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* This survey should be read in conjunction with Bayitch, *Conflict of Laws, 1957-63, Survey of Florida Law*, 18 U. MIAMI L. REV. 269 (1963); Bayitch, *Conflict of Laws, 1964-66, Survey of Florida Law*, 20 U. MIAMI L. REV. 495 (1966); Bayitch, *Conflict of Laws, 1967-1968, Survey of Florida Law*, 22 U. MIAMI L. REV. 509 (1968); and Bayitch, *Conflict of Laws, Florida 1968-69*, 24 U. MIAMI L. REV. 434 (1970) [hereinafter cited as *Survey* I, *Survey* II, *Survey* III and *Survey* IV, respectively].

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I. GENERAL PROBLEMS

The question of characterization of a particular claim arose in a number of cases involving direct action against insurers, the civil or penal nature of the demand, and the statute of frauds.

In *Ehrlichman v. Yarrington*[1] the defendant urged that the *Shingleton v. Bussey*[2] rule, allowing direct action against the insurer, was procedural in nature and, consequently, inapplicable in a federal court. However, the court held that *Shingleton* "enunciated a substantive rather than a procedural rule of law," and added that a federal court sitting in diversity "may not disregard the applicable substantive law of the forum state."[3] Both the characterization of Florida's direct action and its availability in an action in New York was involved in *Barrios v. Dade County*.[4] Plaintiff brought a Florida based tort claim before a New York federal court under the much discussed and often criticized decision of *Seider v. Roth*.[5] Defendants, Dade County and the insurance company, pressed the point that *Shingleton* established a procedural rule and as such is inapplicable outside of Florida. The argument was declined on the ground that Florida's holding in *Shingleton* recognized a "substantive right to an injured person as a third party beneficiary of the insurance policy to recover from the liability insurer of the tortfeasor."[6] Florida, like Puerto Rico in *Oltarsh v. Aetna Insurance Co.*,[7] has created a "separate and distinct right of action against the insurer where no such right had previously existed and thus effected a radical change in the rights accorded injured persons."[8] The fact that this right was "judicially" rather than "legislatively created" does not "detract from its force."[9] The second argument advanced by defendants was based on the New York law providing that, absent a judgment against the insured remaining unpaid for thirty

1. 306 F. Supp. 853 (S.D. Fla. 1969) (withdrawn by order of the court and is only published in slip form in advance sheets).
2. Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969).
3. Ehrlichman v. Yarrington, 306 F. Supp. 853 (S.D. Fla. 1969).
4. 310 F. Supp. 744 (S.D.N.Y. 1970).
5. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).
6. Barrios v. Dade County, 310 F. Supp. 744, 748 (S.D.N.Y. 1970).
7. 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965).
8. *Id.* at 116, 204 N.E.2d at 624, 256 N.Y.S.2d at 580.
9. Barrios v. Dade County, 310 F. Supp. 744, 748 (S.D.N.Y. 1970).

days, this kind of action is not available. This argument was previously rejected in *Oltarsh*;[10] in *Barrios* the court only added that New York being

> receptive to direct actions by its residents against insurers arising from out-of-state accidents, at least when direct actions are authorized by the situs state, and with Florida, the place where the accident occurred, granting the right to maintain such suits, there is at present no basis for any claim that New York State policy would be offended by this action.[11]

The distinction between civil and penal statutes was at issue in *Holbein v. Rigot*.[12] In an action upon a Texas default judgment, the appellate court denied full faith and credit to the part of the sister-state judgment which awarded exemplary or punitive damages as being penal in nature. The Florida Supreme Court reversed on the ground that this part of the judgment was not "based on a Texas penal statute but was based on general common law liability for false, fraudulent and malicious representations on the part of defendant,"[13] on the authority of *Huntington v. Attrill*,[14] *James-Dickinson Farm Mortgage Co. v. Harry*,[15] and the popular *Loucks v. Standard Oil Co.*[16] The court held that the attacked part of the Texas judgment redresses a "private wrong inflicted on plaintiffs and did not purport to redress a public wrong predicated on a statute that is penal in the international sense which may not be enforced in the court of other states."[17]

Whether the statute of frauds is procedural or substantive had to be decided in *Talmudical Academy v. Harris*.[18] Even though the Statute of Frauds is classified as substantive and is governed by the *lex causae*,[19] in this particular case the court held that the Florida statute,[20] providing that agreements to make a will, to give a legacy, or to make a bequest shall be binding only if made in testamentary form, applied to an agreement made in Maryland to be performed in Florida because this statute was classified as being procedural, and therefore, controlled by the *lex fori*, *i.e.*, Florida. In the opinion of the court, this provision is part of the Florida probate law and does not deal "with the validity of an agreement

10. Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965).
11. Barrios v. Dade County, 310 F. Supp. 744, 749 (S.D.N.Y. 1970).
12. 245 So.2d 57 (Fla. 1971).
13. *Id.* at 59.
14. 146 U.S. 657 (1892).
15. 273 U.S. 119 (1926).
16. 224 N.Y. 99, 120 N.E. 198 (1918).
17. Holbein v. Rigot, 245 So.2d 57, 61 (Fla. 1971).
18. 238 So.2d 161 (Fla. 3d Dist. 1970). *Cf.* Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).
19. Castorri v. Milbrand, 118 So.2d 563 (Fla. 2d Dist. 1960); *see Survey* I at 275; *cf.*, Ideal Structures Corp. v. Levine Huntsville Dev. Corp., 396 F.2d 917 (5th Cir. 1968).
20. FLA. STAT. §§ 725.01, 731.051 (1969).

but with the enforceability of the agreement in the courts of this state;"[21] and as such is "part of the public policy of the state dealing with the kind of claim against an estate that will be allowed or enforced by the court of the state."[22] Therefore, the provision is "procedural in nature and applicable to all actions such as the present one brought in this state."[23]

There are signs that the survival of the traditional characterization of the statutes of limitations as procedural may be threatened. Not only has this characterization been weakened by the adoption, in many states, of a borrowing statute,[24] but also by a gradual erosion, noticeable for example, in *Ramsay v. Boeing Co.*[25] In *Ramsay,* the statute of limitations in force at the *locus delicti, i.e.,* Belgium, was applied to a claim arising from an aircraft crash on the basis that the forum state, Mississippi, has adopted the center-of-gravity doctrine. Following this approach, the fact that the airplane was owned and operated by a Belgian airline and crashed in Belgium would put the center-of-gravity there. This fact was considered along with a number of forum state cases which "follow a foreign prescriptive period imposed on a cause of action arising under a foreign statute, if the prescription is contained in the statute creating the right of action."[26]

A number of cases discussed other questions related to the statutes of limitations. The time when a cause of action accrued to a client was decisive in an action brought by a client against his attorney for damages caused by the belated filing of a complaint for malicious prosecution suffered in Honduras.[27] Originally, the complaint was filed in a federal court in New York, but was dismissed as barred by the New York statute of limitations. In the present action brought in Florida for malpractice, the court had to decide whether the claim accrued at the time the New York action was held barred or at the time when the client was notified of the outcome of the New York action. Without entering into the conflict aspects of the issue, the court held that the claim accrued at the time of notification. Consequently, at this moment the three year limitation started to run, the court accepting the position that the New York statute of limitations, the then *lex fori,* applies.

The one year suit clause was litigated in *Quarty v. Insurance Co. of North America.*[28] The summary judgment in favor of the insurer on the authority of *Holderness v. Hamilton Insurance Co.*[29] was affirmed on appeal against plaintiff's contention that Florida Statutes section 95.03

21. Talmudical Academy v. Harris, 238 So.2d 161, 162 (Fla. 3d Dist. 1970).
22. *Id.* at 162.
23. *Id.*
24. *See Survey* III at 510; *Survey* IV at 434.
25. 432 F.2d 592 (5th Cir. 1970).
26. *Id.* at 597. Keaton v. Crayton, 326 F. Supp. 1155 (W.D. Mo. 1969) (Florida statute of limitations applied under Missouri borrowing statute).
27. Downing v. Vaine, 228 So.2d 622 (Fla. 1st Dist. 1969).
28. 244 So.2d 181 (Fla. 2d Dist. 1971).
29. 54 F. Supp. 145 (S.D. Fla. 1944).

(1969) voids such agreements. The appellate court relied on the advisory opinion of the Florida Supreme Court in *Sun Insurance Office, Ltd. v. Clay*[30] where the court observed that the "Legislature of this state could not conceivably have any interest in a contract executed in another state," and added that "imputing any such intention to the Florida Legislature would be an absurdity."[31] The United States Supreme Court in its final determination of the *Clay* controversy[32] bypassed this argument and, instead, evaluated particular contacts present in the case. Comparing these contacts with the ones in the present case, the appellate court emphasized not only that in the latter the contract was made in New York by New York residents, the premiums were paid there, and the loss occurred in New York, but also that the mere fact of plaintiff's moving to Florida within twelve months after the loss occurred "did not give Florida ample contacts with the transaction and the parties to satisfy any conceivable requirement of full faith and credit or due process"[33] and reversed.

The Florida borrowing statute was applied in an action brought by an employee against his employer for damages arising from an accident in Alabama.[34] The district court, sitting in diversity, relied on the Florida Uniform Judicial Notice of Foreign Law Act,[35] and found that Alabama's Code[36] provides for a one year limitation which, being shorter, prevails in Florida under the Florida borrowing statute. The court added that the same result is reached under Florida's *lex loci delicti* rule,[37] thus overlooking the well established Florida rule that statutes of limitations are procedural in nature.

The method of ascertaining the applicable rule of foreign law was litigated in *State-Wide Insurance Co. v. Flaks*.[38] There the court pointed out that Florida Statutes section 92.031 (1969) offers two alternatives to a party pleading "common law and statutes of every state, territory and other jurisdiction of the United States;" one, to present evidence of such law, and another, to have the court "take judicial notice of it."[39] The party relying on foreign law must plead and prove it; in absence of such showing, the court may assume that foreign law, in this case the law of the Bahamas, is the same as Florida law.[40]

Facing a question involving parol evidence, the court in *Chase*

30. 133 So.2d 735 (Fla. 1961).

31. *Id.* at 738.

32. Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964); *see Survey* II at 497.

33. Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964).

34. Griffin v. Seaboard Coast Line R.R., 307 F. Supp. 741 (S.D. Fla. 1969).

35. FLA. STAT. §§ 92.01, 92.031 (1969).

36. ALA. CODE tit. 7, § 26 (1958).

37. FLA. STAT. § 95.10 (1969); Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427 (2d Cir. 1970) (action for implied warranty for damages arising out of a Florida airplane crash barred by a New York statute of limitations).

38. 233 So.2d 400 (Fla. 3d Dist. 1970).

39. *Id.* at 402.

40. Bethell v. Peace, 441 F.2d 495 (5th Cir. 1971).

Manhattan Bank v. First Marion Bank[41] undertook the discussion with strong misgivings: "To even the most courageous Pickwickian, the parol evidence rule must seem a treacherous bog in the field of contract law. Interspersed in this quagmire are quicksand-like state court decisions, which appear equitable in specific situations but remain perilous for legal precedent."[42] Fortunately, this question had no conflicts overtones since only the meaning of the applicable substantive law, the New York version of the Uniform Commercial Code, had to be ascertained.

A novel doctrine which is forcing its way from law reviews into courts is that of false conflicts.[43] In essence, the doctrine deals with a number of unrelated situations; among them the following may be mentioned:

(1) After the conflict analysis according to the conflict law of the forum has been completed, it appears that there is no difference between the potentially applicable foreign laws and the laws in force at the forum. It also may be that the forum and the involved foreign jurisdictions rely on the same conflict rule, and therefore would likely reach the same result.

(2) Both jurisdictions, that of the forum and that identified by the forum's conflict rule, supply different substantive rules, but only the forum has what is termed a "real governmental interest" in having its substantive rule applied.

(3) As a variant, both legal systems have "real governmental interest," but the forum may take a conciliatory attitude and forego application of its rule.

(4) None of the jurisdictions involved, *i.e.*, the forum and the foreign jurisdiction whose law should be applied according to forum's own conflict law, has any governmental interest in having its substantive law applied.

If there is anything which these situations have in common, it is the fact that they show a way to avoid the application of the forum's own conflict rule by substituting the forum's own substantive law, on the ground that the forum has a governmental interest in having its substantive law applied regardless of the precept contained in its own conflict rule. Of course, there is nothing false about the conflicts method applied in these cases before the stage of refusing to follow the forum's own conflict rules is reached. In fact, a complete conflicts analysis is undertaken before the false conflict doctrine is resorted to: the forum's proper conflict rule is identified; the controlling foreign rule found; and, then the decision is made that the latter is unacceptable for one reason or another, usually

41. 437 F.2d 1040 (5th Cir. 1971).

42. *Id.* at 1045.

43. D. CAVERS, THE CHOICE-OF-LAW PROCESS 63 (1965); Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L. J. 171; Ehrenzweig, *"False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law*, 53 VA. L. REV. 847 (1967); Leflar, *True 'False Conflicts', et alia*, 48 B.U.L. REV. 164 (1968); Comment, *False Conflicts*, 55 CAL. L. REV. 74 (1967).

because of an overriding governmental interest in having the forum's own substantive law applied.

Of the situations selected above as representative of the doctrine, situation (1) deals with nothing false or unusual. It is true in the sense that an identical result is reached both ways; but this speaks in favor of the solution found rather than for the truth or falsity of the method. Under type (2) the weighing of governmental interests is introduced, a criterion which originated from situations where true governmental or para-governmental activities, like workmen's compensation[44] or judicial remedies,[45] were involved. However, the extension of this test to private claims arising, for example, from contracts, makes the criterion vague and, in most instances, far-fetched. On the other hand, in tort and insurance[46] situations, governmental interests may exist at least to some extent. The overextension of this test becomes even more apparent if the degree of "conflicting" governmental interests is tested in litigation where the only interest on the part of the plaintiff is to get as much as the law, urged by him, would allow, and the only interest on the defendant's part, to get away with as little as any law would allow. In most cases the net result of the doctrine is to secure plaintiffs the benefit of the forum's law whenever it appears more favorable to local residents, while an outsider is handicapped by the fact that his "protecting government" is eliminated from proceedings while the local government speaks through its own forum. In any case, the alleged governmental interests are unavoidably weighted by an uneven hand and crass parochial attitudes incompatible with the standard of equal protection of the law. It may be added that to some extent the underlying technique is reminiscent of the traditional public policy test designed to block the application of an otherwise controlling rule of foreign law on the ground that the foreign rule is incompatible with the forum's fundamental legal or moral tenets. In many cases, the doctrine is nothing but an expansion of the "protective" principle favoring local plaintiffs over outsiders.

Turning to variant (3), the compromise is a misnomer since only one of the interested jurisdictions, the forum, is participating. The variant under (4) leaves both jurisdictions without an interest in the question of what law should apply. It is only hoped that in spite of such aloofness the forum will feel duty bound to decide the case even if it has to reach for the uninspiringly simple conflict rule of the forum.

All this discussion should preface the fact that two Florida-related federal cases came close to rubbing elbows with the false conflict newcomer. In *Merlite Land Sea & Sky, Inc. v. Palm Beach Investment Properties, Inc.*,[47] the appellate court found the situation to amount to

44. Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).
45. Watson v. Employer's Liab. Assurance Corp., 348 U.S. 66 (1954).
46. *Id.*
47. 426 F.2d 495 (5th Cir. 1970).

type (1). This realization made the dilemma between Florida and New York law moot since "there is apparently no disparity on the substantive principles concerning this case."[48] Also worthy of passing mention is the case of *Singleton v. Foreman.*[49] There the conflict—in its traditional sense —was between the law of Tennessee, the place of the making of the contract, and the law of Florida, the place of performance. Here, too, the court did not need struggle with the question of the controlling law "since under either approach Florida law would apply."[50]

The rise and decline of the false conflict doctrine is exemplified by recent events in Louisiana. The federal district court with jurisdiction based on diversity in *Lester v. Aetna Life Insurance Co.*,[51] relying on the "modern conflicts approach" adopted by a Louisiana appellate court[52] as indicative of developments along the "modern trend of emphasizing significant contacts,"[53] ruled in favor of application of Louisiana law on the ground that "Louisiana contacts are so significant."[54] The court also assumed that "Louisiana courts would give a party the benefits of Louisiana law,"[55] which would be favorable to the resident plaintiff and unfavorable to a foreign insurance company. On appeal, the Fifth Circuit, adopting this "more sophisticated and modern approach,"[56] had to overcome the decision by the Louisiana Supreme Court in *Johnson v. St. Paul Mercury Insurance Co.*[57] This Louisiana decision was rendered after the district court decision and reaffirmed the *lex loci delicti* rule. This, of course, "extinguished the theorizing of the trial court,"[58] but did not prevent the appellate court from affirming the result "on different grounds since . . . no conflict is present."[59] Enters *deus ex machina*, and clothed in the false conflicts doctrine, ordains that difficulties which had arisen among protagonists are but consequences of nefarious goings-on in the court below, where the "parties and the court below . . . created a 'false conflict.' "[60] Thus wiping the stage clean of errors, the "*Klaxon* principle

48. *Id.* at 497 n.2.

49. 435 F.2d 962 (5th Cir. 1970).

50. *Id.* at 968-69.

51. 295 F. Supp. 1208 (W.D. La. 1968).

52. Universal C.I.T. Credit Corp. v. Hulett, 151 So.2d 705 (La. App. 1963).

53. Lester v. Aetna Life Ins. Co., 295 F. Supp. 1208, 1213 (W.D. La. 1968).

54. *Id.*, emphasizing the

> tremendous changes which the area of conflicts of law has undergone since 1965. Applying the "center of gravity" or "grouping of contacts," many courts throughout the United States have discarded or modified the traditional and once well established conflicts rules. The new and more rational approach avoids mechanical application of the law of the place of making or performance of a contract; rather it places emphasis upon the laws of the State having the most significant quantitative *or* qualitative contacts directly concerning the matter in dispute.

Id. at 1211

55. *Id.* at 1212.

56. Lester v. Aetna Life Ins. Co., 433 F.2d 884, 887 (5th Cir. 1970).

57. 256 La. 289, 236 So.2d 216 (1970), *reh. denied. Cf.* Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137 (1969).

58. Lester v. Aetna Ins. Co., 433 F.2d 884, 888 (5th Cir. 1970).

59. *Id.* at 889.

60. *Id.*

[becomes] inapplicable"[61] and with it the rule in *Johnson*.[62] Noting that the "laws of Louisiana and of Wisconsin as to notice differ materially,"[63] the court, following a well trod path, decided the issue by balancing the governmental interests of both states. The interest of the *lex fori* won on the ground that "only Louisiana has even the remotest interest in having its law applied,"[64] while Wisconsin has no "interest in relieving [the insurer], a non-domiciliary insurance company, of the burden of giving notice . . . ."[65] The court added that the Wisconsin policy of "protecting its own domiciliary insurers against mandatory notice requirements would be neither furthered nor impinged upon by application of Louisiana law in this case."[66]

It is indeed significant that in subsequent decisions federal courts shied away from the position taken in *Lester*. In *Pendleton v. Aetna Life Insurance Co.*,[67] the court took notice of *Lester* but found that the Louisiana Supreme Court in *Johnson* had "emphatically rejected over thirty years of modern thought and modern authority in favor of the much condemned and 'archaic' rules of the *lex loci*.[68] Nevertheless, in the true spirit of *Erie-Klaxon*, the court applied Louisiana law as stated in *Johnson*, taking comfort from the fact that that case was one of the innocuous variety since the "application of either law [Georgia or Louisiana] would lead to the same result."[69] The court was even more explicit in *Franklin v. Texas International Petroleum Corp.*[70] There it tackled the false conflict doctrine head-on by stating not only that it "requires the same type of interest analysis and contact analysis which the Louisiana Supreme Court expressly and emphatically rejected in *Johnson*,"[71] but also that it "leads to the same degree of uncertainty as the more 'modern' conflict approaches and that uncertainty appears to be the compelling reason that the Louisiana Supreme Court fully embraced the *lex loci delicti* approach."[72] Accordingly, the court "being strictly bound as we are by the pronouncement of the Louisiana Supreme Court,"[73] felt "compelled to follow the *lex loci delicti* rule,"[74] even though it did so "reluctantly."

61. *Id.*
62. Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 236 So.2d 216 (1970).
63. Lester v. Aetna Ins. Co., 433 F.2d 844, 890 (5th Cir. 1970).
64. *Id.* at 890.
65. *Id.* at 891.
66. *Id.* The ruling also violates the equal protection standard by applying in a diversity case law different from that in force in the forum state. *See* Erie v. Tompkins, 304 U.S. 64 (1938).
67. Pendelton v. Aetna Life Ins. Co., 320 F. Supp. 425 (E.D. La. 1970).
68. *Id.* at 428, *quoting* Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 298, 236 So.2d 216, 225 (1970) (dissenting opinion).
69. Pendelton v. Aetna Life Ins. Co., 320 F. Supp. 425, 428 n.3 (E.D. La. 1970).
70. 324 F. Supp. 808 (W.D. La. 1971).
71. *Id.* at 812.
72. *Id.*
73. *Id.*
74. *Id.*

II. JURISDICTIONAL CONFLICTS

The notion of judicial jurisdiction was recently redefined in *T.J.K. v. N.B.*[75] as having two meanings. One meaning is the "power of the court to act either upon given property or with respect to a given subject matter or as to subject the given parties to personal liability . . . ."[76] The second meaning is the "requirement that a reasonable method of notification be employed and a reasonable opportunity to be heard be afforded to the persons affected,"[77] an explanation of perfecting jurisdiction rather than of jurisdiction as such. In any case, jurisdiction is the "oxygen of an action. If present, the action is alive and the court may act."[78]

For jurisdictional purposes, three types of actions, in personam, in rem, and quasi in rem present a useful classification. The court in *T.J.K. v. N.B.*[79] indicated that the "state has jurisdiction to entertain an action 'in personam' over persons within its territory and to entertain actions 'in rem' with respect to things within its territory."[80] In actions quasi in rem, jurisdiction is exercised to "enforce a personal claim against the defendant to the extent of applying the thing or property seized in satisfaction of the claim."[81] Moreover, the state must provide a procedure "reasonably calculated to give the persons effective notice of the action and a reasonable opportunity to contest the claim."[82] The classic way to perfect jurisdiction remains by service of process on the defendant within the court's jurisdiction since "[s]uch service at one stroke satisfies both the power and notice requirements of jurisdiction."[83] In actions in rem and quasi in rem there must also be "some reasonable means of notifying persons to be affected of the pendency of the action,"[84] which does not include any notion that such person be within the state at any time or that notification be given there. The power notion is satisfied by power over the thing.

Besides presence within the jurisdiction coupled with service, domicile is another traditional jurisdiction creating factor. Although the terms residence and domicile have distinct meanings, they are often used interchangeably. Nevertheless, in the strict sense domicile is the "place where a person has fixed his abode with the present intention of making it his permanent home."[85] Persons who have established domicile in Florida may "manifest and evidence" it by a sworn statement filed with the circuit

75. 237 So.2d 592 (Fla. 4th Dist. 1970).
76. *Id.* at 594.
77. *Id.*
78. Keena v. Keena, 245 So.2d 665, 666 (Fla. 1st Dist. 1971).
79. 237 So.2d 592 (Fla. 4th Dist. 1970).
80. *Id.* at 594.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. Crapps v. Duval County Hosp. Authority, 314 F. Supp. 181, 183 (M.D. Fla. 1970).

court.[86] In case such a person "maintain[s] another place or places of abode in some other state or states," he also may file a statement that the "place of abode in Florida constitutes his predominant and principal home, and that he intends to continue it permanently as such."[87]

Service of process requires compliance with statutory provisions, which are subject to the constitutional standards of due process in order to make certain that a person, when sued, "has notice of the suit and an opportunity to defend."[88] The defendant is even under an obligation to accept service of process which may be performed without the need to have touched it physically. However, for constructive service in a quiet title suit against a nonresident defendant to be effective, strict compliance with the statute is required.[89]

Special jurisdictional rules have developed in courts of equity. In addition to continuing jurisdiction,[90] a court of equity may act in personam with respect to interests in land situated outside of its jurisdiction. In *Bethell v. Peace*,[91] the land to be sold was located in the Bahamas, yet the court maintained jurisdiction on the following grounds: (1) that the parties to the suit were United States nationals personally before the court; (2) that the agreement to sell the land in the Bahamas was signed in Florida; and, (3) that the defendant, a licensed real estate broker in Florida who "engineered" the deal, "owed fiduciary obligations to Floridians by virtue of that license."[92] The chancellor may even reach into foreign countries by enjoining persons under his jurisdiction from litigating abroad. In the case just cited, the court met attacks on such injunction by pointing out that according to Florida law

> [t]his power of a court of equity of one state to restrain its own citizens from prosecuting actions in a sister state when such actions serve to vex, harass, or oppress an opponent is too well established to admit of controversy.[93]

In a somewhat comparable situation, the appellate court reversed the lower court's decree which enjoined a foreign corporation from maintaining an action in its own country, *i.e.*, in the Bahamas, on the ground

86. FLA. STAT. § 222.17(1) (Supp. 1970).

87. FLA. STAT. § 222.17(1) (Supp. 1970).

88. Haney v. Olin Corp., 245 So.2d 671, 673 (Fla. 4th Dist. 1971).

89. Gmaz v. King, 238 So.2d 511 (Fla. 2d Dist. 1970).

90. *See* section V, D, *infra*.

91. 441 F.2d 495 (5th Cir. 1971); *cf.* Jackson v. Jackson, 129 So.2d 692 (Fla. 2d Dist. 1961). The method of substituted service under FLA. STAT. § 48.161 (1969), which requires that a copy be left with the public office, has now been amended by Fla. Laws 1971, ch. 71-308, § 1, to allow the alternative of "mailing the copies by certified mail to the public officer with the fee." The fee was increased as were those in FLA. STAT. § 48.091 (1969). However, the fee under FLA. STAT. § 48.161 (1969) was immediately reduced to its original amount by Fla. Laws 1971, ch. 71-308, § 1.

92. Bethell v. Peace, 441 F.2d 495 (5th Cir. 1971).

93. Groff G.M.C. Trucks v. Driggens, 101 So.2d 58, 60 (Fla. 1st Dist. 1958).

that such power is rarely exercised "at the instance of those who are not residents of the state where the relief is sought."[94] The court stated that this principle is "especially applicable to instances where both parties are non-residents of this jurisdiction and are both residents of the same foreign country."[95] Moreover, the injunction "affects the jurisdiction of a foreign sovereign over its own corporations and over a cause of action arising in the sovereign's own territory;"[96] the injunction also affects the parties' "access to the courts of their own country;"[97] and, finally, there was no "absolute necess[ity] to protect any interest in this state."[98] In a parallel case[99] between the same parties, the question of jurisdiction was limited to appellant's unsuccessful contention that the trial court was without jurisdiction of the subject matter of a suit to restrain the defendant from prosecuting an action in the Bahamas to stay the resort to arbitration.

An injunction against litigating abroad may be based on a contract clause subjecting by agreement (prorogation)[100] a certain kind of dispute to a foreign court. In the case of *In re Unterweser Reederei, GmbH*,[101] a contract of towage provided, *inter alia*, that "[a]ny dispute must be litigated before the High Court of Justice in London."[102] When one of the parties involved in an admiralty suit for limitation brought a related action in the High Court of Justice in England, the party was enjoined by the federal court. On appeal, the federal court took notice of the fact that it administers equity in an admiralty suit and affirmed the injunction on the ground that the moving party itself has "invoked, albeit reluctantly, that very jurisdiction."[103] Even though "a domestic court has no power to restrain the courts of a foreign nation,"[104] the court continued, "it has admitted power to deal with litigants properly before it. An exercise of the latter power is not the assumption of the former."[105] This rule also applies

94. Roberts Realty of the Bahamas, Ltd. v. Miller & Solomon, Ltd., 234 So.2d 417 (Fla. 3d Dist. 1970).

95. *Id.* at 418.

96. *Id.*

97. *Id.*

98. *Id.*

99. Roberts Realty of the Bahamas Ltd. v. Miller & Solomon, Ltd., 234 So.2d 416 (Fla. 3d Dist. 1970).

100. Lenhoff, *The Parties' Choice of a Forum: Prorogation Agreements*, 15 RUTGERS L. REV. 414 (1961); Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187 (1964).

101. 428 F.2d 888 (5th Cir. 1970), *panel opinion adopted by court en banc*, 446 F.2d 907 (5th Cir. 1971), *affirming* 296 F. Supp. 733 (M.D. Fla. 1969); *see Survey* IV at 502. *See also* weighty dissents at 428 F.2d 888, 896, *reiterated at* 446 F.2d 907, 911; Juenger, *Vereinbarungen uber den Gerichtstand nach amerikanischen Recht*, 35 RABELS ZTSCHR. 284 (1971).

102. *In re* Unterweser Reederei, GmbH, 428 F.2d 888, 889 (5th Cir. 1970).

103. *Id.* at 892.

104. *Id.*

105. *Id.*

in admiralty on the ground that "in the Admiralty the Chancellor now goes to sea and has adequate equitable reserves."[106]

A forum selection clause may also be used as the ground to attack the jurisdiction of a court other than the one chosen by prorogation. In *Unterweser* the motion requesting that the court "decline to exercise admitted jurisdiction under the facts of the present case,"[107] was made in vain. The court held that the "forum selection clause, in and of itself, did not compel the district court to stay proceedings in the limitation action so that the parties might litigate in England pursuant to its provisions."[108] The holding was based on the authority of *Carbon Black Export, Inc. v. The SS Monrosa*[109] which stands for the proposition that forum selection clauses do not apply to proceedings in rem.

The question of attachment of land within Florida belonging to non-resident tenants under Florida Statutes section 76.09 (1969) was litigated in *Robinson v. Loyola Foundation.*[110]

The jurisdictional aspects of the cognovit clause, as discussed in previous surveys[111] are continuously being questioned along the lines indicated.[112]

A. *Long-Arm Statutes*

It is true that "[t]he reservoir of state jurisdictional power over non-residents has swollen tremendously in recent years. The receding boundaries of due process reflect the fundamental changes in the national economy since the days of *Pennoyer v. Neff.*"[113] This trend, however, should not be interpreted as heralding the eventual demise of all restrictions; the touchstone announced in *International Shoe Co. v. Washington*[114] still requires "minimum contacts." The rule was updated in *Hanson v. Denckla*[115] to require the defendant to purposefully avail himself "of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."[116]

Jurisdiction creating acts may consist of continuous activities or they may be a single act; *e.g.*, a business venture or a car accident. According to a recent Florida decision,[117] three criteria emerge from cases determin-

106. *Id.*, *quoting* Guillot v. Cenac Towing Co., 366 F.2d 898, 904 (5th Cir. 1966).
107. *In re* Unterweser Reederei, GmbH, 428 F.2d 888, 893 (5th Cir. 1970).
108. *Id.* at 894.
109. 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959), *rehearing denied*, 359 U.S. 999 (1959).
110. 236 So.2d 154 (Fla. 1st Dist. 1970).
111. *See Survey* I at 276; *Survey* IV at 439.
112. *Cf.* Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970); Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971).
113. Coulter v. Sears, Roebuck & Co., 426 F.2d 1315, 1316 (5th Cir. 1970).
114. 326 U.S. 310 (1945).
115. 357 U.S. 235 (1958).
116. *Id.* at 253. *Cf.* Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969).
117. Horace v. American National Bank & Trust Co., 251 So.2d 33 (Fla. 4th Dist. 1971).

ing the present outer limits of in personam jurisdiction based on a single act:

> *First*, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; *second*, the cause of action must derive from the defendant's activities there; *third*, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.[118]

Generally, this summary is correct; nevertheless, it must be implemented by compliance with the jurisdiction creating acts as identified in the respective long-arm statutes and the exception to the connexity[119] requirement established in the *Simari* amendment.[120]

Traditionally, states have shaped their long-arm statutes by identifying the particular acts on the part of the nonresident individual or corporate defendant which are jurisdiction creating. Recently a few states[121] have abandoned this descriptive method and replaced it with a general incorporation of due process standard into their statutes. California, for example, has formulated this glib evasion from the vicissitudes of statutory verbalization and constitutional difficulties by granting jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States."[122] This kind of legislation not only automatically turns every long-arm case into a constitutional problem, but is also vague and overbroad and, consequently, vulnerable on constitutional grounds since "men of common intelligence must necessarily guess as to its meaning and differ as to its application."[123] Furthermore, by incorporating into state statutes a general constitutional standard, the legislature indicated only a constitutional outer limit of judicial jurisdiction without informing "men of common intelligence" regarding situations safely within this constitutional perimeter. Finally, the guidelines emanating from the trilogy of *International Shoe*,[124] *McGee*,[125] and *Hanson*,[126] are fraught with "all the subtleties and refinements born of history and embodied in case experience developed in the context of federal adjudication."[127] Strictly speaking,

118. *Id.* at 46 (emphasis added by court).

119. *See Survey* IV at 449.

120. FLA. STAT. § 48.081(5) (1969); *see Survey* III at 525.

121. N.J. CIV. PRAC. R. 4: 4-4(d)(2) (West 1971); R.I. GEN. LAWS 1956 § 9-5-33 (1969 Reenactment). *Cf.* Westphal v. Stone Mfg. Co., 305 F. Supp. 1187 (D.R.I. 1969) (commenting on the Rhode Island statute).

122. CAL. CODE CIV. P. § 410.10 (Deering Supp. 1971). *Cf.* Marra v. Shea, 321 F. Supp. 1140 (N.D. Cal. 1971).

123. Coates v. City of Cincinnati, 91 S. Ct. 1686, 1689 (1971); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

124. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

125. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

126. Hanson v. Denckla, 357 U.S. 235 (1958).

127. Williams v. Florida, 399 U.S. 78, 130 (1970) (concurring opinion).

the exact holdings of these cases are quite narrow and, as a consequence, incomplete, leaving "men of common intelligence" with a multitude of unanswered questions instead of clearly and precisely delineating the statute's reach in words of common understanding. Even legislators must keep in mind that men desiring to engage in these activities should not be required to guess what activities are proper and subject themselves to consequences if their estimates later prove incorrect. Unless, of course, law should again become a secret knowledge closely guarded by the initiated.

Turning now closer to home, it is to be pointed out that Florida's long-arm statutes consist of a hard-to-manage multitude of amendments and additions of which the innovation involving torts[128] is the most recent example.

1. NONRESIDENT MOTORISTS

Questions turning around this type of long-arm statute seem to be well answered. A particular fact situation was litigated in *Hoover v. Gates*.[129] In that case the nonresident owner parked his car so that the rear of the attached trailer protruded into the street and caused injury. The owner was held amenable to Florida courts under section 48.171 Florida Statutes, on the ground that the injury was "occasioned in the operation of his motor vehicle."[130]

2. NONRESIDENT AIRCRAFT AND WATERCRAFT OPERATORS

The omission of aircraft in the re-enactment of section 47.162 of Florida Statutes in 1967 as Section 48.19 Florida Statutes was corrected in 1970 by enacting the complete original text, including a reference to aircraft.[131]

3. BUSINESS BY NONRESIDENTS

As has been stated repeatedly,[132] the application of long-arm statutes aiming at nonresident business requires that the business activity included in section 48.181 of the Florida Statutes (1969) as business or business venture has been or is being performed in the state and that the claim arose therefrom, except in *Simari* situations.[133] This statement must be qualified by the requirement that the application of the statute may not transgress constitutional limitations imposed by due process.[134]

128. *See* section II *supra*.
129. 229 So.2d 909 (Fla. 3d Dist. 1969).
130. *Id.*
131. FLA. STAT. § 48.19 (Supp. 1970), *amending* FLA. STAT. § 48.19 (1969). *See Survey* IV at 444. Intertemporal problems are discussed in Central Nat'l Bank v. Kelley, 253 So.2d 141 (Fla. 3d Dist. 1971).
132. *See Survey* III at 514.
133. FLA. STAT. § 48.081(5) (1969).
134. *See Survey* III at 515.

In regard to the kind of activity covered by section 48.181 of the Florida Statutes (1969), the Supreme Court of Florida has answered in *DeVaney v. Rumsch*[135] the important question of whether professional activities, in this case the practice of medicine, bring those exercising them within the scope of the statutory term of doing business. The court quashed the appellate decision[136] and held that the distinction between professional and business activities has no "applicability in the context of the statute here involved. The determinative question is whether goods, property or services are dealt with within the state for the pecuniary benefit of the person providing or otherwise dealing in those goods, property or services."[137] Consequently, "one who suffers a personal injury such as is alleged in this case, is entitled to obtain constructive service of the wrongdoer, regardless of whether the injury resulted from goods, services or property transactions within the state."[138] The court also found that in enacting section 48.181 of the Florida Statutes (1969), the legislature intended that

> any individual or corporation who has exercised the privilege of practicing a profession or otherwise dealing in goods, services or property, whether in a professional or nonprofessional capacity, within the State in anticipation of economic gain be regarded as operating a business or business venture for the purpose of service . . . in suits resulting from their activity with the state.[139]

In an action against a foreign corporation for injuries resulting from transfusion of contaminated blood supplied by the corporation, the court held that the corporation had transacted business in Florida in view of the fact that for the last four years it systematically and regularly sold blood or blood products to customers in Florida.[140] The court also admitted its "strong feeling that public policy influences us to a holding that a supplier of human blood for the purpose of transfusion into the body of citizens of this state ought to be amenable to service of process."[141] Adducing also the recent ruling in *DeVaney v. Rumsch*, the court concluded that the foreign corporation falls within the reach of Florida Statutes section 48.181 (1969).

The question whether a single act of the business type qualified under section 48.181 of the Florida Statutes (1969) was tackled traditionally in two ways: first, by relying on the "business venture" concept included in section 48.181 of the Florida Statutes (1969); or, second, by consider-

135. 228 So.2d 904 (Fla. 1969).

136. Rumsch v. DeVaney, 218 So.2d 238 (Fla. 1st Dist. 1969); *Survey* IV at 447.

137. DeVaney v. Rumsch, 228 So.2d 904, 906 (Fla. 1969).

138. *Id.*

139. *Id.* at 907.

140. Sayet v. Interstate Blood Bank, Inc., 245 So.2d 142 (Fla. 3d Dist. 1971), *followed by* Eder Instrument Co. v. Allen, 253 So.2d 962 (Fla. 3d Dist. 1971).

141. Sayet v. Interstate Blood Bank, Inc., 245 So.2d 142, 144 (Fla. 3d Dist. 1971).

ing such act as "initiating a series of such acts."[142] The first approach is exemplified by *duPont v. Rubin*.[143] There the appellate court affirmed the holding of the court below that the defendant who negotiated the purchase of a motel in Florida, formed a corporation to take title to it, became the sole stockholder and the principal officer directing corporate activities (including the contract for the sale of the motel) was, "viewing the transaction in its entirety," engaged in a business venture.[144] Similarly, in *Dans v. Gran Habana Restaurant & Lounge, Inc.*,[145] the fact that the nonresident defendant opened a bank account in Miami, signed a contract to purchase a restaurant, applied for an alcoholic beverage license, and executed a lease of the premises, amounted to "engaging in a business venture." Additionally, the subleasing of an aircraft, coupled with making repairs and the hiring of a pilot, was held to be a business venture in *C.I. Inc. v. Travel Internationale, Ltd.*[146]

The second approach was taken in *Horace v. American National Bank & Trust Co.*[147] The nonresident defendant contended that his only act in Florida was to sign a guaranty. However, the defendant's reliance on *Odell v. Singer*[148] was misplaced since the court, following the three point analysis quoted above, found that the defendant personally appeared at the bank to substitute his signature on an obligation; that he opened an account in the plaintiff bank; that he signed several checks; and that he executed and delivered to the bank a guaranty agreement. These actions on the part of the defendant created the "necessary substantial connection with the forum state so as to make the exercise of jurisdiction reasonable and consonant with the due process tenets of fair play and substantial justice."[149] Moreover, the court felt that Florida has a "legitimate interest in protecting financial transactions and business activities carried on within its borders . . . [and] a manifest interest in preserving the obligations of contracts as well as resolving suits resulting from such contracts and transactions."[150] The court concluded by emphasizing Florida's

> continuing interest in securing reasonable business expectations; similarly, the defendant has a continuing interest in the activities of [the corporation involved] and should not complain if along with the profits from such activities he must also accept process resulting from such activities.[151]

In a similar vein, the court in *Flying Saucers, Inc. v. Moody*[152] char-

142. Horace v. American Nat'l Bank & Trust Co., 251 So.2d 33, 36 (Fla. 4th Dist. 1971).
143. 237 So.2d 795 (Fla. 3d Dist. 1970).
144. *Id.* at 797.
145. 244 So.2d 157 (Fla. 3d Dist. 1971).
146. 236 So.2d 441 (Fla. 1970).
147. 251 So.2d 33 (Fla. 4th Dist. 1971).
148. 169 So.2d 851 (Fla. 3d Dist. 1964); *see Survey* II at 507.
149. Horace v. American Nat'l Bank & Trust Co., 251 So.2d 33, 37 (Fla. 4th Dist. 1971).
150. *Id.* at 37.
151. *Id.*
152. 421 F.2d 884 (5th Cir. 1970).

acterized one act on the part of the defendant as a "continual activity." The court pointed out that the nonresident defendant-buyer sent his representative to Miami to conduct a trial run of the vessel he was about to buy, hired a captain to take care of it, had repairs made according to specifications, and finally accepted the title to the vessel. In view of this activity, the appellate court reversed the dismissal granted in the court below and held that these activities fell "within the concept of 'minimum contacts' which in turn brings it within the power of the state to reach out to obtain service in the manner provided by the Florida statute."[153] It may be true that such activities coupled with connexity might meet minimum due process standards; however, it is doubtful whether such activities meet Florida's statutory requirement of engaging in business or business venture according to Florida Statutes section 48.181 (1969). It is also true that the court has, at least on two occasions "categorically read" the Florida statute as being liberally construed, even "as broadly as consistent with due process."[154] However, this alone does not eliminate the doubt that in this case the vessel bought by defendant had any connection with business, which would be required for the activity to be a transaction "in anticipation of economic gain."[155] The contrary appears from the disclosed facts: the hydrofoil was to be converted into a "luxurious day cruiser."[156] Even less persuasive is the reliance by the court on Florida Statutes section 48.181(3) (1969), dealing with business through intermediaries. The court was unable to "see why an agreement to convey 22,500 shares of stock does not come within the terminology of paragraph 3 which speaks of selling intangible personal property 'by any means whatever.' "[157] Such an agreement, in the opinion of the court, would authorize a conclusive presumption of "operating, conducting, engaging in or carrying on a business venture in this state,"[158] the shares and $10,000 in cash representing the purchase price. However, the court has overlooked that defendant was the buyer in the transaction while Florida Statutes section 48.181(3) (1969) clearly applies to sellers and brings only sellers within the reach of the statute.

Solicitation as a jurisdiction creating activity under section 48.181 of the Florida Statutes (1969) was at stake in *Reader's Digest Association v. State ex rel. Conner*.[159] Affirming the lower court's dismissal of the motion based on lack of jurisdiction, the appellate court again took the

153. *Id.* at 887.

154. *Id. But see* Casano v. WDSU-TV, Inc., 313 F. Supp. 1130 (S.D. Miss. 1970) which held that "state law determines whether a corporation is subject to suit in that state, and the federal decisions are important only in ascertaining whether the state law is within constitutional bounds." *Id.* at 1135.

155. DeVaney v. Rumsch, 228 So.2d 904, 907 (Fla. 1969).

156. Flying Saucers, Inc. v. Moody, 421 F.2d 884, 886 (5th Cir. 1970).

157. *Id.* at 887. *See Survey* I at 283; *Survey* IV at 448. *Cf.* Clark v. Realty Inv. Center, Inc., 252 So.2d 589 (Fla. 3d Dist. 1971).

158. Flying Saucers, Inc. v. Moody, 421 F.2d 884, 888 (5th Cir. 1970).

159. 251 So.2d 552 (Fla. 1st Dist. 1971).

constitutional instead of the statutory approach. As indicated repeatedly, not all activities which meet the due process requirements are, by such fact, within the scope of a long-arm statute; only those activities which comply with the particular statutory identification of such jurisdiction creating acts or activities come within the scope of the statute. It must appear at first glance that under section 48.181 Florida Statutes (1969) jurisdiction creating acts and activities are more restricted than due process may allow. Not contacts generally, as specified in many long-arm statutes of other states, but only those contacts which qualify as business as recently defined fall within the scope of the statute. Therefore, "mere" solicitation may be an "unfortunate adjective that has been used by courts in describing the solicitation rule for many years,"[160] but the question in this case is not, as the opinion suggests: whether the sine qua non is minimum contacts which requires the "evaluation of the quantity as well as the quality of the solicitation."[161] The point to decide is whether solicitation constitutes a business or business venture. Once this basic question is answered in the affirmative, the constitutional issue may be raised and discussed. Nevertheless, the court quite correctly found that the solicitation undertaken by the defendant in Florida was a type of "massive solicitation" by which it invaded the "offices and homes of more than 10,000 Florida citizens . . . urging them to participate in an alleged lottery and purchase various goods and merchandise. . . ."[162] In any case, it may be said that solicitation by whatever means it is undertaken is so closely related to an existing business, the expansion of a business, or the establishment of a business is of such economic significance both to the consumer as well as to business that it may no longer be considered an insignificant collateral activity.

Transacting business through intermediaries, included in Florida Statutes section 48.181(3) (1969), was at issue in *Talcott v. Midnight Publishing Corp.*[163] This case involved an action for libel against a Delaware publisher with its principal place of business in Canada where the libellous publication was printed. The publication was subsequently distributed through independent wholesalers, one of them in Florida. The court relied on *Fawcet Publications, Inc. v. Rand*[164] which established the criterion that foreign publishers should be amenable to Florida courts under Florida Statutes section 48.181(3) (1969) only if they retain some

160. *Id.* at 555.

161. *Id.*

162. *Id.* at 556. Exercise of control over the franchisee by a franchisor who was absent from the state was held to amount to doing business in the state in Fashion Two Twenty, Inc. v. Ralph & Reba, Inc., 254 So.2d 49 (Fla. 3d Dist. 1971). Defendant's corporate officer-agent status combined with fraudulent activities of the Georgia corporation was held sufficient to justify exercising jurisdiction over the individual defendant under FLA. STAT. § 48.161 (1969) since defendant purposefully availed himself of the privilege of engaging in business in Florida, where the cause of action arose. Costin v. Olen, 449 F.2d 129 (5th Cir. 1971).

163. 427 F.2d 1277 (5th Cir. 1970).

164. 144 So.2d 512 (Fla. 3d Dist. 1962); *see Survey* I at 283.

degree of control over the wholesalers or distributors or over the property in their hands. Plaintiff urged that *Fawcet*[165] is no longer law in Florida because of subsequent amendment of the statute and in view of the decision in *DeVaney v. Rumsch*[166] which broaden the scope of Florida Statutes section 48.181 (1969). However, the court found no change in the perimeter of the statute had occurred.

Lack of jurisdiction creating activities on the part of the defendant was ground for dismissal in the following cases. In *South Dade Farms, Inc. v. Investment Bank S.A.L.*,[167] the defendant bank issued letters of credit in connection with land deals in Dade County, to be released from escrow when the deal was "closed." Since the deal never materialized, the letter of credit "did not become viable and would not constitute a doing business within the provision 48.181 Fla. Stat. . . ."[168] Dismissal was affirmed in *Wolfson v. Houston Post Co.*[169] on the ground that the only contact the defendant newspaper had with Florida was the sale of between 10,000 and 11,000 individual copies to unsolicited subscribers and the sale of $38,601 worth of unsolicited advertising, representing 0.15 percent of the total Sunday edition and 0.008 percent of the total daily edition. The paper's advertising revenue realized from Florida amounted to less that 0.153 percent of the total advertising revenues, with the Florida advertising lineage less than 0.091 percent of the total. Lack of jurisdiction due to the lack of jurisdiction creating acts was found in *Gordon v. John Deere Co.*[170] There the claim arose in 1965 from the operation of a machine manufactured by the defendant foreign corporation and sold through a Maryland distributor and a Virginia dealer to plaintiff. For dismissal, the court relied on two grounds: First, the cause of action did not arise from a "transaction or operation connected with or incidental to the activities"[171] of the defendant, and second, the application of the recently enacted Florida Statutes section 48.182 (Supp. 1970)[172] would amount to a retroactive application of a statute which, in the opinion of the court, is not "merely remedial or procedural in nature,"[173] but imposes a "new duty" and, therefore, operates "in the absence of positive legislative expression . . . prospectively only."[174] In any case, the rule is supported by a consistent line of Florida cases.[175]

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165. *Id. Cf.* Clark v. Realty Inc. Center, Inc., 252 So.2d 589 (Fla. 3d Dist. 1971).

166. 228 So.2d 904 (Fla. 1969).

167. 244 So.2d 555 (Fla. 3d Dist. 1971).

168. *Id.*

169. 441 F.2d 735 (5th Cir. 1971), *distinguished in* Eder Instruments Co. v. Allen, 253 So.2d 962 (Fla. 3d Dist. 1971). *Cf.* Buckley v. New York Times Co., 338 F.2d 470 (5th Cir. 1964); New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966).

170. 320 F. Supp. 293 (N.D. Fla. 1970), *question certified*, 451 F.2d 234 (5th Cir. 1971) (to Florida Supreme Court).

171. *Id.* at 295.

172. *See* section II, 12, *infra.*

173. Gordon v. John Deere Co., 320 F. Supp. 293, 295 (N.D. Fla. 1970).

174. *Id.* at 295.

175. *See Survey* I at 285; *Survey* III at 525. *Cf.* Hunt v. Nevada State Bank, 285 Minn. 250, 172 N.W.2d 292 (1969).

A lack of jurisdiction creating activities on defendant's part, formulated as 'minimum contacts' was found in *Hamilton Brothers, Inc. v. Peterson.*[176] The lack of contacts resulted in the dismissal of the action brought by the corporate seller of a vessel stranded off the coast of Mexico to defendant, a resident of Mexico. The only contacts with Florida appear to be a telegram containing the offer which was sent to defendant who was in Florida at the time, and the deposit, by defendant, of the purchase price in a Florida bank. The bill of sale was to be delivered to defendant's attorney in Texas. "Under traditional contract principles if a contract was entered into here [in Texas] it was not entered into in Florida and was not to be consumated in Florida," particularly since defendant was to take possession of the vessel off the coast of Mexico "as-is-where-is."[177] The result seems correct, but the court's reliance on *Florida Towing Corp. v. Oliver J. Olson Co.*,[178] discussed in the following paragraph seems misplaced since there the action was dismissed because of lack of connexity.

The lack of connexity was decisive in *Florida Towing Corp. v. Oliver J. Olson Co.*[179] The court found that the defendant California corporation had never had a place of business, office, agents, or employees in Florida. Nor did it at any time sell products, directly or indirectly, in the state. The court also found that the contract to sell a barge was made and to be performed in California. The wrongful act which defendant alleged, relieved him from further performance of the contract and entitled him to the return of the down payment also took place there. Relying on a line of Florida cases, the court held that the cause of action did not arise out of any activity of defendant in Florida and the defendant was, consequently "regardless of whether it had done any business in Florida . . . not amenable to service under the Florida long-arm statute."[180]

A rarely used Florida long-arm statute, namely Florida Statutes section 48.071 (1969), was involved in *Lipman v. Zuk.*[181] The provision allows service of process on a person in charge of a business transacted by a "natural person or partnership" in Florida or on their agents soliciting orders in the state, provided the "action . . . aris[es] out of such business."[182] On the ground that "[n]onresident service of process statutes are strictly construed," the court held that plaintiff had not carried the burden of proof regarding defendant's business activities in the state.[183]

In some instances, defective service may deprive the court of jurisdiction over a nonresident defendant. A particular aspect of service of process under Florida Statutes section 48.161 (1969) upon the Secretary of State

176. 445 F.2d 1334 (5th Cir. 1971).

177. *Id.* at 1336-37.

178. 426 F.2d 896 (5th Cir. 1970); *Cf.* Mooney Aircraft, Inc. v. Donnelly, 402 F.2d 400 (5th Cir. 1968) (defendant's risk in taking default judgment by not appearing does not deny him the right to assert lack of jurisdiction).

179. 426 F.2d 896 (5th Cir. 1970).

180. *Id.* at 901.

181. 244 So.2d 496 (Fla. 3d Dist. 1970).

182. *Id.* at 497, *quoting* FLA. STAT. § 48.071 (1969).

183. Lipman v. Zuk, 244 So.2d 496, 497 (Fla. 3d Dist. 1970).

was litigated in *Bomann Golf, Inc. v. Cosmos Industries, Inc.*[184] The court held that the previous interpretation of this section, namely that plaintiff has to await the return from the Secretary of State in order to make the supplementary notice to the defendant of the fact that service was made on the Secretary, was changed due to a slight amendment in section 48.181 of the Florida Statutes made in 1970. In view of this change, the court concluded that service is to be held completed with the service of the Secretary of State while the subsequent notice of this service on defendant is a separate requirement which is only an "assurance of procedural due process."[185] As a consequence, service is "effective without notice of service to defendant."[186] Another aspect of such service was at issue in *Parish Mortgage Corp. v. Davis*,[187] namely the statutory injunction of "forthwith." The default judgment against the Louisiana corporation was set aside and service quashed because the notice of service on the Secretary of State under Florida Statutes section 48.161 (1969) was not mailed until 37 days after service on the Secretary of State and 17 days after return date fixed.

Service of process on a foreign corporation qualified to do business in Florida may be had on a resident agent appointed for such service under Florida Statutes section 48.091 (1969), without showing that the "cause of action against the corporation arose out of its activities in the state . . . ."[188] Discussing the *Illinois Central*[189] and *Zirin*[190] cases, the court erroneously assumed that the requirement of connexity was "raised by judicial fiat,"[191] while, in fact, the requirement is statutory. By contrast, the court correctly refused to apply the constitutional standards expressed in minimum contacts and connexity to the rule expressed in Florida Statutes section 48.091 (1969) on the ground that

> such minimum contacts would seem patently established where, as here, the foreign corporation has actually qualified under Florida law to transact business in this state and has appointed a resident agent for service of process as required by F.S. 1969, sec. 48.091 F.S.A.[192]

184. 325 F. Supp. 704 (S.D. Fla. 1971). *Cf.* Clark v. Realty Inv. Center, Inc., 252 So.2d 589 (Fla. 3d Dist. 1971).

185. Bomann Golf, Inc. v. Cosmos Industries, Inc., 325 F. Supp. 704, 706 (S.D. Fla. 1971).

186. *Id.*

187. 251 So.2d 342 (Fla. 3d Dist. 1971). Provisions for substituted service must be strictly construed. Costin v. Olen, 449 F.2d 129 (5th Cir. 1971).

188. Junction Bit & Tool Co. v. Institutional Mort. Co., 240 So.2d 879 (Fla. 4th Dist. 1970).

189. Illinois Cent. R.R. v. Simari, 191 So.2d 427 (Fla. 1966); *see Survey* III at 521.

190. Zurin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961); *see Survey* I at 284.

191. Junction Bit & Tool Co. v. Institutional Mort. Co., 240 So.2d 879, 882 (Fla. 4th Dist. 1970).

192. *Id.* The 1971 legislature has amended FLA. STAT. § 48.091 (1969) by Fla. Laws 1971, ch. 71-269, § 1, to require that foreign corporations qualifying to do business in Florida designate not only a resident agent, but also the "street address of the office, place of business or location," for service of process. The descending order of service under FLA. STAT. § 48.091

4. UNAUTHORIZED FOREIGN INSURERS

Two recent cases deal with the timing and mode of constructive service of process on an unauthorized insurer through the Commissioner of Insurance. The first case, *American Liberty Insurance Co. v. Maddox*,[193] started from the proposition that statutes regulating service must be strictly complied with and held that an insurer must plead within 20 days, counted not from the day the Commissioner mailed the copy of process to the insurer but from the day the insurer received it. The other case, *Home Life Insurance Co. v. Regueira*,[194] held that the notice mailed by the Commissioner of Insurance to the foreign insurer, after having received service of process, must in fact contain a copy of summons and of the complaint. The attempt on the part of the plaintiff to uphold service on the ground that the Commissioner is the "resident agent" of the insurer according to Florida Statutes section 624.0221 (1969) was unsuccessful. This section provides that service of process on the Commissioner "shall be the only method of service" because Florida Statutes section 624.0222 (1969) further provides that "process served upon the commissioner *and copy thereof forwarded as in this section provided* shall for all purposes constitute valid and binding service thereof upon the insurer."[195] The court rejected this argument.

5. NONRESIDENT CHARITABLE INSTITUTIONS

Amendments enacted in the 1971 legislative session have no bearing on jurisdictional problems. No other developments may be reported.

6. PARTNERSHIPS

No new developments may be reported.

7. LAND DEVELOPERS

No new developments may be reported.

8. NON-PROFIT CORPORATIONS

No new developments may be reported.

(1969) is applicable to domestic corporations. Ludlum Enterprises, Inc. v. Outdoor Media, Inc., 250 So.2d 649 (Fla. 4th Dist. 1971); *see Survey* IV at 453.

The inability of plaintiff's attorney to locate certain absent defendants does not constitute a flagrant disobedience of court's order that the action would be dismissed unless plaintiff has obtained sufficient service of process upon them by a certain date and does not justify the entry of a final judgment on the merits. Canada v. Matthews, 449 F.2d 253 (5th Cir. 1971).

193. 238 So.2d 154 (Fla. 2d Dist. 1970).

194. 243 So.2d 460 (Fla. 2d Dist. 1971).

195. FLA. STAT. § 624.0222(3) (1969) (emphasis added).

9. SAVINGS AND LOAN ASSOCIATIONS

The jurisdictional provisions contained in the 1969 statutory amendments, reported previously,[196] have now been included in Florida Statutes as sections 665.501(1) to (5) (1969).

10. FOREIGN DEALERS IN SECURITIES

The 1971 legislative session has amended Florida Statutes section 517.10 (1969) dealing with consent to service.[197] The changes affect its reference to Florida Statutes section 517.08 (1969) regarding application for registration by coordination, and a newly added section dealing with the application for registration by announcement under Florida Statutes section 517.091 (1969). The phrase "whether made by an issuer or registered dealer" was omitted. The subsequent provision, Florida Statutes section 517.10 (1969), that in case

> the issuer is not domiciled in this state, there shall be filed with such application the irrevocable written consent of the issuer that in suits . . . growing out of the violation of any provision of this chapter, the service on the department of any notice, process or pleading therein . . . shall be as valid and binding as if due service had been made on the issuer

remains unchanged.

11. CAR DEALERS

A new long-arm statute was enacted in the 1970 legislative session.[198] According to Florida Statutes section 320.61 (Supp. 1970), "no manufacturer, factory branch, factory representative, distributor, or importer . . . shall engage in business as such" without a license. Acceptance of such license, according to Florida Statutes, section 320.615 (Supp. 1970)

> shall be deemed equivalent to an appointment by such person of the secretary of state as the agent of such person upon whom may be served all lawful process in any action arising out of any transaction or operation connected with or incidental to any activities of such person carried on under such license . . . .

Service is to be performed "in accordance with and in the same manner as now provided for service of process upon nonresidents under the provisions of chapter 48."[199] Difficulties will arise not only from this reference to the difficult to manage service provisions of chapter 48 but also from unavoidable overlapping with Florida Statutes section 48.181 (1969).

196. *See Survey* IV at 457.
197. Fla. Laws 1971, ch. 71-96(5). *See Survey* IV at 458.
198. Fla. Laws 1970, ch. 70-424, *adding* FLA. STAT. § 320.615 (Supp. 1970).
199. FLA. STAT. § 320.615 (Supp. 1970), *amending* FLA. STAT. §§ 48.011-.23 (1969).

12. TORTS

Still another fact situation became the basis for long-arm jurisdiction during the survey period: the commission of a tort outside of Florida with consequences within the state. The enactment by the 1970 legislature[200] of the new section 48.182 is prefaced by a lengthy preamble stating as underlying legislative considerations the "expanding volume of interstate and international commerce transacted in Florida," and the possibility of injuries and losses to Florida residents and visitors

> as result of compensable wrongful acts committed outside of the state by nonresidents or their agents who derive substantial revenue from interstate or international commerce and who should reasonably expect that such wrongful acts might have some injurious consequences in this state." [In order to secure compensation for such losses, the] "courts of this state shall have personal jurisdiction over such nonresidents for wrongful acts committed outside the state which cause injury, loss, or damage to persons within Florida to the extent due process considerations permit."[201]

To facilitate an analysis of this poorly drafted statute, it seems advisable to project it against its precursors adopted in other states. Among these precursors are the New York amendment to section 302(3) Civil Practice Law and Rules,[202] and the Uniform Interstate and International Procedure Act,[203] which has been adopted in a number of states. First of all, it must be kept in mind that these jurisdictions also have statutes based on commission of torts within these states as a jurisdiction creating act. This existing jurisdiction was implemented by a new one, the commission of a tort outside the state with injurious consequences within the forum state, coupled with additional requirements. Among these additional requirements are: doing or soliciting business or "any persistent course of conduct" within the forum state; substantial revenue from goods or services supplied in the forum state; foreseeability on the part of the

200. Fla. Laws 1970, ch. 70-90, *adding* FLA. STAT. § 48.182 (Supp. 1970).

201. Fla. Laws 1970, ch. 70-90.

202. N.Y. Sess. Laws 1966, ch. 590, *amending* N.Y. CIV. PRAC. LAW § 302(c) (Gilbert-Bliss 1963); *see generally* Homburger & Laufer, *Expanding Jurisdiction over Foreign Torts: The 1966 Amendment of New York's Long-Arm Statute*, 16 BUFF. L. REV. 67 (1966). A fraudulent conveyance in New York by a defendant, domiciled in Florida, has been held to be with N.Y. CIV. PRAC. LAW § 302(a)(2) (Gilbert Bliss 1963). Zindwer v. Ehrens, 34 App. Div. 2d 1035, 311 N.Y.S.2d 389 (Sup. Ct. 1970).

203. Uniform Interstate and International Procedure Act [98 U.L.A. § 1.03(a)], *applied in* Lauck v. E.C.K. Chivers & Associates, 320 F. Supp. 463 (E.D. Ark. 1970); Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967) (Connecticut); McKee v. Southern R.R., 327 F. Supp. 905 (N.D. Ga. 1971), Griffin v. Air South, Inc., 324 F. Supp. 1284 (N.D. Ga. 1971) (substantially in regard to torts in Georgia); Fisher v. Albany Mach. & Supply Co., 246 So.2d 218 (La. App. 1971), Boykin v. Lindenkranar, 252 So.2d 467 (La. App. 1971); Mark v. Obear & Sons, Inc., 313 F. Supp. 373 (D. Mass. 1970). *See generally* Leflar, *Act 101: Uniform Interstate and International Procedure Act*, 17 ARK. L. REV. 118 (1963); Comment, *In personam Jurisdiction over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028 (1965).

nonresident wrongdoer of consequences within the forum state; and the fact that the nonresident derives substantial revenue from interstate or international commerce.

The requirement of a wrongful act outside of the forum state which has consequences within that state, including connexity, is—with some modifications—common to this type of long-arm statute which makes jurisdiction run with the product. The additional contacts show considerable variations not only in regard to their number and nature but also in regard to the single or combined alternatives in which they appear. These additional contacts may apply cumulatively or alternatively; the later variant may also establish sets of such contacts with alternatives set up therein to be used alternatively or cumulatively.

The New York statute has established two sets of additional contacts. The first, listed under subsection (1) of section 302(3) of Civil Practice Law and Rules contains two alternatives: first, regular business or solicitation or engaging in "any other persistent course of conduct," and, second, the fact that the nonresident "derives substantial revenue from goods used or consumed or services rendered." Both alternatives require that the acts take place in the forum state. The other set of alternatives enumerated under subsection (ii) of section 302(3) Civil Practice Law and Rules offers a cumulation of contacts, namely that the nonresident "expects or should reasonably expect the act to have consequences in the state," coupled with the fact that he also derives "substantial revenue from interstate or international commerce," regardless of whether such commerce has any relation to the forum state.

The Uniform Interstate and International Procedure Act has adopted a much simpler scheme. Out-of-state tortious acts with consequences within the forum state will support long-arm jurisdiction provided they are accompanied by one of the three alternative contacts with the forum state: doing or soliciting business; engaging in any other "persistent course of conduct;" or, the fact that the nonresident defendant "derives substantial revenue from goods used or consumed or services rendered." The Uniform Act requires connexity with the wrongful out-of-state act. On the contrary, foreseeability is not used as one of the additional alternate contacts.

In the light of these models, the Florida statute[204] has adopted the obvious general premise formulated as the requirement that a nonresident "person, firm or corporation" directly or indirectly through agents "commits a wrongful act outside of the state which causes injury, loss or damage

204. FLA. STAT. § 48.182 (Supp. 1970). The statute is not retroactive. Gordon v. John Deere Co., 320 F. Supp. 293 (N.D. Fla. 1970), and Hyler v. State, 253 So.2d 721 (Fla. 1st Dist. 1971). The case also raised the issue of whether a breach of contract is a wrongful act within the meaning of the statute, or "should be considered not to be a wrongful act as contemplated therein, since a contracting party can elect not to perform a contract, although to so elect may subject the defaulting party to liability," *Id.* at 724. The question, however, was not answered.

to persons or property within this state." This general premise is coupled with two additional cumulative contacts, one of which requires that the nonresident wrongdoer "expects or should reasonably expect the act to have consequences in this state . . . ." Compared with the models just summarized, it appears that the requirement of foreseeability is expanded in the Florida Statutes to include, as an alternative within this contact, the foreseeability of consequences in "any other state or nation . . . ."[205] In addition of such foreseeability, the nonresident wrongdoer must derive "substantial revenue from interstate or international commerce,"[206] regardless of whether such activity is related to Florida.

Compared with analogous statutes in force in other states, the Florida statute reaches considerably farther since a nonresident who committed a tort outside of Florida, who may not have foreseen consequences in Florida, and who is engaged in interstate or international commerce unrelated to Florida, appears to come within the reach of Florida Statutes section 48.182 (Supp. 1970), provided his out-of-state tortious act has caused injurious consequences in Florida. This possibility may run afoul of the constitutional standard which requires that this type of long-arm statute reach a nonresident in a one-act tortious situation only if the nonresident has purposefully availed himself of the privilege of conducting business within the forum state.[207]

Finally, it is to be pointed out that the statute retains the requirement of connexity between the out-of-state wrongful act, its local consequences, and the claim which arises by referring to actions or proceedings "arising from any such act."

The Florida statute also contains provisions dealing with service of process on the nonresident wrongdoer. However, considerable difficulties are bound to arise. First, the statute provides that the nonresident defendant may be "personally served."[208] Taken at its face, the provision is inconsistent with defendant's nonresident status; if the provision aims at service in a foreign jurisdiction, then it should say so. The second difficulty, which is more serious, originates from the provision that service shall be "in the same manner as on nonresident who, in person or through an agent has committed a wrongful act within the state."[209] Since Florida has never adopted a long-arm statute dealing with in-state torts, the reference to such nonexisting provision makes the new statute unworkable, except in situations where torts have been committed in conjunction with any of the already adopted long-arm jurisdictional contacts, for example,

205. FLA. STAT. § 48.182 (Supp. 1970).

206. FLA. STAT. § 48.182 (Supp. 1970).

207. "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws," Hanson v. Denckla, 357 U.S. 235, 253 (1958); *cf.* Rosenblatt v. American Cyanamid Co., 86 S. Ct. 1 (Goldberg, Circuit Justice, 1965), *reh. denied*, 382 U.S. 1002 (1966).

208. FLA. STAT. § 48.182 (Supp. 1970).

209. FLA. STAT. § 48.182 (Supp. 1970).

business or business venture. As shown in this study,[210] recent Florida cases involving marketing of defective blood[211] or causing damage by medical malpractice[212] have included such activities within doing business in Florida under Florida Statutes section 48.181 (1969). Within these situations, the new statute presents a duplication; outside of them, the unfortunate reference to a nonexisting provision might deprive it of any effectiveness.

The new statute concludes by providing that a nonresident deceased's executor or administrator will be subject to personal service in the same manner as a nonresident, and furthermore, that this section does not apply to a "cause of action for defamation of character arising from the act."[213]

Two final remarks seem to be in order. First, the wrongfulness of the out-of-state act will probably be determined by the traditional *lex loci*; for jurisdictional purposes the fact that the consequences took place in the forum state will suffice, regardless of nonresident defendant's substantive liability. The second remark turns to the constitutional posture of the new statute. It is reasonable to expect that—except for one aspect indicated above—the one-act statute combined with connexity will survive attacks based on due process.[214]

13. PROPERTY

Florida lacks a long-arm statute based on the fact that the nonresident defendant maintains property within the state. The only exception appears in Florida Statute section 49.19 (1969). This section is based not only on operation and navigation of an "aircraft, or a boat, ship, barge or other watercraft within the state,"[215] but also their mere "maintenance" in the state.[216] In any case, property—corporeal and incorporeal—may always be used as basis for quasi in rem jurisdiction.

B. *Jurisdiction in rem and quasi in rem*

Actions in rem are those which "seek not to impose personal liability but rather to effect the interests of persons in a specific thing . . . . Typical modern examples are actions for partition or foreclosure of a lien or

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210. *See* section II, A, 3, *supra*.

211. Sayet v. Interstate Blood Bank, Inc., 245 So.2d 142 (Fla. 3d Dist. 1971).

212. DeVaney v. Rumsch, 228 So.2d 904 (Fla. 1969). In Illinois, a tort committed out-of-state with consequences within the state is held to have been committed within the state. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 432, 176 N.E.2d 761 (1961). *Cf.* Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969); *see also Survey* IV at 442 n.68.

213. FLA. STAT. § 48.182 (Supp. 1970).

214. *See Survey* I at 278-79.

215. FLA. STAT. § 48.19 (Supp. 1970).

216. For Florida corporations as defendants in other jurisdictions, see, *e.g.*, O'Hare Int'l Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971) (Oklahoma); Sarno v. Florida E. Coast Ry., 327 F. Supp. 506 (D. Mass. 1971); Lauck v. E.C.K. Chivers & Assoc., 320 F. Supp. 463 (E.D. Ark. 1970); Ferguson v. Kwik-Check, 308 F. Supp. 78 (D.V.I. 1970) (Virgin Islands); State *ex rel.* White Lumber Sales, Inc. v. Sulmonetti, 252 Ore. 121, 448 P.2d 571 (1968).

to quiet title to real estate."[217] Even though the "concept of an in rem action has been extended to those actions which seek to affect *status*, for example, divorce actions,"[218] the court held that an extramarital paternity action is one in personam and does not admit of service of process by publication under Florida Statutes section 49.011 (1969), on the ground that in such a suit there is "nothing to affect the interests of persons in a specific thing or res."[219]

As expressed recently in *T. J. K. v. N. B.*, a quasi in rem action is designed to "enforce a personal claim against the defendant to the extent of applying the thing or property seized in satisfaction of the claim," with the recovery limited to the attached *res*.[220] The quasi in rem mode of establishing jurisdiction became practical in cases where the *res* to be attached for jurisdictional purposes is a claim,[221] particularly against insurance companies. In the leading New York case, *Seider v. Roth*,[222] residents of New York were injured in a car accident in Vermont due to the negligence of a Canadian. In their action brought in a New York court, plaintiffs attached the defendant's claim against his insurer. The underlying question, whether such a duty to defend and indemnify was a "debt" within the pertinent New York statute, was answered in the affirmative. In relation to Florida as the *lex loci delicti* the *Seider* doctrine was tested in *Barrios v. Dade County*,[223] already discussed.

C. *Forum non conveniens*

The doctrine that forum non conveniens is an "equitable doctrine applied when citizens of a foreign state seek to litigate their controversies in another state where the controversy between them arose outside of the state in which they seek to litigate,"[224] was restated in *Ganem v. Issa*.[225] The court also remarked that it was unable to find a case "espousing the proposition that in the absence of statute the courts of this state may invoke the doctrine to effect the transfer of a cause of action from one court in this state to another court within the state for the purpose of trial convenience."[226]

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217. T.J.K. v. N.B., 237 So.2d 592 (Fla. 4th Dist. 1970).

218. *Id.* at 594.

219. *Id.* at 595; *accord*, Hartford v. Superior Court, 47 Cal. 2d 447, 304 P.2d 1 (1956).

220. T.J.K. v. N.B., 237 So.2d 592 (Fla. 4th Dist. 1970).

221. Freeman v. Alderson, 119 U.S. 185 (1886).

222. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966); *contra*, Gov't Employees Ins. Co. v. Lasky, 454 S.W.2d 942 (Mo. 1970); McHugh v. Paley, 63 Misc. 2d 1092, 314 N.Y.S.2d 208 (Sup. Ct. 1970) (*Seider* in a Bahamas accident); Robinson v. Loyola Found., Inc., 236 So.2d 154 (Fla. 1st Dist. 1970) (claims amenable to attachment under Florida law).

223. 310 F. Supp. 744 (S.D.N.Y. 1970); *see also* Lebowitz v. Forbes Leasing & Fin. Corp., 326 F. Supp. 1335 (E.D. Pa. 1971) (foreign attachment); and Maryland Tuna Corp. v. M. S. Benares, 429 F.2d 307 (2d Cir. 1970) (process of maritime attachment and garnishments).

224. Atlantic Coast R.R. v. Ganey, 125 So.2d 576, 579 (Fla. 3d Dist. 1960).

225. 225 So.2d 564 (Fla. 3d Dist. 1969).

226. Atlantic Coast R.R. v. Ganey, 125 So.2d 576, 580 (Fla. 3d Dist. 1960).

In *Unterweser*,[227] the motion to decline jurisdiction on the basis of forum non conveniens was denied by the trial court. Affirming the decision, the appellate court took into account the following factors: (1) that the towage contract envisioned a long voyage, from Mississippi to the Adriatic, with "potential exposure to the jurisdiction of numerous states," the flotilla nevertheless would never escape the "Fifth Circuit's *mare nostrum*;" (2) that the damage on board the towed vessel occurred in "close proximity to the district court;" (3) that a considerable number of potential witnesses reside in the area of the Gulf of Mexico; (4) that preparations for the voyage were made within the jurisdiction and the inspection of the damage and repair work was conducted there; (5) that the testimony of crewmen residing in Germany would be available in the proceedings; and, (6) that although the parties had agreed to litigate their claims in England, the only other nation having significant contacts with the controversy was Germany because England's only relationship was the "designation of her courts in the forum clause." Moreover, the owner of the drilling barge to be towed was a United States corporate citizen. Finally, the court took into consideration the fact that a "remand of the case to a foreign court would result in a significant disadvantage to the owner since the exculpatory provisions contained in the towage contract would be held "prima facie valid and enforceable by an English court," a bar which the owner's "own convenient courts would not countenance."[228]

D. *Access to Courts*

In addition to cases and statutes discussed previously,[229] the provision dealing with unauthorized foreign insurers provides that such insurers may not

> institute, file, or maintain, or cause to be instituted, filed, or maintained, any suit, action, or proceeding in this state to enforce any right, claim or demand arising out of any insurance transaction in this state . . .[230]

except in regard to transactions listed in Florida Statutes section 624.0201 (1969). Transactions under the latter statute may be undertaken without a "certificate of authority."

E. *Federal Courts*

It is well established that in diversity cases state jurisdictional rules determine whether a defendant is amenable to federal courts.[231] Once the

227. *In re* Unterweser Reederei, GmbH, 428 F.2d 888 (5th Cir. 1970). *Cf.* Noto v. Cia Secula de Armanento, 310 F. Supp. 639 (S.D.N.Y. 1970); *see also* Fiorenza v. U.S. Steel Int'l, Ltd., 311 F. Supp. 117 (S.D.N.Y. 1969).

228. *In re* Unterweser Reederei, GmbH, 428 F.2d 888, 894-95 (5th Cir. 1970).

229. *See Survey* IV at 460.

230. FLA. STAT. § 626.0502 (1969).

231. Walker v. Savell, 335 F.2d 536 (5th Cir. 1964). In a Clayton Act [15 U.S.C. § 15 (1970)] action, the court was held to be without jurisdiction over one defendant since he was

question of state law is decided in favor of jurisdiction, the constitutional issue may arise to be tested against the due process standard.[232]

Even though constitutional questions are within the specific federal domain, a federal court will not hear constitutional issues which have been presented and decided in state courts.[233]

F. *Arbitration*

In *Shearson, Hammill & Co. v. Vouis*,[234] the court again refused to comply with the statutory provision that arbitration agreements dealing not only with existing controversies but also with those "thereafter arising between them relating to such contract . . ."[235] are valid and irrevocable. The ground for this refusal was that such statutory provision is designed to "create an exception to the well settled doctrine that an agreement to arbitrate a dispute in the future will not be enforced as an attempt to oust the court's jurisdiction."[236] In the present case the problem has an interesting twist because parties agreed that their arbitration agreement "shall be governed by the laws of the State of New York."[237] Even though the plaintiff urged that if the Florida statute were applied, the same result would be reached as under the chosen New York law, the court maintained its opposition to the Florida statute.

The recognition and enforcement of foreign arbitral awards is now regulated, at least between the contracting countries, by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York on June 10, 1958, ratified by the United States,[238] and implemented by federal legislation.[239] In essence, the Convention deals both with agreements to arbitrate and with arbitral awards. In order to qualify for

not amenable to service pursuant to FLA. STAT. §§ 48.081, 48.161, 48.181 (1969). Manufacturers Buyers Corp. v. El Dorado Tire Co., 324 F. Supp. 225 (S.D. Fla. 1971).

232. Casano v. WDSU-TV, Inc., 313 F. Supp. 1130 (S.D. Miss. 1970), *following* Eyerly Aircraft v. Killian, 414 F.2d 591 (5th Cir. 1969); *see Survey* IV at 442.

233. Haas v. Jefferson Nat'l Bank, 442 F.2d 394 (5th Cir. 1971) (lack of diversity in an injunction suit); Sullens v. Carroll, 308 F. Supp. 311 (M.D. Fla. 1970) (no jurisdiction under 28 U.S.C. §§ 1331, 1343 (1970) in malpractice action against attorney appointed in federal court); Stamicarbon v. Escambia Chem. Corp., 430 F.2d 920 (5th Cir. 1970) (evidence under FED. R. CIV. P. 43(a)); Eitel v. Faircloth, 311 F. Supp. 1160 (S.D. Fla. 1970); Harry Rich Corp. v. Curtiss-Wright Corp., 306 F. Supp. 1114 (S.D. Fla. 1969) (amenability to Florida courts decisive in transfer under 28 U.S.C. § 1404(a) (1970)).

234. 247 So.2d 733 (Fla. 3d Dist. 1971).

235. FLA. STAT. § 682.02 (1969).

236. Shearson, Hammill & Co. v. Vouis, 247 So.2d 733, 735 (Fla. 3d Dist. 1971).

237. *Id.* at 734.

238. [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997 [330 U.N.T.S. 3 (1958)] [hereinafter cited as *Convention*]. Text also found in Springer, *The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards*, 3 INT'L LAW 320 (1969), and in 7 INT'L LEG. MAT. 1042 (1968). *See* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1960); Sultan, *The United Nations Arbitration Convention and United States Policy*, 53 AM. J. INT'L L. 807 (1959); Comment, *The United Nations Conference on Commercial Arbitration*, 53 AM. J. INT'L L. 414 (1959).

239. An Act to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-08 (1970) [hereinafter cited as *Implementing Act*].

international recognition, *i.e.*, to be given effect in the contracting countries, such agreements must be in writing and "submit to arbitration all or any of the differences which have arisen or which may arise between [the parties] in respect [to] a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."[240] The Convention authorizes courts of the contracting countries to "refer the parties to arbitration, unless it finds [the] agreement [to be] null and void, inoperative or incapable to be performed."[241] The resulting arbitral award will have to be recognized and enforced provided it was "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. . . ."[242] Consequently, the Convention applies to awards "not considered as domestic awards in the State where their recognition and enforcement are sought,"[243] an alternative not further clarified but implemented by the federal enactment.[244] Contracting countries may further restrict the applicability of the Convention according to either of the two alternatives offered in article I, paragraph (3). One alternative is to apply the Convention to awards "made only in the territory of another Contracting State . . ."[245] on the basis of reciprocity. The other alternative is to apply the Convention only to differences arising from legal relationships "considered as commercial under the national law of the State making such declaration."[246]

Contracting countries are bound to enforce arbitral awards in accordance with their procedural rules, but never under conditions which would be more onerous than those applicable to domestic awards.[247] The application for enforcement must be accompanied with the "authenticated original award or a duly certified copy . . ."[248] accompanied by an equally qualified agreement to arbitrate. Recognition and enforcement may be denied[249] whenever the objecting party proves that

(1) the parties to the agreement were "under the law applicable to them, under some incapacity," or the agreement is invalid "under the law to which parties have subjected it . . ."[250] or under the law of the place of making; or

(2) the party against which the award is to be enforced received no prior notice of the appointment of the arbitrator; or of the arbitration proceedings; or was "otherwise unable to present his case . . ."[251] or

240. *Convention, supra* note 238, art. II. para. 1.
241. *Convention, supra* note 238, art. II, para. 3.
242. *Convention, supra* note 238, art. I, para. 1.
243. *Convention, supra* note 238, art. I, para. 1.
244. *Implementing Act*, 9 U.S.C. § 202 (1970).
245. *Convention, supra* note 238, art. I, para. 3.
246. *Convention, supra* note 238, art. I, para. 3.
247. *Convention, supra* note 238, art. III.
248. *Convention, supra* note 238, art. IV, para 1.
249. *Convention, supra* note 238, art. V.
250. *Convention, supra* note 238, art. V, para. 1(a).
251. *Convention, supra* note 238, art. V, para. 1(b).

(3) the award deals with a dispute "not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope"[252] of such submission, provided that if matters may be separated, the proper part of the award will survive; or

(4) the composition of the arbitral tribunal or the arbitral procedure was not "in accordance with the agreement . . ." of failing such agreement, not in accordance with the "[l]aw of the country where the arbitration took place;"[253] or

(5) the award is not yet final or has been set aside or suspended. Recognition and enforcement may also be denied if the "competent authority" of the country where recognition and enforcement are sought,[254] finds that:

(a) the "subject matter of the difference is not capable of settlement by arbitration under the law of that country;"[255] or

(b) the recognition or enforcement of the award would be "contrary to the public policy of that country."[256]

In case an application to set aside or suspend the award is made, the competent authority may "adjourn the decision on the enforcement . . . and may also . . . order the other party to give suitable security."[257]

The Act to implement the Convention, enacted as chapter 2 of title 9 of the United States Code, takes effect unless "in conflict with this chapter or the Convention as ratified. . . ."[258] The enactment limits the effect of the Convention in accordance with its article I, paragraph (3) to those undertakings "considered as commercial, including a transaction, contract, or agreement described in section 2"[259] of the Convention, thus incurring the difficulty arising out of the fact that in this country—as distinguished from civil law jurisdictions—the notion 'commercial' is not statutorily defined, nor is it reliably ascertainable from common law. Excluded from coverage are arbitration agreements and awards between United States nationals "unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."[260] In this connection, a corporation is considered a "citizen of the United States if it is incorporated or has its principal place of business in the United States."[261]

In regard to jurisdiction in matters covered by the Convention as implemented, any action or proceeding is deemed to "arise under the laws and treaties of the United States," and the district courts have original

252. *Convention, supra* note 238, art. V, para. 1(c).
253. *Convention, supra* note 238, art. V, para. 1(d).
254. *Convention, supra* note 238, art. V, para. 1(e).
255. *Convention, supra* note 238, art. V, para. 2(a).
256. *Convention, supra* note 238, art. V, para. 2(b).
257. *Convention, supra* note 238, art. VI.
258. *Implementing Act*, 9 U.S.C. § 208 (1970).
259. *Implementing Act*, 9 U.S.C. § 202 (1970).
260. *Implementing Act*, 9 U.S.C. § 202 (1970).
261. *Implementing Act*, 9 U.S.C. § 202 (1970).

jurisdiction "regardless of the amount in controversy."[262] Venue lies in the district where "save for the arbitration agreement" the litigation could be brought, or designated "as the place of arbitration if such place is within the United States."[263] This provision excludes arbitrations and awards arising out of claims which could not have been litigated in the United States as well as awards entered abroad.

Since jurisdiction in these matters is concurrent with state courts, cases filed in the latter may be removed to the federal court "embracing the place where the action or proceeding is pending."[264] The routine procedure for removal shall apply, except that the "ground for removal . . . need not appear on the face of the complaint but may be shown in the petition for removal."[265] For the purposes of the Convention, a removed action or proceeding shall be "deemed to have been brought in the district court to which it is removed."[266]

Arbitration will be compelled by an order directing that "arbitration be held in accordance with the agreement at any place therein provided . . ." regardless of whether this place is "within or without the United States."[267] The court also may appoint arbitrators "in accordance with the provisions of the agreement."[268] Parties may, within three years after an arbitral award is made, apply to the competent court for an "order confirming the award as against any other party to the arbitration," unless a ground listed in the Convention warrants other disposition.[269]

In relation to agreements to arbitrate covered by the Convention, the Florida Arbitration Code, enacted in 1957, will be the object of significant changes.[270] In any case, the "well settled doctrine" denying effect to an agreement to arbitrate future controversies will this time have to yield to the supremacy clause of the federal constitution.

III. Foreign Judgments

In an action in Florida upon a Texas default judgment, defendant admitted that he received notice of the pendency of the proceedings, that he did not attack jurisdiction by alleging fraud, nor did he submit to the Texas court acting under its long-arm statute any evidence that he never transacted business in Texas. The district court of appeals upheld[271] the

262. *Implementing Act*, 9 U.S.C. § 202 (1970).
263. *Implementing Act*, 9 U.S.C. § 202 (1970).
264. *Implementing Act*, 9 U.S.C. § 205 (1970).
265. *Implementing Act*, 9 U.S.C. § 205 (1970).
266. *Implementing Act*, 9 U.S.C. § 205 (1970).
267. *Implementing Act*, 9 U.S.C. § 206 (1970).
268. *Implementing Act*, 9 U.S.C. § 206 (1970).
269. *Implementing Act*, 9 U.S.C. § 207 (1970).
270. Fla. Stat. §§ 682.01–.22 (1969). The impact of the *Convention* (*supra* note 238) on the Florida Arbitration Code will be discussed in the next *Survey*. On recognition and enforcement of awards outside of the *Convention*, see Bayitch, *Treaty Law of Private Arbitration*, 10 Arb. J. 188 (1955); Domke, *American Arbitral Awards: Enforcement in Foreign Countries*, 1965 Ill. L. Forum 399.
271. Rigot v. Holbein, 233 So.2d 458 (Fla. 3d Dist. 1970).

lower court's judgment for the plaintiffs with the exception of the award of exemplary or punitive damages. However, the Florida Supreme Court[272] reversed this part of the decision on the ground that the Texas judgment was not based in a penal statute but "on general common law liability for false, fraudulent and malicious representations on the part of defendant which wrongfully induced plaintiffs to their injury to enter into a franchising agreement with defendant."[273] The court concluded that the enforcement of the Texas judgment "does not violate the principle that penal laws of a state are not enforceable in another . . ."[274] because the award made by the Texas court was "not to punish defendant for an offense against the state or general public but to give plaintiffs redress or reparation by way of punitive or exemplary damages for the private wrong suffered."[275] The court added that an "exception to the constitutional guarantee of full faith and credit is that penal statutes of one state do not have extraterritorial effect."[276]

It appears that the court considered as decisive the question of whether the common law rule granting punitive and exemplary damages is penal in nature and as such may not be applied extra-territorially. However, two kinds of situations must be distinguished in this respect. The first situation is the choice-of-law situation where a sister-state court, following its own conflict rule, is faced with the application of a foreign rule of law which might be penal in nature and therefore could be denied application in spite of the full faith and credit due to sister state laws, statutory and decisional. A different situation arises when a claim has been reduced to judgment in a sister-state and is before the court of another jurisdiction and claims full faith and credit. There the hands of the court are bound since the demand is no more based on the original cause of action but is one arising from the judgment. This prevents the court from looking behind the judgment, not only to the rendering court's own compliance *vel non* with the applicable law, but also to the possibility that extraterritorial effect which may be indirectly given to a rule of the adjudicating forum which otherwise might be excluded from extraterritorial effect.[277] As stated in *Milwaukee County v. M. E. White*:

> A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis.[278]

The reliance by the court on *James-Dickinson Mortgage Co. v.*

272. Holbein v. Rigot, 245 So.2d 57 (Fla. 1971).
273. *Id.* at 59.
274. *Id.*
275. *Id.*
276. *Id.*
277. Fauntleroy v. Lum, 210 U.S. 230 (1908).
278. 296 U.S. 268, 275 (1935).

Harry[279] and *Loucks v. Standard Oil Co.*[280] might have been proper in choice-of-law situations as necessary to substantiate the definition of a penal statute. The reliance on *Huntington v. Attrill*,[281] however, in this full faith and credit situation is not persuasive because of the inherent weakness of that case and the fact that *Huntington* is overshadowed by the quoted English case[282] which determined the effect to be given to a New York judgment in Canada. However, the court in *Huntington* overlooked the decisive difference, namely, that the English case is one of international recognition where the discrimination against foreign penal statutes enjoys free range while in the case before them the question to be decided was one of full faith and credit to a sister state judgment.[283] These remarks do not suggest a different result, but they might indicate a better way to reach it.

Estoppel by judgment was at issue in *Bardwell v. Langston*.[284] There the plaintiff, who was injured in a Louisiana collision, succeeded in her action filed in a Louisiana federal court against the driver of the car involved in the accident. When she subsequently instituted an action in a federal court in Florida against the insurer of a motor company which was believed by defendant to have been the owner of the car at the time of the accident, the court held—without the motor company participating in the proceedings—that the company did not own the car. Then the plaintiff instituted an action in a Florida state court directly against the motor company insisting on its ownership. The defense countered with res judicata. The appellate court affirmed judgment for defendant by reason of estoppel by judgment, in spite of the fact that the motor company was not involved in the previous litigation nor was it in what is generally understood, privity with the defendant insurer. Moreover, identity of the parties was lacking.

The most promising attack upon a sister-state judgment which is sought to be enforced in another jurisdiction remains the one based on lack of jurisdiction. In *Maloney v. Hicks*,[285] the court found that affidavits raised a genuine issue of material fact regarding the proper service of process on the nonresident defendant under the Arkansas long-arm statute since defendant allegedly refused to accept the respective mailings and now denied any knowledge of the Arkansas suit altogether.

Cases involving the effect due to sister-state decisions dealing with divorce, alimony, support and custody will be discussed later.[286]

279. 273 U.S. 119 (1927).

280. 224 N.Y. 99, 120 N.E. 198 (1918).

281. 146 U.S. 657 (1892).

282. Huntington v. Attrill, [1893] A.C. 150. (P.C.).

283. The connotation of a penal statute in the "international" sense, used properly in the English case, continues in interstate situations from *Huntington* and *Loucks* down to *Holbein*.

284. 244 So.2d 742 (Fla. 4th Dist. 1971); *cf.* Weissinger v. United States, 423 F.2d 795 (5th Cir. 1970), *vacating* 423 F.2d 782 (5th Cir. 1968).

285. 239 So.2d 620 (Fla. 4th Dist. 1970).

286. *See* section V, D, *infra*; Somportex Ltd. v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161 (E.D. Pa. 1970) (enforcement of an English judgment in federal court).

IV. ERIE-KLAXON DOCTRINE

A. *General Problems*

The thrust of the *Erie-Klaxon* doctrine has been enunciated by federal courts repeatedly and in a variety of formulations. When faced with the application of state statutory or decisional law, federal courts follow the interpretation supplied by state courts and, whenever possible, by an authoritative pronouncement of the highest state court, in order to find the "way the *Erie* wind blows."[287] In other instances, they search for the "lampposts to light our *Erie* way."[288]

Difficulties arise where the highest court of the state has not spoken. In such instances the federal court

> may assume that state law will accord with generally accepted principles of substantive law. . . . But in such a situation, a federal diversity court nevertheless has an obligation to carefully examine the rules of construction and the substantive approach of the state court in analogous areas in an attempt to derive 'instructive guidance' from the state tribunal.[289]

In fact, such efforts may amount to "an enlightened guess"[290] fraught with difficulties which confront federal courts with the perplexing need to

> prognosticate what a Florida judge would think a Pennsylvania judge would think about a question that Pennsylvania judges have not thought about.[291]

In some instances, federal courts "follow published intermediate state appellate court decisions unless [they] are convinced that the highest state court would decide differently."[292] In others, federal courts take into consideration the "decisions of other states, federal decisions or the general weight of authority."[293]

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287. Delduca v. United States Fidelity & Guar. Co., 357 F.2d 204, 206 (5th Cir. 1966). *See* Fuchs v. Harbor Island Spa, Inc., 420 F.2d 1100 (5th Cir. 1970). Unlike a denial of certiorari by the United States Supreme Court, such a denial by the Supreme Court of Florida is equivalent to an affirmation on the merits. Eastburn v. Ford Motor Co., 438 F.2d 125 (5th Cir. 1971). *See generally* Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Klaxon Co. v. Stentor Elec. Mfg., Co., 313 U.S. 487 (1941).

288. Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co., 440 F.2d 36, 40 (10th Cir. 1971).

289. Glover v. Daniels, 310 F. Supp. 750, 753 (N.D. Miss. 1970), *quoting* Jackson v. Sam Finley, Inc., 366 F.2d 148, 153 (5th Cir. 1966).

290. Glover v. Daniels, 310 F. Supp. 750, 753 (N.D. Miss. 1970), *quoting* Necaise v. Chrysler Corp., 381 F.2d 459, 463 (5th Cir. 1967).

291. Beck v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 429 F.2d 813, 816 (5th Cir. 1970); Klingbiel v. Commercial Credit Corp., 429 F.2d 1303 (10th Cir. 1971), a "classical situation where this Court must divine what a Kansas Court would think that a Missouri Court was thinking about a question on which a Missouri Court had not yet thought."

292. Ruth v. Bituminous Cas. Corp., 427 F.2d 290, 292 (6th Cir. 1970).

293. Cottonwood Mall Shop, Inc. v. Utah Power & Light Co., 440 F.2d 365, 40 (10th Cir. 1971), *quoting* 1 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 8, at 40 (Wright ed. 1961).

Recently, the Fifth Circuit Court of Appeals restated its position in Tompkins v. City of El Paso, 449 F.2d 842 (5th Cir. 1971) that in *Erie* cases a federal district court.

> in making a vicarious determination of state law, [may] base its conclusion upon

Does a mere expectation of a change in state law justify a federal court in fulfilling such expectations and effectuate the change in their determination of state law? A switch from the *lex loci actus* for contracts to the law of significant relationship was foreseen in *Singleton v. Forman*.[294] But another such hunch went wrong in the *Lester*[295] litigation forcing the court behind the wall of the false conflicts doctrine. Federal courts, however, remain "*Erie* bound" by Florida precedents even though Florida law on the particular point is a minority view. "[A]nomalous as the Florida law may be, [the plaintiffs] are entitled to the benefit of it."[296]

By contrast, holdings of state trial courts are not considered binding as precedents.[297] However, the opinion may have the

> persuasive force of having been entered in the very case and on precisely the same issues, and it has the additional persuasiveness of the fact that the state judge, in seeking to divine what was the law of Florida, relied upon the opinion of the highest court of Illinois.[298]

Another question is that of the effect of determinations of state law made by federal courts, both on other federal courts and on state courts. In regard to the first question, the federal court of appeals in the already discussed *Flying Saucers*[299] case, faced with the interpretation of a Florida long-arm statute, section 48.181 of Florida Statutes (1969), felt bound

> to look to the decisions of the Florida courts. However, where our court has construed such a statute and no intervening state court decision has placed a different construction on it, the rule

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> all relevant sources to which the state courts would themselves look . . . . This is not to say that the federal courts cannot be innovative or impart new direction to state law in diversity cases; rather the converse is true. It is, however, improper for the federal courts to disregard the forum state's jurisprudence . . ., especially where the jurisprudence does not evidence a trend toward the position taken by the district court.

Id. at 844.

294. 435 F.2d 962 (5th Cir. 1970). On predicting future developments of state law, see Putman v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964); Ideal Structures Corp. v. Levine Huntsville Dev. Corp., 251 F. Supp. 3 (N.D. Ala. 1967), *rev'd*, 396 F.2d 917 (5th Cir. 1968). There, the court declined to accept the lower court's reasons for imminent change of state law based on a recent trend in other states, increased doctrinal criticism, the espousal of the foreseen rule by the RESTATEMENT ON CONFLICTS OF LAW (SECOND) §§ 332, 334, 599a (1969), and the fact that the forum state (Alabama) had enacted the UNIFORM COMMERCIAL CODE containing the novel rule of significant relationship. The appellate court, however, reasoned that "our Erie antenna is not so sensitive that we can gauge every variant breeze of change" (*Id.* at 922), as inviting the "exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." *Id.*, *quoting* Spector Motor Serv. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1943) (Learned Hand, J., dissenting).

295. Lester v. Aetna Life Ins. Co., 433 F.2d 884 (5th Cir. 1970).

296. State Farm Mut. Ins. Co. v. Sampson, 305 F. Supp. 50, 53 (M.D. Fla. 1969).

297. King v. Order of United Commercial Travelers, 333 U.S. 153 (1948).

298. Hill v. United States Fidelity & Guar. Co., 428 F.2d 112, 115 (5th Cir. 1970). "[A]s to the law of the United States, and particularly with respect to constitutional issues, the Florida court's views are without binding effect." Sun Ins. Office, Ltd. v. Clay, 319 F.2d 505, 509 (5th Cir. 1963).

299. 421 F.2d 844 (5th Cir. 1971).

> of stare decisis binds us to our earlier decision just as it does with respect to any other matter with which the court has to deal.[300]

The same position prevailed in *Entron, Inc. v. General Cablevision of Palatka*.[301] However, the second question was not discussed recently.

In reviewing lower court's determination of state law, federal courts of appeals give great weight to the views "taken by a district judge experienced in the law of the state, although of course the parties are entitled to review by us of the trial court's determination of state law just as they are in any other legal question in a case."[302]

Cases of first impression involving the interpretation of state statutes are particularly unwelcome to federal courts. In one such situation, a federal court felt itself confronted with the "*enfant terrible* of the *Erie* rule: a state statute, the duty of whose initial interpretation is delivered into the unloving hands of the federal court."[303] This aspect of a case decided recently by the United States Supreme Court[304] was one of the reasons the court ruled as it did.

In *Erie* situations, federal courts have dealt with various aspects of Florida law. Among these aspects are: torts,[305] contracts,[306] (particularly insurance),[307] the Uniform Commercial Code,[308] workmen's compensa-

300. *Id.* at 886-87. *Cf.* Brown v. City of Jacksonville, 236 So.2d 141 (Fla. 1st Dist. 1970).

301. 435 F.2d 995 (5th Cir. 1970).

302. Freeman v. Continental Gin Co., 381 F.2d 466 (5th Cir. 1967), *quoted in* C.H. Leavel & Co. v. Board of Comm'rs, 424 F.2d 764, 766 (5th Cir. 1970).

303. Little v. Schafer, 319 F. Supp. 190 (S.D. Tex. 1970). Where the federal district judge did not have a Florida appellate decision available rendered a few days before, he granted a summary judgment, and the case was remanded. Edwards v. Imperial Cas. & Indem. Co., 418 F.2d 570 (5th Cir. 1969).

304. Reetz v. Buzanich, 397 U.S. 82 (1970).

305. Rawls v. Conde Nast Pub., Inc., 446 F.2d 313 (5th Cir. 1971); Digregorio v. Industrial Supply Corp., 438 F.2d 303 (5th Cir. 1971); Box v. Southern Georgia Ry., 433 F.2d 89 (5th Cir. 1970); Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co., 430 F.2d 38 (5th Cir. 1970); Dvorak v. Holiday Inns of America, Inc., 429 F.2d 54 (5th Cir. 1970); Emerson Elec. Co. v. Farmer, 427 F.2d 1082 (5th Cir. 1970); Pemberton v. Pan American World Airways, 423 F.2d 426 (5th Cir. 1970); Horne v. Georgia So. & Fla. R.R., 421 F.2d 975 (5th Cir. 1970); Seaboard Coast Line R.R. v. Tennessee Corp., 321 F.2d 970 (5th Cir. 1970); Hertz Co. v. Ralph M. Parsons Co., 419 F.2d 783 (5th Cir. 1969); Wm. G. Roe & Co. v. Armour & Co., 414 F.2d 862 (5th Cir. 1969); Honka v. Eastern Air Lines, Inc., 327 F. Supp. 251 (S.D. Fla. 1971); Brooms v. James Lee Motor Co., 318 F. Supp. 867 (N.D. Fla. 1970).

306. Inter-Continental Promotions, Inc. v. Miami Beach First Nat'l Bank, 441 F.2d 1356 (5th Cir. 1971); Northwest Accep. Corp. v. Heinicke Inst. Co., 441 F.2d 887 (5th Cir. 1971); Eastern Air Lines, Inc. v. Hartford Accident & Indem. Co., 437 F.2d 449 (5th Cir. 1971); Sanitary Linen Serv. Co. v. Alexander Proudfoot Co., 435 F.2d 292 (5th Cir. 1971); Precision Plating & Metal Finishing Inc. v. Martin-Marietta Corp., 435 F.2d 1262 (5th Cir. 1970); Lake v. Fidelity & Deposit Co., 430 F.2d 1251 (5th Cir. 1970); Central Distrib., Inc. v. M.E.T., Inc., 428 F.2d 369 (5th Cir. 1970); Mohasco Indus., Inc. v. Maxwell Co., 425 F.2d 436 (5th Cir. 1970); Craddock v. Greenhut Constr. Co., 423 F.2d 111 (5th Cir. 1970); United Bonding Ins. Co. v. Banco Suizo-Panamento, S.A., 422 F.2d 1142 (5th Cir. 1970); General Dynamics Corp. v. Miami Aviation Corp., 421 F.2d 416 (5th Cir. 1970); Fuchs v. Harbor Island Spa, Inc., 420 F.2d 1100 (5th Cir. 1970); Granik v. Perry, 418 F.2d 832 (5th Cir. 1969); Aerojet-General Corp. v. Kirk, 318 F. Supp. 55 (N.D. Fla. 1970).

307. Connecticut Mut. Life Ins. Co. v. Carter, 446 F.2d 136 (5th Cir. 1971); Continental Ins. Co. v. Sherman, 439 F.2d 1294 (5th Cir. 1971); Moore v. John Hancock Mut. Life Ins.

tion,[309] trusts,[310] and the statute of limitations.[311]

A few well established rules have found recent expression. The determination of whether there is sufficient evidence to submit the case to the jury is made according to federal standards.[312] Similarly, whenever questions of state law arise on a motion for summary judgment which raises the question of the materiality of particular facts, the question of whether trial is necessary remains a matter to be decided by federal law.[313]

Co., 436 F.2d 823 (5th Cir. 1971); Bishop v. Franklin Life Ins. Co., 435 F.2d 173 (5th Cir. 1970); Cheek v. Agricultural Ins. Co., 432 F.2d 1267 (5th Cir. 1970); Aetna Cas. & Surety Co. v. Atlantic Nat'l Bank, 430 F.2d 574 (5th Cir. 1970); Corporation of Americas, Ltd. v. Export-Import Bank, 425 F.2d 429 (5th Cir. 1970); Bush v. Allstate Ins. Co., 425 F.2d 393 (5th Cir. 1970); Rosen v. Godson, 422 F.2d 1082 (5th Cir. 1970); United States v. United Bonding Ins. Co., 422 F.2d 277 (5th Cir. 1970); Yates v. State Farm Fire & Cas. Co., 417 F.2d 766 (5th Cir. 1969); Stefanski v. Mainway Budget Plan, Inc., 326 F. Supp. 138 (S.D. Fla. 1971); Fidelity & Deposit Co. v. Usaform Hail Pool, Inc., 318 F. Supp. 1301 (M.D. Fla. 1970); Miami Nat'l Bank v. Pennsylvania Ins. Co., 314 F. Supp. 858 (S.D. Fla. 1970).

308. *In re* Fibre Glass Boat Corp., 324 F. Supp. 1054 (S.D. Fla. 1971); F.D.I.C. v. Marine Nat'l Bank, 303 F. Supp. 401 (M.D. Fla. 1969).

309. Trail Builders Supply Co. v. Reagan, 430 F.2d 828 (5th Cir. 1970).

310. Investors Syndicate of America, Inc. v. City of Indian Rocks Beach, 434 F.2d 871 (5th Cir. 1970); Celanese Coating Co. v. McKenzie Tank Lines, Inc., 421 F.2d 673 (5th Cir. 1970) (bailment).

311. Eastburn v. Ford Motor Co., 438 F.2d 125 (5th Cir. 1971); Knowles v. Carson, 419 F.2d 369 (5th Cir. 1969); Grissom v. North American Aviation, Inc., 326 F. Supp. 465 (M.D. Fla. 1971).

312. Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969), *followed in* Telfair v. Zim Israel Nav. Co., 428 F.2d 127 (5th Cir. 1970).

313. Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co., 420 F.2d 1211 (5th Cir. 1969). Outside of diversity cases, state law may fill gaps in federal law, particularly regarding statutes of limitation. Mizell v. North Broward Hosp. Dist., 427 F.2d 468 (5th Cir. 1970). There is the qualification that

> although the federal courts apply a state limitations statute in suits to vindicate a federal right, they look to the federal purpose, policy and intent of Congress as to the objectives of the legislation in determining whether the pursuit of state remedies tolls this statute.

Id. at 474. The award of interest depends on state law. Peterson v. Klos, 433 F.2d 911 (5th Cir. 1970).

The contention of the defendant in United States v. D'Amato, 436 F.2d 52 (5th Cir. 1970) that the question of state law involved in a conviction for traveling in interstate commerce to promote violation of state law may only be challenged and interpreted in the state courts, was rejected on the authority of Meredith v. Winter Haven, 320 U.S. 228 (1943) on the ground that the federal judiciary had never hesitated to

> decide questions of state law when necessary for the disposition of a case . . . although the highest court of the state ha[d] not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain . . . .

United States v. D'Amato, 436 F.2d 52, 54 (3d Cir. 1970), *quoting* Meredith v. Winter Haven, 320 U.S. 228, 234 (1943), even though "it is the state court that speaks with final authority on questions of state law." The court observed that its power to

> decide state-law questions is not limited to cases brought under the Federal court's diversity jurisdiction. In cases brought by virtue of their involvement with Federal questions, the court is not limited to the Federal questions but will decide all of the issues in the case including state-law questions.

Id. Federal law also controls the relationship between the lender, borrower, and the Small Business Administration. St. Petersburg Bank & Trust Co. v. Boutin, 445 F.2d 1028 (5th Cir. 1971).

B. *Abstention and Certification*

A federal court may, in certain "narrowly limited 'special circumstances,' "[314] decline to entertain an action even though its jurisdiction is properly invoked, in order to allow a state court to resolve the question of state law involved in the federal litigation. There are three typical situations where this may happen.[315] The first involves cases where the constitutionality of a state law under federal standards is questioned, and a constitutional test may be avoided or materially altered by a prior determination of state law in state courts. The second situation arises where a federal court is called upon to intrude into an area of paramount state interest in the operation of the state's own administration. Third, the type of interest for this study, arises in diversity litigation "where the abstention has been countenanced when unclear or unusually difficult questions of state law are presented."[316]

The doctrine of abstention has been developed through a long line of cases, among them those handed down in 1959,[317] when the doctrine reached its broadest application. Subsequent cases have substantially limited its scope. Recently, the United States Supreme Court has ruled on situations involving constitutional aspects. Nevertheless, the radiation of these decisions may reach into mere choice-of-law situations. In *Reetz v. Bozanich*,[318] the court was faced with the constitutionality of an Alaska statute under the Alaska and federal constitutions. The court repeated the principle that abstention is "not necessary whenever a federal court is faced with a question of local law,"[319] since abstention "certainly involves duplication of effort and expense and an attendant delay."[320] Consequently, abstention should be applied only where the "issue of state law is uncertain."[321] In the present case a determination by a state court of the constitutionality of the statute under the state constitution could "conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship,"[322] particularly since "here the nub of the whole controversy may be the state constitution."[323]

314. Zwickler v. Koota, 389 U.S. 241, 248 (1967); Hall v. Garson, 430 F.2d 430 (8th Cir. 1970); *see Survey* IV at 472.

315. Hall v. Garson, 430 F.2d 430, 437 (5th Cir. 1970); Press v. Pasadena Ind. School Dist., 326 F. Supp. 550 (S.D. Tex. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Bednar, *Abstention under Delaney: a Current Appraisal*, 49 TEX. L. REV. 247 (1971); Keilin, *Abstention from Jurisdiction: Accommodation or Abdication?*, 23 ARK. L. REV. 412 (1969).

316. Press v. Pasadena Ind. School Dist., 326 F. Supp. 550, 553 (S.D. Tex. 1971).

317. Kurland, *Toward A Cooperative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1960).

318. 397 U.S. 82 (1970).

319. *Id.* at 86.

320. *Id.*

321. *Id.*, *quoting* Harman v. Forssenius, 380 U.S. 528, 534 (1964).

322. Reetz v. Bozanich, 397 U.S. 82, 87 (1970).

323. *Id.*

Finally, the "first judicial application of these constitutional provisions should properly be by an Alaska court," when parties "repaired to the state courts for a resolution of their state constitutional question."[324]

In a similar situation involving a "rather vague Puerto Rican law that the Supreme Court of Puerto Rico has not yet authoritatively construed," the same result was reached.[325]

However, in *Wisconsin v. Constantineau*,[326] a widely split court has rejected abstention on the ground that the Wisconsin statute is not uncertain. In another case involving Florida's loyalty oath, the dissenting justice urged unsuccessfully that "Florida courts should . . . be given an opportunity to construe the clause before the federal courts pass on its constitutionality."[327]

Turning now to Florida related federal cases, the construction of a family automobile liability insurance policy was at issue in *Boyd v. Bowman*.[328] The court, "confronted with a perplexing question of State law that resists satisfactory resolution by this Court alone," and finding that "existing State decisions cast little *Erie* light," expressed its belief that it is "blessed with no greater prescience after absorbing Erie-Florida law than before, and following oft-established practice of declining to accept our own judicial hypotheses when State decisional certainty is within legitimate reach,"[329] decided on certification. The court was aware of the alternative to "pre-guess the Florida courts and dispose of this controversy immediately . . . by trying to divine what the State law will be though the markers are nonexistent or indistinct."[330] This procedure, the court continues, will prevent federal courts from reaching "a decision *now* which turns out a moment later to be wrong."[331] It also will avoid

> the uncertainty of the principles presented primarily involv[ing] state policy choices in the process of interpretation on our part, and when alternatives such as certification are available, we need not to be content with *Erie* shots in the dark at the shifting and oft-times illusory target of State law as a basis for disposing of the controversy here and now.[332]

Similarly certified was the question of liability of a supervising architect for damages to the general contractor in *Moyer v. Graham*.[333]

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324. *Id.*

325. Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970).

326. 400 U.S. 433 (1971).

327. Connell v. Higgenbotham, 91 S. Ct. 1772, 1774 (1971) (Stewart, J., concurring in part and dissenting in part).

328. 443 F.2d 848 (5th Cir. 1971).

329. *Id.* at 849.

330. *Id.*

331. *Id.* at 850.

332. *Id.*

333. 443 F.2d 434 (5th Cir. 1971); *see also* Allen v. Estate of Carman, 446 F.2d 1276 (5th Cir. 1971); National Education Ass'n v. Lee County Bd. of Pub. Instruction, 448 F.2d 451 (5th Cir. 1971) and Oliva v. Touchton, 448 F.2d 437 (5th Cir. 1971) where the court expressly reserved the federal constitutional question, but without preventing the Florida

V. CHOICE-OF-LAW RULES

A. *Torts*

The dissolution of the simple *lex loci delicti*[334] has brought about a variety of complex decisional adjustments which are currently far from having jelled in a workable tool. The strongest counter-attack against the innovators came from the Louisiana Supreme Court in *Johnson v. St. Paul Mercury Insurance Co.*[335] A guest passenger riding in a car owned by another Louisianan, garaged in Louisiana, and insured under a Louisiana contract, was injured on a trip to Iowa. The injury occurred in Arkansas which has the usual guest statute requiring willful negligence while Louisiana has no guest statute at all, and ordinary negligence would warrant recovery. The Louisiana Supreme Court first stressed the difference between *stare decisis* and *jurisprudence constante* obtaining in Louisiana and found that no line of decisions warrants a deviation from the *lex loci delicti* rule adhered to consistently by Louisiana courts. Of course, defendant urged that Louisiana should abandon its *lex loci* rule in favor of the grouping of contacts and the resulting center of gravity rules as the New York court did in *Babcock v. Jackson.*[336] The court found this rule anything but clear in its combination with the doctrine of proper law, governmental interest, the most significant relationship and the place of the garaging of the vehicle. This, and other factors, caused the Louisiana court to "pause and hesitate to embrace this somewhat fashionable but free-wheeling tendency."[337] In the opinion of the court, the cause of action must be given by some law, and it "can be given only by the law of the place where the tort is committed."[338] If this were not the case, the court would apply its tort law extraterritorially. There is also the selection by the plaintiff of the forum "with . . . attendant built-in inclination to favor

Supreme Court from "relying upon, articulating or expressing its reasons in terms of constitutional principles (state or Federal) in arriving at decisions on the State question." *Id.* at 439.

334. For an up-to-date survey, see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (1971); Kahn-Freund, *Delictual Liability and the Conflict of Laws*, 124 RECUEIL DES COURS DE L'ACADEME DE DROIT INT'L 5 (1968); Ehrenzweig, Specific Principles of Private *Transnational Law*, 124 RECUEIL DES COURS DE L'ACADEME DE DROIT INT'L 179 (1968); Weintraub, *The Emerging Problems in Judicial Administration of State-Interest Analysis of Tort Conflict of Laws Problem*, 44 So. CAL. L. REV. 877 (1971).

335. 256 La. 289, 236 So.2d 216 (1970), *rev'g* 218 So.2d 375 (La. App. 1969); Couch, *Choice of Law, Guest Statutes and the Louisiana Supreme Court: Six Judges in Search of a Rule Book*, 45 TUL. L. REV. 100 (1970). *Cf.* Orestiadou v. Succession of Andrews, 236 So.2d 884 (La. App. 1970); Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970).

336. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), first adopted by the Florida Supreme Court acting on a certified question in Hopkins v. Lockheed Aircraft Corp., 201 So.2d 743 (Fla. 1967), but immediately rejected on rehearing by Hopkins v. Lockheed Aircraft Corp., 201 So.2d 743 (Fla. 1967); *see Survey* III at 544.

337. Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 305, 236 So.2d 216, 222 (1970).

338. *Id.* at 306, 236 So.2d at 222. The court describes the *Babcock* doctrine as

> vague and ill defined at best leading to confusion, and at worst manifestly dangerous because it opens wide the door to decisions based on whim or caprice, with after-the-fact fabrication of contact analysis offered for additional weight and justification.

Id. at 304, 236 So.2d at 221.

the plaintiff,"[339] particularly since the adoption of the contact doctrines will "warrant an excursion into a nebulous field where in complex situations each decision will call for an unstable exercise in legal gymnastics."[340] Such far-reaching law reform through courts was considered improper lest courts "devise new and untried rules to circumvent . . . legislative enactments." On the contrary, the *lex loci delicti* rule has certainty, simplicity, ease of application, and also complies with the full faith and credit precept. This rule also encourages comity which is "so important to a workable federalism,"[341] and imposes restraint upon states in the extraterritorial application of their laws. In disposing of the issue, the court indicated a threefold process to be followed in such situations: first, it must "perceive the relevant social policies involved in the change;"[342] second, it must develop a rule to replace the rule to be abandoned; and third, the rule so formulated must be workable. Limiting this scheme to the last aspect, the court found that the new doctrines were "in their formative stages, and will not lend themselves to a sound declaration of new law,"[343] particularly since the main thrust is not directed toward establishing a rule of general application, but "to do justice in the individual case."[344]

Only two decisions dealing with torts may be noted. In *Kuklis v. Hancock*,[345] the court approved the judgment for a plaintiff which granted damages arising out of a car collision in Germany. Difficulties involved in the case had been eliminated by a stipulation between parties to have Florida tort law control all aspects of the case. Particular problems, such as admission of the accident report, defendant's blood-alcohol test,[346] and the applicability of the federal shop-book statute[347] were decided without reference to the *lex loci delicti*. In *Morison v. General Motors Corp.*,[348] the release of "all other persons, firms, and corporations liable or who may be claimed to be liable" contained a settlement between the insurer of the driver and the owner of the car on the one hand, and the passenger, on the other, and also benefited the manufacturer of the car. Both parties had consented to the application of the *lex loci delicti*, *i.e.*, Arkansas, and Arkansas law was applied by the court.

Recent difficulties in handling guest statutes according to the *Babcock*[349] rule have appeared not only in Louisiana in *Johnson*, but also in New York. In *Pryor v. Swarner*,[350] the federal court with jurisdiction

339. *Id.* at 306, 236 So.2d at 222.
340. *Id.* at 307, 236 So.2d at 222.
341. *Id.* at 308, 236 So.2d at 223.
342. *Id.* at 309, 236 So.2d at 223.
343. *Id.* at 310, 236 So.2d at 223.
344. *Id. Cf.* McDaniel v. Petroleum Helicopters, Inc., Case No. 71-1057 (5th Cir. filed January 24, 1972).
345. 428 F.2d 608 (5th Cir. 1970).
346. FLA. STAT. § 317.171 (1969).
347. 28 U.S.C. § 1732 (1970).
348. 428 F.2d 952 (5th Cir. 1970).
349. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).
350. 445 F.2d 1272 (2d Cir. 1971).

based on diversity held that the New York guest statute is inapplicable to an Ohio accident involving a New Yorker as a guest passenger in an automobile registered and insured in Florida, in view of the fact that both Ohio and Florida bar recovery for simple negligence.

B. *Contracts*

In Florida the traditional choice-of-law rule regarding contracts—absent parties' choice of law—still seems to prevail. The traditional rule combines—according to the two phases of the contractual process—the law of the place of making with the law of the place of performance. Recently, the rule was restated in *State-Wide Insurance Co. v. Flaks*,[351] where the court noted that

> matters bearing on the execution, validity, interpretation and obligations of contracts are determined by the law of the place where the contract is made, although matters connected with performance are regulated by the law of the place where the contract by its terms may have been provided to be performed and matters relating to the procedure, . . . [by] the law of the forum.[352]

The new relativist approach using the "grouping of contacts" did not remain unnoticed in Florida. This approach was tentatively mentioned in *Rutas Aereas Nacionales, S.A. v. Robinson*,[353] and, in addition to the choice of law by parties agreement, later became the fundamental rule for transactions within the scope of the Uniform Commercial Code,[354] under the formula of "appropriate relation to this state."[355] It may be expected that the new method will percolate into areas outside of the Uniform Commercial Code[356] and gradually influence conflict rules applicable to contracts generally.

Without waiting for any of these possibilities to materialize, a federal court sitting in diversity took a step in this direction. In *Singleton*

351. 233 So.2d 400 (Fla. 3d Dist. 1970).

352. *Id.* at 402. The language stems from Justice Storey's opinion in Bank of the United States v. Donnally, 33 U.S. (8 Pet.) 361, 371 (1834) that, as a general principle adopted by civilized nations, the "nature, validity and interpretation of contracts are to be governed by the law of the country where the contracts are made, or are to be performed." This doctrine was adopted subsequently in Perry v. Lewis, 6 Fla. 555 (1856) and Crowell v. Skipper, 6 Fla. 580 (1856); *followed in* Brown v. Case, 80 Fla. 703, 86 So. 684 (1920). *Cf.* Connor v. Elliott, 79 Fla. 513, 85 So. 164 (1920); Warner v. Florida Bank & Trust Co., 160 F.2d 766 (5th Cir. 1947).

353. 339 F.2d 265 (5th Cir. 1964). *See Survey* II at 528.

354. *Survey* II at 498.

355. FLA. STAT. § 671.105 (1969).

356. Such expansion is even recommended in Morange v. States Marines Lines, Inc., 398 U.S. 375, 392 (1970):

> It has always been the duty of the common law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common law principles—many of them deriving from earlier legislative exertions.

Cf. United States v. Hext, 444 F.2d 804 (5th Cir. 1971).

v. Foreman,[357] an action brought by a client against her attorney, the court started from the traditional rule of the *lex loci actus* and proceeded to later cases that indicate a "more flexible position." The subsequent cases look to both traditional contract contacts, *i.e.*, the place of making and the place of performance interchangeably, connecting them with "or." In its attempt to find cases dealing with situations where the place of making and performances were different, the court remained unsuccessful and resorted to the assumption that if a Florida court would have to choose between these two contacts, it would decide in favor of the one with "more significant relationship to that contract."[358] Following this line of reasoning, the court found that "Florida, the place of performance, has the more significant relationship to the contract," while the Tennessee contacts, arising "solely from the transitory presence of the parties, were insignificant and entirely fortuitous."[359] The attorney's contract to represent the plaintiff in her divorce suit to have been filed in Florida was "performable in Florida since the contract dealt with a divorce and property settlement to be obtained in Florida." The contract was also found to touch upon matters in the nature of "sensitive domestic relations . . . peculiarly within Florida's domain."[360]

In an action for breach of contract, apparently made in New York and to be performed in Florida, the court in the previously discussed *Merlite*[361] case observed that in matters of contracts the "*Erie* light is now refracted by many prisms of competing theories."[362] Nevertheless, the court felt "bound to determine which law the Florida courts would apply,"[363] and found that Florida courts would apply the law of the place of making. The conflict, however, was moot "since under any of the possible theories only the law of Florida or New York could be applied," and there was "apparently no disparity on the substantive principles concerning this case."[364]

A number of recently decided cases deal with sales. In *Economic Research Analysts, Inc. v. Brennan*,[365] the alleged breach on the part of defendant of his promise given to the plaintiff California corporation not to enter into employment with another dealer in securities in the South Florida area was disposed of under Florida Statutes section 542.12 (1969). Claims arising from the sale in Florida of an aircraft in custody of seller's bailee in Luxembourg, including the rescission of the contract, were decided according to Florida law, without referring to the choice-of-law

357. 435 F.2d 962 (5th Cir. 1970).
358. *Id.* at 969.
359. *Id.*
360. *Id.*
361. Merlite Land, Sea & Sky, Inc. v. Palm Beach Inv. Properties, Inc., 426 F.2d 495 (5th Cir. 1970).
362. *Id.* at 497 n.2.
363. *Id.*
364. *Id.*
365. 232 So.2d 219 (Fla. 4th Dist. 1970).

problems involved, in *Pinellas Central Bank & Trust Co. v. International Aerodyne, Inc.*[366] An extensive discussion of choice-of-law questions also was avoided in *Holcomb v. Cessna Aircraft Co.*,[367] involving the purchase of an airplane in Kansas to be ferried to Louisiana and later flown to Florida. When defects were subsequently discovered, the buyer claimed damages. The trial court applied Kansas law on the authority of *Sperry Rand Corp. v. Industrial Supply Corp.*,[368] and the parties agreed with this solution. In consequence the Uniform Commercial Code, as adopted in Kansas in 1966, was applied.

Among insurance cases, the already mentioned *State-Wide Insurance Co. v. Flaks*[369] dealt with the question of what law determines the interest due on the insurance sum. The court was faced with the dilemma that Florida allows interest on the sum due on the judgment while New York adheres to the rule that interest is due on the amount payable according to the policy. The court decided, relying on the conflict rule that the interpretation and obligations of contracts are determined by the laws of the place where the contracts are made,"[370] in favor of New York law. A family combination policy issued to plaintiff's father in Pennsylvania while the plaintiff was stationed in Florida and as such a resident of Florida was interpreted according to the law of Pennsylvania which would be applied by Florida courts.[371] However, Pennsylvania has not yet decided whether a serviceman changes his residence by being stationed away from home. Consequently, the federal court had to "prognosticate" and found that Pennsylvania courts would hold that the serviceman was still a resident of his father's household, mainly on the ground that Pennsylvania would follow the majority rule. The law of the place of making also prevailed in *Allstate Insurance Co. v. Employers' Liability Assurance Corp.*,[372] and the Illinois rule adopting the majority position in favor of the excess clause won over the minority position giving effect to an escape clause.

It may be added that the decision in *Confederation Life Insurance Co. v. Campaneria*[373] was affirmed on the authority of *Confederation Life Association v. Vega Arminan*[374] and *Imperial Life Assurance Corp. v. Colmenares*.[375] In the latter case, the Supreme Court of Canada held that place of making of a contract is not decisive as the proper law but the problem of determining the proper law to be "solved by considering the

366. 233 So.2d 872 (Fla. 3d Dist. 1970).
367. 439 F.2d 1150 (5th Cir. 1971).
368. 337 F.2d 363 (5th Cir. 1964); *Survey* II at 528.
369. 233 So.2d 400 (Fla. 3d Dist. 1970).
370. *Id.* at 402.
371. *Id.*
372. 316 F. Supp. 1216 (S.D. Fla. 1970). *Cf.* Hopkins v. Lockheed Aircraft Corp., 201 So.2d 743, 751 (Fla. 1967).
373. 247 So.2d 496 (Fla. 1971).
374. 207 So.2d 33 (Fla. 1968); *see Survey* IV at 480.
375. [1967] Can. Law Rep. 443, 62 Dom. L. Rep. 2d 138 (1967).

contract as a whole in light of all the circumstance which surround it and applying the law with which it appears to have the closest and most substantial connection."[376]

A question of usury was litigated in *Southern Farm Bureau Life Insurance Co. v. McClellan*[377] involving an additional collateral note for an old indebtedness. The note provided for six and one-half percent interest which was considered as usurious under the controlling law of New York. The appellate court agreed with the trial court that the additional note was not a new and separate obligation and affirmed the judgment for plaintiff.

Two cases involving international choice-of-law situations also have been decided. In *Corporation of Americas, Ltd. v. Export-Import Bank*,[378] the insured seller of aircraft engines and spare parts brought an action on a policy issued in connection with the shipment of goods to a Chilean airline. However, the foreign buyer failed to submit the necessary documents to obtain an import license which, in turn, would allow the conversion of foreign currency into dollars. In consequence, the insurer was held not liable on a policy covering transfer risk because of the failure of the Chilean government to appropriate the necessary exchange. Consequently, the plaintiff was precluded from recovery under the transfer risks of the policy. The other case is *Bethell v. Peace*.[379] In addition to the jurisdictional issue already discussed,[380] the court discussed the choice-of-law question and stressed that it presents a different problem. In general terms the court pointed out that "[w]hen dealing with contracts to sell land, rather than actual conveyances, courts have sometimes applied the substantive law that would be applied under the conflicts rule dealing with contracts in general," and indicated that Florida courts "might apply Florida law here because of its strong interest in the parties and the contract."[381]

A few decisions dealt with workmen's compensation. In *Wainwright*

376. *Id.* at 448, 62 Dom. L. Rep. 2d at 142. Among Cuban insurance cases, note Johansen v. Confederation Life Ass'n, 312 F. Supp. 1056 (S.D.N.Y. 1970); Gonzales y Camejo v. Sun Life Assur. Co., 313 F. Supp. 1011 (D.P.R. 1970).

Recently, two additional cases dealing with Cuban insurance contracts have been decided. In Oliva v. Pan American Life Ins. Co., 448 F.2d 217 (5th Cir. 1971), the court held that rights under an insurance policy of a former Cuban resident were not expropriated by Cuban confiscation decrees, nor did the act of state doctrine preclude liability on the part of the insurer; but the proviso of the policy converted in 1952 to be payable on the basis of one peso for one dollar (at this time equivalent), was modified in regard to the cash surrender so as to be computed at the exchange rate prevailing when the demand was made. In Confederation Life Assoc. v. Conte, 254 So.2d 45 (Fla. 3d Dist. 1971), the insured was held to be under no duty to return to Cuba to receive payment in Cuban pesos; instead, he was entitled to the mature value of the policy in dollars (equivalent to the proper conversion rate from pesos). *Cf.* Johansen v. Confederation Life Ass'n, 447 F.2d 175 (2d Cir. 1971).

377. 422 F.2d 825 (5th Cir. 1970).

378. 425 F.2d 429 (5th Cir. 1970); *cf.*, Keystone Acceptance Corp. v. Dynalectron Corp., 445 F.2d 729 (D.C. Cir. 1971).

379. 441 F.2d 495 (5th Cir. 1971).

380. Section II *supra.*

381. Bethell v. Peace, 441 F.2d 495, 497 (5th Cir. 1971).

v. Wainwright, Inc.,[382] the Supreme Court of Florida held that the Florida Workmen's Compensation Law cannot be statutorily expanded to other states to cover employments in which Florida has neither interest nor authority, in spite of an agreement to this effect. In *Hanover Insurance Co. v. Florida Industrial Comm.*,[383] the court found coverage under the Florida statute since the employee was hired to work partially in the Bahamas, but not exclusively. Finally, in *de Cancino v. Eastern Air Lines*,[384] the court held that the employee may seek recovery in another state, but may not recover in Florida additional benefits which would bring recovery beyond what was due to him under the Florida statute.

C. *Property*

1. REAL PROPERTY

The litigation between the United States and a group of developers planning to construct a new sovereign nation on reefs off the Florida coast resulted in a permanent injunction against interference by the developers with the rights of the United States in the coral reefs. The injunction was granted by the trial court[385] on one of the two grounds urged by the government, namely that the activities of the developers have been unlawfully conducted without the required authorization from the Secretary of the Army while the second ground, a trespass on an area over which the United States has control, was rejected. The court of appeals[386] affirmed the decision on the ground relied upon by the trial court, but reversed it in regard to trespass. The court below took the position that the interests of the United States in the area are "something less than a property right, consisting of neither ownership nor possession, and consequently not supporting law action for trespass *quare clausum fregit*."[387] Instead, the appellate court found sovereign and exclusive rights of the United States in the disputed area under federal as well as international law, namely the Convention on the Continental Shelf (Geneva, 1958),[388] which "paramount rights" also support, regardless of ownership or possession, the injunctive relief granted.[389]

2. PERSONAL PROPERTY

Two cases dealing with Florida law applied in other jurisdictions may be noted. In *Insurance Company of North America v. Alexander*,[390]

382. 237 So.2d 154 (Fla. 1970).
383. 234 So.2d 661 (Fla. 1970).
384. 239 So.2d 15 (Fla. 1970).
385. United States v. Ray, 294 F. Supp. 532 (S.D. Fla. 1969); *see Survey* IV at 484.
386. United States v. Ray, 423 F.2d 16 (5th Cir. 1970).
387. *Id.* at 19.
388. [1964] 2 U.S.T. 473, T.I.A.S. No. 5578.
389. *See* Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970) (dredging and filling of navigable waters); Continental Oil Co. v. London Steam-Ship Owners Mut. Ins. Ass'n, 417 F.2d 1303 (5th Cir. 1969) (outer continental shelf).
390. 321 F. Supp. 697 (E.D. Mo. 1970).

the endorsement of a Florida certificate of title to a car was involved. In *Seely v. First Bank & Trust*,[391] a New York court held that the plaintiff buyer of a truck not sold in the ordinary course of business and without the buyer's knowledge of the Florida source of the title has priority for his purchase interest over the defendant bank which held a mortgage on the truck and permitted the seller, who had acquired title in Florida, to register title in New York. The seller did not use the proceeds to pay the bank lien.

Two minor changes in statutory law brought about by the 1970 legislative session may be mentioned. One affects Florida Statutes section 65.031 (1969), dealing with the enforcement of liens on the owner or operator of a garage or storage place which attach to cars deposited there by a law enforcement agency. The period which must elapse before the lien may be enforced without judicial proceedings was reduced from 75 to 45 days. This procedure also may affect foreign registered cars thereby creating conflict problems. The second change affects the escheat of funds in possession of federal agencies.[392]

D. *Family Law*

The 1971 Florida legislature enacted a significant reform of the traditional divorce law.[393] It eliminated enumerated divorce grounds and substituted the criteria of an irretrievable break and mental incompetence.[394] Some of the newly enacted provisions affect conflict aspects and will be discussed in the following paragraphs.

1. JURISDICTION TO DISSOLVE MARRIAGE

The new enactment did not change controlling jurisdictional rules. It even retained the misleading provision that such proceedings "may be brought against persons residing out of state."[395] The six months residence requirement[396] also remained unchanged.

The existence of a domicile in Florida on the part of the wife suing for divorce from the husband residing in England was at issue in *Ashmore v. Ashmore*.[397] In principle, the appellate court held that the alleged intention of the wife to go to England did not amount to such a "change in domicile as defeats the jurisdiction of Florida courts," particularly since there is "no evidence that she acted on that intention, and the intent alone

391. 64 Misc. 2d 845, 315 N.Y.S.2d 374 (Sup. Ct. 1970).

392. FLA. STAT. § 716.02(5) (Supp. 1970).

393. Fla. Laws 1971, ch. 71-241, *amending* FLA. STAT. §§ 61.011, 61.021, 61.031, 61.061, 61.071, 61.08, 61.09, 61.10, 61.11, 61.12, 61.13, 61.14, 61.16, 61.17, 61.18, 61.19 (1969); *adding* FLA. STAT. §§ 61.043, 61.044, 61.052; *repealing* FLA. STAT. §§ 61.041, 61.042, 61.051, 61.15 (1969).

394. FLA. STAT. § 61.052.

395. Fla. Laws 1971, ch. 71-241, *amending* FLA. STAT. § 61.061 (1969).

396. Fla. Laws 1971, ch. 71-241, *amending* FLA. STAT. § 61.021 (1969).

397. 241 So.2d 424 (Fla. 2d Dist. 1970).

does not suffice."[398] Nevertheless, the court left open a door by asking the question whether upon her marriage to an Englishman in England she "lost her Florida domicile by operation of law and became a domiciliary of England in spite of her retention of her home here."[399]

The sufficiency of notice to the husband was litigated in *Roxby v. Roxby*.[400] On appeal, constructive service of process at defendant's last known residence outside of Florida was held sufficient to give the court jurisdiction to reverse a judgment setting aside the divorce decree obtained by the wife, even though she "may have lacked candor and good faith in not sending an additional notice"[401] regarding husband's known mailing address.

The jurisdiction of federal courts in matters of divorce was again at issue in *Lutsky v. Lutsky*.[402] The wife, divorced in Alabama, sought a declaratory judgment that the divorce was null and void. The federal district court maintained the traditional position of the federal courts and "disclaim[ed] any jurisdiction . . . upon the subject of divorce."[403] Nevertheless, the court admitted that this does not "necessarily mean that [the federal courts] lack jurisdiction to determine the validity of a divorce decree rendered by a foreign [sic] court, provided there is some jurisdictional basis, such as diversity."[404] This may be true in cases where the question of divorce is incidental to a matter which otherwise is within the subject matter jurisdiction of the federal judiciary. However, a federal court must not "ignore the effect of prior litigation upon the rights of the parties to now contest their marital status in this court."[405] In any case, final decisions of state courts are within the scope of res judicata and the full faith and credit clause. These concepts are also operative between federal and state courts except in rare cases where state judgments are vulnerable on constitutional grounds amounting to constitutional deficiencies. In the present case, the court held that the plaintiff was not "entitled to two declarations of the same right," nor did the declaratory judgment procedure "furnish a new forum to re-litigate issues previously decided."[406]

2. GROUNDS FOR DISSOLUTION

By eliminating the previously enumerated divorce grounds, the 1971 divorce reform act sounded a well deserved death knell to the oft-

398. *Id.* at 425.
399. *Id.*
400. 235 So.2d 58 (Fla. 2d Dist. 1970).
401. *Id.* at 59.
402. 310 F. Supp. 517 (S.D. Fla. 1970). *See also* Spindel v. Spindel, 283 F. Supp. 797 (E.D.N.Y. 1968).
403. Lutsky v. Lutsky, 310 F. Supp. 517, 518 (S.D. Fla. 1970).
404. *Id.* at 519.
405. *Id.*
406. *Id.* at 520.

litigated Ground Eight which required that defendant has "obtained a divorce from plaintiff in any other state or country."[407]

3. FOREIGN DIVORCE DECREES

Final divorce decrees are entitled—on the interstate as well as state-federal level—to full faith and credit. The first part of the principle was recently restated by the Supreme Court of Florida in *Newton v. Newton*:[408]

> It is well-established law that every state is required to recognize and respect the valid final decrees and orders of the courts of all other states. A decree or order valid in the state where it is issued ordinarily will be honored in any state where an attempt is made to bring suit on the same cause of action. A divorce decree of any state is presumed valid on its face and until same is proved to be invalid serves as a bar to successful prosecution of another action for divorce in this state. The trial court is not at liberty to ignore the binding order of the foreign court.[409]

Foreign divorce mills have recently moved from one jurisdiction to two others;[410] however, legal problems they cause in this country remain the same.

4. ALIMONY

In *Newton v. Newton*,[411] the affirmance by the appellate court of a decree in a wife's divorce action granting temporary alimony and counsel's fees, was quashed on the ground that defendant's contention that he had been divorced in Nevada by a final decree, valid on its face, was bypassed by the trial court. On the authority of *Steward v. Steward*,[412] the court held that the trial court could not order payment of alimony or counsel's fees until it had determined whether the Nevada divorce involved in that case was valid. The dissent opposed the ruling on three grounds: first, that plaintiff did not challenge the Nevada decree, but used it as the basis for asserting Ground Eight; that such action qualifies her for alimony pursuant to the rationale of *Pawley v. Pawley*;[413] and finally, that Florida

407. FLA. STAT. § 61.041(8) (1969); *see Survey* I at 311.

408. 245 So.2d 45 (Fla. 1971).

409. *Id.* at 46.

410. In 1971, Mexico enacted an amendment to its Nationality and Naturalization Law of 1934, severely restricting jurisdiction involving divorces by aliens. [1971] D.O. *See* Bayitch, *Inter-American Legal Developments*, 3 LAW. AM. 274, 299 (1971). Divorces granted in Haiti and the Dominican Republic have replaced the now defunct Mexican "quickie" divorce; *see* Bayitch, *Inter-American Legal Developments*, 3 LAW. AM. 507, 535, 542 (1971). The statement in W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 862 (1971), regarding the new Mexican enactment, is erroneous. On recognition of Mexican divorces, see S. BAYITCH & M. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES: A BILATERAL STUDY 241 (1968).

411. 245 So.2d 45 (Fla. 1971).

412. 115 Fla. 158, 155 So. 114 (1934).

413. 46 So.2d 464 (Fla. 1950).

courts have the power to modify foreign alimony decrees, in this case the decree rendered in Nevada granting plaintiff 75 dollars per month.

The Uniform Reciprocal Enforcement of Support Law[414] was used by a wife to require the husband to pay arrearages due under an out-of-state support order. The husband's counterclaim for divorce was dismissed by the appellate court on the ground that the import of the statute is to "confer jurisdiction on the circuit court solely for the purpose of enforcing a reciprocal support order."[415]

It may be added that Florida Statutes section 61.10 consolidated petitions of either spouse, but underwent no changes affecting conflict aspects. The requirement that the petitioning spouse reside in this state apart from the other spouse and minor children "whether or not such separation is through his fault," remains unchanged.

The interplay between two divorce actions, one in Alabama and the other in Florida, was considered in *Billingsley v. Billingsley*.[416] The wife filed her divorce suit in Alabama on July 9, 1966, while her husband filed his suit on July 26, 1966 in Florida. The wife's attorney plead in abatement in the Florida action, but was not heard since he was not authorized to practice in the state. The Florida court entered a divorce decree on September 19, 1966. The Alabama proceedings resulted, without the husband's participation, in a divorce decree in September 29, 1966, also vesting the title to land in Alabama, previously held under tenure in common, exclusively in the wife as lump sum alimony. The husband filed a bill of review which brought the case before the Supreme Court of Alabama. There can be no doubt that the marriage had been dissolved even though service in Alabama was constructive. Both courts had jurisdiction and reached an identical result:

> It is perfectly clear under the developed doctrines that a court may have full power to grant a divorce to a person domiciled therein even though the service on the other party be constructive. This for the reason that a sufficient part of the marriage res accompanies the domiciliary complainant, and authorizes an in rem action to determine the status of such res.[417]

A more difficult question was that regarding land granted as alimony. The Alabama Supreme Court stated its position as follows: "Alimony, however, is a personal action and a court cannot properly award a personal judgment for alimony unless personal jurisdiction be acquired of the respondent, or, as here, property be within the jurisdiction of the granting state."[418] The court concluded that since the land was situated in Alabama, it was within the power of Alabama courts to issue a decree "af-

414. FLA. STAT. §§ 88.011-.371 (1969).
415. Simpson v. Simpson, 247 So.2d 792, 793 (Fla. 3d Dist. 1971).
416. 285 Ala. 239, 231 So.2d 111 (1970).
417. *Id.* at 241, 231 So.2d at 113.
418. *Id.* at 242, 231 So.2d at 113.

fecting the res or status of the Alabama land. . . ."[419] In response to the husband's contention that alimony can be awarded only in divorce proceedings which presuppose an existing marriage (which did not exist after Florida's earlier divorce decree), the court first emphasized that the divorce court in its position of a court of equity had the "power to determine the interrelated equities of the interest and of the parties to the land"[420] in Alabama. Admitting that permanent alimony may only be granted in divorce proceedings, and that such proceedings are dependent upon the existence of a marital relation at the time the action is instituted (the action in Alabama was instituted prior to the one in Florida), the court held that once a court of equity "acquires jurisdiction of a cause for any purpose, it will retain it and do complete justice between the parties, enforcing, if necessary, legal rights and applying legal remedies to accomplish that end, and that jurisdiction is not ousted because it does not have power to do all the things requested."[421] The court concluded that Alabama's jurisdiction over the subject matter (land) "continued notwithstanding the Florida decree except insofar as recognition of the marital capacity of the parties is necessitated by the Full Faith and Credit provision of the Federal Constitution. . . ."[422] The Alabama decree in no way interfered with the Florida decree regarding its marital status changing effects. It may be added that a divorced wife is not prevented, at least on constitutional grounds, from pressing her claim for alimony provided the respective jurisdiction provides for such a remedy.[423]

5. CUSTODY

The question of jurisdiction in matters of custody was discussed in *Keena v. Keena*.[424] Contrary to the ruling of the trial court holding that it has no jurisdiction regarding custody because the wife had removed the children—during the divorce action—to Germany, the appellate court held that "once a court acquires jurisdiction, it has continuing jurisdiction which cannot be divested when one of the parties flees the geographical area."[425] Quoting from *Rhoades v. Bohn*,[426] the court encountered a qualification on the rule, namely that once a court acquires jurisdiction of a minor as an ancillary matter in a divorce proceeding and enters an order or decree touching custody, the court has continuing jurisdiction. This qualification, however, was held to be a "distinction without a difference"[427] here, since the important and overriding factor was that the trial

419. *Id.*
420. *Id.*
421. *Id.* at 242, 231 So. 2d at 114.
422. *Id.*
423. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).
424. 245 So.2d 665 (Fla. 1st Dist. 1971).
425. *Id.* at 666.
426. 114 So.2d 493, 498 (Fla. 1st Dist. 1959).
427. Keena v. Keena, 245 So.2d 665, 667 (Fla. 1st Dist. 1971).

judge has "acquired jurisdiction over the person of the defendant-wife and the minor children by reason of their physical presence in the geographical area of the court's jurisdiction. . . ."[428] Additionally, both parties had actively participated in the proceedings which "vested jurisdiction of the subject matter in the trial court."[429]

The question of continuing jurisdiction again came up in *Haley v. Edwards*.[430] There the court ruled that continuing jurisdiction of a divorce court in matters of custody is exclusive, at least on an inter-county basis. However, where the original custody decree was rendered in a sister state, such continuing and exclusive jurisdiction does not apply "[s]ince there should always be a court to protect an infant's interest in the state where he is located."[431]

The perennial question of whether custody decrees partake of the benefits of the full faith and credit clause was answered in *Powell v. Powell*[432] in that "Florida . . . judgments affecting the custody of minors are not entitled to recognition under the full faith and credit clause because they do not possess the requisite degree of finality. . . ."[433] This position is open to doubt since any judicial act qualified by its origin, jurisdiction, and procedure retains, as long as it stands unchallenged and not modified by another court of proper jurisdiction, the authority of res judicata which is guaranteed by the full faith and credit clause. Instead, Florida courts—and courts of other jurisdictions—recognize only that sister state custody decrees are "entitled to great weight and respect under the doctrine of comity, absent a showing by clear and convincing evidence that such new conditions have arisen since rendition of the decree as would justify a change of custody."[434] In any case, such ruling may apply only for the future by reason of the fact that a retroactive change of custody would simply make no sense regardless of the generally admitted prima facie validity of sister state judicial decisions. Nevertheless, according to the holding in the case discussed here, the "[a]pplication of the doctrine of comity is a matter of discretion . . . and depends for its consideration upon the foreign court having had jurisdiction and having properly litigated the matter before it."[435] In the present case, the Louisiana court which ruled on the custody was found to have had jurisdiction based on domicile and had properly litigated the issue. For this reason, the Florida trial court's ruling in accordance with the Louisiana decree was affirmed on appeal since no appreciable change in the circumstances has been shown. The trial court's reliance on the full faith and credit clause was, however, found to be erroneous.

428. *Id.* at 667.
429. *Id.*
430. 233 So.2d 647 (Fla. 4th Dist. 1970).
431. *Id.* at 649.
432. 242 So.2d 138 (Fla. 1st Dist. 1971).
433. *Id.* at 139.
434. *Id.*
435. *Id.*

The change of custody from the maternal grandfather, as initially decreed by a West Virginia court, to the maternal grandfather, as ordered by a Florida court, was upheld in *Brooks v. McCutcheon*.[436] The basis for the decision was that the West Virginia decree was not entitled to full faith and credit and the trial court's finding of a change of circumstances "amply supported" its decree.

A custody decree expected to emerge from divorce proceedings in Germany where the spouses had been stationed was included by the trial court in a grant of temporary custody to the father to await a decision as to their custody by the foreign court or other court of proper jurisdiction. On appeal,[437] the decree was held to be contrary to Florida law on the ground that the Florida court

> having jurisdiction of the parties and the . . . children, need not honor such foreign custody order other than to attach such weight thereto as it may deserve based on the predicate for its entry, and in such case the Florida court should not relegate to another jurisdiction the determination of custody but is under obligation to decide the question of custody on the merits, as between the contending parties, leaving or placing the custody where the best interests of the child or children require.[438]

The widely publicized Baby Lenore case originated in New York where the extramarital mother first surrendered her child to an authorized adoption agency which placed the child with a married couple for adoption, thus giving them "provisional custody." Later, the mother changed her mind, requested the return of the child, and initiated habeas corpus proceedings against the adoption agency. The lower court granted her petition and was affirmed on appeal.[439] The court invoked the interest of the child regardless of the fact that "if surrender may be undone, authorized agencies will be inconvenienced or even frustrated in their placement of children [this being] not a sufficient counterweight."[440] The court of appeals affirmed[441] on the ground that a parent's right to regain custody is within the discretion of the court which may "approve a revocation of the surrender when the facts of the individual case warrant it and avoids the obvious dangers posed by the rigidity of the extreme positions."[442] Consequently, the court has the power to "direct a change of custody from the agency back to the natural parent, notwithstanding the document of surrender," provided it determines that the "interest of such child will be

436. 244 So.2d 515 (Fla. 1st Dist. 1970).

437. Anderson v. Anderson, 234 So.2d 722 (Fla. 3d Dist. 1970).

438. *Id.* at 723.

439. State *ex rel.* Scarpetta v. Spence-Chapin Adoption Serv., 36 App. Div. 2d 524, 317 N.Y.S.2d 928 (1971). *Cf.* DeMartino v. Scarpetta, 334 F.Supp. 1089 (S.D.N.Y. 1971).

440. *Id.* at 524, 317 N.Y.S.2d at 929.

441. People *ex rel.* Scarpetta v. Spence-Chapin Adoption Serv., 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971).

442. *Id.* at 189, 269 N.E.2d at 790, 321 N.Y.S.2d at 69.

promoted thereby."[443] In any case, the court held that the parent has a right "superior to that of all others," unless the parent has abandoned the right or is found to be unfit. This "primacy of status thus accorded the natural parent is not materially altered or diminished by the mere fact of surrender under the statute, although it is a factor to be considered by the court."[444] The court found that the surrender was improvident and that the child's interest will be best served by its return to the natural mother. The prospective adopting parents who, according to the opinion, had provisional custody of the child, were denied the right to intervene on the ground that they "do not have legal custody of the baby" which was vested with the adoption agency, nor does the status of prospective adoptive parents convey them any vested rights. Therefore, by "not being permitted to intervene, they are not deprived of a protected interest, as contemplated by the Constitution," *i.e.*, under the due process of law.[445] An appeal by the prospective adopting parents to the United States Supreme Court was dismissed for want of jurisdiction and certiorari was also denied.[446] When the prospective adopting parents moved with the child to Florida, the mother filed another habeas corpus petition, this time against the prospective adopting parents. The district court of appeal affirmed the lower court's denial in a per curiam opinion.[447] Starting from the parties' stipulation that a child custody order of a sister state is not entitled to full faith and credit, but may be given great weight under the doctrine of comity, the court concluded that "under the circumstances of this case, the trial judge followed proper procedure and law in ruling that the best interest and welfare of Lenore were served by leaving her custody with the appellees," there being "sufficient, competent and substantial evidence in the record to affirm his ruling."[448] At this time, the decision of the third district court of appeal is not yet final.

The role of habeas corpus in custody litigation was redefined in *Crane v. Hayes*[449] as an independent action, legal and civil in nature, designed to secure prompt determination of the legality of restraint. When child custody is involved, a habeas corpus takes on the nature of an equitable proceeding to assure the welfare of the child. It is a proper proceeding to regain custody of a wrongfully withheld child without turning into a full fledged civil action in equity. On the contrary, it contains its form as a special proceeding of high priority and limited scope. Upon entry of a judgment, jurisdiction terminates and the judgment becomes subject to timely review. Consequently, a final judgment is, as res judicata, entitled

443. *Id.* 191-92, 269 N.E.2d at 790-91, 321 N.Y.S.2d at 70, *quoting* N.Y. Soc. Services Law § 383(1) (McKinney 1970).

444. *Id.* at 193, 269 N.E.2d at 791, 321 N.Y.S.2d at 71.

445. *Id.* at 196, 269 N.E.2d at 793, 321 N.Y.S.2d at 74.

446. DeMartino v. Scarpetta, 92 S. Ct. 54 (1971).

447. Scarpetta v. DeMartino, 254 So.2d 813 (Fla. 3d Dist. 1971).

448. *Id.* at 814.

449. 253 So.2d 435 (Fla. 1971), *aff'g* 244 So.2d 544 (Fla. 4th Dist. 1971).

to full faith and credit. However, this is not the case when a sister state decree grants temporary custody. In such a case, a Florida court may, on petition for habeas corpus, determine the child's best interest. Moreover, where it is shown that circumstances have changed subsequently to the entry of a prior order, res judicata and full faith and credit do not prevent a court of proper jurisdiction to adjudicate according to new circumstances. In regard to jurisdiction, the physical absence of the child from the jurisdiction may be replaced by the domicile of its parent. The domicile of a child in valid custody of the mother would follow the latter's domicile. In case of the mother's absence from the jurisdiction, Florida's interest would cease. In case the mother's custody is not valid, Florida's existing jurisdiction would continue, particularly if the child has been returned to Florida.

6. SUPPORT

The trials and tribulations of a mother trying to raise a California-granted support award of 75 dollars monthly for her extramarital son born in 1955 on the ground of changed circumstances are drastically shown in *D. R. T. v. O. M.*[450] The mother's efforts started in 1965 and resulted in dismissal of her complaint for failure to fully allege her case within the purview of Florida decisions,[451] a ground patently incorrect. Not only had the mother, according to the same opinion, submitted a certified copy of the California judgment, but she also had made sufficient averments of changed circumstances as well as all necessary jurisdictional allegations. Nevertheless, the opinion expressly found that she "did not pray the court to establish the California decree as a Florida decree and request modification of it by way of supersession of its terms."[452] But, the true ground for dismissal appears clearly in the opinion, namely that "future support payments must be established as a Florida decree. Once established, the chancellor has jurisdiction to modify the decree by way of supersession of its terms and provisions in accordance with Section 742.06 Fla. Stat., F.S.A."[453]

Thus supersession became the focal point of this litigation which came before the same appellate court in 1971.[454] There was no question regarding the defendant's paternity, the propriety of the California support decree, or the jurisdiction of Florida courts based in defendant's residence in the state. Difficulties arose from two sources: first, the lower court increased the support not only by 100 dollars, but also by an equal additional amount, if the boy were to go to college. The second difficulty arose in regard to the duration of the father's duty to support his son.

450. 244 So.2d 752 (Fla. 2d Dist. 1971).
451. Mocher v. Rasmussen-Taxdal, 180 So.2d 488 (Fla. 2d Dist. 1965).
452. *Id.* at 492.
453. *Id.* The provision is inapplicable here.
454. D.R.T. v. O.M., 244 So.2d 752 (Fla. 2d Dist. 1971).

The appellate court took the position that by supersession the California support decree became subject to the Florida statute limiting the period of support.[455]

The ruling of the appellate court denied increased support for future college studies on the ground that the "probability or possibility of future changes in circumstances should not be taken into consideration in determining the amount of support awards. . . ."[456] The court ruling that "[s]uch changes may be conjectural and may never happen,"[457] seems reasonable because the ruling does not adversely affect the California decree. However, the second point deserves a closer examination since it involves the proper operation of the full faith and credit clause. In analyzing the situation, the court started from the inaccurate proposition that the mother had "elected to have the decree established here and then *modified by way of supersession* in accordance with F.S. § 742.06, F.S.A."[458] In fact, the election was imposed upon her when the court in *Mocher*[459] dismissed her complaint solely because her complaint did not expressly pray for supersession when asking for the increase in support. Therefore, the statement that the mother had

> chosen to have had the decree modified in California, then under the rule of comity the decree, as to future installments, could have been established as a local decree and enforced by those equitable remedies customary in the enforcement of our local decrees for support[460]

seems hardly fair.

It is generally admitted that once past due support installments granted by sister state decrees become final under the law of the jurisdiction rendering them, they will qualify for full faith and credit and as such may become a basis for an action on a foreign judgment. It seems that when a foreign support decree is "established" as a local decree, such action becomes unnecessary and past due installments may be enforced without the need for an action by appropriate equitable remedies. Whether or not such "domestication" is in the nature of supersession seems questionable since, by its very meaning, supersession wipes out a sister state support decree, at least regarding the amount of support, and replaces it by new and independent local determination. However, the issue in the present case is narrower. The issue involved only the duration of support because the amount due was at least partially consented to by the father, and the additional raise was denied. The restriction of the original period for support presents a constitutional problem. It is well

455. FLA. STAT. § 742.041 (1969).
456. D.R.T. v. O.M., 244 So.2d 752, 754 (Fla. 2d Dist. 1971) (emphasis added).
457. *Id.*
458. *Id.* (emphasis in original).
459. Mocher v. Rasmussen-Texdal, 180 So.2d 488 (Fla. 2d Dist. 1965).
460. D.R.T. v. O.M., 244 So.2d 752, 754 (Fla. 2d Dist. 1971).

established that states may grant more than the minimum required by the full faith and credit clause, but never less. In this particular case, the court, using the mystery of supersession, deprived the California decree of one of its elements, namely the determination of how long the duty to support shall last. The "election" by the mother to have the California decree locally "established" and "then modified by way of supersession" did not modify or eliminate the obligation to give a final sister state decree full faith and credit, particularly since there is no indication that this part of the decree is amenable to change under California law. Even if the mother was induced to apply for supersession, such prayer would subject her only to local procedural rules, including remedies, but not to substantive provisions of the Florida Bastardy Act. Paternity as well as the duty to support and its duration have been finally decided by a California court in accordance with California law, and these decisions are protected under the full faith and credit clause. In fact, by using the notion of supersession, the court imposed Florida's substantive law on the mother regarding extramarital paternity, a position untenable even under a choice-of-laws approach. Such an approach, attempted by the dissent, is unavailable in a full faith and credit situation because both mother and son are residents of California which, in extramarital filiation, are decisive contacts. In any case, the court has violated the precept of the full faith and credit clause, and it also might have deprived the mother of property without due process of law.

Similarly, a mother became enmeshed in the web of legal niceties in *Villano v. Harper*.[461] There the mother succeeded in having certain Colorado divorce decrees regarding child support—both interlocutory and final—established as Florida judgments in order "to obtain future enforcement of child support . . . and to obtain a judgment for unpaid, past-due child support."[462] The appellate court dismissed her alternative causes of action for "past due child support which sought to establish two Colorado child support arrearage judgments as Florida judgments"[463] on the ground that the defendant father received no notice of the Colorado proceedings wherein the arrearage judgments were rendered. This ruling seems to be ill-founded since the appellate court found not only that "Florida indulges in the presumption that the courts of a sister state have no authority to alter a final decree as to past-due installments for child support,"[464] but also that the mother "in an abundance of caution" introduced "incontroverted evidence that under Colorado law, upon entry of a Colorado divorce decree directing installment child support payments to be made, each installment becomes a final judgment debt as it matures, and these are unmodifiable."[465] These findings distinguish this case from *Sackler v.*

461. 248 So.2d 205 (Fla. 3d Dist. 1971).
462. *Id.* at 206.
463. *Id.*
464. *Id.*
465. *Id.*

Sackler[466] which held that a foreign judgment for arrearages is necessary to qualify them for enforceability by ordinary legal process, but only because the New York Civil Practice Act[467] as then in force, allegedly required such judgment. However, since according to Colorado law support installments became final once due, there was no obstacle to their enforcement, even by equitable remedies. Therefore, even though the defendant father contended that he did not receive notice of the proceedings which resulted in two Colorado child support arrearage judgments, the children were entitled to their benefit. In regard to future installments, this opinion takes the position that such decrees may be established as local decrees and thereby become clothed with all the equitable remedies by which the enforcement of a local decree of alimony may be secured. The court added that such transformation of an obligation to support into more specific form, such as a decree to pay, does not make it an ordinary debt but a continuing obligation. In any case, the father retains the right to request a modification of a foreign decree established here as a local decree as to future installments.

7. PATERNITY

The one reported case deals with jurisdiction to establish extramarital paternity. The appellate court[468] held that such action is one in personam, citing *T. J. K. v. N. B.*,[469] and that consequently, jurisdiction over the nonresident defendant may not be acquired by constructive service.

E. *Decedents' Estates*

The reference in a will to the "income and principal statutes of the State of Florida" was interpreted in *Jenkins v. Donahoo*[470] as a reference to the Uniform Principal and Income Act[471] as in effect at the time when the will was executed.

In *In re Estate of Johnson*,[472] the probate judge refused to allow the value of property conveyed by the deceased husband without his wife's joining or relinquishing her rights, to be used in determining the dower of the widow, a Florida domiciliary. The appellate court affirmed on the basis of the general rule that the right to dower (or statutory forced share interest) in real property is "determined by the law that would be applied by the court of the situs (although the determining law may be otherwise as to movable property)."[473] This would, the court continued, enable the courts of the situs of land to determine that the wife has "no dower right

466. 47 So.2d 282 (Fla. 1950).

467. N.Y.C.P.A. § 1171-b (1920), *as amended through* 1948, *repealed by* N.Y. CIV. PRAC. LAW § 10001 (McKinney 1963); *now* N.Y. DOM. REL. LAW § 244 (McKinney 1964).

468. J.E.S. v. B.J.F., 240 So.2d 520 (Fla. 4th Dist. 1970).

469. 237 So.2d 592 (Fla. 4th Dist. 1970).

470. 231 So.2d 809 (Fla. 1970).

471. Fla. Laws 1937, ch. 18392, §§ 3, 5.

472. 240 So.2d 840 (Fla. 2d Dist. 1970).

473. *Id.* at 841.

in the property and would not apply Florida law in the determination of wife's rights." Consequently, if she has no dower rights in the real property "then it is difficult to see where the Florida legislature has empowered a Florida probate court to divert Florida probate assets from the heirs or legatees who would otherwise receive them and to award those assets to the widow as dower in the out-of-state property."[474] This point was particularly troublesome because the Michigan land was validly conveyed "in full compliance with the law and custom of the state in which the property was located, and in which the widow has no inchoate dower."[475]

F. *Corporations*

Recent legislative enactments have affected choice-of-law aspects of particular corporate activities. In regard to mergers, the amended Florida Statutes section 608.21 (Supp. 1970) provides that consolidation or merger with entities established in other states or countries is permissible, but only if the laws under which said other corporation or corporations are formed permit such consolidation or merger. The respective agreements must be signed and acknowledged by each of the corporations involved in accordance with the same laws. The transacting of business by out-of-state banking corporations, one of the exemptions from limitations contained under Florida Statutes section 659.57(1)(b) (1969) has been amended in 1971.[476] That amendment has added "servicing directly" persons authorized to transact business in Florida in addition to the original "entering into mortgage servicing contracts."

G. *Trusts*

Recent statutory amendments enacted in 1971[477] affect some choice-of-law aspects of the rules regarding trusts and trustees. In regard to trust powers granted to banks under Florida Statutes section 660.10 (1969), the powers which may be granted under a will or other testamentary in-

474. *Id.*

475. *Id. See also* Miller v. Perry, 307 F. Supp. 633 (E.D.N.C. 1969) (Florida appointed administrator's action dismissed because of lack of diversity). The 1970 legislature enacted Fla. Laws 1970, ch. 70-295, *adding* FLA. STAT. § 665.61 (Supp. 1970), which in para. 2 regulates the right of a personal foreign representative of a deceased regarding his safe deposit box kept by a savings association.

476. Fla. Laws 1971, ch. 71-336, *amending* FLA. STAT. § 609.57(1)(b) 1969. Relations between Delaware corporation and Florida holder of warrant are governed by Delaware law. Tisch Family Foundation, Inc. v. Texas Nat'l Petroleum Co., 326 F. Supp. 1128 (D. Del. 1971).

An aftermath to Curtiss v. McCall, 244 So.2d 354 (Fla. 1st Dist. 1969) (*Survey* IV at 492) was introduced by the court with the statement, "To man, the sophisticated scavenger cash is carrion." That case denied prohibition against the circuit judge to restrain him from proceeding with an action to enjoin a Florida stakeholder, a bank, from turning over estate funds to the local administrator, where each administrator (one in Florida and the other in Georgia) refused to "go into the jurisdiction of the other," on the ground that Florida court has decided the issue of jurisdiction, including the lack of it on the part of Georgia courts. Lewis v. Hodges, 254 So.2d 397 (Fla. 1st Dist. 1971).

477. Fla. Laws 1971, ch. 71-55, *amending* FLA. STAT. § 660.10(3) (1969).

strument have been expanded to include also "devises of real property located in Florida" which may be sold, transferred and conveyed.

H. *Taxation*

In *City of Jacksonville v. Florida Fresh Water Corp.*,[478] the court held that taxes levied on supplying of fresh water to ships lying in harbor within the city limits did not constitute an illegal burden on interstate commerce, even though the ships so supplied were engaged in interstate and foreign commerce, and the supplier's activities took place on navigable waters of the United States.

I. *Criminal Law*

The territorial scope of criminal statutes, in this case of the willful withholding of support from children under Florida Statutes section 856.04 (1969), was at issue in *State v. Darnell*,[479] which involved the location of the perpetrator and the victims. The trial court dismissed the information because of lack of jurisdiction, and the appellate court affirmed.[480] However, the Florida Supreme Court quashed the decision on the authority of *Dukes v. State*,[481] which is to be understood in the sense that defendant's "citizenship is irrelevant . . . *if either the defendant or his children are present in the state when the desertion and non-support occur.*"[482] The statutory language "in this State" was held to refer to the crime committed, rather than to the location of the father committing it. "The evil effect," the court continues, "of his abandonment operated against the defendant's children in the State of Florida and against the State of Florida."[483]

> If the defendant had stood immediately across the Florida line in a sister state and had directed some form of physical mistreatment to his children who were physically across the line in the State of Florida, the adverse effect upon said children would have been similar to that resulting from defendant's failure to provide the support for them in this State."[484]

Importation of marijuana from the Panama Canal Zone into Florida was involved in *United States v. Matthews*.[485] The court held that in regard to such transportation the Zone is to be regarded as a foreign country, unless there is a specific provision to the contrary. However, the conviction was reversed on other grounds. A foreign seaman's conviction for bringing marijuana into the United States without having it regis-

478. 247 So.2d 739 (Fla. 1st Dist. 1971).
479. 230 So.2d 151 (Fla. 1970).
480. State v. Darnell, 217 So.2d 127 (Fla. 3d Dist. 1969); *Survey* IV at 496.
481. 148 Fla. 109, 3 So.2d 754 (1941).
482. State v. Darnell, 230 So.2d 151, 152-53 (Fla. 1970) (emphasis in original).
483. *Id.* at 153.
484. *Id.*
485. 427 F.2d 992 (5th Cir. 1970).

tered was affirmed in *United States v. Betancourt*[486] against his contention that he was denied due process on the ground that he did not know of the requirement. Persons who conducted a lottery in Florida near the Georgia border were found guilty of interstate travel with the intent to "promote, manage, establish, carry on or facilitate"[487] such activities. The United States Supreme Court[488] reversed on the ground that defendants were not shown to have crossed state lines in connection with their operation, regardless of the fact that their Florida establishment was frequented by out-of-state gamblers.

A conviction for conspiracy to overthrow the government of Haiti was affirmed in *United States v. Leon*[489] in spite of defense reliance on *Rivard v. United States*[490] and the fact that the underlying conspiracy was formulated outside of the United States. Equally ineffective was the contention that items had been admitted in evidence, even though they had been seized on a United States auxiliary airfield in the Bahamas. The search was held legal since it was conducted in accordance with military law.

VI. Aviation

In an action[491] by a passenger's widow against the estate of the pilot and against the corporate owner of an airplane which crashed at sea, the plaintiff was successful against the former, but failed against the latter. The court ruled that maritime law creates no vicarious liability on the part of the owner unless he is guilty of direct negligence. The Florida doctrine of dangerous instrumentality was held inapplicable to actions arising on the high seas, and the Federal Aviation Act[492] was found to create no federal cause of action.[493]

In *Compania Dominicana de Aviacion v. Knapp*,[494] a claim arose from the operation by a Dominican carrier of an aircraft which crashed into an automobile shop in Miami, killing two of the plaintiff's three sons. The application of the *lex loci delicti* was unquestioned. One of the grounds for appeal on the part of the defendant carrier, which had to pay 1,800,000 dollars in damages, was the fact that the trial court denied a motion for a new trial because defendant's insurer was mentioned. The court found not only that the insurance company was properly joined under the *Shingleton* doctrine; it also held that "awarding a new trial because of the mention of insurance would be an improper result where the government of a sovereign nation is the alleged tortfeasor,"[495] a rather cryptic remark.

486. 427 F.2d 851 (5th Cir. 1970).
487. 18 U.S.C. § 1952(3) (1970).
488. Rewis v. United States, 401 U.S. 808 (1971).
489. 441 F.2d 175 (5th Cir. 1971).
490. 375 F.2d 882 (5th Cir. 1967).
491. Lockwood v. Astronautics Flying Club, Inc., 437 F.2d 437 (5th Cir. 1971).
492. 49 U.S.C. § 1301(26) (1970).
493. *See* Rodgers v. Ray Gardner Flying Serv., Inc., 435 F.2d 1389 (5th Cir. 1970).
494. 251 So.2d 18 (Fla. 3d Dist. 1971).
495. *Id.* at 21.

Aircraft mortgages continue to play a significant role in the financing of the industry. Their regulation was affected by the Uniform Commercial Code[496] which presents, on the interamerican scene,[497] a steadily changing picture. A significant domestic case is worth noticing.[498]

On the international level, the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw, 1929)[499] was again[500] amended, this time by the protocol signed at Guatemala City on March 8, 1971.[501] Among the signatories was the United States, and the Protocol will enter into force upon ratification by thirty countries.

Criminal conflict rules applicable to crimes of the air present a complex statutory situation.[502] Within the federal criminal code, the notion of "special maritime and territorial jurisdiction of the United States" applies as defined in United States Code title 18, section 7(5) (1970):

> Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state.[503]

The subsequent amendment to the Federal Aviation Act, enacted in 1961,[504] and dealing mainly with air piracy and related crimes, limited its application to acts taking place on aircraft "in flight in air commerce," as defined in section 101(4) of the Act. These references have been amended in 1970 by the Act to implement the Convention on Offences and Certain Other Acts Committed on Board Aircraft,[505] and for other pur-

496. *See* Note, *International Aircraft Financing under the Uniform Commercial Code*, 2 N.Y.U.J. INT'L L. & POL. 180 (1969).

497. *See* Bayitch, *Aircraft Mortgage in the Western Hemisphere: Recent Developments*, 2 LAW. AM. 137 (1970).

498. Dowell v. Beech Accep. Corp., 3 Cal. 3d 544, 647 P.2d 401, 91 Cal. Rptr. 1 (1970) (holder of prior, recorded security interest in new airplane prevailed over subsequent buyer in ordinary course of business who failed to record his own title of search Federal Aviation Agency records for security holder's prior claim).

499. [1934] 49 Stat. 3000, T.S. No. 876. For recent developments see GILES, UNIFORM COMMERCIAL LAW: AN ESSAY ON INTERNATIONAL CONVENTIONS IN NATIONAL COURTS 108 (1970); Tompkins, *Limitation of Liability by Treaty and Statute*, 36 J. AIR L. COMM. 421 (1970).

500. The Hague Protocol (1955) and Guadalajara agreement (1961) were not ratified by the United States. In 1966, the so-called Montreal Agreement was added. CAB Order No. E23680, 31 Fed. Reg. 7302 (1966); *Survey* III at 565.

501. For pertinent extracts from the text, see McKenry, *Aviation*, 3 LAW. AM. 661 (1971).

502. *See generally* Survey IV at 497-500.

503. 18 U.S.C. § 7(5) (1970).

504. Pub. L. No. 87-197, 75 Stat. 466 (1961).

505. [1969] 3 U.S.T. 2941, T.I.A.S. No. 6768; *see Survey* IV at 497. The Convention for the Suppression of Unlawful Seizure of Aircraft, Oct. 14, 1971, [1971]—U.S.T.—, T.I.A.S. No. 7192, art. 1, contains a definition of the offence to be committed on board aircraft in flight as defined in art. 3, para. (1). The Convention applies only to flights which took off or

poses.[506] The convention referred to in the Act is the Tokyo Convention of 1963 which imposed upon the contracting countries the duty to "take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State."[507] The United States not only fulfilled this obligation, but also went further and regulated criminal conflict law in situations not covered by the Tokyo Convention.

This was done by inserting in section 101 of the Federal Aviation Act a new subsection (32) which introduced a new term, that of "special aircraft jurisdiction of the United States." This jurisdiction embraces (a) "civil aircraft of the United States," apparently meaning private aircraft registered in the United States; and (b) "aircraft of the national defense forces of the United States," *i.e.*, military aircraft.[508] Going beyond the scope of the Tokyo Convention, the amendment also includes within the newly created notion

> (c) any other aircraft—
>
> (i) within the United States, or
>
> (ii) outside the United States which has its next scheduled destination or last point of departure in the United States provided that in either case it next actually lands in the United States.[509]

The new delineation of "special aircraft jurisdiction of the United States" has replaced the previously used term "in flight in air commerce" in criminal provisions in section 902 of the Federal Aviation Act, particularly subsection 902(i), (j), and (k). It follows that the crimes of aircraft piracy, interference with flight crew members of flight attendants, and certain crimes aboard aircraft in flight as taken from the federal Criminal Code and enumerated under (k)(1) and (2) of section 902 of the Federal Aviation Act will be punishable under the Act if committed on civil or military aircraft of the United States in flight. The crimes will be punishable regardless of the place where the aircraft was at the time of the commission of the crime as well as on foreign aircraft in flight "within the United States," or outside the United States as determined under (ii). The Act also provides for a definition of an aircraft in flight to mean "from the moment when power is applied for the purpose of take-off until the moment when the landing run ends."[510]

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actually landed outside of the territory of the state of registration, regardless of whether the flight was international or domestic (art. 3, para. 3). The offense of seizure of aircraft "shall be deemed to be included in any extradition treaty existing" between countries members to this Convention (art. 8, para. 1). The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971, is not yet in force.

506. 84 Stat. 921; 49 U.S.C. § 1472(i)(2) (1970).

507. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Dec. 4, 1969, [1969] 3 U.S.T. 2941, 44, T.I.A.S. No. 6768, art. III, para. 2.

508. Pub. L. No. 91-449(1) 84 Stat. 929, *amending* 49 U.S.C. § 1472(i) (1970).

509. Pub. L. No. 91-449(1), 84 Stat. 929, *amending* 49 U.S.C. § 1472(j) (1970).

510. Pub. L. No. 91-449(1), 84 Stat. 929, *amending* 49 U.S.C. § 1472(k) (1970).

As a consequence, the amended section 902(k)(1) of the Federal Aviation Act will read:

> Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, commits an act which, if committed within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18, United States Code, would be in violation of sections 113, 114, 661, 662, 111, 113, 2031, or 2111 of such title 18, shall be punished as provided therein.

This may offer a fascinating exercise in statutory interpretation, but there must be a better way to draft laws.

VII. ADMIRALTY

The nature of the contract being the criterion for the applicability *vel non* of the laws of admiralty was decisive in *Jack Neilson v. Tug Peggy*,[511] an action by the owner of a vessel for recovery of unpaid rentals under a lease-purchase agreement cast in form of bareboat charter. However, an action by a naval architect for services rendered in the construction of a vessel were held not to be within admiralty law in *Bond v. F/V Mermaid*.[512] In tort actions the *locus delicti* still prevails with the understanding that the locus is not the place where the wrongful act had its inception, but rather where the impact of the act or omission results in injury. Finding that the damages demanded were not based on faulty manufacture, but were caused by heavy weather during the crossing from Miami to Bimini, the action[513] was held to be maritime in nature.

A number of jurisdictional issues were raised and litigated in *In re Unterweser Reederei, GmbH*,[514] an action brought by the tower for mitigation of its liability. Underweser, a German limited liability firm, contracted with Zapata, a Delaware corporation with its principal place of business in Texas, to tow the former's drilling barge, Chaparral, from Louisiana to Italy. While proceeding in the Gulf of Mexico, the barge suffered damages and made for Tampa, the nearest port. There, Bremen, the tug which towed the barge, was arrested and her master served with Zapata's complaint for 3.5 million dollars in damages. In the proceedings

511. 428 F.2d 54 (5th Cir. 1970).

512. 311 F. Supp. 1013 (S.D. Fla. 1970). A contract for the sale of a ship is not a maritime contract, and therefore an admiralty court has no jurisdiction to compel specific performance. Similarly, a contract for construction of a vessel is not within admiralty jurisdiction, nor a mortgage, unless it is within exclusive admiralty jurisdiction under the Ship Mortgage Act of 1920 [46 U.S.C. § 911 (1970)]. Generally, a maritime contract is one which involves maritime transportation, and relates to navigable waters and concerns maritime employment. However, the mere fact that a ship is involved will not bring the cause within admiralty jurisdiction. Richard Bertram & Co. v. Yacht, Wanda, 447 F.2d 966 (5th Cir. 1971).

513. Finkel v. Challenger Marine Corp., 316 F. Supp. 549 (S.D. Fla. 1970).

514. *In re* Unterweser Reederei, GmbH, 428 F.2d 888 (5th Cir. 1970); *reh. denied*, 446 F.2d 907 (5th Cir. 1971).

brought before the federal court for the Middle District of Florida, Unterweser made a number of procedural motions: to dismiss because of lack of jurisdiction; to decline as forum non conveniens; or, to stay proceedings because of the forum selection clause in the contract. The rulings of the trial court have been affirmed on appeal and are discussed in the jurisdictional section of this study (section II *supra*).

The availability of actions under the Jones Act to foreign seamen was decided by adopting the multi-contacts method in *Lauritzen v. Larsen*[515] and followed in Florida in *Corella v. McCormick Shipping Corp.*[516] Recently, in *Hellenic Lines Ltd. v. Rhoditis*,[517] this holding was modified to some extent. The plaintiff, a Greek seaman whose contract provided that Greek law and Greek collective labor agreements applied and that all claims be adjudicated in Greek courts, was injured in the port of New Orleans on board a vessel owned by a Greek corporation with its main offices in New York and additional offices in New Orleans. More than 95 percent of the corporation's stock was owned by a Greek national who had been a lawful permanent resident in this country since 1952. In its opinion, the United States Supreme Court noted the seven contacts considered in *Lauritzen*, but held that the test is not a mechanical one since the "significance of one or more factors must be considered in the light of the national interest served by the assertion of Jones Act jurisdiction."[518] The *Lauritzen* list is not exhaustive. The base of operations in the United States is another factor as is the fact that the vessel involved is one of a fleet "earning income from cargo originating or terminating here."[519] Consequently, their alien owner may not escape the obligation imposed on a Jones Act employer although the flag, the nationality of the seamen, the fact that the employment contract was Greek, and that the employee agreed to be compensated in Greece are, in the opinion of the court, "in the totality of the circumstances of this case minor weights on the scales compared with the substantial and continuing contacts which this alien owner has with this country."[520] Against a strong dissent, the court held the Greek owner to be an employer under the Jones Act.

The widow of a longshoreman, killed when working on a vessel in navigable waters within Florida, brought an action in a state court against the owner of the vessel for damages for wrongful death as well as for pain and suffering of the deceased. Upon removal of the action to a federal court, the defendant urged that maritime law provided no recovery for wrongful death which occurred within state's territorial waters. On an interlocutory appeal, the appellate court certified the question to the Su-

515. 345 U.S. 571 (1953).
516. 101 So.2d 908 (Fla. 3d Dist. 1958).
517. 398 U.S. 306 (1970).
518. *Id.* at 309.
519. *Id.* at 310.
520. *Id.*

preme Court of Florida under Florida Statutes section 25.031 (1969). The court answered the question in the negative[521] upon which the judgment of the trial court for defendant was affirmed.[522] The United States Supreme Court granted certiorari[523] and overruled the holding in *The Harrisburg*,[524] thus allowing recovery of damages for death of a longshoreman due to unseaworthiness of a vessel on navigable waters of a state. The change was not so much due to the inherent weakness in *The Harrisburg*, branded as an "unjustifiable anomaly in the present maritime law,"[525] as to the general trend indicated by federal as well as state legislation granting recovery. According to the court, this policy has "become itself a part of our law, to be given its appropriate weight not only in matters of statutory interpretation but also in those of decisional law."[526]

Damages for spoilage and loss of shipments of frozen shrimp in freezer-trailers from Nicaragua to Miami were demanded in *Inter-American Foods, Inc. v. Coordinated Caribbean Transport*.[527] The issue was the applicability of section 1304(5) of the Carriage of Goods by Sea Act dealing with the limitation of carrier's liability for goods transported in packages. The court found that the sealed and strapped master cartons containing frozen shrimp constitute packages under the Act regardless of their being stored for transportation in a trailer. However, even if the shipper had delivered a sealed container to the defendant, the definition of a package in the Brussels Protocol was found to clearly establish "that each unit in 'palletized' or 'containerized' cargo constitutes a 'package,' "[528] and consequently, qualifies for limitation of liability under the Act.

The M/V NILI, which made repeated voyages into federal courts[529] in Florida, generated an "international multi-party lien priority race."[530] Once the vessel was sold at auction, two main issues arose: is the mortgage held by the State of Israel a preferred and valid mortgage under United States Code, title 46, section 951 (1970), and whether the preclusionary clause in Israel's foreign ship mortgage by which the original owner of the vessel agreed not to encumber the NILI is valid and effective. In *State of Israel v. Motor Vessel NILI*,[531] the appellate court

521. Morange v. States Marine Lines, Inc., 211 So.2d 161 (Fla. 1968); *Survey* IV at 475.

522. Morange v. States Marine Lines, Inc., 409 F.2d 32 (5th Cir. 1969).

523. Morange v. States Marine Lines, Inc., 398 U.S. 375 (1970).

524. 119 U.S. 199 (1886).

525. Morange v. States Marines Lines, Inc., 398 U.S. 375 (1970).

526. *Id.*; Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970) (aircrash within Louisiana territorial waters); *cf.* Dugas v. National Aircraft Corp., 438 F.2d 1387 (3d Cir. 1971); Guilbeau v. Calzada, 240 So.2d 104 (La. App. 1970) (collision of boats).

527. 313 F. Supp. 1334 (S.D. Fla. 1970).

528. *Id.*

529. *Survey* IV at 502.

530. State of Israel v. Motor Vessel Nili, 435 F.2d 242, 243 (5th Cir. 1970), *aff'g* State of Israel v. Motor Vessel Nili, 318 F. Supp. 1196 (S.D. Fla. 1968).

531. *Id. Cf.* Florida Bahamas Lines, Ltd., v. Steel Barge "Star 800," 433 F.2d 1243 (5th Cir. 1970).

affirmed the holding of the lower federal court which answered the first question in the affirmative and the second in the negative. The good vessel also was involved in tax difficulties[532] when it became "unsuccessful in the hopes of her owner, operator and perhaps preferred-ship-mortgagee angel, the State of Israel, to tap the rich tourist trade as a cruise ship in and out of the Port of Miami."[533] The issue was the amount of dockage due under the port authority's tariff, the State of Israel contending unsuccessfully that only half of the dockage was due since the vessel was berthed for purposes other than loading or discharging cargo. The court observed that a tariff "like the law of the Medes and Persians which altereth not, is more than a consensual contract. It has the force of law."[534] The only tolerance permissible is in its construction, "a task which here is free of tariffese which often plagues such problems, sending judges searching for a way to put the burden on a supposedly expert body."[535]

Other cases decided during the survey period deal with charter agreements;[536] insurance;[537] limitation of actions;[538] and forfeiture.[539]

VIII. CONCLUSION

In a period of strong revisionist trends presently experienced in the area of conflict law in this country, such efforts unavoidably have their ups and downs. Regardless of their fate, however, they perform a valuable function: they pose questions where for too long passive acquiescence has replaced rationalization. Aggressive and overstating their objectives at the start, the revisionist trends meet their final test, not in books and law reviews, but in legal practice, particularly in courts. There, these theories face the facts of life as no clever abstractions or fancy constructions decide their survival. In any case, the attitude of accepting traditional solutions has past, and every rule has to show its inherent strength in order to survive. In this scrutiny, the eager reformists have frequently succeeded, but they have also failed, not because of any errors in their theoretical principles, but because their solutions, as attractive and "just" or "reasonable" they may seem, have proven incompatible with the present needs of a mass society which appears to favor certainty over ultimate case-by-case justice.

532. State of Israel v. Metropolitan Dade County, 431 F.2d 925 (5th Cir. 1970).

533. *Id.* at 927.

534. *Id.* at 928.

535. *Id.*

536. Dominica Mining Co. v. Port Everglades Towing Co., 318 F. Supp. 500 (S.D. Fla. 1969); Andros Marine Chartering Co. v. Tug Gladiator, 307 F. Supp. 17 (D.P.R. 1969).

537. S. Felicione & Sons Fish Co. v. Citizens Cas. Co., 430 F.2d 136 (5th Cir. 1970).

538. Coquette Originals Inc. v. Canadian Gulf Line, Inc., 240 So.2d 847 (Fla. 3d Dist. 1970).

539. United States v. Vessel FL 4127 SE, 311 F. Supp. 1353 (S.D. Fla. 1970). *See* Fredelos v. Merrit-Chapman & Scott Corp., 447 F.2d 435 (5th Cir. 1971) (wage and salvage claims against the fund from sale of a vessel stranded off Bimini); C.I.T. Corp. v. M/V Miss Eileen, 447 F.2d 761 (5th Cir. 1971) (incorporation of the Florida interest rate in a ship mortgage).

The trends are reflected in publications produced during the period under review. The most significant is the new Restatement.[540] Faced with the agitated state of the area, the Restatement tries to bridge the gap between tradition and reform and allows law-making in areas beyond established law. In these frontier areas, solutions should take into consideration the following factors:

(a) the needs of the interstate and international systems:
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issues.
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.[541]

There is only one treatise to be noted, Professor Weintraub's Commentary,[542] a down-to-earth presentation of the law and its leading ideas. A thought provoking summation of some of Professor Ehrenzweig's impressive contributions has been published as a Hague lecture,[543] as was Professor Cavers' lucid overview of the American conflicts scene.[544] The variety and intensity of works published in law reviews by addicts on both sides of the cathedra are most impressive. Among them the continuing nation-wide survey by Professor Leflar[545] provides a much needed overall pragmatical perspective, supplemented by an increasing number of state-by-state surveys.

540. RESTATEMENT (SECOND) CONFLICT OF LAWS (1971).
541. *Id.* at 6, § 2.
542. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (1971).
543. Ehrenzweig, *Specific Principles of Private Transnational Law*, 124 RECUEIL DES COURS DE L'ACADEME DE DROIT INT'L 178 (1968).
544. Cavers, *Contemporary Conflicts Law in American Perspective*, 131 RECUEIL DES COURS DE L'ACADEME DE DROIT INT'L 77 (1971).
545. Leflar, *Conflict of Laws*, ANNUAL SURVEY OF AMERICAN LAW, 1970-71, 33 (1971).