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CONFLICT OF LAWS—ONE INCH FORWARD, A HALF INCH BACKWARD

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During the past year, Illinois courts have resolved questions of conflict of laws with increasing frequency. In this Article, Professor Polelle critically analyzes these Illinois conflicts decisions, with particular emphasis on developments affecting the law of torts, contracts, and sister state judgments, and examines difficulties and ambiguities arising from the courts' decisions. He concludes that the difficulties are largely the result of important doctrinal changes effected within the conflicts area by recent decisions, and predicts their ultimate resolution in future decisions, as Illinois courts continue to incorporate more modern principles into decisions within the conflicts area.

IN the last survey of Illinois conflict of laws, Professor Conviser characterized the development in this area of law as inching forward slowly.[1] This past year the Illinois courts have encountered conflicts problems with even greater frequency. The evaluation of doctrinal changes wrought by this encounter is one that might better be characterized as a process of one inch forward and a half inch backward. The modern rule of validation has made its tentative appearance in Illinois law alongside the traditional Illinois conflicts rule for contract cases. However, application of the "most significant relationship" principle in the torts area has been at least temporarily stifled by ambiguity in the 1970 Illinois Supreme Court opinion, *Ingersoll v. Klein*,[2] which introduced the principle into Illinois jurisprudence. Any doctrine relating to the enforceability of sister state judgments in Illinois should be updated before it causes future problems. But all in all, in any case, the law slowly works itself free of largely nineteenth-century doctrine.

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1. Conviser, *Conflict of Laws, 1972-1973, Survey of Illinois Law*, 23 DEPAUL L. REV. 89 (1973).

2. 46 Ill. 2d 42, 262 N.E.2d 593 (1970).

TORT LAW

The preference of Illinois courts for a result-oriented methodology is best seen in the sequel to *Ingersoll*, a 1970 landmark decision that abandoned the traditional Illinois approach in torts cases. The traditional approach, or *lex loci delicti*, required that the law of the place where the tort was committed be used to resolve conflicts cases in the tort field.[3] Instead, the Illinois Supreme Court in *Ingersoll* adopted the *Restatement (Second)* approach, which requires that in tort cases the law of the jurisdiction with the most significant relationship to the occurrence be used.[4] Little noticed at the time was the last paragraph of the *Ingersoll* opinion and the pregnant admonition it contained.

> We are aware that the views expressed herein may create hardship in other cases filed in reliance upon the doctrine of *lex loci delicti*. In such cases where hardship would result, the rules expressed herein shall not apply. See: *Molitor v. Kaneland Com. Unit Dist.*, 18 Ill. 2d 11, 27 and cases cited therein.[5]

This cryptic paragraph has been eagerly seized upon by the Illinois apppellate court in the last year as a way of providing relief for Illinois residents who are plaintiffs in multistate personal injury cases.

In *Cardin v. Cardin*,[6] a daughter drove her mother in the daughter's automobile on a short trip to Wisconsin in May, 1967. On the way back to Illinois, where both parties were residents, the daughter-driver crashed into another vehicle on the Wisconsin side of the border. Subsequently the mother sued the daughter in Illinois for personal injuries caused by the alleged negligent driving of the daughter. At trial the lower court granted a directed verdict against the complaint on the ground that the applicable Illinois guest statute required the plaintiff to allege and prove that the host-driver committed wilful and wanton conduct. The jury returned a verdict for the defendant-daughter. The appellate court reversed this jury

3. RESTATEMENT OF CONFLICT OF LAWS §§ 377-383 (1934); 2 J. BEALE, THE CONFLICT OF LAWS § 378.2, at 1289 (1935). For a discussion of the development of the *lex loci delecti* doctrine, *see* CAVERS, THE CHOICE-OF-LAW PROCESS 5-9 (1965).

4. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) [hereinafter cited as RESTATEMENT (SECOND)].

5. 46 Ill. 2d at 49, 262 N.E.2d at 597.

6. 14 Ill. App. 3d 82, 302 N.E.2d 238 (1st Dist. 1973).

verdict on the ground that Wisconsin law, rather than Illinois law, should have been applied. The Wisconsin law required only proof of negligence, since Wisconsin had no guest statute and, unlike Illinois, employed the doctrine of comparative negligence rather than contributory negligence. The same factual pattern involving the same states occurred a few months later in *Amundson v. Astrin.*[7] The trial court, using the most significant relationship test, applied Illinois law. Again the appellate court reversed and sent the case back for a new trial under the laws of Wisconsin.

Both courts cited the last paragraph of the *Ingersoll* opinion as a justification for application of the law of the place where the tort was committed, that is, the law of Wisconsin. The *Cardin* court indeed admitted that, but for this last paragraph of the *Ingersoll* opinion, an appellate court would normally be obligated to follow the law in force at the time a case comes up on appeal.[8] Since the Illinois Supreme Court opinion in *Ingersoll* was filed on March 24, 1970, an appellate court in 1973 would of course be obligated to follow the decision of a higher court if that opinion were not limited to prospective application. However, the *Cardin* court accepted the argument of the plaintiff that applying the *Ingersoll Restatement (Second)* approach would cause her a "hardship;" she had acted in reliance upon existing law, the "place-of-tort" rule, when she filed her complaint in December, 1967.[9] The plaintiff also argued that it was not her fault that the trial docket was so crowded that she could not get a trial before *Ingersoll* was decided. In finding the plaintiff's logic impeccable, the *Cardin* court strangely ignored the fact that the appellate and supreme court decisions in the *Ingersoll* case came down well before the plaintiff ever went to trial in the case. Moreover, the *Amundson* court agreed that, under the last paragraph of the Illinois Supreme Court opinion in the *Ingersoll* case, it would be a hardship on the plaintiff to meet the higher Illinois burden of proving wilful and wanton conduct because the change of law in the *Ingersoll* decision was *inherently* a hard-

7. 15 Ill. App. 3d 997, 305 N.E.2d 685 (1st Dist. 1973).

8. People *ex rel.* Baver v. Water Commission, 20 Ill. 2d 139, 144, 169 N.E.2d 350, 353 (1960); People *ex rel.* Eitel v. Lindheimer, 371 Ill. 367, 374, 21 N.E.2d 318, 321 (1939).

9. 14 Ill. App. 3d at 85, 302 N.E.2d at 240.

ship. Yet, in the *Amundson* case, the accident occurred in Wisconsin during February, 1966, and the complaint was filed in May, 1967. Therefore, when the *Amundson* case went to trial in January, 1970, the appellate court decision in the *Ingersoll* case, which applied the *Restatement (Second)* approach, was known to the plaintiff in the *Amundson* case before that Plaintiff ever went to trial. Clearly, in neither the *Cardin* case nor the *Amundson* case was the plaintiff surprised by the *Restatement (Second)* approach. Rather, the change of the law in itself, although it occurred before the plaintiff ever went to trial, was supposed to have worked a hardship.

On the same day that *Amundson* was decided by the fourth division of the First District, the fifth division decided *Naramore v. Colquitt*.[10] In *Naramore* both plaintiff and defendant, who were Illinois residents, became involved in an automobile accident in Kentucky on September 3, 1966. At the time, the plaintiff was a guest passenger in an automobile driven by the host-defendant. In March, 1967, the plaintiff filed suit in Illinois. Kentucky, like Wisconsin, had no guest statute and therefore only required that a guest passenger prove negligence against the host-driver. Illinois law required the application of a guest statute with the higher standard of wilful and wanton conduct. This appellate court reversed a verdict rendered for the defendant under Illinois law and remanded the case for a new trial according to the lower standard of simple negligence under Kentucky law. The *Naramore* court acknowledged that in *Ingersoll* not only the appellate decision, but even the supreme court opinion, had been published between the filing of the original complaint in the *Naramore* case on March 1, 1967, and the subsequent amended complaint filed in August, 1971. It is thus absolutely clear that before the plaintiff in the *Naramore* case ever went to trial, the law in Illinois had been changed from *lex loci delicti* to the *Restatement (Second)* approach of "most significant relationship." Faithful to the strict language of the supreme court *Ingersoll* opinion, the fifth division in *Naramore* refused to accept the plaintiff's argument that the *Ingersoll* decision was really only meant to be applied prospectively. Despite the reference to *Molitor v. Kaneland*

10. 15 Ill. App. 3d 954, 305 N.E.2d 662 (1st Dist. 1973).

Community Unit Dist. No. 302[11] in the *Ingersoll* opinion, the fifth division stated that had the Illinois Supreme Court meant the *Ingersoll* decision to be applied only prospectively, the Illinois Supreme Court was obligated to do so *expressly* under ordinary canons of judicial craftsmanship. Rather, the court in *Naramore* felt bound by the rule that a case is to be decided on the law as it stands when judgment is rendered and not when the suit is brought. Clearly, this rule was adverse to the plaintiff in the *Naramore* case, since it would lead to the conclusion that Illinois law, as the law of the most significant relationship, should be applied. Unable to accept this result, the fifth division seized upon the last paragraph of the Illinois Supreme Court decision in *Ingersoll* as a way of finding for the plaintiff while still not holding the *Ingersoll* decision to be entirely prospective. Yet the fifth division obscurely conceded that the *Ingersoll* opinion had some kind of undefined, limited retroactivity that did not apply to the facts of the *Naramore* case because of hardship.

The fifth division concluded in *Naramore* that *Ingersoll* was to be applied retrospectively as well as prospectively, except in those cases where hardship would result from filing a complaint in reliance upon the *lex loci delicti* rule. The appellate court then found that the plaintiff had suffered hardship because the plaintiff had "placed justifiable reliance on the law of Illinois as it then existed" when the original complaint was filed, and that such reliance "need not be affirmatively proved but can be implied from the attendant circumstances of the case."[12] Apparently, the alleged inferred hardship resulted from the fact that since the plaintiff had presumed at the time of filing the original complaint that Illinois would apply the *lex loci delicti* rule, the plaintiff was deterred from filing suit in Kentucky, which would then have applied its own law of simple negligence. The court also noted that suits for negligence must be commenced within one year from the date of injury under Kentucky law. The gist of the determination of hardship is contained in the following words:

> Consequently, the application of the Illinois law and the requisite increase in the degree of proof necessary to establish liability, coupled with the in-

11. 18 Ill. 2d 11, 163 N.E.2d 89 (1959). In *Molitor*, the Illinois Supreme Court abolished the doctrine of school district tort immunity. However, the decision was given only prospective operation. *See* text accompanying note 16 *infra*.

12. 15 Ill. App. 3d at 959, 305 N.E.2d at 666.

> ability of plaintiff to adjudicate his claim in a favorable forum, effectively prevented plaintiff from recovering for his injuries. These factors constitute a hardship attributable to the placing of reliance on the doctrine of *lex loci delicti* and should exempt plaintiff from the *Ingersoll* holding (citations omitted).[13]

The *Cardin-Amundson-Naramore* line of cases is based on an indefensible rationale that equates supposed reliance by plaintiff with hardship to plaintiff. The whole support of a flexible "most significant relationship" approach in modern conflicts cases involving torts is precisely that reliance is an almost meaningless concept in tort law.[14] Plaintiffs do not plan to become involved in vehicular accidents while taking multistate vacations and still less do they conjecture what law would apply in a multistate automobile accident in the event that a hypothetical automobile accident should take place. Once the accident happens, it would be extraordinary to suggest that a plaintiff has a vested right in freezing the growth of the law as soon as the complaint is filed. It is certainly not unusual for the law to change in Illinois before a complaint is filed, after a complaint is filed, during a trial and after a trial while a case is on appeal. Yet, it has always been supposed in these instances, as the *Cardin* and *Naramore* cases hasten to concede, that the new law is to be applied retroactively as well as prospectively, save for the unusual case where the Illinois Supreme Court expressly applies its decision prospectively. If reliance is to be taken seriously in this context, one should inquire why plaintiffs do not also rely on the expectation that law can be changed after a case is filed and even after the case is on appeal.

Surely the *Amundson* court has put the issue too broadly by its statement: "We find that hardship to plaintiffs' cause was inherent as a result of the change in the law."[15] New case law is commonly applied by appellate courts, even during oral argument (and even though such case law did not exist during the trial), so how can a trial-level plaintiff, still in the pleading stage, experience any greater hardship or reliance? Such an overboard view would stifle

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13. *Id.*

14. "In the torts area, it is a rare case where the parties give advance thought to the law that may be applied to determine the legal consequences of their action." RESTATEMENT (SECOND) § 188, Comment b.

15. 15 Ill. App. 3d at 1000, 305 N.E.2d at 686.

the growth of any law if taken to heart. Moreover, even the narrower suggestion of *Naramore* that deprivation of suit in a more favorable forum constitutes the hardship to plaintiff is analytically suspect. Surely no plaintiff has the right to delay legal development across the country after he or she selects a jurisdiction in which to file a complaint on the ground that any change of law after the complaint was filed might deprive the plaintiff of a more favorable jurisdiction in which to sue. In any event, there is no indication in *Naramore* that the defendant, an Illinois resident who returned to Illinois right after the accident, was amenable in any way to service in Kentucky under the more-favorable forum approach even had the plaintiff wished to sue in Kentucky.

If the reliance interest were to be taken at face value, then it would be paradoxical that the courts in *Cardin*, *Amundson* and *Naramore* did not evaluate the reliance or expectation interests of the defendants in having the "most significant relationship" holding of the *Ingersoll* case applied. The paradox is especially curious because the *Molitor* case, cited in the last paragraph of the supreme court *Ingersoll* opinion, was concerned precisely with governmental units which as defendants—not plaintiffs—had come to rely on the doctrine of sovereign immunity. As a result, the Illinois Supreme Court in the *Molitor* case used an express prospective ruling so that governmental units would have time to become adequately insured. Moreover, if introduction of strict tort liability was not considered a sufficient hardship on Illinois defendants so as to make the *Suvada v. White Motor Co.*[16] ruling prospective or at least to create possible exceptions for hardship cases, then one must wonder why reliance interests of plaintiffs in tort cases are greater than those of defendants.

The Illinois appellate court has in effect made the *Ingersoll* decision practically prospective by giving the broadest possible meaning to hardship. Despite the protestations of the appellate court that it is not reading *Ingersoll* as a prospective opinion, it is virtually impossible to imagine a plaintiff who would be unsuccessful in invoking the *lex loci delicti* rule on the broad grounds of hardship that have been carved out by the appellate courts. The

16. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

plaintiff under this interpretation has the best of all possible worlds. If the "most significant relationship" rule is more favorable, the plaintiff will of course invoke the *Ingersoll* holding; if the doctrine is unfavorable, the plaintiff can avoid the *Ingersoll* holding simply by claiming the hardship that automatically arises from any change of law and then reverting to the *lex loci delicti* rule. The single rule of conflicts law that emerges from the *Cardin-Amundson-Naramore* cases with hornbook clarity is the following: the plaintiff who was injured before *Ingersoll* was decided will probably prevail one way or another. However, one wonders what would have happened if Wisconsin or Kentucky law had provided for a guest statute and Illinois law had not. If the defendant under this reversed hypothetical had claimed hardship, would the appellate courts have applied the *lex loci delicti* rule in favor of the defendant? If not, then it may be that some members of the Illinois judiciary are implicitly moving toward a "better law" approach so as to leave the court free to apply the law which appears to be the best from any jurisdiction that has substantial contact with the occurrence.[17] It may be that a part of the Illinois judiciary is so disenchanted with the Illinois tort doctrines of contributory negligence, guest statute liability and interfamily immunity that it is eager to apply the tort doctrines of other jurisdictions in multistate situations. It may use the cloak of a conflicts analysis so as to allow the plaintiff to recover for severe injuries. The implicit assumption of at least a part of the Illinois judiciary may be that the better law is the law which allows the plaintiff to recover in tort cases. If so, then this assumption should be set forth candidly by the courts so that bench and bar may consider it and modify the internal law of Illinois accordingly. The indirect venting of such substantive tort preferences in the occasional happenstance of a multistate tort case, however, hampers the development of neutral conflicts principles.

In fairness to the Illinois appellate court, it should be observed

17. A leading proponent of the "better rule of law" approach is Professor Robert A. Leflar. *See* R. LEFLAR, AMERICAN CONFLICTS LAW 243-45 (1968). The "better law" approach is also approved in Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 235 (1969). A Minnesota court recently relied on the "better rule of law" approach to apply the *lex loci delicti* which did not have a guest statute. Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973).

that if the Illinois Supreme Court in the *Ingersoll* case meant that decision to operate only prospectively, then the Illinois Supreme Court should expressly so hold and should provide a reasoned justification of that extraordinary step. This obligation is especially imperative because the Illinois appellate court has termed the mandate of the *Ingersoll* hardship paragraph "unclear,"[18] and is proceeding on the doctrinal assumption that *Ingersoll* was not intended to be entirely prospective. If, on the other hand, the Illinois Supreme Court did not intend the *Ingersoll* decision to be applied only prospectively, then it should have supplied a reasoned definition of the hardship concept. The present broad meaning interpreted by the Illinois appellate court has practically turned the *Ingersoll* decision into an entirely prospective one, since a mere change in law or deprivation of a more favorable forum is automatically considered a hardship.

CONTRACT LAW

In *Cook Associates, Inc. v. Colonial Broach & Machine Co.*,[19] the defendant was a Delaware manufacturing corporation which had its place of business in Michigan. The defendant hired an employee referred to it by the plaintiff, an Illinois employment agency. The defendant corporation had neither offices nor employees in Illinois nor was it listed as a foreign corporation doing business in Illinois. The employee, a Wisconsin resident, responded to the plaintiff's advertisement in a business journal by traveling to Chicago to register with the employment agency. A coded anonymous resume was prepared by the Illinois employment agency and mailed in the form of a "flyer" to prospective employers all across the United States. The vice-president of the defendant corporation thereupon telephoned the plaintiff employment agency from Michigan. Over the telephone the plaintiff agreed to forward particulars about the prospective employee in exchange for a promise by the vice-president to pay the referral fee upon hiring the prospective employee. Subsequently the defendant corporation hired the prospective em-

18. 15 Ill. App. 3d at 957, 305 N.E.2d at 665. *See*, 14 Ill. App. 3d at 84, 302 N.E.2d at 240.

19. 14 Ill. App. 3d 965, 304 N.E.2d 27 (1st Dist. 1973).

ployee. When the plaintiff company discovered this it sued in Illinois to recover its referral fee from the defendant corporation. The appellate court found that the one telephone call made from Michigan to Chicago was sufficient to establish jurisdiction in Illinois under the minimum contacts theory of *International Shoe Co. v. Washington.*[20]

Having found jurisdiction, the appellate court in *Cook Associates* held that Illinois contract law rather than Michigan contract law should be applied under the applicable Illinois conflict of laws principle. The appellate court summarized the traditional Illinois conflicts rule in contracts cases:

> Under Illinois law, if a contract is made in one state with the intention that it be performed in another, and the states are governed by different laws, the law of the place where the contract is to be performed will control as to the contract's validity and will prevail over the law where the contract was entered into (citations omitted).[21]

Under Michigan law the contract was alleged to be unenforceable because the plaintiff company was not licensed to do business in Michigan, as required by Michigan statutory law. In addition, the defendant claimed that under Michigan statutory law the contract was unenforceable because it was not in writing. The appellate court found it unnecessary to determine the state of Michigan law because it held that the Illinois law, which did not have these restrictions, should apply. The court avoided the issue of where the contract was made, but the facts indicate that the contract was made in Michigan where the vice-president spoke the words of accept-

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20. 326 U.S. 310 (1945). Substantial treatments of the "minimum contact" requirement of the *International Shoe* decision are: Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 NW. U.L. REV. 599 (1955); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533.

21. 14 Ill. App. 3d at 971, 304 N.E.2d at 31. For criticism of the "place of performance" rule, *see* Morris, *The Eclipse of the Lex Loci Solutionis—A Fallacy Exploded*, 6 VAND. L. REV. 505 (1953).

Comprehensive discussion of the various choice-of-law rules which have evolved regarding the validity and construction of contracts appear in the following articles: Coyne, *Contracts, Conflicts, and Choice-Influencing Considerations*, 1969 U. ILL. L.F. 323 [hereinafter cited as Coyne]; Prebble, *Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws*, (pts. 1-2), 58 CORNELL L. REV. 433, 635 (1973) [hereinafter cited as Prebble]; Weintraub, *Choice of Law in Contract*, 54 IOWA L. REV. 399 (1968).

ance into the telephone receiver. The appellate court looked immediately to the place of performance and admitted that the parties did not specify in their telephone conversation where the contract was to be performed.

Undaunted, the First District Appellate Court found that the contract was really to be performed in Illinois because "the nature of the contract was such that both parties knew plaintiff's services would be performed from its office in Illinois."[22] The court discounted the fact that the interviewing and hiring of the employee took place in Michigan, since the services which made the defendant liable had already taken place in Illinois prior to the interviewing and hiring. As an "additional ground," the appellate court adopted the largely academic theory that when contracts are voluntarily made, the law of the state which would validate the contract should be chosen for the solution of the conflicts problem because it is to be presumed the parties intended an enforceable contract rather than an unenforceable one.[23] Since the contract would probably be unenforceable under Michigan law, the court chose to employ Illinois law under the validation theory, thereby upholding the enforceability of the contract.

The most interesting aspect of the *Cook Associates* case is the additional ground of the decision, based on the rule of validation.[24] The *Cook Associates* court curiously skipped over the *Restatement (Second)* theory of "most significant relationship" in its attempt to bolster the traditional Illlinois conflicts rule and instead applied an even more novel rule of validation. There are two possible reasons why the "most significant relationship" test was avoided as an additional ground by the First District. First, the contacts were so evenly split between Michigan and Illinois that neither Illinois nor Michigan was realistically the state of the most significant relationship. The second reason may be that the *Restatement (Second)* test relegates the justified expectations of the parties to a mi-

22. 14 Ill. App. 3d at 971, 304 N.E.2d at 32.

23. *Id.* at 971-72, 304 N.E.2d at 32.

24. The rule of validation has been applied frequently to contracts cases that involve an issue concerning usury. Coyne, *supra* note 21, at 334. A leading proponent of a broad rule of validation is Professor Albert A. Ehrenzweig. *See* A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS § 173, at 458 (1962). For an excellent discussion of the *lex validitatis* theory see Prebble, *supra* note 21, pt. 2, at 657-63.

nor rank behind more imposing contact points, such as the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract and the domicile of the parties.[25] It may be that for this appellate court the presumed expectations of the parties are either the sole or at least the predominating factor in selecting the appropriate law for contract cases. If this additional ground is a glimpse of things to come, then Illinois will have leaped from a pre-*Restatement (Second)* methodology of the "most significant relationship" to the "rule of validation," whose unreserved support has been still largely confined to academe, with only tentative inroads into the decision-making process of the courts. The irony is that Illinois eagerly seized upon the *Restatement (Second)* approach for the solution of tort cases in *Ingersoll v. Klein*[26] but has yet to adopt an unadulterated *Restatement (Second)* approach in the field of contracts where the Illinois appellate court has obviously not been completely satisfied with the traditional place-of-performance rule as the ultimate determinant.

SISTER STATE JUDGMENTS

In *Davis v. Nehf*[27] a New York real estate broker, licensed in New York, sued there for a brokerage commission allegedly owed by the defendant, Nehf, who owned an office building in Chicago. The defendant had his sole place of business in Illinois and had not been to New York for five years. The only contacts between the plaintiff and the defendant were by telephone and mail concerning the rental of space in defendant's Chicago office building. The plaintiff, Davis, telephoned the defendant, Nehf, from New York to advise Nehf of a prospective tenant whom Davis had found for Nehf's building. Considerable correspondence ensued between Davis and Nehf. In addition, telephone calls were placed by Davis from New York to Chicago and by Nehf from Chicago to New York concerning the prospective lease. It was agreed that Nehf would pay Davis the prevailing brokerage fees in exchange for his

25. RESTATEMENT (SECOND) § 188.

26. *See* text accompanying note 2 *supra.*

27. 14 Ill. App. 3d 318, 302 N.E.2d 382 (1st Dist. 1973).

brokerage services. When the lessee defaulted on the rent, Davis filed suit in New York for the brokerage fee and served the defendant with summons in Chicago pursuant to the New York long-arm statute. The defendant did not file an appearance in New York and allowed a New York judgment to be entered against him by default. Davis then filed a petition in the Circuit Court of Cook County to register the New York judgment. The appellate court reversed the summary judgment in favor of Davis' petition to register the New York judgment on the ground that New York lacked jurisdiction to enter the judgment.

The appellate court rejected the argument of Davis that Illinois was bound by the full faith and credit clause of the Constitution to honor the default judgment of the New York court whose jurisdiction had not been directly challenged by defendant in New York. The appellate court simply said in support of its position:

> We must, of course, reject this argument. The courts of Illinois may inquire into the proceedings of a sister state to determine whether such court had jurisdiction of the subject matter or the parties so as to bring the judgment within the full faith and credit clause (citations omitted).[28]

The *Davis* case is a correct result arrived at by an apparently over-inclusive rationale. A preliminary confusion is caused by some doubt as to whether the opinion turns on the point that the New York contacts are too minimal to comply even with the constitutional minimums of *International Shoe*, or that even though the contacts comport with minimal constitutional requirements, the New York long-arm statute as a matter of statutory construction is not sufficient to extend as far as the Constitution would permit. Upon analysis, however, the *Davis* opinion must necessarily be read to hold that the New York contacts were sufficient to establish jurisdiction in the New York courts under the *International Shoe* doctrine; this very term two cases in Illinois have held that a single telephone call made within Illinois by a nonresident defendant was enough to establish jurisdiction in Illinois.[29] These cases render it inconceivable that Illinois could seriously claim New York had insufficient con-

28. *Id.* at 321, 302 N.E.2d at 385.

29. Colony Press Inc. v. Fleeman, 17 Ill. App. 3d 14, 308 N.E.2d 78 (1st Dist. 1974); Cook Associates, Inc. v. Colonial Broach & Machine Co., 14 Ill. App. 3d 965, 304 N.E.2d 27 (1st Dist. 1973).

tacts for constitutional purposes in the *Davis* case while Illinois could claim such constitutional jurisdiction based on one telephone call into the State of Illinois.

The real question in the *Davis* case, therefore, is to what extent the courts of Illinois may construe the long-arm statute of a sister state as insufficient to confer jurisdiction under the existing case law of that state, even though the contacts of that state to the case are obviously sufficient to meet *International Shoe* standards. In effect, the *Davis* court, after having analyzed several New York appellate cases, held that a New York trial court did not have jurisdiction to enter a judgment because New York appellate cases construing the New York long-arm statute did not interpret that statute to reach so far, although the Constitution would have permitted it. Obviously this presents the awkward procedural stance of an Illinois appellate court presumably telling the trial courts of a sister state how to interpret a statute of the sister state according to the case law of the sister state. Yet it is basic law that an error of law commited by a sister state when it renders a judgment is insufficient reason for another state to refuse to enforce that judgment.[30]

The inherent danger of the *Davis* case lies in the perhaps unintentionally sweeping nature of its language that Illinois may always question the jurisdictional basis of a judgment rendered in a sister state. This overly broad statement of the law has been aided and abetted by decisions and hornbooks that have failed to absorb modern developments in conflict of laws.[31] Relying on *Baldwin v. Iowa State Traveling Men's Assn*,[32] the United States Supreme Court

30. This is the common law rule, entirely apart from the full faith and credit clause. Morris v. Jones, 329 U.S. 545 (1946); Fauntleroy v. Lum, 210 U.S. 230 (1908); Van Matre v. Sankey, 148 Ill. 536 (1893). *Accord*, RESTATEMENT (SECOND) § 106.

31. Long after *Baldwin* and the other decisions relied on in *Durfee* should have put an end to the notion that jurisdiction was something special, at least one textbook continues to parrot the old saw that "The full faith and credit clause of the Constitution and the legislation thereunder do not preclude an inquiry into the question of jurisdiction of the first court to render the judgment," with only a footnoted cross-reference to the revolution worked by the more recent decisions. GOODRICH, CONFLICT OF LAWS 395 (Scoles ed. 1964).
R. CRAMPTON & D. CURRIE, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 603 (1968).

32. 283 U.S. 522 (1931).

in *Durfee v. Duke*[33] unequivocally held:

> However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutitionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissibile scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.[34]

The apparent holding of *Davis* is simply too broad to be constitutionally acceptable in light of the interlocking nature of modern society in the United States. Even though the *Davis* case seemed to have nothing turn on the fact that the case involved a default judgment, that factor is a crucial one under the *Durfee* doctrine that jurisdictional matters once fairly and fully litigated are binding in another state under normal res judicata principles so as to preclude collateral attack. Even several earlier Illinois cases were aware that in the divorce area the United States Supreme Court has required that foreign divorce decrees be honored by a sister state where the issue of jurisdiction was fully litigated in the state which rendered the judgment.[35] There is no reason why judgments for money, such as in the *Davis* case, should be treated any differently than the jurisdictional requisites of domicile in divorce cases.

Thus the proper disposition of the *Davis* case under a modern theory of judgments is to ask whether the default judgment obtained in New York involved a full and fair hearing on the question of New York jurisdiction. An analysis of New York law leads to the conclusion that in cases of default judgments the clerk of court simply enters the judgment if the claim is for a sum certain or the sum can be made certain by mathematical computation.[36] It is apparent, therefore, that under the law of New York the issue of jurisdiction was neither litigated nor decided by a judge. In addi-

33. 375 U.S. 106 (1963).

34. *Id.* at 311.

35. "It is the rule that where the question of jurisdiction has been raised in the proceedings in the sister State and there adjudicated, such decision becomes *res adjudicata* of the question (citations omitted)." Blakeslee v. Blakeslee, 213 Ill. App. 168, 170 (1st Dist. 1919). *See also In re* Estate of Day, 7 Ill. 2d 348, 131 N.E.2d 50 (1955).

36. N.Y. CIV. PRAC. § 3215 (McKinney 1970).

tion, the *Restatement (Second)* suggests that the local law of the state where the judgment was rendered should determine whether a party who loses the jurisdictional issue and has a judgment rendered against himself should be able to collaterally attack the judgment in another state for lack of jurisdiction.[37] The law of New York, where the judgment was rendered, does apply the principle of res judicata to default judgments.[38] However, the local law of New York is the same as the constitutional requirements of the *Durfee* principle: collateral attack on a judgment for lack of jurisdiction is only permissible where the issue of jurisdiction, or the jurisdictional facts, were not previously litigated in the first forum.[39] Thus, whether one applies the constitutional implications of the *Durfee* case under full faith and credit, or simply the local law of New York, the Illinois appellate court could properly permit Nehf, the defendant in the *Davis* case, to collaterally attack the New York judgment for lack of personal jurisdiction under New York law because the issue of jurisdiction was never litigated at all in New York. Had the issue been litigated, the *Davis* case should have been decided differently.

What should be avoided by bench and bar is the facile dictum that lack of jurisdiction can always be raised as a defense to a sister state judgment even where the issue of jurisdiction has been fully and fairly litigated in the sister state. If the sister state has erred in interpreting its own jurisdictional law, that is clearly insufficient reason to dishonor the sister state judgment. The proper recourse is for the defendant to appeal the sister state trial court decision on the jurisdictional point to the appellate courts of the sister state in order to correct the error of law. Where the issue of jurisdiction over subject matter and person has been fully and fairly litigated in a sister state, it would do presumptuous violence to the principle of federalism for the appellate courts of Illinois to hold that the trial courts of another state have erred in interpreting their own statutes and their own case law. Finally, the melding of twentieth-century American society into a homogeneous unity irrespective of

37. RESTATEMENT (SECOND) § 97.

38. WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE § 5011.12 (rev. 1973).

39. *Id.* § 5011.43 n.278.

state lines is a historical process that renders quaint the nineteenth-century theory that judgments of sister states can always be attacked for lack of jurisdiction whether or not the jurisdictional issue has been already litigated in the sister state.

MISCELLANEOUS MATTERS: HEREIN OF FORUM NON CONVENIENS AND INJUNCTIONS

In a precedent-setting case the Illinois Supreme Court has held that a trial judge will be reversed where the judge abuses his discretion in denying defendant's motion for forum non conveniens.[40] In *Adkins v. Chicago, Rock Island & Pacific R.R.*[41] the plaintiff's decedent was killed in Iowa when the defendant's train collided with a truck driven by the deceased. The plaintiff, a resident of Michigan, sued for the death in the federal district court of Iowa. The railroad, a Delaware company, which did business in Iowa, Illinois and twenty other states, was the sole defendant. The case was dismissed at the trial level on plaintiff's motion, and suit was brought anew in Illinois, the Circuit Court of Rock Island County, with the railroad again named as the sole defendant. The defendant then filed its motion of forum non conveniens and before the Illinois trial court ruled on the motion, the plaintiff bolstered opposition to the motion by adding the chief engineer and the traffic engineer of the railroad as individual defendants, both of whom were conveniently Illinois residents. The trial court thereupon denied defendant's motion of forum non conveniens. The case went to trial in Illinois where a judgment of $449,757 was entered at the trial level against the defendant but was later reduced by the appellate court by means of a $199,757 remittitur.

The Illinois Supreme Court reversed and remanded on the ground that the motion for forum non conveniens should have been

40. The doctrine of *forum non conveniens* permits the court, at its discretion, to dismiss the action where there is no substantial or legitimate basis for plaintiff's choice of forum. W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 218 (6th ed. 1971). For an excellent statement of the reasons underlying the rule, *see* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929). For an interesting discussion of the doctrine's application to long-arm jurisdiction, *see* Morley, *Forum Non Conveniens: Restraining Long-Arm Jurisdiction*, 68 NW. U.L. REV. 24 (1973).

41. 54 Ill. 2d 511, 301 N.E.2d 729 (1973).

granted. The Illinois Supreme Court laid down three factors to be used by the trial courts in determining whether to grant a forum non conveniens motion: (1) The relative capacity of the two jurisdictions to provide a fair trial; (2) the relative inconvenience to the witnesses and parties; and (3) the burden upon the taxpayers and residents of the jurisdiction to which the cause of action is transported. In applying these standards to the case, a majority of the Illinois Supreme Court observed that since Iowa law was to be applied and since an Iowa jury could more conveniently view the scene of the occurrence, Iowa was the more convenient forum. In addition, the court noted that the average delay in trial for the 14th Judicial Circuit, which includes Rock Island County, was eighteen and one-half months so that the promptness inherent in a fair trial would be diminished were the case tried in Illinois. Justice Goldenhersh in dissent felt that these grounds were insufficient to find an abuse of discretion on the part of the trial judge.

The conclusion of the Illinois Supreme Court was reinforced by what the majority considered the "unusual circumstances"[42] of the case. These circumstances were that the case had been ready for trial in federal court in Iowa more than a year and a half before the case was tried in Illinois but that the plaintiff nonetheless dismissed the Iowa suit and refiled in Illinois because the plaintiff was dissatisfied with the pretrial rulings of the Iowa judge on the admissibility of certain evidence at trial. The Illinois Supreme Court stated:

> What we have, then, is in practical result an appeal to the Illinois courts from the rulings of the Iowa judge. This is unseemly business, and in our opinion the denial of the motion to dismiss, which was accompanied by a waiver of the statute of limitations, was an abuse of discretion.[43]

The appellate court was unimpressed by the addition of two individual Illinois defendants some four months after the action had already been refiled in Illinois and more than a year and a half after the plaintiff had first sued in Iowa. A majority of the Illinois Supreme Court believed that the two individual defendants were not joined either with probable cause or in good faith.

The unusual circumstances of the *Adkins* decision should be

42. *Id.* at 515, 301 N.E.2d at 731.

43. *Id.*

kept in mind when assessing the scope of this decision. Since the Illinois Supreme Court did not compare trial delays in Illinois with comparable statistic for trial delays in Iowa, the eighteen and one-half months trial delay in Rock Island County loses meaning. The fact that Iowa law is to be applied and that the scene of the occurrence is in Iowa are factors of some importance but probably insufficient in themselves to brand the action of the trial judge as an abuse of discretion. Rather, one is left with the definite impression that the alleged attempt of the plaintiff to circumvent adverse pretrial rulings of the Iowa judge was the crucial factor for the Illinois Supreme Court. If Illinois were to allow a plaintiff to evade adverse rulings by a federal judge using the law of a sister state, the efficacy and desirability of pretrial rulings as a means of simplifying issues at trial would be severely undercut. It may even be that the judges would become reluctant to rule on issues at the pretrial stage for fear that the plaintiff, upon sustaining an adverse ruling, would simply dismiss the case and refile in a sister state that also had jurisdiction.

Finally, in *Crawley v. Bauchens*[44] a husband and wife were divorced in Illinois, and the wife was awarded custody of Eric, the child of the marriage. The former wife then married a career army officer in the Canal Zone. The army officer, according to the court, was not a resident of Illinois but was a resident of either Florida, the Canal Zone, or both. The career army officer, who held the rank of major, filed a petition in the United States District Court for the Canal Zone to adopt Eric. The former wife of Eric's natural father, and by then, the current wife of the major, consented to the petition. Notice of the pending adoption was served on the natural father who then filed his own petition in Illinois to enjoin Eric's mother from proceeding with the adoption in the Canal Zone and to require that she withdraw her consent to the adoption. The Illinois trial court granted this aspect of the petitition filed by the natural father.

The appellate court in Illinois first decided that Illinois had jurisdiction over Eric and his mother even though the general rules are that the domicile of the wife would be that of her new husband and

44. 13 Ill. App. 3d 791, 300 N.E.2d 603 (5th Dist. 1973).

that the domicile of a minor child of divorced parents is that of the parent to whom custody has been granted. However, the court invoked the principle of continuing jurisdiction[45] to hold that since Illinois had granted the divorce to Eric's parents, Illinois still retained jurisdiction over the incidents of the divorce. Having determined that Illinois had jurisdiction, the appellate court, nonetheless, reversed the decision of the trial court on the ground that even though the federal court in the Canal Zone was not an article III court, the supremacy clause of the Constitution seemed to require that the right to file for adoption in the Canal Zone was a right created by Congress and thus entitled to superior recognition. The court in dictum did indicate that even if the status of the federal court were no different than that of a sister state court, prior Illinois precedent would require that "since the Canal Zone Court has jurisdiction of the subject matter and all the interested parties, action there should not be restrained."[46] The dissenting opinion held that there was a sufficiently important interest in protecting the rights of the natural father so as to offset any policy against enjoining action in another jurisdiction.

CONCLUSION

There is the possibility that the courts of Illlinois will be as creative in refashioning the principles of conflicts law as they were in the area of products liability. The cautious introduction of the rule of validation into Illlinois jurisprudence by the *Cook Associates* case is a hopeful sign that an antiquated conflicts rule for contracts cases will be replaced by a validation principle that gives maximum play to the intention of the parties to make enforceable contracts. This principle of validation in contracts cases is even more advanced than the *Restatement (Second)* view because of its greater emphasis on fulfilling the justified expectation of the parties that they entered into an agreement that was legally binding. Despite the brief backsliding of the *Cardin, Amundson,* and *Naramore* cases, the "most significant relationship" principle is still firmly es-

45. "If a state obtains judicial jurisdiction over a party to an action, the jurisdiction continues throughout all subsequent proceedings which arise out of the original cause of action." RESTATEMENT (SECOND) § 26.

46. 13 Ill. App. 3d at 798-99, 300 N.E.2d at 609.

tablished for tort cases. As the pre-*Ingersoll* cases are disposed of, there will be no way to evade the full impact of the *Ingersoll* decision. The only danger would be if the *Ingersoll* decision were simply used as a rationalizing device so that plaintiffs could always prevail under the more favorable law. Such an approach would destroy any possibility of developing a defensible body of conflicts principles in the tort area because the expectations of the parties simply do not play the same role in tort law that they do in contracts cases. It is meaningless to imply that in tort cases the parties intend the plaintiff to recover in the same way that parties intend to make a binding argeement in the contract area. Finally, the same concern should be shown for sister state sensitivity in the area of judgments that has been shown this last term in the *Adkins* case where the issue was only one of forum non conveniens.