period.[2] The court of civil appeals affirmed the dismissal, holding that, under Colorado law,[3] the judgment was void and not merely voidable. The judgment, therefore, was properly subject to collateral attack by the defendant and the Texas trial court was not required to give the decree full faith and credit. In the appellate court the plaintiff argued that the defendant was estopped from attacking the validity of the decree since he had remarried subsequent to the Colorado divorce. The court rejected the plaintiff's argument noting that the estoppel was not alleged in the pleadings and was raised for the first time on appeal. It may be argued by implication that had the plaintiff seasonably raised the fact of remarriage, the divorce and alimony judgment, even though void, could not have been successfully attacked.

The validity of a divorce decree rendered before the lapse of the statutory waiting period should be distinguished from a decree rendered when the parties fail to meet the prerequisite time of residence in the state. As noted by the court in *Fyke*, it is well established in Texas that a judgment granting a divorce prior to the expiration of the statutory period is void and not merely voidable.[4] The status of a judgment rendered without the required time of residence, however, is not clear. Although at least one older case held that such a judgment was void,[5] the more recent cases have held that the judgment is voidable.[6] Thus, two recent cases have stated that Texas divorce judgments rendered without the necessary residency requirements cannot be collaterally attacked.[7]

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[1] 442 S.W.2d 760 (Tex. Civ. App.—Fort Worth 1969).

[2] COLO. REV. STAT. ANN. § 46-1-6 (1963) provides that "[n]o trial for an action for divorce shall be had until at least ninety days after service of process . . . ." *See* TEX. REV. CIV. STAT. ANN. art. 4632 (1960), *now* TEX. FAMILY CODE § 3.60 (1969), which provides for a sixty-day waiting period in Texas.

[3] *See* Feuquay v. Industrial Comm., 107 Colo. 336, 111 P.2d 901 (1941).

[4] In Beeler v. Beeler, 218 S.W. 553 (Tex. Civ. App.—El Paso 1920), it was first held that the statutory waiting period is "mandatory, and compliance with its terms cannot be waived or dispensed with." *Id.* at 553. *See also* Givens v. Givens, 304 S.W.2d 577 (Tex. Civ. App.—Dallas 1957); Ingram v. Ingram, 249 S.W.2d 86 (Tex. Civ. App.—Galveston 1952).

[5] Coleman v. Coleman, 20 S.W.2d 813 (Tex. Civ. App.—Eastland 1929).

[6] Perry v. Copeland, 323 S.W.2d 339 (Tex. Civ. App.—Texarkana 1959), *error dismissed*; Buffaloe v. Buffaloe, 210 S.W.2d 429 (Tex. Civ. App.—Dallas 1948), *error dismissed*; Mitchell v. Mitchell, 199 S.W.2d 699 (Tex. Civ. App.—Amarillo 1947).

[7] Gilliam v. Riggs, 385 S.W.2d 444 (Tex. Civ. App.—Beaumont 1964), *error dismissed* (residence requirements falsely alleged); Martinez v. Martinez, 343 S.W.2d 734 (Tex. Civ. App.—Eastland 1961) (allegation of residence omitted); *see* Aucutt v. Aucutt, 62 S.W.2d 77 (Tex.

Mexican Divorce Decrees. In *Schacht v. Schacht*[8] the Dallas court of civil appeals rendered the first substantial Texas opinion concerning the validity of the so-called "Mexican divorce." In *Schacht* the husband had hired a lawyer to arrange for the Mexican divorce proceedings. He had obtained no consent from his wife and she was not represented in the proceeding; nor was the wife served with citation or notice or afforded an opportunity to appear and defend the divorce action. The husband admitted that he had not resided in Mexico for six months although he had lived there, for the purpose of bringing the divorce action, while he was working in El Paso. A subsequent wife of the husband brought an action in the Texas court to annul their marriage on the ground that the Mexican divorce was void and thus the husband was still married to the first wife. The court of civil appeals affirmed the trial court's order decreeing annulment.

It is important to note initially that since no effort was made to prove the law of Mexico (Chihuahua) the Texas court applied the presumption that the law of other jurisdictions is the same as that of Texas.[9] Because of the lack of notice to the wife[10] and the absence of a bona fide domicile by the husband in Mexico, the court held that the divorce decree was a nullity. Several points in the court's decision should be noted. The court correctly noted that the full faith and credit clause of the Federal Constitution[11] is inapplicable to a judgment of a foreign court, but even had the divorce decree been of a sister state it would not have been entitled to enforcement in Texas absent the necessary jurisdictional basis, namely a bona fide domicile.[12] It seems clear that the husband in *Schacht* did not establish a bona fide domicile in Mexico since he admittedly went there only "to get [his] divorce;"[13] thus the Mexican court was without jurisdiction to render the divorce decree. The Texas court, however, held that the husband had not obtained a valid divorce "for the simple reason that he admittedly did not establish legal residence in Mexico, only remaining there less than six months."[14] It is submitted that the court erred, even under the presumption that the laws of Mexico are the same as those of Texas, in applying the residency requirement of article 4631[15] for the purpose of determining the jurisdiction of the Mexican court. As noted earlier,[16] the Texas courts have held that the required period of residency is not jurisdictional; this judicial attention should not so much be on the length of the residence in Mexico,

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Comm'n App. 1933), *opinion adopted*, holding that the twelve-month residential requirement of TEX. REV. CIV. STAT. ANN. art. 4631 (1960), *now* TEX. FAMILY CODE § 3.21 (1969), was not intended to be essential to invoke the jurisdiction of the court but was intended only to specify the qualifications of the petitioners in an action for divorce.

[8] 435 S.W.2d 197 (Tex. Civ. App.—Dallas 1968).

[9] *See* Ross v. Beall, 215 S.W.2d 225 (Tex. Civ. App.—Texarkana 1948), *error ref. n.r.e.*; 21 TEX. JUR. 2D *Divorce & Separation* § 427, at 57 (1961).

[10] TEX. R. CIV. P. 109.

[11] U.S. CONST. art. IV, § 1.

[12] Williams v. North Carolina, 325 U.S. 226 (1945).

[13] 435 S.W.2d at 202.

[14] *Id.*

[15] TEX. REV. CIV. STAT. ANN. art. 4631 (1960), *now* TEX. FAMILY CODE § 3.21 (1969).

[16] *See* note 7 *supra*, and accompanying text.

but rather the existence of the party's intention to stay in the country permanently or at least indefinitely. A proper reading of the *Schacht* decision should focus, therefore, upon the fact that the Juarez court did not require the issuance of notice to the absent spouse nor the submittance of an affidavit that the husband did not know the whereabouts of the absent spouse.

Custody Decrees. Although it is firmly established that a custody decree of a sister state is entitled to full faith and credit in Texas,[17] the apparent readiness of some Texas courts to find a "change of conditions"[18] renders the credit to be given such decrees somewhat illusory. While the Texas supreme court has been slow to find such changed conditions, the lower courts have too often ignored the guidelines of the higher court. In *Dohrmann v. Chandler*[19] the court of civil appeals affirmed the trial court's judgment awarding custody to the mother based upon a finding of changed conditions even though only two months had passed since the original North Dakota decree had been rendered. In a well-reasoned dissent[20] it was argued that the facts as set out in the record were not legally sufficient to show a material change in conditions since the rendition of the North Dakota decree. The dissent pointed out that the majority finding of changed circumstances could not be reconciled with prior decisions of the Texas supreme court.[21]

In *Knowles v. Grimes*[22] the Supreme Court of Texas again stated its policy guidelines for the determination of materially changed circumstances. The custody of the child had previously been awarded to the paternal aunt and uncle by an Alabama decree. In a suit by the mother to obtain custody of the child the Texas trial court held that materially changed circumstances had not been shown and that the parties must abide by the Alabama judgment. The court of civil appeals reasoned that the Alabama court must have established the unfitness of the natural mother and that, based on the presumption favoring custody of the child by the natural parent and the stipulations by the attorneys that the mother was not unfit, a material change of conditions had been shown and awarded custody to the mother.[23] In reversing, the Texas supreme court held that the essential showing of changed circumstances "was not supplied by the . . . forbearance of counsel . . . in not attacking the character or motives of the [mother] in the Texas hearing. Mrs. Grimes did not, therefore, overcome the bar of res judicata of the Alabama judgment and, such being

[17] Bukovich v. Bukovich, 399 S.W.2d 528 (Tex. 1966); Short v. Short, 163 Tex. 287, 354 S.W.2d 933 (1962).

[18] *See* TEX. REV. CIV. STAT. ANN. art. 4639(c) (1960).

[19] 435 S.W.2d 232 (Tex. Civ. App.—Corpus Christi 1968).

[20] *Id.* at 237.

[21] *Id.* at 239. The dissent noted that the grounds upon which the majority found a change of conditions (the non-custodian parent's remarriage, the child's adaption to living with the non-custodian parent, and the prospective improvement of the non-custodian parent) have been expressly declared insufficient to support a change of custody. *Id.* at 240.

[22] 437 S.W.2d 816 (Tex. 1969).

[23] Grimes v. Knowles, 431 S.W.2d 602 (Tex. Civ. App.—Tyler 1968).

the case, presumptions favorable to her as a natural parent did not arise."[24] More importantly, the court firmly restated its policy guidelines by stating that "[a]s a matter of public policy, there should be a high degree of stability in the home and surroundings of a young child, and, in the absence of materially changed conditions, the disturbing influence of relitigations should be discouraged."[25] Stricter adherence to this guideline, despite its vagueness, could result in a substantial decrease in protracted and confused litigation and lend weight to the principle of giving full faith and credit to sister-state custody decrees.

Enforcement of Sister-State Judgments Under Part IV of the Texas Uniform Reciprocal Enforcement of Support Act. While the normal procedure for the enforcement of sister-state judgments is to bring a new action upon the original judgment and seek to have the judgment accorded full faith and credit in the new state, the federal judicial code provides a simplified procedure for the registration of federal judgments sought to be enforced in a second federal court.[26] A similar procedure has been proposed in which states would allow the registration of foreign judgments in the courts of that state.[27] Although the proposal has been adopted in Texas only to a limited extent,[28] the Uniform Reciprocal Enforcement of Support Act (URESA) embodied in article 2328b-4[29] allows the registration of a "foreign support order" in the Texas courts. The case of *Adams v. Adams*[30] demonstrates that considerable confusion continues to exist among attorneys and trial courts concerning the scope and procedure of the URESA. In *Adams* the divorced wife had petitioned in the domestic relations court for the enforcement of child support decrees rendered in Louisiana and Arkansas. The court dismissed the petition on the husband's plea to the court's jurisdiction which alleged that the foreign judgments were in the nature of a debt and thus the enforcement action should have been brought in the district court.[31] The court of civil appeals reversed, holding that the district court and the domestic relations court have concurrent jurisdiction over petitions to enforce child support orders. The court further held that the Louisiana judgment, although it mentioned the word "alimony," was clearly an order fixing support for the children and not alimony for the divorced wife, which is specifically excluded from the purview of the URESA.[32]

Two interesting aspects of the *Adams* decision should be noted. First, the court of civil appeals did not decide the question of whether the Arkansas decree was a judgment or merely a docket entry in the Arkansas

[24] 437 S.W.2d at 818.
[25] *Id.* at 817.
[26] 28 U.S.C. § 1963 (1964).
[27] UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT § 2 (1964 version).
[28] TEX. PROB. CODE ANN. §§ 95-100 (1956), *as amended*, TEX. PROB. CODE ANN. §§ 97-99 (Supp. 1969).
[29] TEX. REV. CIV. STAT. ANN. art. 2328b-4 (Supp. 1969).
[30] 441 S.W.2d 917 (Tex. Civ. App.—Houston 1969).
[31] TEX. REV. CIV. STAT. ANN. art. 2338-16, § 3 (Supp. 1969).
[32] *Id.* art. 2328b-4, §§ 34-37.

court. Thus, the determination of what constitutes a "foreign support order" is not always easily made. Second, and of greater importance, the court held that two Louisiana money judgments, based on the original custody and child support decree, for delinquencies in child support payments were not "decrees fixing support" and therefore not within the jurisdiction of the domestic relations court under the URESA.[33] The two judgments, therefore, were ineligible for the simplified registration procedure and the wife should have brought an action in the district court to enforce the judgments under the full faith and credit requirement. The court's interpretation of the concept of "foreign support orders" may be questioned in light of the desired purpose of the statute, namely the simplification of the enforcement procedure for wives and children entitled to support under sister-state judgments. The fact that the arrears in the support payments have been reduced to an exact money judgment should not preclude the enforcement of the support obligation under the simplified procedure.

Original Judgments. The application of the Texas long arm statute presented a case of first impression to be decided by the court of civil appeals in *Collins v. Mize*.[34] The plaintiff brought an action to recover real estate commissions against the seller. Jurisdiction over the nonresident defendant was obtained by invoking section 6 of the Texas long arm statute and notice was served upon the defendant through the Texas Secretary of State.[35] This section provides:

> When any corporation . . . or natural person becomes a non-resident of Texas . . . after a cause of action shall arise in this State, but prior to the time the cause of action is matured by suit in a court of competent jurisdiction in this State, when such corporation . . . or natural person is not required to appoint a service agent in this State, such corporation . . . or natural person may be served with citation by serving a copy of the process upon the Secretary of State of Texas . . . .[36]

The plaintiff alleged, and it was not disputed, that the defendant was a resident of the state of Texas at the time the cause of action arose but had established residence in Oklahoma prior to the time the action was filed. The court found, however, that the plaintiffs failed to allege or prove that the nonresident defendant was not required to appoint a service agent in this state. The court held that "[t]he absence of this allegation renders the allegation insufficient to confer jurisdiction under Section 6"[37] and therefore service upon the Secretary of State was not sufficient to invoke jurisdiction over the defendant. The court pointed out that although the allegations were insufficient to comply with the provisions

[33] 441 S.W.2d at 920.
[34] 436 S.W.2d 938 (Tex. Civ. App.—Amarillo 1968), *rev'd*, 447 S.W.2d 674 (Tex. 1969).
[35] TEX. REV. CIV. STAT. ANN. art. 2031b, § 6 (1964).
[36] *Id.*
[37] 436 S.W.2d at 942.

of section 6, they were sufficient to invoke jurisdiction under section 3.[38] The court held, however, that jurisdiction could be maintained under that section only if section 6 were shown to be unavailable.

The Texas supreme court recently reversed the decision of the court of civil appeals and held that the plaintiff had obtained personal jurisdiction over the defendant under section 6 of the long arm statute.[39] The supreme court briefly rejected the reasoning of the lower court and held that if the defendant desired to challenge the trial court's jurisdiction then "he assumed the burden of proving that he came within a Texas law requiring his appointment of an agent."[40] The supreme court further rejected the reasoning of the lower court that section 3 could not constitute the basis of jurisdiction until section 6 had been shown to be unavailable. Thus, the trial court in the present case had jurisdiction over the nonresident defendant irrespective of the sufficiency of the allegations supporting section 6. The supreme court also disposed of the defendant's claim that the Texas court lacked sufficient "minimum contacts" under the "appropriate federal constitutional standards."[41] The court could "see no problem of due process when the forum state is determining a controversy arising out of a transaction consummated in the forum state at a time when the defendant himself was a resident of the forum state."[42] *Collins v. Mize* is the first reported case to expressly deal with the substance of section 6 of the long arm statute. Of three prior opinions of the United States district courts considering the section, two have held that section 6 does not apply retroactively to causes of action which arose before the effective date of the statute.[43] The third decision involved section 6 only by implication.[44]

In a less significant decision[45] the Dallas court of civil appeals interpreted the Texas long arm statute with respect to the doctrine of minimum contacts. Although the fact situation under which the action arose was not clearly explained in the court's opinion, the court restated the well-established rule that absent the existence of certain minimum contacts a Texas court may not invoke in personam jurisdiction over a nonresident defendant. The court went on to warn that the long arm statutes have not

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[38] Any foreign corporation . . . or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation . . . or nonresident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State . . . .

TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (1964).

[39] Collins v. Mize, 447 S.W.2d 674 (Tex. 1969).

[40] *Id.* at 675.

[41] *Id.*

[42] *Id.* at 675.

[43] Rozell v. Kaye, 201 F. Supp. 377 (S.D. Tex. 1962); Rozell v. Kaye, 197 F. Supp. 733 (S.D. Tex. 1961).

[44] Dixie Carriers, Inc. v. National Maritime Union of America, 35 F.R.D. 365 (S.D. Tex. 1964).

[45] Bodzin v. Regal Accessories, Inc., 437 S.W.2d 655 (Tex. Civ. App.—Dallas 1969).

eliminated all of the traditional due process arguments against the wide-open application of state claims to jurisdiction over nonresident defendants and that all vestiges of *Pennoyer v. Neff*[46] have not disappeared. To emphasize its reasoning the court quoted from *Hanson v. Denckla*: "But it is a mistake to assume that this trend [away from *Pennoyer v. Neff*] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him."[47] The court's opinion, especially when considered in conjunction with other recent decisions,[48] indicates that the scope of article 2031b may not be as broad as some might suppose.[49]

Forum Non Conveniens. In *Cole v. Lee*[50] the Dallas court of civil appeals made a controversial contribution to the scant number of cases dealing with the doctrine of *forum non conveniens* in Texas. Mrs. Cole and her husband, Mr. Lee, executed a property settlement agreement in the Virgin Islands prior to their divorce there. The next year Mrs. Cole brought an action against Lee in Texas to set aside the settlement agreement and an action to try title to recover her one-half interest in the Texas real estate. Mrs. Cole alleged that Lee had fraudulently misrepresented and concealed the extent of the Texas property and had thereby received more than one-half of the community estate. The husband, after making first a special and then a general appearance in the Texas court,[51] moved that the action be dismissed under the doctrine of *forum non conveniens*. The trial court dismissed the action and the wife appealed to the court of civil appeals alleging (1) that the doctrine of *forum non conveniens* was not applicable to in rem actions, (2) that the court was obliged to retain jurisdiction of the action under article 1975[52] of the Texas statutes, (3) that the action involved the Texas court since it was the court most suited to determine the intricate questions of Texas community property and real estate law, and (4) that to dismiss the action would be to preclude the wife from the only available forum.

[46] 95 U.S. 714 (1878); *cf.* McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[47] 357 U.S. 235, 251 (1958).

[48] *See, e.g.*, Sun-X Int'l Co. v. Witt, 413 S.W.2d 761 (Tex. Civ. App.—Texarkana 1967), *error ref. n.r.e. But see* Crothers v. Midland Prods. Co., 410 S.W.2d 499 (Tex. Civ. App.—Houston 1967).

[49] *See* VanDercreek, *Texas Civil Procedure, Annual Survey of Texas Law*, 22 Sw. L.J. 174 (1968).

[50] 435 S.W.2d 283 (Tex. Civ. App.—Dallas 1968).

[51] The husband was personally served in the Virgin Islands. Whether he was before the Texas court for personal jurisdiction is not entirely clear. He first entered a special appearance in the trial court alleging that the court had no jurisdiction over his person or property. A month later an amended special appearance was filed alleging that the court should dismiss under the doctrine of *forum non conveniens*. The trial court considered the amendment to constitute a general appearance. The court of civil appeals, however, noted that the "[a]ppellee made only a limited appearance and the Texas court had no jurisdiction to render judgment against him setting aside those portions of the settlement agreement which were unsatisfactory to appellant, or enforcing the remaining portions, or for accounting, or for damages, or even for costs, all of which were causes *in personam*." *Id.* at 287.

[52] "Persons claiming a right to or interest in property in this State may bring . . . actions against non-residents of this State . . . who claim an adverse . . . interest in . . . said property . . . ." TEX. REV. CIV. STAT. ANN. art. 1975 (1964).

The court of civil appeals noted, with respect to the wife's first allegation, that the action was primarily transitory in nature and not in rem. Although the action contained a claim to the Texas land, the court held that Mrs. Cole could not prevail unless and until she succeeded in setting aside the settlement agreement.[53] The court then acknowledged that under article 1975 the trial court possessed jurisdiction over the action but held that the court "was not prohibited thereby from declining to exercise it."[54] Although the question appears to be one of first impression in Texas, the wife reasoned that since the disposition of land is within the exclusive jurisdiction of the courts of the state in which the land is located such jurisdiction should be considered to be mandatory.[55] Support for this position may be found in *H. Rouw Co. v. Railway Express Agency*[56] in which it was held that a statute providing that a foreign corporation which has a permit to do business in Texas may maintain actions in the courts of the state invokes mandatory jurisdiction upon such courts.

With respect to the wife's contention that the intricacies and peculiarities of Texas community property and real estate law require the Texas courts to decide the issues involved, the court held that "[t]he Virgin Islands courts are in a better position than the Texas courts to resolve the issue which is prerequisite to the determination of the question of title to the real estate; i.e., the issue of jurisdiction to vacate the property settlement agreement."[57] In support of the wife's position it may be argued that the issue of fraud in the procurement of a settlement agreement is one involving general principles of jurisprudence which the Texas court could easily determine. On the other hand, the Virgin Islands court would be faced with "dissimilarity of laws" in determining questions of Texas community property law. The Virgin Islands has no statutes similar to the community property law of Texas and, on the contrary, its statutes provide that upon partition the property of the parties may be divided as the court determines is "just and proper."[58]

To support the wife's claim that to dismiss the action would be to preclude her from the only available forum, it was pointed out that the Virgin Islands courts could not hear the action since the suit would be barred by the two-year statute of limitations.[59] The court of civil appeals stated that there was no evidence of such a statute in the record and the Texas court was not obliged to take judicial notice of such a statute absent a request by the attorneys for the wife in the trial court.[60] The court further noted that "there is no burden on a movant in these circumstances to show affirmatively that his adversary's claim is not barred in another

[53] 435 S.W.2d at 286.

[54] *Id.* at 287.

[55] Hardy v. Beatty, 84 Tex. 562, 19 S.W. 778 (1892), was relied upon by the wife. The court of civil appeals held that that case stands only for the proposition that the Texas court has jurisdiction to adjudicate title to Texas land as against a non-resident defendant, and not that the court *must* exercise such jurisdiction. 435 S.W.2d at 287.

[56] 154 S.W.2d 143 (Tex. Civ. App.—El Paso 1941), *error ref.*

[57] 435 S.W.2d at 288.

[58] VIRGIN ISLANDS CODE tit. 16, ch. 3, § 109 (1964).

[59] *Id.* tit. 5, ch. 3, § 31(5) (1964).

[60] TEX. R. CIV. P. 184a.

jurisdiction.'"[61] No authority was cited for this proposition, however, and no prior Texas decision has determined where the burden of proof lies when the doctrine of *forum non conveniens* is invoked.

It would appear that the Texas supreme court missed an excellent opportunity to clarify the application of the doctrine of *forum non conveniens* in the Texas courts when it chose not to grant the writ in *Cole v. Lee*. The decision demonstrates the harsh results which can occur as a consequence of an apparently incorrect application of the doctrine. It is submitted that a proper application of the doctrine of *forum non conveniens* would clearly have resulted in a denial of the motion to dismiss in *Cole*.[62]

Res Judicata. In *Boman v. Gibbs*[63] the court of civil appeals decided a rather complex case involving the extent of the doctrine of res judicata and the policy of enjoining a litigant from pursuing a claim in a court of a foreign nation. Under the will of his predeceased wife, the husband, who was also deceased prior to the initiation of the present litigation, was left a life estate in certain real property located in the Philippines. The probate proceeding relative to the wife's property was still pending in the Philippines when her heirs instituted an action against the husband in a Texas court to construe her will. This action resulted in an agreed judgment in which the husband renounced his life estate, thereby vesting the entire interest in the wife's estate in the wife's other heirs. When the heirs of the husband asserted ownership of the Philippine land in the probate proceeding in the Philippine court, the heirs of the wife instituted the principle suit in the Texas court to enjoin the administrators of the husband's estate from prosecuting the claim in the Philippine court. The wife's heirs asserted that the prior agreed Texas judgment was res judicata as to the husband's (and thus the husband's heirs') claims to the Philippine real estate. The court of civil appeals affirmed the denial of the injunction on the ground that the prior agreed judgment "did not, and could not, adjudicate the title, and rights thereto, of the property located in the Philippines. That court did have jurisdiction over the persons there involved but did not have jurisdiction over the subject matter—the Philippine property."[64]

Similarly, the court further noted that an injunctive order entered by the trial court in the present case would not be binding on the husband's administrators in the Philippine court. The court's decision not to grant the injunction may have been based more upon practicalities, and a recognition that the Texas court would be powerless to enforce such a decree, than upon the substantive law of jurisdiction. One judge dissented to the denial of the motion for rehearing noting that, on the basis of such cases as *McElreath v. McElreath*,[65] the Texas court "having acquired in

[61] 435 S.W.2d at 288; *see* Flaiz v. Moore, 359 S.W.2d 872 (Tex. 1962).

[62] *See generally* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

[63] 443 S.W.2d 267 (Tex. Civ. App.—Amarillo 1969), *error ref. n.r.e.*

[64] *Id.* at 271.

[65] 162 Tex. 190, 345 S.W.2d 722 (1961), *noted in* 16 Sw. L.J. 516 (1962). In this case the Texas supreme court enforced an Oklahoma judgment under principles of comity because both

personam jurisdiction over [the parties] also had jurisdiction to determine the respective interests and rights of those parties in the [estate] irrespective of the location or nature of the properties held by the estate."[66]

II. Choice of Law

Characterization. In *Francis v. Herrin Transportation Co.*[67] the Texas supreme court faced the "procedure-substance" dichotomy in the determination of choice of law questions. The plaintiff brought suit in the Texas court for the wrongful death of her husband in a Louisiana automobile accident which had occurred thirteen months earlier. She contended that the action was authorized under Texas article 4678, which permits a wrongful death action to be brought in Texas if the state where the wrongdoing occurred gives the right to maintain such an action.[68] Although Louisiana law provides for the maintenance of a wrongful death action, the statute creating the right of action provides that "[t]he right to recover . . . shall survive for a period of one year from the death of the deceased."[69] In Texas, however, wrongful death actions are governed by a two-year limitation period.[70] Pursuant to the defendant's motion for dismissal the trial court took judicial notice of the Louisiana statute and dismissed the suit. The court of civil appeals affirmed the trial court's dismissal holding that the action could not be brought under article 4678 since that article requires a *right* to maintain the action in the state where the action arose and in the present case any *right* to bring the action in Louisiana had been extinguished by the operation of the statute of limitations in that state.[71] On writ of error to the Texas supreme court the decision of the court of civil appeals was reversed.[72]

The supreme court, after pointing out that the petitioner had instituted an action in the Louisiana court within the one-year period, stated the principle issue to be whether the one-year statute of limitations was prescriptive or peremptive in nature. "The difference between prescription and peremption is that the former simply bars the remedy whereas, in the latter, time is made of essence of the right granted and a lapse of the statutory period operates as a complete extinguishment of the right."[73] Significantly, the court looked to the Louisiana law for the determination of whether the article 2315 statute of limitations is peremptive or prescriptive; *i.e.*, procedural or substantive. Based upon its examination of the interpretation accorded to article 2315 by the Louisiana courts, the Texas supreme court held that although the statute is considered to be

parties had been before the Oklahoma court in spite of the fact that the land adjudicated was located in Texas.

[66] 443 S.W.2d at 274.

[67] 432 S.W.2d 710 (Tex. 1968).

[68] Tex. Rev. Civ. Stat. Ann. art. 4678 (1952).

[69] La. Civ. Code art. 2315 (Supp. 1970).

[70] Tex. Rev. Civ. Stat. Ann. art. 5526(7) (1958).

[71] Francis v. Herrin Transp. Co., 423 S.W.2d 610 (Tex. Civ. App.—Houston 1968), *discussed in* Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 23 Sw. L.J. 159, 162-63 (1969).

[72] 432 S.W.2d 710 (Tex. 1968).

[73] Succession of Pizzillo, 223 La. 328, 65 So. 2d 783, 786 (1953).

peremptive in nature, the suit filed by the petitioner in the Louisiana court tolled the running of the statute and the plaintiff's action should have been allowed in the Texas district court under article 4678. Thus, the Texas court, contrary to the generally applied rule that questions of characterization are determined by the application of the law of the forum, yielded to the law of Louisiana in the present instance.

It is submitted that the court in *Francis* may have reached the right decision, but by improper reasoning. The United States Court of Appeals for the Fifth Circuit, applying Texas law, demonstrated the line of reasoning which the court in *Francis* should have followed. In *Gaston v. B. F. Walker, Inc.*,[74] decided only two weeks before the Texas supreme court's decision in *Francis*, the federal court held that under established Texas law "where the staute [*sic*] creates a right and also incorporates a limitation upon the time within which the suit is to be brought, the limitation qualifies the right so that it becomes a part of the substantive law rather than procedural . . . ."[75] Thus the court, having characterized the issue as substantive under Texas law, looked to the law of Louisiana to determine the interpretation of article 2315. While there is Texas authority to the effect that "[although] the courts of one state are not bound by the construction placed on the statutes of another state by its courts, it is always well to look to the decisions of that state in construing one of its statutes . . . ."[76] It is doubtful that this approach, at least with respect to the issue of characterization, is in accord with the Proposed Official Draft of the *Restatement (Second) of Conflict of Laws*.[77] The *Restatement* specifically provides that the determination of whether a statute bars the right or only the remedy is governed by the law of the forum.[78]

III. Federal-State Relations

Although the survey period did not see any significant developments in the area of federal-state relations, several cases should be noted as demonstrating the plight of the federal court which is forced to apply state law although that law may be in need of change. In such cases the court is clearly "*Erie*-bound" to apply the state law,[79] even though its application is not always without reluctance. In *Castilleja v. Southern Pacific Co.*,[80] involving a wrongful death action, the appellant alleged that the trial court should have instructed the jury "that under Texas law it is presumed that the injured person was exercising due care for his own safety when the accident occurred."[81] The court of appeals held that in light of

[74] 400 F.2d 671 (5th Cir. 1968). The facts in *Gaston* were almost identical to those in *Francis*.
[75] *Id.* at 673, quoting from California v. Copus, 158 Tex. 196, 201, 309 S.W.2d 227, 231 (1958), 67 A.L.R.2d 758 (1958).
[76] Penny v. Powell, 162 Tex. 497, 500, 347 S.W.2d 601, 603 (Tex. 1961), following Vowell v. Manufacturers Cas. Ins. Co., 229 La. 798, 86 So. 2d 909 (1956).
[77] Restatement (Second) of Conflict of Laws § 143 (Prop. Off. Draft, pt. I, 1967).
[78] *Id.* comment *b*; *see* Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 23 Sw. L.J. 159, 164 (1969).
[79] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
[80] 406 F.2d 669 (5th Cir. 1969).
[81] *Id.* at 674.

the only Texas case on the point[82] the lower court correctly refused the requested instruction. The court noted that "[a]lthough a contrary conclusion is suggested by learned commentary and respectable authority from elsewhere . . . we are required by *Erie* to take the state law as we find it."[83] Similarly, in *Sheppard Federal Credit Union v. Palmer*,[84] the trial court had not followed the Texas presumption in favor of the creditor's good faith. In reversing on the basis of "plain error," the Fifth Circuit held that:

> The criterion [of whether justice has miscarried] is certainly not whether the court approves or does not disapprove the result of the case. In many instances, such a standard would permit the court to substitute its own policy judgment for that of the state legislature. Indeed, in the present case, as a matter of policy, this court does not disapprove the result in the district court because '[t]he . . . decision to throw the burden of proof on the debtor is debatable.' However, we are not at liberty to accept or reject the legislative policy of the state of Texas; we are bound to apply state law as it is, not as we might wish that it were.[85]

The displeasure of the Fifth Circuit with the decision of the Texas court in *United Services Life Insurance Co. v. Delaney*[86] found outlet in a decision involving issues similar to those in the *Delaney* litigation.[87] In *Seguros Tepeyac, S. A., Compania Mexicana de Seguros Generales v. Jernigan*[88] the court considered the effectiveness of the "*Culberson* doctrine" which requires that, in order for an insured to maintain an action against the insurer for a judgment suffered after the insurer previously refused an offer to settle for a lesser amount, the insured must have actually paid to the injured party the amount by which the judgment exceeds the policy coverage.[89] The dissatisfaction of the Fifth Circuit with the rule of *Culberson* was evident in Judge Goldberg's opinion and the court seemed to express some question as to whether the rule is still good law in Texas. Nevertheless, the court held that it was obliged to accept *Culberson* and only "hope that the Supreme Court of Texas will some day toll the knell of *Culberson's* parting day and grant it, at long last, a graceful demise."[90]

In *Huth v. Southern Pacific Co.*[91] it was argued that the federal court need not follow state statutes which, although never formally repealed, have become "ancient" through disuse. The court held, however, that

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[82] Armstrong v. West Texas Rig Co., 339 S.W.2d 69, 74 (Tex. Civ. App.—El Paso 1960).

[83] 406 F.2d at 675.

[84] 408 F.2d 1369 (5th Cir. 1969).

[85] *Id.* at 1371-72 (footnotes omitted).

[86] 396 S.W.2d 855 (Tex. 1965), *discussed in* United Serv. Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir. 1964).

[87] Judge Goldberg began his opinion in the present case by stating: "We take the *Erie* route once again to visit our old friends in Texas Jurisprudence, *Culberson* and *Linkenhoger*." Seguros Tepeyac, S.A. Compania Mexicana de Seguros Generales v. Jernigan, 410 F.2d 718, 719 (5th Cir.), *cert. denied*, 396 U.S. 905 (1969) (footnotes omitted); *see* Linkenhoger v. American Fid. & Cas. Co., 152 Tex. 534, 260 S.W.2d 884 (1953); Universal Auto. Ins. Co. v. Culberson, 126 Tex. 282, 86 S.W.2d 727, *rehearing denied*, 87 S.W.2d 475 (1935).

[88] 410 F.2d 718 (5th Cir.), *cert. denied*, 396 U.S. 905 (1969).

[89] *See* Universal Auto. Ins. Co. v. Culberson, 126 Tex. 282, 86 S.W.2d 727, *rehearing denied*, 87 S.W.2d 475 (1935).

[90] 410 F.2d at 725.

[91] 293 F. Supp. 732 (S.D. Tex. 1968).

Texas articles 1151[92] and 6327[93] "might be ancient, but they are still the law in Texas and have never been repealed . . . ."[94] Thus the federal court was obligated to follow the statutes.

The frequently re-occurring problem of the extent to which a federal court will look to state law to supplement its application of a federal statute arose in *Mendiola v. United States*.[95] Mendiola brought an action against the United States under the Federal Tort Claims Act[96] four years after the injury occurred. It was argued that the action was not barred by the federal provision's two-year statute of limitations since the action did not "accrue" under Texas law until the final determination of Mendiola's state workmen's compensation suit. Mendiola relied upon the Texas rule that if the injured party elects to proceed initially against the employer's compensation carrier rather than the negligent party, the Texas statute of limitations is tolled pending the outcome of the workmen's compensation action.[97] Relying principally upon *Quinton v. United States*[98] the Fifth Circuit affirmed the trial court's dismissal of the action holding that the determination of when an action accrues is a matter of federal law. The court noted that the Federal Tort Claims Act contains no tolling provision and does not either expressly or by implication incorporate tolling provisions under state law. Quoting from *Quinton*, the court noted that "if the various states' rules could severally determine when a claim accrued against the Government under Section 2401(b), the uniformity which Congress sought by enacting that section would be, for all practical purposes a goal impossible of attainment."[99]

[92] TEX. REV. CIV. STAT. ANN. art. 1151 (1963). The statute was last applied in James v. Missouri-Kan.-Tex. R.R., 182 S.W.2d 921 (Tex. Civ. App.—Waco 1944), *error ref.*

[93] TEX. REV. CIV. STAT. ANN. art. 6327 (1926). The statute was last applied in Gulf, C. & S.F. Ry. v. Woods, 262 S.W. 229 (Tex. Civ. App.—Austin 1924).

[94] 293 F. Supp. 732, 733 (S.D. Tex. 1968).

[95] 401 F.2d 695 (5th Cir. 1968).

[96] 28 U.S.C. § 2401(b) (Supp. IV, 1969).

[97] TEX. REV. CIV. STAT. ANN. arts. 8306, 8307, § 6a (1967).

[98] 304 F.2d 234 (5th Cir. 1962).

[99] 401 F.2d at 698, quoting from Quinton v. United States, 304 F.2d 234, 236 (5th Cir. 1962).