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## Conflict of Laws

S. A. Bayitch

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# CONFLICT OF LAWS

S. A. BAYITCH\*

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The period under review is marked by significant events in the development of conflict of laws.<sup>1</sup> The 1967 Florida Legislature enacted a rather disappointing revision of jurisdictional statutes,<sup>2</sup> and the Supreme Court of Florida through the certification procedure, almost joined the *Kilberg* reformist movement.<sup>3</sup> On the national scene an enlivened discus-

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1. This survey should be read in conjunction with the two surveys previously published in 18 U. MIAMI L. REV. 269 (1963) and in 20 U. MIAMI L. REV. 495 (1966) [hereinafter referred to as Survey I and Survey II].

Editorial help by Mrs. Sara Laxson Smith, senior law student at the University of Miami, is gratefully acknowledged.

2. Fla. Laws 1967, ch. 67-254.

3. See note 186 *infra*.

sion<sup>4</sup> continues on some of the doctrinal principles and there has been a lining-up of jurisdictions along the *Kilberg-Babcock* schism.

### I. GENERAL PROBLEMS

A number of cases reported recently revolved around statutes of limitations. The Florida statute (including the borrowing aspect as well as the tolling provisions) was at issue in *Aviation Credit Corporation v. Batchellor*.<sup>5</sup> In an action brought in Florida upon a promissory note the defendant pleaded the California statute of limitations, on the ground that the note was executed in California, the defendant's domicile. Reversing the lower court's decision for defendant, the appellate court held that regardless of the defendant's domicile, the cause of action arose in Florida where the note was payable on the ground that:

[T]he accrual of a cause of action does not depend upon the coincident existence of all those factors which are necessary to transform the cause of action into a judgment. The law provides a remedy for wrongs, *i.e.*, a right of action upon a cause of action. If the plaintiff seeks a judgment in personam in most cases, our laws require personal service of process upon the defendant. Therefore, the unavailability of the defendant in a given state may have an effect upon the availability of an immediate remedy in that state, but this does not mean that no cause of action accrued in that state.<sup>6</sup>

The court concluded that Florida's borrowing statute, which is limited to causes of action that have "arisen in another state . . . of the United States," was inapplicable. The defendant also argued that he could not have "returned to Florida" as required by the tolling provision since he had never been in Florida before. This argument was dismissed on the ground that such a literal interpretation of the statute had been rejected in prior Florida Supreme Court decisions.

The crucial questions of when and where the cause of action arose under the Pennsylvania borrowing statute were before a federal forum sitting in Pennsylvania in *Mack Truck, Inc. v. Bendix-Westinghouse Auto, A.B. Co.*<sup>7</sup> The plaintiff bought brake assemblies manufactured by a third party from the defendant to be used in vehicles assembled by the plaintiff. A Florida resident purchased a truck from the plaintiff, and while operating it in Florida was involved in an accident because of defective brakes. A judgment was obtained against the plaintiff by a party injured in the

4. For a lucid insight, see Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966). For a discussion of general problems, see Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966), and *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966).

5. 190 So.2d 8 (Fla. 3d Dist. 1966).

6. *Id.* at 11.

7. 372 F.2d 18 (3d Cir. 1966).

accident. More than three years after the plaintiff satisfied the judgment the present action was instituted in a federal district court in Pennsylvania against the manufacturer for indemnity in the amount of the judgment. The defendant raised the statute of limitations and the court applied the conflict rules of Pennsylvania, including the borrowing statute which referred to the "state . . . in which the [cause of action] arose." While recognizing that the Pennsylvania borrowing statute utilizes the "concept of the arising of a cause of action in relation to the place rather than to time," the court nevertheless held that the "cause of action arises where, as well as when the final significant event that is essential to a suable claim occurs," and concluded that the cause of action arose when the judgment was entered against and satisfied by the plaintiff, adding that "by the same token, Florida is the state where the cause of action for indemnity arose."<sup>8</sup> Since the three year Florida statute of limitations had run, the court, despite a strong dissent, affirmed the lower court's dismissal of the case.

Florida's statute of limitations was indirectly involved in an action brought in Puerto Rico by a plaintiff who was injured there while employed by a Florida corporation. In *De Vane v. United States*<sup>9</sup> the one year Puerto Rican statute of limitations had expired, but the plaintiff urged the application of the Florida four year statute of limitations alleging that he was insured pursuant to Florida Workmen's Compensation Law, and that this state's limitations statute should therefore control. The court, however, held that the conflict rule in force in Puerto Rico is that of *lex loci delicti*, which, being also the *lex fori*, makes the Puerto Rican limitation provisions applicable regardless of the plaintiff's domicile in Florida. Observing that "there is no rule of *renvoi* in tort actions brought within this jurisdiction," the court indicated that even if the law of Florida controlled, it "would still end up by applying the law of Puerto Rico on the question of the statute of limitations"<sup>10</sup> because of Florida's borrowing statute. Finally the court dealt in general terms with two propositions. First, assuming (erroneously) that if the action could not be maintained in Florida because the "law applicable in the jurisdiction of Florida would be the law from the jurisdiction where the cause of action

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8. *Id.* at 20. *Cf.* *Chartener v. Kice*, 270 F. Supp. 432 (E.D.N.Y. 1967); *Baron Tube Co. v. Transport, Ins. Co.*, 365 F.2d 858 (5th Cir. 1966). The issue as to the time when the action arose was involved in an action brought by a Florida corporation against its attorneys for malpractice resulting in damages, *i.e.*, impounding its boats fishing in Venezuelan waters, *Fort Myers Seafood Packers v. Steptoe and Johnson*, 381 F.2d 261 (D.C. Cir. 1967), *rehearing denied*. Note, *The Commencement of the Statute of Limitations in Legal Malpractice Actions: the Need for Re-evaluation*, *Eckert v. Schaal*, 15 U.C.L.A. L. REV. 230 (1967).

Federal law will determine the "date of accrual [of a federally created right] even though the period of limitation thereafter is determined by state law," *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5 (5th Cir. 1967), *rev'g* 246 F. Supp. 780 (S.D. Fla. 1965).

9. 259 F. Supp. 18 (D.P.R. 1966).

10. *Id.* at 20.

has arisen" (*i.e.*, Puerto Rico), the Florida four year limitation "cannot be applied in this case, where the action is brought in a court within the jurisdiction of Puerto Rico." The court also commented that the possible extraterritorial effect of the Florida statute of limitations had no bearing, since Florida law "adopting and specifically making applicable the statute of limitations from the jurisdiction where the cause of action arises,"<sup>11</sup> would apply the one year statute of limitations of Puerto Rico.

Morals, taxes, and law converge in a cacophony of unsavory accommodations in cases dealing with gambling debts incurred in a jurisdiction where a particular mode of gambling is legal, when enforcement is sought in a jurisdiction which allows controlled gambling, but not the particular mode in question. In *Dorado Beach Hotel Corporation v. Jernigan*,<sup>12</sup> while admitting that Florida condones certain specified forms of gambling, staged for those "seeking pleasure in the State—primarily tourists," with the state receiving its "cut of the take," the court nevertheless denied its "judicial arm to the collection of monies wagered in such enterprises not authorized by the law of the State of Florida." However, the public policy argument used by the court deserves a more careful analysis. First of all, the legality *vel non* of a foreign gambling debt is not directly controlled by the *lex fori* since this law applies only to gambling activities in Florida, and this law, as it is written, claims no extraterritorial effect. Only if Florida's gambling statutes should provide the basis from which general principles of public policy are to be gleaned may such principles apply to the local enforcement of a foreign incurred gambling debt. In distilling such public policy from Florida statutes it must be noted that both Florida and Puerto Rico have adopted, in regard to gambling, practically identical policies by allowing limited, licensed, government-controlled gambling, assuring, at the same time, the particular government a share in the proceeds. However, it is difficult to see how differences in the modes of gambling may overshadow the identical permissive policy in regard to controlled gambling, strongly motivated, in both instances, by overriding governmental fiscal interests. Thus it appears that both governments give preference to their own fiscal interests over the dangers awaiting the tragic gambler known from so many novels. But even in this respect Puerto Rico has shown humanitarian concern for the victim of such nefarious activities by providing for a reduction or even cancellation of gambling debts whenever they exceed what the statute terms "customs of a good father of family," a compassion utterly foreign to Florida. Moreover even admitting for the sake of argument that gambling is against public policy and only to be tolerated, it must be kept in mind that public policy intends to

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11. *Id.* at 21.

12. 202 So.2d 839 (Fla. 1st Dist. 1967) on the authority of *Young v. Sands, Inc.*, 122 So.2d 618 (Fla. 3d Dist. 1960). *But cf.* *International Hotels Corp. v. Golden*, 15 N.Y.2d 9, 203 N.E.2d 210, 254 N.Y.S.2d 527 (1964), discussed in 11 N.Y.L. FORUM 548, 556 (1965). Jurisdiction over a non-resident guest and gambler, *San Juan Hotel Corp. v. Lefkowitz*, 277 F. Supp. 28 (D.P.R. 1967).

prevent foreign created claims from taking effect locally in a way which would shock the moral fiber of the community. Applied to the present situation, it is difficult to imagine that the mere payment of a check executed in Puerto Rico not showing its "immoral origin" could cause even a ripple of revulsion wherever it may appear, *e.g.*, in a local bank accepting payment. On the contrary, it could be a lesson to the gambler himself as well as a deterrent to those who might otherwise succumb to such temptation, an effect most desirable under the very public policy expounded by the court. Neither should the long-range results of the court's interpretation be overlooked. There can be no doubt that the shield of public policy extended to Floridians when gambling abroad will encourage rather than discourage them in their foreign escapades since they will feel safe both when pocketing winnings and also when owing for losses. Finally, there is involved a simple question of basic propriety, namely whether public policy should condone that an adult, apparently of some means, who executed a valid check to pay for his pleasures at the licensed gambling tables in another jurisdiction within the United States, may, upon returning to his home in Florida take the moralistic attitude that what he did was wrong and, consequently, renege on his otherwise valid promise. Instead, the court took a rather grandiose stand of moral rectitude when proclaiming that "this forum will not extend its judicial arm to aid in the collection of this type of gambling debt whether the transaction giving rise to the loss arose in Nevada, Puerto Rico, or Monte Carlo."

## II. JURISDICTIONAL CONFLICTS

The concepts of jurisdiction and venue are often confused. As recently stated,<sup>13</sup> "venue is one thing; jurisdiction another. They are not synonymous. Venue concerns 'the privilege of being accountable to a court in a particular location.' Jurisdiction is 'the power to act,' the authority to adjudicate the subject matter." The fundamental principles of judicial jurisdiction have been succinctly restated in another case:<sup>14</sup>

Personal jurisdiction refers to the Court's ability to assert judicial power over the parties and bind them by its adjudication. Service of process is the corollary requirement which sets the Court's personal jurisdiction in gear. That is, someone amenable to the assertion of jurisdiction cannot be subject to its exercise until he has been properly served. Both that assertion of power and the subsequent service must be statutorily and constitutionally permissible. Due process requires certain ties or contacts between a foreign defendant and the forum which asserts jurisdiction . . . and service reasonably calculated to notify him of the proceeding and afford him an opportunity to appear and be heard.<sup>15</sup>

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13. *Williams v. Ferrentino*, 199 So.2d 504 (Fla. 2d Dist. 1967).

14. *Japan Gas Lighter Ass'n v. Ronson Corp.*, 257 F. Supp. 219 (D.N.J. 1966).

15. *Id.* at 224.

### A. *Acting Within Jurisdiction*

The traditional rules for perfecting jurisdiction over the person of a defendant require that he be served with process while present in the state, that he be domiciled there, or that he consent to the jurisdiction.<sup>16</sup> These rules have been supplemented by a number of statutory methods of imposing jurisdiction on an individual or on corporate defendants not otherwise amenable to local jurisdiction. This is achieved by reliance, for jurisdictional purposes, on past activities in the state, or present contacts through agents, or offices or close connections with local business activities through marketing set-ups. Florida has adopted these methods in its long-arm statutes.<sup>17</sup>

At the risk of being repetitious,<sup>18</sup> a proper method may be suggested for dealing with long-arm statutes, based on the distinction between the jurisdictional grant contained therein on the one hand, and the constitutional limitations imposed on such statutes under due process, on the other. These two factors and their interrelations have been well presented in a recent federal case:<sup>19</sup>

One of the most elementary of legal principles is that a basis of jurisdiction must exist before a court has competence to act. Two tests are applied in determining whether a basis exists. The first is the inquiry whether legislative jurisdiction exists: does the state have the power to declare that its courts have jurisdiction over a particular subject matter? The second is whether judicial jurisdiction exists, a determination made on the basis of a twofold test: (1) assuming that legislative jurisdiction exists, has the state exercised it by providing the courts with a method of acquiring jurisdiction? (2) If a method has been so provided, are there sufficient jurisdictional facts to satisfy the requirements of the method provided?<sup>20</sup>

In other words, is the jurisdictional grant as contained in the long-arm statute within the legislative powers of the state as limited by the due process clause? And if so, is the application of the statute within the scope of proper statutory interpretation which may—in turn—take the position that the jurisdictional grant is intended to expand the state's judicial powers as far as constitutionally permissible? As a result, the jurisdictional grant may be found to coincide with the constitutional limitations on state legislative powers, or it may be interpreted as intended not to occupy the whole area available to state courts under the standards of due process.<sup>21</sup>

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16. See Survey I, at 275, and Survey II, at 502.

17. See Survey I, at 278, and Survey II, at 503.

18. See Survey II, at 504.

19. *Elliott v. Cabeen*, 224 F. Supp. 50 (D. Colo. 1963).

20. *Id.* at 52. *Cf. Waltham Precision Instrument Co. v. McDonnell Aircraft Corp.*, 310 F.2d 20 (1st Cir. 1962), and *Williams v. Connolly*, 227 F. Supp. 539 (D. Minn. 1964).

21. Other jurisdictions are well aware of this alternative. In interpreting their long-

Although the interrelationship between the statutory jurisdictional grants and their constitutional validity has never been squarely faced by the Florida courts, judicial opinions indicate that rather than applying a narrow statutory interpretation, the courts will interpret the jurisdictional grants under the long-arm statutes to reach the constitutional outer limits and therefore to be co-extensive with the requirements of due process.<sup>22</sup>

Service of process on nonresidents is performed by substituted serv-

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arm statutes as co-extensive with the constitutional due process, these courts have abdicated "their duty to construe the statutes of their own states and [then turn] it over to the Supreme Court of the United States, which is the ultimate interpreter of the Constitution of the United States" adding that "The attempt thus to expand jurisdiction is no new phenomenon; it has just been more successful in recent years," *Taylor v. Portland Paramount Corp.*, 383 F.2d 634, 640 (9th Cir. 1967). This position was taken in *Alabama*, *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So.2d 25 (1962), *rev'd on other grounds*, 376 U.S. 254 (1964), *motion for rehearing denied*, 376 U.S. 967 (1964); *Alaska*, *Northern Supply, Inc. v. Curtiss-Wright Corp.*, 397 P.2d 1013 (Alaska 1965); *California*, *Henry Jahn & Son, Inc. v. Superior Court*, 49 Cal. 2d 835, 323 P.2d 437, 439 (1958); *Mechanical Contractors Ass'n v. Mechanical Contractors Ass'n of N. Cal.*, 342 F.2d 393 (9th Cir. 1965); *Illinois*, *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *Gordon v. International Tel. & Tel. Corp.*, 273 F. Supp. 164, 168 (N.D. Ill. 1967); *Consolidated Laboratories v. Shandon Scientific Co.*, 384 F.2d 797 (7th Cir. 1967); —La.—, *Terasse v. Wisconsin Feeder Pig Mkt. Coop.*, — La. —, 202 So.2d 330 (Ct. App. 1967); *Bowlero, Inc. v. Allen*, — La. —, 205 So.2d 196 (Ct. App. 1967); *Maryland*, *Gkiasis v. Steamship Yiosonas*, 342 F.2d 546 (4th Cir. 1965); *Beaty v. M.S. Steel Co.*, 276 F. Supp. 259 (D. Md. 1967); *Minnesota*, *Washington Scientific Indus., Inc. v. Polan Indus., Inc.*, 273 F. Supp. 344, 346 (D. Minn. 1967); *Montana*, *Bullard v. Rhodes Pharmacal Co.*, 263 F. Supp. 79 (D. Mont. 1967); *New Hampshire*, *Sanders Ass'n, Inc. v. Galion Iron Works & Mfg. Co.*, 304 F.2d 915 (1st Cir. 1962); *New Jersey*, *Jaffe v. Donal*, 264 F. Supp. 845 (E.D.-N.J. 1967); *Ohio*, *Kahn v. Maico Co.*, 216 F.2d 233 (5th Cir. 1954); *Seilon, Inc. v. Brema*, 271 F. Supp. 516 (N.D. Ohio 1967); *Oklahoma*, *B.K. Sweeney Co. v. Colorado Interstate Gas Co.*, 429 P.2d 759 (Okla. 1967); *South Carolina*, *Shealey v. Challenger Mfg. Co.*, 304 F.2d 102 (4th Cir. 1962); *Ard v. State Stove Mfrs., Inc.*, 263 F. Supp. 699 (D.S.C. 1967); *American Iwer Corp. v. Rueland Elec. Co.*, 277 F. Supp. 375 (D.S.C. 1967); *Tennessee*, *Hamilton Nat'l Bank v. Russel*, 261 F. Supp. 145 (E.D. Tenn. 1966); *Texas*, *Turner v. Jack Tar Grand Bahamas, Ltd.*, 353 F.2d 954 (5th Cir. 1965); *Atwood Hatcheries v. Heisdorf & Nelson Farms*, 357 F.2d 847 (5th Cir. 1966); *Virginia*, *Moore-McCormack Lines, Inc. v. Bunge Corp.*, 307 F.2d 910 (4th Cir. 1962); *District of Columbia*, *Origoni v. Bulletin Co.*, 258 F. Supp. 359 (D.D.C. 1966), and *Puerto Rico*, *Executive Air Servs., Inc. v. Beech Aircraft Corp.*, 254 F. Supp. 415 (D.P.R. 1966); *San Juan Hotel Corp. v. Lefkowitz*, 277 F. Supp. 28 (D.P.R. 1967).

A narrower interpretation has been adopted, for example, in *Arkansas*, *Davis v. Triumph Corp.*, 258 F. Supp. 418 (E.D. Ark. 1966); *Massachusetts*, *Caso v. Lafayette Radio Electronics Corp.*, 370 F.2d 707 (1st Cir. 1966); *New York*, *Longines-Wittnauer Watch Co. v. Barnes & Reineche*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965); *Rosen v. Savant Instruments, Inc.*, 264 F. Supp. 232 (E.D.N.Y. 1967); *North Carolina*, *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966); *Pennsylvania*, *Miller v. Kiamesha-Concord, Inc.*, 420 Pa. 604, 218 A.2d 309 (1966) and *Utah*, *State Tax Comm'n v. Cord*, 81 Nev. 403, 404 P.2d 422 (1965).

The alternatives are generally discussed in *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965), followed in *Bonhiver v. Louisiana Brokers Exch., Inc.*, 255 F. Supp. 254 (D. Minn. 1966), pointing out that Minnesota state courts take a liberal approach, *Id.* at 260, note 13. *Cf. Williams v. Connolly*, 277 F. Supp. 539 (D. Minn. 1964).

22. Survey II, at 505. *Cf. Morrison v. Hampshire Ins. Co.*, 249 La. 546, 187 So.2d 729 (1966). The court in *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*, 332 F.2d 135, 137 (5th Cir. 1964) found that FLA. STAT. § 47.16 (1965) "reflects a purpose to reach as far as the Federal constitution permits."

ice on the appropriate public official, who in Florida may be, for example, the Secretary of State or the Commissioner of Insurance as now expressly provided in the partly amended section 48.161 of the Florida Statutes.<sup>23</sup> Moreover, notice of such service and a copy of the process must be sent immediately to the defendant by registered or certified mail by the plaintiff or his attorney, but if the defendant is "found without the state," process shall be served by "a sheriff . . . of any county . . . in the state or jurisdiction where the defendant is found." Unavoidable difficulties arise where a nonresident defendant declines to accept the registered or certified letter or does not claim it. As long as postal regulations are not coordinated with procedural requirements for substituted service, uncertainties will continue to plague the courts. However, in *Richardson v. Williams*<sup>24</sup> the court found that the service of process on a defendant who had concealed himself and refused to accept the certified letter was perfected by serving the Secretary of State under the nonresident motorist statute. Thus, the notice requirement of section 47.30 of the Florida Statutes was satisfied. The court held that "if the defendant chooses to flout the notice and refuses to accept it, he will not be permitted to say in the next breath that he has not been served."<sup>25</sup>

#### 1. NONRESIDENT MOTORISTS

Jurisdictional questions regarding this oldest of long-arm statutes are well settled, both in regard to the necessary activities involved and the connexity between the claim and such activities. Difficulties still arise in regard to the requirements of substituted service. In *Zarcone v. Lesser*,<sup>26</sup> the lower court set aside a default judgment for the plaintiff without ruling on the question of improper service on the defendant's showing that the copy of process remained unclaimed according to postal authorities. On appeal the case was reversed on the ground that a justiciable question was presented as to the validity of service where registered mail is unclaimed. If the defendant refused to accept delivery of the registered

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23. Now expressly regulated in FLA. STAT. § 48.161 (1967):

When authorized by law, substituted service of process on a nonresident . . . by serving a public officer designated by law shall be made by leaving a copy of the process . . . with the public officer or in his office. The service is sufficient service on a defendant who has appointed the public officer as his agent for the service of process.

24. 201 So.2d 900 (Fla. 2d Dist. 1967), regardless of the fact that the court was unable to maintain its original findings that "[p]ostal endorsements on the envelopes indicate that the [defendants] were located and given several notices of the certified mail but never claimed it," and that "defendants received such notice [by certified letter accompanied by a copy of the process] they would not accept the letter." However, it seems doubtful whether or not this ruling would withstand an attack on constitutional grounds as established in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

25. *Richardson v. Williams*, 201 So.2d 900, 903 (Fla. 2d Dist. 1967). *But cf.* *Wuchter v. Pizzuti*, 278 U.S. 13 (1928).

26. 190 So.2d 805 (Fla. 3d Dist. 1966). *Cf.* *Richardson v. Williams*, 201 So.2d 900 (Fla. 2d Dist. 1967). Service of process on motorist concealing his whereabouts, *Fernandez v. Chamberlain*, 201 So.2d 781 (Fla. 2d Dist. 1967).

letter, the failure of the plaintiff to file receipts as required by section 47.30 of the Florida Statutes would not invalidate the service. If the failure of delivery resulted from misdirection by the plaintiff or for some other reason not chargeable to the defendant, there would be no valid service because the statutory requirement of notice would not have been met.

The nonresident motorists provisions contained in section 47.29 of the Florida Statutes were reenacted by the 1967 Florida legislature as section 48.171 without change as to substance. However, paragraph (2) dealing with service on the defendant's administrators, executors or personal representatives is now to be found as paragraph (2) of section 48.161.

## 2. NONRESIDENT WATERCRAFT OPERATORS

Florida's nonresident watercraft operators statute was amended in 1965 to include nonresident aircraft operators.<sup>27</sup> In 1967 it was reenacted as section 48.19 but without the provision regarding aircraft operators. This change does not affect actions against foreign commercial air carriers who are amenable to process by virtue of qualifying to do business in the state under section 48.091 of the Florida Statutes, or under the nonresident business statute.<sup>28</sup> However, non-corporate nonresident operators, particularly those operating noncommercial airplanes, will escape under the amended statute.

## 3. BUSINESS BY NONRESIDENTS

This type of long-arm statute seems not only to be the most practical, but also the most productive of litigation in regard to its substantive requirements. Constitutional overtones are implicit in the required type of jurisdiction creating activities necessary to trigger the operation of the statute and in the connexity between the cause of action and such activities within the state.<sup>29</sup>

A short flash-back may put these problems in a better perspective. Once the doctrine of nonexistence of a corporation outside of the state of incorporation was overcome,<sup>30</sup> amenability to such foreign courts was

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27. Survey II, at 504. Cf. *Meier v. Grimes*, 202 So.2d 870 (Fla. 4th Dist. 1967).

28. FLA. STAT. § 48.071 (1967).

29. The long-arm statute based on business activities encompasses both nonresident individuals and foreign corporations. However, the amenability of foreign corporations may change through the process of qualifying for local activities in pursuance of the applicable statute, FLA. STAT. § 48.091 (1967). The statute imposes upon such foreign corporations the duty to file a "certificate designating a resident agent and an office, place of business or location for the service of process within this state." In respect to foreign corporations which qualified for local business, no connexity is required. The same section also deals in paragraph (5) with the right of foreign corporations which have not qualified, to "maintain any action in any court." Cf. FLA. STAT. § 613.04 (1965), *Crockin v. Boston Store*, 137 Fla. 853, 188 So. 853 (1939), and *Rubin v. Kapell*, 105 So.2d 28 (Fla. 3d Dist. 1958).

30. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839).

sought on the basis that the foreign corporation acted within the foreign jurisdiction in the same manner that a natural person would assert his presence therein. This shift from the simple certainty of nonexistence to the uncertainties of a fictional presence brought about a mixture of fiction and fact out of which three unavoidable questions arose. The first demanded an answer as to how the presence of a fictitious entity within a foreign jurisdiction is to be determined even though a corporation is "a fiction intended to be acted upon as though it were a fact."<sup>31</sup> Such presence, at least for jurisdictional purposes, was seen in the activities performed by the foreign corporation through its officials and agents, a solution "used merely to symbolize those activities of the corporation's agent within the state which the courts will deem to be sufficient to satisfy the demands of due process."<sup>32</sup> The second question turned on the mechanics of service of process. As a solution, the fiction of the presence of a foreign corporation through its activities was expanded so as to support an express or implied appointment of a local agent as authorized to accept service. Finally, the question arose whether or not a foreign corporation is amenable to local jurisdiction in all actions or only in those related to activities which resulted in its jurisdictional presence. In regard to connexity, however, no clear-cut rule has emerged.<sup>33</sup> In some jurisdictions courts insisted on connexity. But "there have been instances in which the continuous corporate operations within a state were thought so substantial and of such nature as to justify suit against it on causes of action arising entirely distinct from those activities,"<sup>34</sup> provided the acceptance of jurisdiction

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31. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

32. *Id.* at 317. The "corporate presence theory" as labelled in the *International Shoe* case (at 316) was defined, e.g., in *Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264, 265 (1917): "A foreign corporation is amenable to process to enforce a personal liability in the absence of consent, only if it is doing business within the state in such a manner and to such extent as to warrant the inference that it is present there," and repeated, e.g., in *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914), and in *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79 (1918). For a penetrating analysis see Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts, 1877-1958*, 25 U. CHI. L. REV. 569 (1958).

33. Originally, lack of connexity was evaluated as a burden on interstate commerce, *Davis v. Farmers' Co-op. Equity Co.*, 262 U.S. 312 (1923), on the ground that "this condition imposes upon interstate commerce a serious and unreasonable burden which renders the statute [not requiring connexity] obnoxious to the commerce clause." *Id.* at 315. *Atchison, T. & S.F. Ry. v. Wells*, 265 U.S. 101 (1924); *Michigan Cent. R.R. v. Mix*, 278 U.S. 492 (1929) (all cases involving railway companies as defendants). *But see Missouri ex rel. St. Louis B. & M.R.R. v. Taylor*, 266 U.S. 200 (1924), and *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511 (1934). For a recent discussion, see *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 196, & n.2 (8th Cir. 1965).

34. *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). In *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), the Court started from the general activities of the foreign corporation transacted in the jurisdiction, observing that "if the corporation carries on, in that state [forum] other continuous and systematic corporate activities . . . those activities are enough to make it fair and reasonable to subject that corporation to proceedings in personam in that state, at least as the proceedings in personam seek to enforce causes of action relating to those very activities or to other activities of the corporation in the state." *Id.* at 445. However, the Court went one step further and

is not only supported by "certain minimum contacts," but also does not offend "traditional notions of fair play and substantial justice."<sup>35</sup> By this quotable rephrasing of a solution already reached, the *International Shoe* case became the panacea in the area of long-arm statutes, despite the fact that the Supreme Court was not concerned with such a statute but rather with the question of simple common law presence of a corporation through continuous activities under the searching light of constitutional standards.

Common law jurisdiction over a foreign corporation was again at issue in *Hanson v. Denkla*.<sup>36</sup> The Supreme Court tested Florida's claim to jurisdiction not in the light of its potentially applicable long-arm statute,<sup>37</sup> but against contacts which, in the fashion of *International Shoe*, would have constituted presence in the common law sense of doing business. The Court found that the defendant foreign trust company "has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State either in person or by mail."<sup>38</sup> Furthermore, the Court noted that the cause of action was "not one that arises out of any act done or transaction consummated in the forum State," and that the "agreement was executed in Delaware by a trust company incorporated in that State and a settlor domiciled in Pennsylvania."<sup>39</sup> Even though the settlor "carried on several bits of trust administration" in Florida, there were no instances in which "the trustees performed any

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in regard to the requirement of connexity, relying on the *International Shoe* case, found "no requirement of due process that either prohibits Ohio from opening its courts to the cause of action here presented, or compels Ohio to do so," *Id.* at 446. In consequence, it limited its consideration to the sole question whether "as a matter of federal due process" the business done in Ohio was "sufficiently substantial and of such a nature as to permit Ohio to entertain the action," *Id.* at 445. This case was brought into present perspective by the statement in *L.R. Reeder Contractors v. Higgins Indus.*, 265 F.2d 768, 775 (9th Cir. 1959), admitting that the *Perkins* case is "authority for the theory that the cause of action need not arise out of the activity of the nonresident within the forum state. But this was an earlier case than either *McGee* or *Hanson*, and rests upon its own peculiar facts." *Cf. Gordon v. International Tel. & Tel. Corp.*, 273 F. Supp. 164, 167 (N.D. Ill. 1967).

35. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The Supreme Court of Washington, in *International Shoe Co. v. State*, 22 Wash. 2d 146, 154 P.2d 801 (1945), considered the interpretation of the local "doing business" statute. However, the Supreme Court sidestepped the construction of the statute and its constitutional implications and preferred to decide the case on already generally accepted common law principles of jurisdiction in the light of minimal constitutional standards.

36. 357 U.S. 235 (1958). See Survey I, at 277. The Court added to the "quality and nature of the defendant's activity" the additional requirement that "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the foreign State, thus invoking the benefits and protection of its laws." *Id.* at 251. The requirement that such action must have been "taken voluntarily . . . calculated to have effect in the forum state," was further developed in *Rosenblatt v. American Cyanamid Co.*, 382 U.S. 110 (1965). *Cf. Boit v. Emmco Ins. Co.*, 271 F. Supp. 366 (D. Mont. 1967).

37. FLA. STAT. § 48.181 (1967).

38. *Hanson v. Denkla*, 357 U.S. 235, 251 (1958), noted in 13 U. MIAMI L. REV. 246 (1959).

39. *Id.* at 252.

acts in Florida."<sup>40</sup> Distinguishing this case from *McGee v. International Life Insurance Co.*,<sup>41</sup> the Court found that California had enacted "special legislation [Unauthorized Insurers Process Act] to exercise what the court called its manifest interest in providing effective redress for citizens." The Court overlooked, however, that Florida also had special legislation in the form of nonresident business as well as unauthorized insurers long-arm statutes which reflect a legitimate interest in redress for Florida-connected litigation involving nonresident defendants.

It is significant that outside of *Hess v. Pawloski*<sup>42</sup> where the Supreme Court upheld a nonresident motorist statute under state police powers, and the numerous statutory foreign railway corporation cases, the only Supreme Court case dealing with a long-arm statute is *McGee v. International Life Insurance Co.*,<sup>43</sup> concerning the California unauthorized insurers statute. There the Court found the application of this long-arm statute to be constitutionally proper since the premiums had been mailed from the forum state where the insured resided at his death. However, the relevant factor of the connexity between the claim and the activity within the jurisdiction was not raised probably because it was too obvious.

When considering Florida law in this area, it must be kept in mind that the nonresident business statute applies to individual as well as to corporate defendants. This is significant since it is well established that under the common law individuals are not considered present for jurisdictional purposes unless they are physically present within the jurisdiction when served with process or are domiciliaries of the jurisdiction.<sup>44</sup> Under the common law a person who has previously acted within a jurisdiction or is acting vicariously in the jurisdiction while physically outside its borders, is not present within the state for jurisdictional purposes, and only a statute may subject him to local jurisdiction. Consequently, it may be said that the old section 47.16 of the Florida Statutes is declaratory of common law only in regard to foreign corporate defendants<sup>45</sup> who "operate, conduct, engage in, or carry on a business" in the state, thus meeting the requirements as recently expressed in *International Shoe*.<sup>46</sup> By contrast, the Florida statute, like the majority of similar statutes enacted in other states, presents an innovation over common law in that it applies the same jurisdiction-creating activities, *i.e.*, one-man ventures, equally to corporate as well as to individual nonresident defendants. Furthermore, jurisdiction may also be based on the mere fact that a nonresident defendant, corporate or individual, has an "office or agency in the state." a

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40. *Id.*

41. 355 U.S. 220 (1957).

42. 274 U.S. 352 (1927).

43. 355 U.S. 220 (1957).

44. Recently discussed in *Elliott v. Cabeen*, 224 F. Supp. 50, 56 (D. Colo. 1963).

45. Not qualified to do business in the state, *see* note 29 *supra*.

46. 357 U.S. 235 (1958).

contact yet to be construed by Florida courts. Finally, vicarious business activities by foreign corporate and individual defendants through selling, consigning, or leasing "by any means whatsoever tangible or intangible property through brokers, jobbers, wholesalers or distributors" to anybody "within the state" have been added.<sup>47</sup> In such cases, however, there is the additional statutory requirement calling for connexity between such activities and the claim sued upon,<sup>48</sup> except under the 1967 statutory amendment triggered by the *Simari* case and limited to corporate defendants, to be discussed below.

A survey of the cases involving the types of jurisdiction-creating activities by nonresidents begins, this time, with the final disposition, at least insofar as the judiciary is concerned, in the *Simari* case.<sup>49</sup> Even though reversed because of lack of connexity between the claim and the activities within the jurisdiction,<sup>50</sup> the Supreme Court of Florida found, as indicated in a companion case, *Giannini Controls Corporation v. Eubanks*,<sup>51</sup> that the defendant foreign railway company was transacting business in the state by maintaining "two permanent offices in Florida staffed by thirteen permanent employees, for the purpose of soliciting passengers and freight for interstate trips originating in Florida and for routing such trips," even though these employees did not "issue bills of lading, collect freight charges, sell passenger tickets, settle claims, or handle cash transactions of any kind." On the contrary, in the *Giannini* case it appeared that the corporate defendant's activities consisted only of "four visits to the state by personnel [of the defendant] over the period of a year and a half . . . in order to study the . . . control systems and suggest improvements for their maintenance."<sup>52</sup> All of this, however, did not prevent the court from delving into the secondary question of the necessary connexity between the claim and the activities even though the primary jurisdictional requirement based on activities was not met.

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47. See Survey I, at 278, and Survey II, at 279.

48. Not required in regard to foreign corporations qualified to do business in the state, cf. *Confederation of Can. Life Ins. v. Vega y Arminan*, 135 So.2d 867 (Fla. 3d Dist. 1962), cert. denied, 144 So.2d 805 (Fla. 1962), and under the newly amended FLA. STAT. § 48.081 (1967).

49. *Simari v. Illinois Cent. R.R.*, 179 So.2d 220 (Fla. 1st Dist. 1965) (discussed in Survey II, at 504), rev'd *Illinois Cent. R.R. v. Simari*, 191 So.2d 427 (Fla. 1966). In a similar case involving Illinois law, an opposite result was reached, *Lindley v. St. Louis-San Francisco Ry.*, 276 F. Supp. 83 (N.D. Ill. 1967).

50. Relying on *Zirin v. Charles Pfizer & Co.*, 128 So.2d 594 (Fla. 1961) rather than on the controlling statutory provision. Half a century ago Pound criticized such practice when courts ignore important legislation "or, if they do refer to legislation, do so through the judicial decisions which apply it." *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

51. 190 So.2d 171 (Fla. 1966).

52. *Id.* at 172. In *Hubsch Mfg. Co. v. Freeway Washer & Stamping Co.*, 205 So.2d 337 (Fla. 1st Dist. 1967) the application of FLA. STAT. § 47.16 (1965) was supported by the fact that the non-resident defendant corporation was sending its officers, engineers and salesmen into Florida and that the damages resulted from the sale and delivery of defective hardware for use by plaintiff in its Florida operation.

In another case, the court found that the requirements of section 47.16 of the Florida Statutes regarding the defendant's activities were not met where a presently nonresident defendant, while employed in a Florida hospital, allegedly injured the plaintiff.<sup>53</sup> The court held that the "rendition of personal services to an employer" cannot be construed as "engaging in and carrying on a business or business venture within the purview of the constructive service statute here considered."<sup>54</sup> By contrast, the fact that the defendant foreign corporation maintained a sales representative who spent forty to fifty percent of his total worktime in Florida, calling on customers to promote sales, accepting complaints, quoting prices, but without writing orders, was held sufficient "minimum contact" in *Phillips v. Hooker Chemical Corporation*.<sup>55</sup>

A business venture was at issue in *Lomas & Nettleton F. Corp. v. All Coverage Underwriters*.<sup>56</sup> Here the court found that the defendant, incorporated in Delaware and having its only office in Texas, was "doing business in Florida," because "on at least two occasions defendant was engaged in financing the construction of improvements to real estate in Florida. In each instance the mortgages were to be serviced by the defendant's wholly owned subsidiary with offices in Miami."<sup>57</sup> Moreover, the court noticed that the "resident vice president of the subsidiary, which acted as a mortgage broker, was also an assistant secretary of the defendant." Declining to use the "broader ground for finding the defendant subject to the terms of the Long Arm Statute," the court chose to rely on the "business venture" concept, which "criterion can be met by a lesser involvement than that required for doing business."<sup>58</sup> In a similar vein, the court in *O'Connel v. Loach*<sup>59</sup> held that the nonresident defendant who bought and sold land in Florida and listed a tract for sale with the plaintiff broker, was "engaging in a business venture" if not actually engaging in business in Florida.<sup>60</sup>

Vicarious business activities as defined in paragraph (2) of the old section 47-16 of the Florida Statutes<sup>61</sup> were involved in *Evershield Products, Inc. v. Sapp*.<sup>62</sup> The district court of appeals accepted the trial court's findings that the defendant foreign corporation was engaged in business through a Florida corporation as "broker, jobber or distributor" of its materials because "strong economic ties" existed between the two

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53. *Williams v. Duval Co. Hosp. Auth.*, 199 So.2d 299 (Fla. 1st Dist. 1967).

54. *Id.* at 302.

55. 375 F.2d 189 (5th Cir. 1967).

56. 200 So.2d 564 (Fla. 4th Dist. 1967).

57. *Id.* at 565.

58. *Id.* In *Smeltzer v. Deere & Co.*, 252 F. Supp. 552, 556 (W.D. Pa. 1966), the court pointed out that Pennsylvania lacks a comparable statute.

59. 203 So.2d 350 (Fla. 2d Dist. 1967), *rev'g* 194 So.2d 700 (Fla. 2d Dist. 1967).

60. The court relied on the leading case *State ex rel. Weber v. Register*, 67 So.2d 619 (Fla. 1953).

61. *See* Survey II, at 510.

62. 195 So.2d 10 (Fla. 2d Dist. 1967).

companies, as indicated by the existence of substantial monetary credit, sales assistance and advertising materials as well as the sales and distribution of the defendant's products to be "used and serviced in Florida." A telling point was the fact that the Florida corporation came into being when officers of the defendant foreign corporation "decided to form the corporation and go into business in the State of Florida . . . as the official applicators"<sup>63</sup> of the defendant's materials.

Whether or not a long-arm statute may be applied retroactively so as to include activities that occurred prior to its enactments was at issue in *Haberle v. P.R.O. Liquidating Company*.<sup>64</sup> The activity within the jurisdiction consisted of a sale in 1950 of an X-ray machine. The lack of proper shielding resulted in injury to the plaintiff and was not discovered until 1961. In a decision involving no constitutional overtones,<sup>65</sup> it was held that the defendant was not subject to service under the statute in the absence of a showing that it had engaged in business within the jurisdiction since the enactment of the statute.

Questions of connexity present fewer difficulties once the nature of the particular jurisdiction-creating activity has been properly established. In the previously discussed *Simari*<sup>66</sup> case, the Supreme Court of Florida quashed the appellate decision<sup>67</sup> because of the lack of such relationship between the activity within the jurisdiction and the claim, quoting not the express statutory provision but the *Zirin*<sup>68</sup> and *International Shoe*<sup>69</sup> cases. In *Manus v. Manus*,<sup>70</sup> an action for divorce, alimony, and support for a minor, the court found that "neither the complaint nor the proofs submitted on the issue of jurisdiction disclose any cause of action that arose out of anything that [the defendant] allegedly did or any obligation it incurred in Florida," and added that "due process of law requirements limit all of our service of process statutes based on the 'doing business' theory to obligations or cause of action which arose out of activities of the foreign corporation in this state."<sup>71</sup> Similarly, the court in *O'Connel v. Loach*<sup>72</sup> held that a complaint which does not even allege that the claim arose out of the business activities of the defendant within the jurisdic-

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63. *Id.* at 14.

64. 186 So.2d 280 (Fla. 1st Dist. 1966). *Accord*, *Meier v. Grimes*, 202 So.2d 870 (Fla. 4th Dist. 1967); *Majerus v. Walk*, 275 F. Supp. 952 (D. Minn. 1967).

65. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *cf.* *Hardy v. Rekab, Inc.*, 266 F. Supp. 508 (D. Md. 1967).

66. *Illinois Cent. R.R. v. Simari*, 191 So.2d 427 (Fla. 1966).

67. Followed in *Bradbery v. Frank L. Savage, Inc.*, 190 So.2d 183 (Fla. 4th Dist. 1966), evaluating the opinion as "scholarly," *Id.* at 184.

68. *Zirin v. Charles Pfizer & Co.*, 128 So.2d 594 (Fla. 1961). *See* *Survey I*, at 284.

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

70. 193 So.2d 236 (Fla. 4th Dist. 1966).

71. *Id.* at 238, implying connexity to be a due process requirement. *United States v. Montreal Trust Co.*, 358 F.2d 239 (2d Cir. 1966), *cert. denied*, 384 U.S. 919 (1966), holds connexity to be a "mandate of *International Shoe Co.*" and the New York long-arm statute requiring connexity not vulnerable on constitutional grounds.

72. 194 So.2d 700 (Fla. 2d Dist. 1967).

tion, will not support personal jurisdiction over the nonresident defendant. In *Federal Insurance Company v. Michigan Wheel Company*<sup>73</sup> a motion to dismiss for lack of jurisdiction was granted on the ground that the claim "could have accrued without any and all of [the defendant's] activities, for it is entirely independent of and unrelated to them." The court held that "although Florida may have *McGee*-declared constitutional power . . . to flex its jurisdictional muscles more strongly, it has chosen, by its legislature and its Supreme Court, not to do so and has firmly established the above limitation [a connexity between the business activity within the jurisdiction and the claim] on its long arm statute."<sup>74</sup>

In order to be effective, constructive as well as other types of service of process must meet requirements set out in the particular long-arm statutes. Such requirements often demand more than the bare constitutional minimum. It follows that service under a long-arm statute may be ineffective because of non-compliance with frequently cumulative methods even though the service as performed might have met minimum consti-

73. 267 F. Supp. 639 (S.D. Fla. 1967).

74. *Id.* at 640. May connexity as a constitutional requirement be dispensed with in case where the activity on the part of the foreign corporation is continuous and considerable, as distinguished from the one-act long-arm situations? *Missouri K. & T. Ry. v. Reynolds*, 255 U.S. 565 (1921), as well as *Tanza v. Susquehanna Coal Co.*, 220 N.Y. 250, 115 N.E. 915 (1917) would indicate support. *But see* *Old Wayne Mutual Life Ass'n v. McDough*, 204 U.S. 8 (1907); *Green v. Chicago B. & Q. Ry.*, 205 U.S. 530 (1907). Stepping "tuft from tuft across the morras," *Hutchinson v. Chase*, 45 F.2d 139, 141 (2d Cir. 1930), courts apparently move in this direction. *Cf.* *Volkswagen Interamericana v. Rohlsen*, 360 F.2d 437, 440 (1st Cir. 1966).

In *Gordon v. International Tel. & Tel. Corp.*, 273 F. Supp. 164, 167 (N.D. Ill.), for example, the court wrote:

The evolution reflected by *International Shoe* could have been limited to situations where forum state activities were related to the suit in which jurisdiction was asserted. However, the Supreme Court in *International Shoe* recognized cases where jurisdiction had been grounded on substantial forum state activities unrelated to the cause in suit. That substantial unrelated activities within the forum state could support in personam jurisdiction over a nonresident was affirmed in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

Exploring "sufficient affiliation with the State of Florida," the Supreme Court in *Hanson v. Denckla*, 357 U.S. 235 (1958), found that "The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State," *Id.* at 251, and distinguished *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) on this ground. A further weakening of the requirement of connexity is indicated in *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 227 N.E.2d 851 (1967) holding an English corporation amenable to New York courts for claims arising out of plaintiff's fall in the bathtub of the London hotel, on the ground that the foreign corporation was doing business in New York in the "traditional sense," *i.e.*, according to common law principles in force prior to the enactment of the long-arm statute, which jurisdictional rules remained in force under Section 301 of the N.Y. Civ. Prac. L., as amended in 1966, providing that a court may exercise jurisdiction "as might have been exercised heretofore." The question of connexity has not even been raised. *Cf.* *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967).

In *Woodham v. Northwestern Steel & Wire Co.*, 390 F.2d 27 (5th Cir. 1968) the appellate court sidestepped the requirement of connexity (FLA. STAT. § 47.16, 1965) by interpreting the (old) § 47.17(4) as establishing jurisdiction regardless of connexity and not as identifying persons authorized to accept service on behalf of a foreign corporation for purposes of notification.

tutional standards. Service under the old section 47.15 of the Florida Statutes upon an agent "transacting business for [the foreign corporation] in this state" was involved in *Bradbery v. Frank L. Savage, Inc.*<sup>75</sup> The court found that this agent displayed merchandise, solicited business, received and forwarded orders for which he received salary plus commission, and, therefore, qualified as a statutorily constituted agent for service of process. A related but not identical jurisdictional requirement is, of course, that of the defendant's own local activities under the old section 47.16 of the Florida Statutes. Finally, it may be noted that where the defendant foreign corporation ignores service upon its agent within the jurisdiction as in *Evershield Products, Inc. v. Sapp*<sup>76</sup> (decided on the authority of *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*),<sup>77</sup> it was held to have received sufficient notice of action through its local affiliate in the sense of the old section 47.16(2) of the Florida Statutes.

In 1967 the legislature redrafted, renumbered and in some instances amended Florida's jurisdictional statutes. The nonresident business statute contained in the old section 47.16, now renumbered as section 48.181, underwent no substantive changes. Service of process may be had on the Secretary of State or, as added in 1967, on a "resident agent or officer in the state," an addition unnecessary in view of section 48.081 which reenacted the former section 47.17. Consequently, the former paragraph (2) dealing with transacting business through brokers, jobbers, wholesalers or distributors, became paragraph (3).

The provisions of former section 47.161 of the Florida Statutes, now section 48.071, dealing with jurisdiction over individuals and partnerships "not residing or having their principal place of business in this state," underwent no changes. Such nonresidents will remain amenable to local jurisdiction provided they "engage in business in this state" and the action arises out of such business. Service of process may be had on the person "in charge of any business in which the defendant is engaged within this state at the time of service," or on "agents soliciting orders for goods, wares, merchandise or services."

A trend to dispense with the requirement of connexity in nonresident business statutes is apparent in a subsequent amendment to the already revised section 47.17, now section 48.081, of the Florida Statutes. Apparently in response to the difficulties encountered in the *Simari*<sup>78</sup> litigation, the legislature decided to favor actions against foreign corporations by providing that:

- (5) Where a corporation has a business office within the state and is actually engaged in the transaction of business

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75. 190 So.2d 183 (Fla. 4th Dist. 1966).

76. 195 So.2d 10 (Fla. 2d Dist. 1967).

77. 332 F.2d 133 (5th Cir. 1964). See Survey II, at 511.

78. *Simari v. Illinois Cent. R.R.*, 179 So.2d 220 (Fla. 1st Dist. 1965). See discussion note 49 *supra*.

therefrom, service upon any officer or business agent, resident in the state, may personally be made, pursuant to this section, and it is not necessary in such case, that the action, suit or proceeding against the corporation shall have arisen out of any transaction or operation connected with or incidental to the business being transacted within the state.

In other words, the requirement of connexity does not apply in actions against foreign corporations not qualified to transact business in Florida, provided they have a "business office and [are] actually engaged in the transaction of business therefrom." Even though this amendment affects the jurisdictional provisions contained in the former section 47.16 and the present section 48.081 of the Florida Statutes, it was inserted into the former section 47.17, presently section 48.081, which deals with the routine method of service provided that jurisdictional requirements under the present section 48.081 are met.

Two observations may be made when comparing this provision with that reenacted in section 48.181. The line of distinction between corporate activities required under section 48.181, which uses, among others, the contact of having an office in the state, and that of section 47.17(8) (now numbered as section 48.081(5)) relying on having a "business office within the state and [being] actually engaged in the transaction of business therefrom," appears too thin to present a workable tool, particularly since one of them relieves the plaintiff of the burden of showing connexity. Rather, it appears as an unwelcome invitation to procedural pettifoggery. There is also uncertainty posed by paragraph (5), namely, whether service of process provided therein "upon any officer or business agent, resident in the state" is in addition to methods available in section 48.081, particularly since the method of service adopted in this amendment is also available in the new section 48.081(1)(d).

Summarizing, first, the statutory provisions presently dealing with the jurisdiction over foreign corporations transacting business in Florida, the following unnecessarily complex picture emerges:

- (1) Foreign corporations which have qualified to transact business in Florida are amenable to any kind of actions with service on designated agents;<sup>79</sup>
- (2) Foreign corporations not qualified to "transact business in Florida" may become amenable to local jurisdiction provided they
  - (a) "operate, conduct, engage in, or carry on a business or business venture in the state, or . . . have an office or agency in the state," and the cause of action arises "out

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79. FLA. STAT. § 48.091 (1967).

- of any transaction or operation connected with or incidental to the business or business venture;" or
- (b) have "a business office within the state and [are] actually engaged in the transaction of business therefrom," without the need that the cause of action "shall have arisen out of any transaction or operation connected with or incidental to the business being transacted within the state;"<sup>80</sup> or
  - (c) engage in unauthorized insurance business;<sup>81</sup> or
  - (d) have acted in connection with their business activities within the state so as to bring themselves within the alternate scope of the remaining long-arm statutes, all of them requiring connexity.<sup>82</sup>

In regard to nonresident individuals transacting business in the state, the method of subjecting them to local jurisdiction through the process of qualification is not available. Hence, only patterns available for foreign corporations which have not qualified for local business, remain:

- (1) The general nonresident business statute contained in Florida Statutes, section 48.181 quoted in its crucial provisions above under (2) (a), requiring the defined activity as well as connexity;
- (2) Florida Statutes, section 48.071 applicable to natural persons and partnerships "not residing or having his or their principal place of business in this state," and engaging in business in this state coupled with the requirement of connexity;
- (3) By having acted, in connection with their business, so as to bring themselves within the alternate scope of other long-arm statutes, all of them requiring connexity.

In conclusion, it may be pointed out that the recent revisions and amendments have created new uncertainties rather than eliminated old ones. It is to be regretted that instead of giving Florida a simple, compact, general long-arm statute like those in force in many states, the legislature has chosen to compound existing difficulties by retaining the old patchwork and by adding, for good measure, a few new patches on top of it all.

#### 4. UNAUTHORIZED FOREIGN INSURERS

The 1967 legislature adopted in paragraph (1) of the Unauthorized Insurers Process Law<sup>83</sup> a policy statement enlarging that already con-

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80. FLA. STAT. § 48.081(5) (1967).

81. See Survey I, at 288.

82. See Survey I, at 281, and Survey II, at 503.

83. FLA. STAT. § 626.05071 (1967). On service, see *United States v. St. Paul Mercury*

tained in section 626.0504 of the Florida Statutes. Jurisdiction of the Commissioner of Insurance was defined in paragraph (2) of the same section.

#### 5. NONRESIDENT CHARITABLE ORGANIZATIONS AND SOLICITORS

The 1967 legislature reenacted section 496.12<sup>84</sup> of the Florida Statutes dealing with foreign charitable organizations and expanded it to include professional solicitors. Even though such organizations or agents may have their "principal place of business without the state, or [be] organized under and by virtue of the laws of a foreign state," if "they solicit contributions from people in this state," they are deemed to have appointed the Secretary of State as their agent for service in any proceedings "brought under the provisions of this act."

#### 6. NONRESIDENT PARTNERSHIPS

Foreign partnerships<sup>85</sup> are amenable to local jurisdiction under any of the long-arm statutes if they engage in business under sections 48.071, 48.171 and 48.19 of the Florida Statutes or operate a motor vehicle or watercraft within the jurisdiction. The method of service is prescribed by the particular long-arm statute or by section 48.061(1). However, in cases of doing business under section 48.071, a particular method of service is prescribed and the provisions of section 48.061(1) are unavailable to the plaintiff.

Foreign limited partnerships may be served according to section 48.061(3) on any general partner found in the state. If "no general partner is found in Florida," process may be served according to sections 48.071 and 48.21.

#### 7. FOREIGN LAND DEVELOPERS

The newly amended statute regulating promotional real estate offerings<sup>86</sup> grants jurisdiction over causes of action arising under its provisions to the circuit courts. Civil remedies, now available under section 478.191 (1) and (2), may be sought in Florida courts, provided:

- (1) the subdivided lands offered for disposition are located in this state; or

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Ins. Co., 361 F.2d 838 (5th Cir. 1966). Statute found constitutional in *Parmalee v. Iowa State Traveling Men's Ass'n*, 206 F.2d 518 (5th Cir. 1953).

Corporations engaged in insured scholarship programs (FLA. STAT. § 617.50 (1967)), domestic and foreign, must irrevocably appoint the Commissioner of Insurance as agent for service "of all legal process issued against [them] in any civil action and proceeding in this state," this authority to remain in effect "as long as there is outstanding any obligation or liability of the corporation resulting from its business transactions therein." FLA. STAT. § 617.80 (1967). For statutory construction, see Survey I, at 287.

84. See Survey II, at 512.

85. See Survey I, at 286.

86. FLA. STAT. ch. 478 (1967).

- (2) the subdivider's principal office is located in this state; or
- (3) any offer or disposition of subdivided lands is made in this state or is directed by the offeror to a person or place in this state and received by the person or at the place to which it is directed.

Subdividers are required by section 478.121(1)(a) to appoint irrevocably in their application for registration an "agency to receive service of any lawful process on any noncriminal proceedings arising under this act against the applicant or his personal representative."<sup>87</sup> If this is not done, section 478.291(2) provides that:

If any person, including any nonresident of this state, engages in conduct prohibited by this act, or any rule or order hereunder, and has not filed a consent to service of process and personal jurisdiction over him cannot otherwise be obtained in this State, that conduct authorizes the board to receive service of process in any noncriminal proceeding against him or his successor which grows out of that conduct and which is brought under this act or any rule or order hereunder, with the same force and validity as if served on him personally.

In that event, notice is given under section 478.291(1) by delivering process to the office of the board to become effective only if a copy is "forthwith sent by certified mail to the defendant at his last known address and plaintiff's affidavit of compliance with this provision is filed with the court."

#### B. *Jurisdiction in Rem*

Many cases where jurisdiction is based upon the location of the real property involved are contested because the mode of service required under the applicable statute may be constructive. In *Vanstone v. Whitelaw*,<sup>88</sup> the defendants, residents of Canada and owners of land in Florida, were sued in an action to abate a nuisance on their property. Constructive service by publication was upheld as not violative of the due process and equal protection clauses of the Federal Constitution because the defendants were "properly named parties defendant in an action seeking the exercise of state court jurisdiction over real property within this state."<sup>89</sup> Justice Ervin filed a weighty dissent, pointing out that the action aiming at removal of spoil disposal put on the defendants' property by the government is an action in equity *in personam* and not an action *in rem* and, as such, requires perfection of jurisdiction over the persons of the defendants.<sup>90</sup>

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87. FLA. STAT. § 478.121(1)(a).

88. 196 So.2d 425 (Fla. 1967). Cf. *Wilentz v. Edwards*, 134 N.J. Eq. 522, 36 A.2d 423 (Ct. Err. & App. 1944).

89. 196 So.2d 425, 426 (Fla. 1967).

90. *Id.* at 428.

The sufficiency of constructive service was also at issue in *Hennig v. Hennig*,<sup>91</sup> an action by a husband to establish title to realty which had been awarded to his wife in a previous divorce decree. Despite a strong dissent, the Supreme Court of Florida discharged the defendant's petition of certiorari on the ground that constructive service on the husband in the divorce proceedings did not perfect jurisdiction regarding this property held by the entireties because it was not properly described in the notice by publication. Consequently, the divorce decree awarding husband's interest in this property to the wife was subject to collateral attack.

### C. *Forum Non Conveniens*

The doctrine of *forum non conveniens* was at issue in *Texas Gulf Sulphur Company v. Downtown Investment Company*.<sup>92</sup> The lower court denied the defendant's motion to dismiss based on this doctrine on the ground that Florida has no statute comparable to Title 28, section 1404(2) of the United States Code. The district court of appeals dismissed the interlocutory appeal stating that the "Florida venue statute specifies the forums in which an action may be commenced," and, relying on *Touhcton v. Atlantic Coast Line Railroad*,<sup>93</sup> an intrastate venue case, held that the principle enunciated in that case was "equally applicable to actions properly brought in Florida where it is made to appear that a more convenient forum may be found in another state."

Fortunately, Florida law was stated correctly in the later case of *Southern Railway v. McCubbins*.<sup>94</sup> There the appellate court recognized the doctrine as "one which is sanctioned by the law of this state, where the cause of action arises in another jurisdiction and neither party resides in Florida,"<sup>95</sup> and on rehearing, reversed the denial of a motion to dismiss and found abuse of discretion on the part of the court below for overlooking the following facts present in the case:

astute forum shopping; an exercise of strategy to force the trial at a distant place inconvenient and expensive to an adversary and thereby including a measure of harassment; inaccessibility to sources of proof; unavailability of compulsory process for attendance of unwilling witnesses; cost of employment of

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91. 185 So.2d 457 (Fla. 1966).

92. 188 So.2d 19 (Fla. 1st Dist. 1966).

93. 155 So.2d 738 (Fla. 3d Dist. 1963). *Cf.* *Gallen v. Howard D. Johnson Co.*, 271 F. Supp. 680 (S.D.N.Y. 1967) granting transfer to Florida under 28 U.S.C., § 1404(a), taking into account that witnesses are in Florida, that Florida statutory and common law would have to be applied, that a view of the premises would be possible, that the dockets of the Florida federal court "are less congested," and finally, that the plaintiff has chosen to do business in Florida and that the controversy developed there.

94. 196 So.2d 512 (Fla. 3d Dist. 1967). The doctrine is not adopted in Louisiana, *Trahan v. Phoenix Ins. Co.*, — La. —, 200 So.2d 118 (1967); *Chaney v. Williker*, — La. —, 205 So.2d 770 (Ct. App. 1968).

95. 196 So.2d 512, 514 (Fla. 3d Dist. 1967); *Hagen v. Viney*, 124 Fla. 746, 169 So. 391 (1936).

additional counsel at the place selected for trial; loss of opportunity for a jury view of the premises, where such may become important; no substantial difference in the time in which such a case may be reached for trial in the courts of the two locations; no necessity to resort to a forum in another state in order to obtain a fair trial; an undue and unnecessary imposition on a busy Florida court by adding to its docket a cause of action arising elsewhere between nonresident litigants; and all other practical problems that make trial of a case easier and more expeditious and inexpensive in the forum in the state where the cause of action arose, the parties reside and where normally it would be filed.<sup>96</sup>

#### D. *Litispendency*

Litispendency was involved in *Orlowitz v. Orlowitz*.<sup>97</sup> The appellate court held that jurisdiction in the divorce suit should have been reserved pending determination of the wife's suit against her husband in Florida for unpaid, accrued alimony based on a Pennsylvania separate maintenance decree, because if the Pennsylvania decree should be found invalid or unenforceable, the amount to be awarded in the Florida divorce action would be affected.

#### E. *Immunity from Process*

Even though the general doctrine of sovereign immunity in favor of the State of Florida still obtains,<sup>98</sup> the 1967 Florida Legislature altered the rule for tort actions wherein the state is the plaintiff to the extent of "permitting the defendant to counter-claim for damages resulting from the same transaction or occurrence."<sup>99</sup>

#### F. *Federal Law*

There are some interesting developments in the area of federal law. Section 1391 of Title 28 of the United States Code was amended in 1964 by adding paragraph (f) dealing with venue of civil actions arising out of automobile accidents. Paragraph (f) was merged in 1966 with paragraphs (a) and (b) as follows:

- (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law be brought only in the judicial district where all plaintiffs or all the defendants reside, or in which the cause of action arose.

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96. 196 So.2d 512, 516 (Fla. 3d Dist. 1967). Forum non conveniens involving Florida resident in New York, *Varkonyi v. S.A. Empresa de Viacao Aerea Rio Grandense*, 27 App. Div. 2d 731, 277 N.Y.2d 577 (1967).

97. 187 So.2d 670 (Fla. 3d Dist. 1966).

98. *Valdez v. State Rd. Dep't*, 189 So.2d 823 (Fla. 2d Dist. 1966).

99. Fla. Laws 1967, ch. 67-2204.

- (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

Consequently, paragraph (f) was repealed.

In the international area, it should be noted that the Convention on the Service of Judicial and Extrajudicial Documents in Civil and Commercial Matters, signed at The Hague in 1965, has been ratified by the United States, but is not yet in force.<sup>100</sup>

### III. FOREIGN JUDGMENTS

On the interstate level the Supreme Court was faced in *Watkins v. Conway*,<sup>101</sup> with the constitutional implications of a denial of full faith and credit. Relying on the Georgia *lex fori* rule that "all suits upon judgments obtained out of this State shall be brought within five years after such judgments shall have been obtained,"<sup>102</sup> a Georgia court refused to give full faith and credit to a "dormant"<sup>103</sup> Florida judgment. The Court held that in view of the Georgia interpretation of its statute whereby suits on foreign judgments are barred only if the plaintiff cannot "revive his judgment in the State where it was originally obtained" and that the critical date is "not the date of the original judgment, but rather it is the date of latest revival of the judgment," the Georgia statute as applied in this instance did not discriminate against the judgment from Florida, but rather:

it has focused on the law of the State. If Florida had a statute of limitations of five years or less on its own judgments, the [plaintiff] would not be able to recover here. But this disability would flow from the conclusion of the Florida Legislature that suits on Florida judgments should be barred after that period. Georgia's construction of § 3-701 would merely honor and give effect to that conclusion. Thus, full faith and credit is insured, rather than denied, the law of the judgement State. Similarly, there is no denial of equal protection in a scheme that relies upon the judgment State's view of the validity of its own judgments. Such a scheme hardly reflects invidious discrimination.<sup>104</sup>

The defendant's attempt to collaterally attack a California paternity judgment in Florida under the Uniform Reciprocal Enforcement of Sup-

100. 61 AM. J. INT'L L. 799 (1967).

101. 385 U.S. 188 (1966).

102. GA. CODE ANN. § 3-701 (1933).

103. For the medieval doctrine of dormant judgments revived by the princely kiss of *scire facias*, see *Union Bank v. Powell*, 3 Fla. 175, 191 (1850); *Massey v. Pineapple Orange Co.*, 87 Fla. 374, 100 So. 170 (1924); and *Spurway v. Dyer*, 48 F. Supp. 255 (S.D. Fla. 1942).

104. *Watkins v. Conway*, 385 U.S. 188, 190 (1966).

port Act was unsuccessful in view of the controlling California law that the defendant's only available remedy was a timely and direct attack by appeal from the default judgment obtained after the defendant had been personally served in California.<sup>105</sup> Estoppel by judgment was found in *International Breweries, Inc. v. Anheuser-Busch, Inc.*,<sup>106</sup> where the plaintiff had recovered a declaratory judgment in a federal court in Ohio granting protection against the use by defendant's privy of the trademark "Bavarian." Similarly in *Meyers v. Forty-Five Twenty-Five, Inc.*,<sup>107</sup> a New York judgment against a husband and wife for unpaid rent prevented the relitigation in Florida of a suit for damages by the wife previously pleaded without success as a defense in a New York action.<sup>108</sup>

Full faith and credit to a New York judgment obtained by plaintiff attorneys who "rendered professional services to defendant while he was a domiciliary of New York" but was at the time of the commencement of the suit a domiciliary of Florida was (even though not noted) involved in *Brown v. Henrich*.<sup>109</sup> Jurisdiction in the New York action was perfected under the New York long-arm statute subjecting to local jurisdiction any non-domiciliary if he transacts any business in person within the state and there is connexity between such activity and the demand.<sup>110</sup> The appellate court felt that "there has been some confusion in the New York law as to whether or not CPLR 302 would apply to a non-domiciliary who was domiciled in New York at the time of the transaction in question."<sup>111</sup> Reading a New York case as holding that "CPLR 302 does apply to a defendant who was domiciled in New York at the time he transacted the business but a non-domiciliary at the time of service,"<sup>112</sup> the court supposedly applied "the law prevailing at the

105. *Holcomb v. Holcomb*, 198 So.2d 32 (Fla. 4th Dist. 1967).

106. 364 F.2d 261 (5th Cir. 1966).

107. 198 So.2d 650 (Fla. 3d Dist. 1967).

108. In the unreported case of *Oppenheim v. World Wide Realty & Investing Corp.*, NO. 66-1221 (S.D. Fla. 1967), an action upon a judgment obtained in Illinois upon a cognovit note dated and payable in Illinois, but in fact executed in Florida, was dismissed on the ground that plaintiff did not show the judgment is valid under the controlling Illinois statute, ILL. ANN. STAT. ch. 10, § 50(4) (1966 Supp.).

109. 203 So.2d 183 (Fla. 4th Dist. 1967).

Arbitral awards rendered according to art. 50, 51, and 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1966, 17 U.S.T. 1270, T.I.A.S. No. 6090) are, under art. 1650 (a) of 22 U.S.C.A. (1967), recognized as rights "arising under a treaty of the United States, and, insofar as they impose a pecuniary obligation, "shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several states." Federal district courts are vested with "exclusive jurisdiction over [such] actions and proceedings . . . regardless of the amount in controversy."

110. N.Y. CIV. PRAC. L. & R. § 302(a) (McKinney 1963).

111. *Brown v. Henrich*, 203 So.2d 183, 184 (Fla. 1967).

112. *State v. Davies*, 18 N.Y.2d 950, 223 N.E.2d 570, 277 N.Y.S.2d 146 (1966). The court's reliance on this case is patently misplaced since § 203 of the CPLR requires no present or past domicile on the part of defendant. Rather it uses domicile only as a fictional and meaningless justification for the long-arm jurisdictional grant by stating that "any non-domiciliary" may be subject to local jurisdiction because of his transacting, in

time it renders its decision,<sup>113</sup> and reversed, directing—correctly—summary judgment for the plaintiff. It may be added, however, that the New York court's finding that professional legal services are equivalent to transacting business in person on the part of the client may be unusual.<sup>114</sup> Nevertheless, in a full faith and credit situation, a wrong interpretation of the forum's jurisdictional rules will not deprive the judgment thus rendered of full faith and credit except where their application amounts to denial of due process, a possibility not even raised in the case.

Among cases concerning Florida judgments to be enforced in other states, *Higginbotham v. Higginbotham*<sup>115</sup> deserves to be mentioned. As previously reported,<sup>116</sup> the lower New Jersey court denied full faith and credit to a Florida alimony decree in regard to land, but granted it in regard to chattels. On appeal the Superior Court faced two impressive precedents, one local, *Bullock v. Bullock*,<sup>117</sup> and the other national, *Fall v. Estin*.<sup>118</sup> The former was overcome by finding that it could not be "considered binding authority because the court there was hopelessly divided."<sup>119</sup> *Fall v. Estin* was distinguished on three grounds. First, the defendant there was not personally served in F<sub>1</sub>, namely the State of Washington. Secondly, F<sub>2</sub>, Nebraska, had no remedy to award real estate as alimony and, consequently, was not compelled under the full faith and credit clause to "recognize an award or order (*i.e.*, Washington's) which the equity courts in Nebraska could not themselves lawfully render."<sup>120</sup> Thirdly, in that case the plaintiff sued on the theory that the Washington decree in itself affected the title to the Nebraska land, and placed the title in the plaintiff. In the present case, however, the court relied on personal jurisdiction perfected over the defendant both in Florida and New

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person, business in New York "in the same manner as if he were a domiciliary of the state." Furthermore, the New York case dealt not with the question of present or past domicile, but with the specific question whether or not this statute applies to actions "penal rather than tortious in nature," *Id.* at 951, 233 N.E.2d at 571, 277 N.Y.S.2d at 147, and held that in spite of the fact that the action "sought redress for a public wrong rather than a private wrong, it was a civil proceeding and was therefore governed by CPLR 302." *Id.*

113. *Brown v. Henrich*, 203 So.2d 183, 184 (Fla. 1967).

114. "Transacting any business within the state" N.Y. CIV. PRAC. L. § 302 (McKinney 1963) includes also acting in a state court, *Drugor Shipping Corp. v. Union Tank Car Co.*, 361 F.2d 43 (9th Cir. 1966), *cert. denied*, 385 U.S. 831 (1966); and execution in N.Y. of a separation agreement and deposit security therefor, *Van Wagenberg v. Van Wagenberg*, 241 Md. 154, 215 A.2d 812 (1966), *cert. denied*, 385 U.S. 833 (1966). *But see* *Ohio Cas. Ins. Co. v. First Nat'l Bank*, 425 P.2d 934 (Okla. 1967).

115. 92 N.J. Super. 18, 222 A.2d 120 (1966).

116. *See* *Survey II*, at 519.

117. 52 N.J. Eq. 561, 30 A. 676 (1894).

118. 215 U.S. 1 (1909). *Hancock, Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: the Supreme Court and the Land Taboo*, 18 STAN. L. REV. (1966). For a recent judicial evaluation of *Fall v. Estin*, in the light of *McElreath v. McElreath*, 162 Tex. 190, 345 S.W.2d 722 (1961), see *Allis v. Allis*, 378 F.2d 721 (5th Cir. 1967).

119. *Higginbotham v. Higginbotham*, 92 N.J. Super. 18, 22, 222 A.2d 120, 122 (1966).

120. *Id.* at 33, 222 A.2d at 128.

Jersey rather than on the *in rem* effect of the Florida decree over land in New Jersey and directed the lower court to enter judgment for the plaintiff and issue any order "necessary to give her a fee simple" in the land involved.<sup>121</sup> This was granted in spite of Florida's indulgence in the "formalism" displayed in her decree that

it be considered and taken in all courts of law and equity to have the same operation and effect as if the conveyance . . . had been executed by the defendant . . . and [Florida's court order] to its special master to execute and deliver a deed to plaintiff after defendant, in disregard of the decree and the court's *ne exeat* order, fled the jurisdiction.<sup>122</sup>

#### IV. ERIE-KLAXON DOCTRINE

##### A. General Problems

No significant developments may be noted in the *Erie-Klaxon* doctrine. Some of its aspects have been restated in *Commissioner v. Estate of Bosch*,<sup>123</sup> referring to the Rule of Decision Act that in the absence of the Constitution or acts of Congress, the "laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."<sup>124</sup> While the decrees of lower state courts should be given some weight, such decisions are not controlling "where the highest court of the state has not spoken."<sup>125</sup> The rulings of intermediate state courts are a "datum for ascertaining state law," and not to be disregarded by federal courts "unless [they are] convinced by other persuasive data the highest court of the state would decide otherwise."<sup>126</sup> Consequently, the Court in the *Bosch* case concluded that "under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling."<sup>127</sup> Although this was not a diversity case, the Court held that the Erie doctrine may be applied "for the same reasons, *viz.*, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law," and "if there be no decision by that court then federal authority must

121. *Id.* at 36, 222 A.2d at 130.

122. *Id.* at 35, 222 A.2d at 129. On full faith and credit due to Puerto Rican judgment, see *Americana of Puerto Rico, Inc. v. Kaplus*, 368 F.2d 431 (3d Cir. 1966). Florida judgment against incompetent not entitled to full faith and credit in New York because of failure to appoint in Florida a guardian ad litem, in addition to New York's exclusive jurisdiction, *In re Raffa*, 24 A.D.2d 949, 261 N.Y.S.2d 423 (1965). In *Esser v. Cantor*, 284 N.Y.2d 914 (1967), a Florida judgment based on section 47.16(2) of the Florida Statutes was given full faith and credit in New York, the court finding that "minimum contacts required by the Florida statute do not offend traditional notions of fair play and substantial justice."

123. 387 U.S. 456 (1967).

124. *Id.* at 464.

125. *King v. Order of United Commercial Travelers*, 333 U.S. 153, 161 (1948).

126. *Commissioner v. Estate of Bosch*, 35 U.S.L.W. 4542, 4545 (U.S. June 5, 1967).

127. *Id.*

apply what it finds to be the state law after giving 'proper regard' to relevant rulings of the other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court."<sup>128</sup>

In proper *Erie* cases it appears that federal courts still swing between two extremes: that of being "only another court of the state"<sup>129</sup> or that of being a judiciary with an independent identity.<sup>130</sup> Relying on *Byrd v. Blue Ridge Rural Electric Co-Operative*,<sup>131</sup> the court in *Prudential Insurance Company of America v. Schreffler*<sup>132</sup> held that the question of what "circumstances justify the setting aside of a jury verdict, like other questions concerning the judge-jury relationship in the federal courts, is governed by federal law."<sup>133</sup> The question of the sufficiency of evidence was involved in *ABC-Paramount Records, Inc. v. Topps Record Distributing Co.*<sup>134</sup> There the court noted that both parties "argue the question of sufficiency of evidence as if it were a question of Florida law,"<sup>135</sup> and again relying on the *Byrd* case held that

[T]he federal court's judge-jury relationship would suffer a similar disruption if the trial judge had to apply the Florida rather than the federal standard of sufficiency of evidence in determining whether to take away from the jury certain fact issues concerning damages,<sup>136</sup>

and added the oft-stated rule that in a diversity case "state law controls as to the substantive elements of the plaintiff's case and of defendant's defense, but the sufficiency of evidence to raise a question of fact for the jury is controlled by federal law."<sup>137</sup>

Following *Erie*, federal courts sitting in Florida resort, whenever so directed by Florida conflict rules, to Florida substantive law. In a tort case, for example, a federal court has applied the Florida rule that the burden of proof is on the defendant in cases where damage has resulted from two causes, one of which involved *vis major*.<sup>138</sup> They have also fol-

128. *Id.*

129. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

130. *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525 (1958).

131. *Id.*

132. 376 F.2d 397 (5th Cir. 1967).

133. *Id.* at 399.

134. 374 F.2d 455 (5th Cir. 1967). *Cf. Liberty Leasing Co. v. Hillsum Sales Corp.*, 380 F.2d 1013 (5th Cir. 1967); *Marshall v. Mintz*, 386 F.2d 415 (5th Cir. 1967).

135. *ABC-Paramount Records, Inc. v. Topps Record Distrib. Co.*, 374 F.2d 455, 459 (5th Cir. 1967).

136. *Id.* at 460.

137. *Id.* Relying on *Sperry Rand Corp., v. Industrial Supply Corp.*, 337 F.2d 363 (5th Cir. 1964), *Survey II*, at 528, the same court in *Freeman v. Continental Gin Co.*, 381 F.2d 459 (5th Cir. 1967) held that a federal court in diversity must apply the parol evidence rule as a state court would. In regard to characterization as substantive or procedural, see *Maryland Cas. Co. v. Williams*, 377 F.2d 389 (5th Cir. 1967).

138. *Parker v. Wideman*, 380 F.2d 433 (5th Cir. 1967). *Cf. Alford v. Blake*, 385 F.2d 1010 (5th Cir. 1967) (doctrine of sudden emergency); *Florida Power & Light Co. v. Hercules Concrete Pile Co.*, 275 F. Supp. 427 (S.D. Fla. 1967) (active-passive tort-feasor doctrine).

lowed the Florida law in regard to punitive damages in defamation suits;<sup>139</sup> in actions based on Florida's Wrongful Death Statute,<sup>140</sup> in suits on the right to use a trade name based on Florida's Fair Trade Law;<sup>141</sup> in contract matters regarding the enforcement of a price fight agreement<sup>142</sup> and the requirements of mutual consent;<sup>143</sup> the principles of agency;<sup>144</sup> and in a large number of cases involving insurance contracts.<sup>145</sup> However, it was held in *Jacksonville Terminal v. Florida East Coast Ry.*<sup>146</sup> that federal and not state law controlled the question of whether or not the president and general counsel of the company were properly discharged under a contract approved by the Interstate Commerce Commission.

### B. Abstention

The doctrine of abstention,<sup>147</sup> closely related to *Erie* situations, is one of the alternatives open to federal courts when faced with difficulties

139. *Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co.*, 378 F.2d 377 (5th Cir. 1967). *Cf.* *Fox v. City of West Palm Beach*, 383 F.2d 189 (5th Cir. 1967) (not recoverable against a municipality).

140. *Wm. G. Roe & Co. v. Armour & Co.*, 370 F.2d 829 (5th Cir. 1967) (damages resulting from flourine gas emission); *Marsden v. Patane*, 380 F.2d 489 (5th Cir. 1967) (traffic violation rebuttable presumption of negligence); *Hamilton v. Armstrong Cork Co.*, 371 F.2d 139 (5th Cir. 1967) (liability for break of pole); *Olin's Tire Serv., Inc. v. United States Rubber Co.*, 382 F.2d 852 (5th Cir. 1967) (loss of profits).

141. *Miami Parts & Spring, Inc. v. Champion Spark Plug Co.*, 364 F.2d 957 (5th Cir. 1966); *Metropolitan Life Ins. Co. v. Metropolitan Ins. Premium Fin. Corp.*, 264 F. Supp. 507 (S.D. Fla. 1966) (deceptive use of similar name); *Gant of New Haven, Inc. v. Chez Boye Parfums International, Inc.*, 256 F. Supp. 982 (M.D. Fla. 1966); *Mead Johnson & Co. v. Baby's Formula Serv., Inc.*, 270 F. Supp. 607 (S.D. Fla. 1967) (appropriation of trade name). *Cf.* *Tursair Executive Aircraft Servs., Inc. v. United States*, 383 F.2d 381 (5th Cir. 1967) (trade usage in Florida).

142. *Inter-Continental Promotions, Inc. v. MacDonald*, 367 F.2d 293 (5th Cir. 1966). *Cf.* *Barzda v. Quality Courts Motel, Inc.*, 386 F.2d 417 (5th Cir. 1967) (third-party beneficiaries).

143. *O'Neill v. Corp. Trustees, Inc.*, 376 F.2d 818 (5th Cir. 1967); *Brunswick Corp. v. Vineberg*, 370 F.2d 605 (5th Cir. 1967) (breach of contract and inducing it); *L & A Contracting Co. v. Oxley*, 261 F. Supp. 469 (N.D. Okla. 1966) [interpretation of contract under Florida law according to 15 OKLA. STAT. ANN. § 162 (1961)].

144. *Duke v. Heppleston*, 258 F. Supp. 313 (S.D. Fla. 1966); *Exhibition Display Serv. Co. v. Liberty Mut. Ins. Co.*, 378 F.2d 903 (5th Cir. 1967) (passing of title in sale).

145. *Bershire Mut. Ins. Co. v. Moffett*, 378 F.2d 1007 (5th Cir. 1967) (evidence of value); *Hamilton v. Maryland Cas. Co.*, 368 F.2d 768 (5th Cir. 1966) (non-owned automobile); *American Sur. Co. v. Coblenz*, 381 F.2d 185 (5th Cir. 1967) (negligence or assault and battery); *Commercial Union Ins. Co. v. Reichard*, 262 F. Supp. 275 (S.D. Fla. 1966) (assault); *Sykes v. Fireman's Fund Ins. Co.*, 269 F. Supp. 229 (S.D. Fla. 1967) (death of minor); *Metropolitan Life Ins. Co. v. Main*, 383 F.2d 952 (5th Cir. 1967) (external cause); *Glens Falls Ins. Co. v. Gray*, 386 F.2d 520 (5th Cir. 1967) (ambiguous condition in policy); *Commercial Union Inc. Co. v. Reichard*, 273 F. Supp. 952 (S.D. Fla. 1967) (actual and vicarious tortfeasor); *Gordon v. American Motorists Co.*, 274 F. Supp. 592 (M.D. Fla. 1967) (preexisting physical condition).

146. 363 F.2d 216 (5th Cir. 1966). But Florida law controls liabilities of directors of dissolved corporation, *Gould v. Brick*, 258 F.2d 437 (5th Cir. 1966).

147. Described in *Sun Ins. Office, Ltd. v. Clay*, 319 F.2d 505, 508 (5th Cir. 1963) as a remitting of the parties in a pending federal court action to a state court for a decision of a question of state law with a determination of the other issues by the federal court; or upon election of the party remitted to the state court, for a complete and final adjudication by that court of the entire controversy.

in ascertaining the applicable state law. The number of abstention cases involving Florida law is undoubtedly affected by the Florida statute<sup>148</sup> providing for certification of "questions or propositions of the law of this state, which are determinative of said cause," provided there are "no clear controlling precedents in the decisions of the supreme court of this state." In such cases the Supreme Court of Florida may answer requests for "instructions concerning such questions or propositions of state law" by written opinions. It is to be kept in mind that this statutory function is limited to cases where the particular question of Florida Law is determinative of the case and there are no "controlling precedents in the decisions" of the supreme court. Consequently, the Supreme Court of Florida has three alternatives for denying to act on such certifications. It may find that the particular rule of law certified for declaration is not determinative of the case and on this ground not give an opinion. Or it may deny certification on the ground that the supreme court has already ruled on the question of law. However, the fact that intermediate or trial courts have ruled on this point, appears not to be ground for such denial. The third alternative is that there may be no state law in point to be declared since the supreme court lacks power to create new law in certification proceedings.

Whether or not such opinions are binding upon federal courts<sup>149</sup> will not be discussed here. It is clear, however, that in matters involving a federal constitutional question, federal courts have declined,<sup>150</sup> in unmistakable terms, to accept such answers as binding. Additional doubts may arise from general constitutional considerations based on the principle of separation of powers, or from the lack of constitutional grant of power to a particular state supreme court.<sup>151</sup> To show the problem in

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148. FLA. STAT. § 25.031 (1965). Kaplan, *Certification Of Questions From Federal Appellate Courts To The Florida Supreme Court And Its Impact On The Abstention Doctrine*, 16 U. MIAMI L. REV. 413 (1962).

149. This effect was seriously questioned in *Sun Ins. Office, Ltd. v. Clay*, 319 F.2d 505, 508 (5th Cir. 1963) where the court declined the imputation that by ordering certification the Supreme Court also intended to declare such opinion to be binding, adding that the Florida statute

does not require nor, we think, does it contemplate that parties in the federal litigation shall submit themselves to the jurisdiction of the state court . . . . The power of the federal court to make a determination of the litigable issues between the parties to the pending cause was neither transferred to nor shared with the state court. The Supreme Court of Florida has, it seems, original jurisdiction only in the issuance of extraordinary writs.

In this respect the authority relied upon by the Florida supreme court supporting its law-declaratory power seems to be a passage from 1 J. ANDREWS, *AMERICAN LAW* 221 (2d ed. 1908) and a number of Florida cases cited for the proposition that judicial powers vested by the state constitution may be enlarged by the legislature, *Sun Ins. Office, Ltd. v. Clay*, 133 So.2d 735, 742 (Fla. 1961).

150. *E.g.*, *Sun Ins. Office, Ltd. v. Clay*, 319 F.2d 505, 510 (5th Cir. 1963). See generally Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967).

151. *E.g.*, *United Serv. Life Ins. Co. v. Delaney*, — Tex. — , 396 S.W.2d 855 (1965). In *Douglas Oil Co. v. State*, 81 S.W.2d 1064 (Tex. Civ. App. 1935) the court saw the essential difference between the declaratory judgment and the purely advisory

better perspective, it may suffice to compare the solutions available in jurisdictions without a statutory certification procedure. There parties may be requested by the federal courts to litigate the point of state law in regular proceedings in the appropriate state courts in order to recover, in most cases, a declaratory judgment<sup>152</sup> which not only constitutes a proper precedent but, at the same time, becomes *res judicata* between the litigants and entitled in federal courts to full faith and credit.<sup>153</sup>

Generally, federal courts consider themselves authorized as well as qualified to ascertain and apply state law, even though, in particular situations, for reasons of "federalism, comity and convenience"<sup>154</sup> they may postpone their final adjudication. However, in situations not involving constitutional issues or state administrative actions, federal courts appear ready to ascertain state law even if there are no state precedents on point by taking into account "not merely the generalizations and dicta in cases from the past but also trends in modern legal thought."<sup>155</sup> Since they have

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opinion . . . in the fact that the former is a binding adjudication of the contested rights of the litigants, though unaccompanied by consequential relief: whereas, the latter is merely an opinion of the judges of the court, adjudicating nothing, and is binding on no one. The former is held to be the exercise of a strictly judicial function; the latter that of a wholly non or extra judicial function.

*Id.* at 1077.

152. *E.g., In re Richards*, — Me. —, 223 A.2d 827 (1966), held state courts' participation in a certification procedure a "valid exercise of judicial power," *Id.* at 832, following *Florida's Sun Ins. Office, Ltd. v. Clay*, 319 F.2d 505 (5th Cir. 1963), but declined to give advisory opinion because the crucial facts were not established by the requesting federal district court; this prevented the state court from determining whether or not the statement of state law would be "determinative of the cause," as required by the controlling statute. *Cf. Leiter Minerals, Inc. v. California Co.*, 241 La. 915, 132 So.2d 845 (1961) (directive from the Supreme Court to the Louisiana supreme court to render an advisory opinion in the form of a declaratory judgment).

153. Delays caused by certification proceedings are dramatically revealed in the *United Servs. Life Ins. Co. v. Delaney* litigation. After the insured died in 1959, the beneficiary's claim was granted by a federal court in 1961 and affirmed on appeal, 308 F.2d (5th Cir. 1962); after rehearing on the point of abstention, 328 F.2d 483 (5th Cir. 1964), and after certiorari was denied, 377 U.S. 935 (1964), motion for rehearing was granted, 358 F.2d 714 (1966), and certiorari denied 385 U.S. 846 (1966), the Texas courts were called upon to declare the state law regarding interpretation of the insurance policy. However, the demand was dismissed for lack of jurisdiction, first by the trial, then by the appellate court, 386 S.W.2d 648 (Tex. Civ. App. 1965) and finally by the Texas supreme court, — Tex. —, 396 S.W.2d 855 (1966). Thus the federal judiciary finds itself exactly where it started in 1961, and the widow is now waiting for some kind of decision for almost ten years. *Agata, Delaney, Diversity, and Delay: Abstention or Abdication?* 4 HOUSTON L. REV. 422 (1966).

Generally, note the dissenting opinion in *W.S. Ranch Comp. v. Kaiser Steel Corp.*, 388 F.2d 257, 263 (10th Cir. 1968).

154. *United States v. Shock*, 379 F.2d 29, 31 (8th Cir. 1967). In favor of state courts as the "final expositors of state law," *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), and recently *DuVall v. Moore*, 276 F. Supp. 689 (N.D. Iowa 1967).

155. *Graves v. Associated Transp., Inc.*, 344 F.2d 894, 896 (4th Cir. 1965); *State v. Capital Airlines*, 267 F. Supp. 298, 303 (D. Md. 1967). In *Hill v. United States Fid. & Guar. Co.*, 272 F. Supp. 569 (M.D. Fla. 1967) the court assumed, in absence of any Florida cases in point that the Supreme Court of Florida "would probably follow the well reasoned opinion" of the appellate court of Illinois in *Nelson v. Union Wire Rope Corp.*, 39 Ill.

jurisdiction over the parties and the subject matter, they apply, according to the Rule of Decision, state law as they find it. However, this relatively simple method of law finding may, as already indicated, be abandoned in favor of the expensive, time-consuming,<sup>156</sup> and complex procedure of certification. This was done by the Supreme Court in regard to Florida law in the *Clay*<sup>157</sup> and *Aldrich*<sup>158</sup> cases, but not in *Hanson v. Denkla*.<sup>159</sup> In some cases, however, federal appellate courts take advantage of certification, following the majority rule in *United Services Life Insurance Company v. Delaney*.<sup>160</sup> In *Life Insurance Company v. Shifflet*,<sup>161</sup> for example, the motion to certify the interpretation of section 627.01081 of the Florida Statutes was granted in view of the different positions taken by the federal courts of appeals and a Florida district court of appeal. In *Hopkins v. Lockheed Aircraft Corporation*<sup>162</sup> the federal court of appeals wanted to know if Florida followed the *Kilberg* doctrine, and certified the question to the Supreme Court of Florida even though a summary perusal of recent Florida cases would have given a simple answer in the negative. It is significant that the question was phrased conditionally: what rule would the courts of Florida apply in such a case? The Supreme Court of Florida gave an equally conditional<sup>163</sup> answer which was a "forecast rather than a determination,"<sup>164</sup> and reversed on rehearing.<sup>165</sup>

There is a growing number of cases where federal courts decline certification and take upon themselves to ascertain Florida law in the same manner as Florida state courts, with no similar alternative of certification to ascertain federal law. In *Hamilton v. Maryland Casualty Company*<sup>166</sup> the judge dissenting in *Delaney*<sup>167</sup> had his way and prevented abstention in a case involving the interpretation of a Florida insurance policy, writing as follows:

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App. 2d 73, 187 N.E.2d 425 (1963) involving personal injuries which occurred in Florida. Faced with the state law problem of products liability, the court in *Helene Curtis Ind., Inc. v. Pruitt*, 385 F.2d 841 (5th Cir. 1968), decided to consider "all the available data, including the restatements of law, treatises, law review commentary, and the majority rule. Hopefully, our *Erie* prediction will be indicative of what Oklahoma will do in the future and will not be easily erased." *Id.* at 848.

156. See note 146, *supra*.

157. *Clay v. Sun Ins. Office, Ltd.*, 277 U.S. 179 (1964); see Survey I, at 273, and Survey II, at 497.

158. *Aldrich v. Aldrich*, 375 U.S. 249 (1963); see Survey II, at 516.

159. 357 U.S. 235, 262 (1958).

160. 328 F.2d 483 (5th Cir. 1964), *cert. denied*, 377 U.S. 935 (1964).

161. 380 F.2d 375 (5th Cir. 1967). The rule in *Life Ins. Co. v. Shifflet*, 201 So.2d 715 (1967) was followed in *McDonell v. New England Mut. Life Ins. Co.*, 380 F.2d 983 (5th Cir. 1967).

162. 358 F.2d 347 (5th Cir. 1966).

163. *Hopkins v. Lockheed Aircraft Corp.*, 201 So.2d 743 (Fla. 1967).

164. *Railroad Comm'n v. Pullman*, 312 U.S. 496, 499 (1941).

165. *Hopkins v. Lockheed Aircraft Corp.*, 201 So.2d 749 (Fla. 1967).

166. 368 F.2d 768 (5th Cir. 1966).

Another of that ever-growing list of intramural insurance Donnybrooks which, as local disputes over the local reading of a local contract with no federal overtones, constitutional, statutory, or otherwise, could better be left to local courts to resolve, it seems the better part of judicial wisdom to bring this to an end without postponing the evil day of decision. . . . Helpful as is the Florida Supreme Court reference procedure, especially in areas which present alternative governmental or social policy choices even though ostensibly garbed in the austere form of an insurance policy, we think the question here is the simple one whether the insurance contract says what it means and means what it says.<sup>168</sup>

The same attitude prevailed in a number of subsequent insurance cases. In *Greer v. Associated Indemnity Corporation*<sup>169</sup> the court, observing that "insurers flee from state forums to litigate their local, nonfederal claims in the Federal Courts," declined to abstain saying:

Indeed, we can think of no more local an Erie-problem than construction of the provisions of an insurance contract, a judicial process in which public policy factors frequently assume extraordinary importance, so much so as to produce diametrically opposite judicial constructions of uniform policy clauses . . . . Pointing as such considerations do toward utilizing—as we have done often in the past—the salutary provisions for certification to the Florida Supreme Court, we think such circuitry unnecessary and, hence, inadvisable here. There is simply no room for doubt as to the required result. We read the Erie signal loud and clear with no need for amplification.<sup>170</sup>

Again, in *Motor Vehicle Casualty Company v. Atlantic National Insurance Company*<sup>171</sup> the interpretation of an insurance policy was at issue. In the words of the judge, the question was "who picks up the pieces under Florida contract law between parties who never knew each other or for all that appears, never wanted to have anything to do with each other."<sup>172</sup> Such "intra-mural dispute" between two insurers "one of whom puts on the appealing garb of an animate assured . . . to force on its brother underwriter a liberal construction of a kind he would normally repel," was found "neither intricate nor repetitive enough to warrant a Clay-type referral to the Supreme Court of Florida."<sup>173</sup> And again, in *Liberty National Life v. Dobson*<sup>174</sup> the federal court of appeals, after finding that there were no Florida appellate cases in point and "each of the

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167. *United Serv. Life Ins. Co. v. Delaney*, 328 F.2d 483 (5th Cir. 1964).

168. *Hamilton v. Maryland Cas. Co.*, 368 F.2d 768, 769 (5th Cir. 1966).

169. 371 F.2d 29 (5th Cir. 1967).

170. *Id.* at 30.

171. 374 F.2d 601 (5th Cir. 1967).

172. *Id.* at 602.

173. *Id.* at 602.

174. 377 F.2d 861 (5th Cir. 1967).

conflicting views is plausible," took it upon itself to determine what "Florida appellate courts would hold," in the "hope that our guess will be enlightened and inspired."<sup>175</sup>

### V. CHOICE-OF-LAW RULES

The trend of loosening the traditional conflict methods and dissolving the one-contact rules into general standards of reasonableness, significance or interests, has reached Florida in the colorless formulas of "reasonable" and "significant relations" espoused by the Uniform Commercial Code.<sup>176</sup> Neither of these standards, alone or in conjunction, is easy to apply or to predict. Lack of enthusiasm for these novel rules has been expressed recently as follows:

The cardinal virtue of the traditional rule was its certainty, ease of application, and predictability. Departure from that rule, where it has been departed from—largely due to the labour and prolific writing of legal scholars—has left a different problem of formulating a rule to take its place.<sup>177</sup>

It is clear to some courts that our mass society is more interested in certainty of the law than in refinements urged by well intentioned addicts of legal *l'art-pour-l'art*. The layman enmeshed in the unpredictable intricacies of such schemes suspects, and with reason, that in matters of contracts these uncertainties will only increase the length and expense of litigation as well as the complexity of the fine print in the adhesion contracts which he cannot avoid or change.<sup>178</sup> The same apprehension is understandable in tort actions which, for the most part, are litigated as insurance claims. Here too, the risk of different adjudications will force insurers to run for cover under additional fine print in policies and increased insurance rates because of ill defined legal standards actuarially unpredictable. One means of remedying the unwanted side-effects of the new wave engulfing traffic accidents is a federal statute fashioned after the Death on High Seas Act and covering injuries and deaths arising from all modes of interstate and international transportation.<sup>179</sup>

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175. *Id.* at 864. For two recent opinions by the Supreme Court dealing with abstention, see *Zwickler v. Koota*, 88 S. Ct. 391 (1967), and *Provident Tradesmens Bank & Trust Co. v. Patterson*, 88 S. Ct. 733, 746 (1968).

176. See *Survey II*, at 498.

177. *Casey v. Manson Constr. & Eng'r Co.*, — Ore. — , — , 428 P.2d 898, 899 (1967). *But see* *Watts v. Pioneer Corn Co.*, 342 F.2d 617 (7th Cir. 1965), and *Karczewski v. Baltimore & O. R.R.*, 274 F. Supp. 169 (N.D. Ill. 1967).

178. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 454 (1962). See generally Note, *Predictability versus Flexibility: the Conflict in Conflict of Laws*, 18 W. RES. L. REV. 938 (1967).

179. For recent developments in international transportation of persons, see note 318 *infra*. Two bills (S. 3305 and S. 3306) have been introduced (April 1968) in Congress by Senator Tydings to confer exclusive jurisdiction arising from passenger claims in interstate and international air transportation on federal courts and to enact a federal statute unifying matters covered by wrongful death and survival statutes.

A. *Torts*

In a minority of jurisdictions the traditional scope of the *lex loci delicti* has recently been modified in regard to the amount of damages arising out of aviation accidents and in regard to some aspects of liability in automobile accidents in foreign jurisdictions. In air transportation it is felt that the place of the crash may be allowed to provide the basis for liability of the carrier, but should not limit the amount recoverable whenever the *lex fori* has no limitation and in addition displays other contacts with the parties which are considered more significant than the fortuitous place of the accident. This innovation has been adopted in the *Kilberg* case,<sup>180</sup> first in New York and subsequently followed in some other jurisdictions. Even though constitutionally unobjectionable,<sup>181</sup> it was rejected in a number of jurisdictions where the innovation resulted only in a strengthening of the traditional *lex loci delicti* rule.<sup>182</sup> The other qualification grafted onto the *lex loci delicti* rule involves intra-vehicular liability claims between occupants in non-commercial automobile transportation. These relationships have been taken out of the scope of the *lex loci delicti* and made subject to the *lex fori*. This leaves extra-vehicular aspects of the same tort (e.g., the rule of the road, liability for injuries to persons and things outside the vehicle) subject to the untrammelled reign of the traditional *lex loci* rule. Intra-vehicular relationships, whenever decisive in such situations, may be of a twofold nature: those based on the family status (e.g., marital relationship) affecting the right to sue; or those based on a recently created status, that of guest passenger<sup>183</sup> who may claim only under special conditions. The determination of these relationships as well as their effect on the tort claim has been isolated in some jurisdictions from the *lex loci* and subjected to the *lex fori*; provided, however, that the application of the forum's law is supported by additional meaningful contacts. This, in substance, was the holding of the *Babcock* case<sup>184</sup> while marital and other family relationships had been dissociated from the *lex loci delicti* much earlier.

180. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). For recent developments, see *Gore v. Northeast Airlines, Inc.*, 373 F.2d 717 (2d Cir. 1967).

181. *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

182. E.g., *Marmon v. Mustang Aviation, Inc.*, 416 S.W.2d 58 (Tex. Civ. App. 1967). Moreland, *Conflict of Laws: Choice of Law in Tort Cases, A Critique*, 56 Ky. L.J. 5 (1967).

183. Ehrenzweig, *Foreign Guest Statutes and Forum Accidents: Against the Disperanto of State 'Interests'*, 68 COLUM. L. REV. 49 (1968).

184. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); followed recently in *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966), and *Mellk v. Mellk*, 49 N.J. 226, 229 A.2d 625 (1967). Baer, *Two Approaches to Guest Statutes in the Conflict of Laws: Mechanical Jurisprudence versus Gropping for Contacts*, 16 BUFFALO L. REV. 537 (1967).

Plaintiff's attempt to attack the *lex loci delicti* rule in a guest statute litigation on constitutional grounds, urging the rule in *Alexander v. Alexander*, 140 F. Supp. 925 (D.S.C. 1956), *Survey I*, at 298, was unsuccessful in *Locklair v. Locklair*, 256 F. Supp. 530 (D.S.C. 1966). *Cf. Bencomo v. Bencomo*, 200 So.2d 171 (Fla. 1967). See generally Note, *Litigation be-*

The *Kilberg* doctrine came before the Supreme Court of Florida through certification from a federal court of appeals<sup>185</sup> asking the following question:

Would the State Courts of Florida, for reasons of public policy or otherwise, refuse to apply the Illinois limitation of damages in the above situation, and if so, would any limitation of damages apply.<sup>186</sup>

The case was against a manufacturer and arose out of an airplane crash in Illinois. Plaintiff's deceased, a Florida resident, was a passenger on the last leg of a round trip from Milwaukee to Tampa on a ticket purchased in Tampa where the flight originated. The limited amount of damages available under Illinois law as the *lex loci delicti* had already been paid by the air carrier.

Tempted by the plaintiff counsel's suggestion that the Supreme Court<sup>187</sup> here "has an opportunity to align itself with those courts which have discarded the ancient rule that the *lex loci delicti* is the sole arbiter of the substantive rights and liabilities of the parties in tort cases,"<sup>188</sup> it accepted the belief that the decisions following the *Kilberg* doctrine are "based on impeccable and irresistible logic and reasoning."<sup>189</sup> The court noted that the *lex loci delicti* rule has "over the years lost much if not all of its authenticity,"<sup>190</sup> citing an Ohio case for that proposition. The court saw in the *Babcock*<sup>191</sup> case authority to refute the "conceptual foundation in the vested rights doctrine," in favor of "underlying policy considerations in evaluating the significance to be ascribed to the circumstance that an act had a foreign situs in determining the rights and liabilities which arise out of that act."<sup>192</sup> Turning to the "frequently announced and strongly worded policy of this forum to give primary consideration, in choice-of-laws cases, to the public policy—legislative as well as organic—or 'any salutary interest' in this state and to decline to enforce a foreign law when contrary thereto,"<sup>193</sup> the court aligned itself with the *Kilberg* doctrine, adding the following:

It is clear that we can, consistently with our application of the judicial principle of comity in choice-of-law cases and without doing any real violence to the principle of stare decisis, take the one small logical step forward and hold squarely, as did the New

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*tween Husband and Wife*, 79 HARV. L. REV. 1650 (1966); Comment, *Tort Liability between Husband and Wife*, 21 U. MIAMI L. REV. 423 (1966).

185. *Hopkins v. Lockheed Aircraft Corp.*, 358 F.2d 347 (5th Cir. 1966).

186. *Id.* at 349.

187. *Hopkins v. Lockheed Aircraft Corp.*, 201 So.2d 743 (Fla. 1967).

188. *Id.* at 745.

189. *Id.*

190. *Id.*

191. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

192. *Hopkins v. Lockheed Aircraft Corp.*, 201 So.2d 743, 746 (1967).

193. *Id.* at 747.

York court in *Babcock v. Jackson* . . . , that the strict *lex loci delicti* rule should be abandoned in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court.<sup>194</sup>

In so doing the court not only overlooked the language of Florida's own Wrongful Death Statute, allowing unlimited recovery only for claims arising in Florida,<sup>195</sup> but brushed aside any serious consideration of the passenger-manufacturer warranty relationship, which distinguishes this case from *Kilberg*. In conclusion the court stated that the "purely fortuitous circumstance that the plane happened to crash in Illinois does not give that state a controlling interest or concern in the amount to be awarded to a Florida resident, by a Florida court, from a California defendant,"<sup>196</sup> and held that the State<sup>197</sup> of Florida "would refuse to apply the Illinois limitation of damages in the circumstances of this case."

Florida would have adopted the *Kilberg* doctrine through the certification procedure but for a rehearing which resulted in the repudiation of the doctrine and the return to the traditional rule of *lex loci delicti*.<sup>198</sup> Beginning with the proposition that damages claimed are of statutory origin and unavailable without the non-severable limitation contained therein, the court reached the conclusion that the action "survives the death of the party only by virtue of statutory preservation under the law of the state where death occurred, in Illinois."<sup>199</sup> Since the court was unable to "find such overriding collision with public policy simply because the statute governing action for death occurring in this state contains no damage limitation,"<sup>200</sup> and the action was one based on warranty, the court held that:

To the extent, however, that the place of performance or breach of warranty may control the action, the law of Illinois should govern in this case, and there are obvious virtues, in consistency and stability, supporting the application of laws whenever possible in a cohesive rather than piecemeal fashion. In other words, the applicability or inapplicability of foreign law should so far as possible be based on objective and stable standards. While the place at which an event occurs may indeed be fortuitous, that circumstance nevertheless seems to me of primary importance in determining the legal effect to be accorded any occurrence upon which a cause of action depends. A domiciliary

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194. *Id.*

195. FLA. STAT. § 768.01(1) (1965).

196. *Hopkins v. Lockheed Aircraft Corp.*, 201 So.2d 743, 748 (Fla. 1967).

197. The question reads "Would the State Courts of Florida . . ." but was answered what "the State of Florida" would do.

198. *Hopkins v. Lockheed Aircraft Corp.*, 201 So.2d 743, 749 (Fla. 1967).

199. *Id.* at 751.

200. *Id.*

or other forum in which a transitory action is brought may in these times be equally fortuitous.<sup>201</sup>

The 1967 Florida Legislature adopted the Uniform Single Publication Act,<sup>202</sup> substituting for "one cause of action" the phrase "one choice of venue,"<sup>203</sup> an amendment representing no improvement. Thus, the modified version reads:

No person shall have more than one choice of venue for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.<sup>204</sup>

Consequently, a judgment recovered in any jurisdiction shall "bar any other action for damages by the same plaintiff against the same defendant founded on the same publication or exhibition or utterance."<sup>205</sup> For good measure, section 4 adds that:

No person shall have more than one choice of venue for damages for libel founded upon a single publication or exhibition or utterance, as described in section 1, and upon his election in any one of his choices of venue, then he shall be bound to recover there all damages allowed him.

### B. *Contracts*

As sketched in a recent Supreme Court dissent:

There was a time in the evolution of conflict of laws theories when the idea was championed that every detail and element of a contract, every action taken under it, was governed by the law of the place where the contract was made. This concept ran into

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201. *Id.* Followed in *Messinger v. Tom*, 203 So.2d 357 (2d Dist. 1967), holding that minor plaintiff had no cause of action for death of mother in North Carolina, on the ground urged by defendant that by the

law of *lex loci*, North Carolina, the minor child had no cause of action [since] the law of North Carolina which . . . provides that a wrongful death action may be maintained only by a representative of the decedent's estate, governed the action, despite the overwhelming contacts with the State of Florida and the salutary interest of this state underlying the particular issue before the trial court.

*Id.* at 358. *Cf.* *Brooks v. United States*, 273 F. Supp. 619 (D.S.C. 1967).

202. For venue cases, see *Firstamerica Dev. Corp. v. Daytona Beach News-Journal Corp.*, 196 So.2d 97 (Fla. 1966), and *Drummond v. Tribune Co.*, 193 So.2d 183 (Fla. 1st Dist. 1966). See generally *Insull v. New York World Telegram Corp.*, 172 F. Supp. 615 (Ill. 1959), *aff'd*, 273 F.2d 166 (7th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960); *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967).

203. *Cf.* UNIFORM SINGLE PUBLICATION ACT (1952 version); *Ogden v. Association of the U.S. Army*, 177 F. Supp. 498 (D.D.C. 1959).

204. FLA. STAT. § 770.05 (1967).

205. *Id.*

many difficulties. Was the contract made at the home office of an insurance company or at the place where an agent dropped it in the mail to send it to a man in another State? Exceptions sprang up such as the rule applying the law of the place where the contract was to be performed to issues of performance. Soon it was discovered that it was almost as puzzling to tell where a contract was intended to be performed or what part of activities under a contract could be considered performance as it had been to determine where a contract was made. These and other such academic problems dissipated the dream of a fixed rule or rules for deciding which law governed contract cases. As the concepts developed, there came an emphasis upon having a contract governed by the law which the parties intended to be applied. But it was not always possible to tell which law the parties had agreed upon, and there was resistance on the part of some jurisdictions having close interests in the events leading to litigation to applying foreign law, against their deeply felt policies, solely because the parties at one time preferred it. As business boomed throughout our growing country giving more States than one an interest in what a contract meant and how it should be enforced for the benefit of the citizens who made it or for whose benefit it was made, practical men began to see that there could not be one single rule of law to govern a contract in which the citizens of many States were interested.<sup>206</sup>

Solutions available both for interstate and international choice-of-law situations are twofold: to spell out operative contacts and list them as guidelines, or to adopt general, abstract standards and let parties and courts take care of their concretization. The former alternative was chosen in the Restatement<sup>207</sup> while the latter alternative of "reasonable" and "appropriate relation" adopted in the Uniform Commercial Code became, in 1967, within the scope of the Code, Florida's statutory rule.<sup>208</sup> However, there are no reported Florida cases in this area.

As an aftermath of numerous and extensive litigations involving enforcement in Florida of Cuban insurance contracts,<sup>209</sup> a number of cases remained to be finally adjudicated. It may be noted that, as these numerous cases progressed, additional factors came into play, among them the final decision in the *Sabbatino* case<sup>210</sup> with its congressional modification,<sup>211</sup> and the fact that Cuba withdrew from the International Monetary

206. *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 217 (1960).

207. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332(b) (Tent. Draft No. 6, 1961). Cf. *Rutas Aereas Nacionales, S.A. v. Robinson*, 339 F.2d 265 (5th Cir. 1964); Survey II, at 528.

208. See Survey II, at 498.

209. Comment, *International Law: Insurance Claims on Policies of Cuban Nationals*, 18 U. MIAMI L. REV. 454 (1963).

210. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); Grove, *International Law, Conflict Law and Sabbatino*, 19 U. MIAMI L. REV. 216 (1964).

211. 22 U.S.C. § 2370(e)(2) (1964); cf. *Banco Nacional de Cuba v. Farr*, 383 F.2d

Fund. It is also gratifying that courts have started considering the Bretton Woods Agreement<sup>212</sup> more carefully.

In a group of cases<sup>213</sup> the federal court of appeals ruled that the seizure of assets of an insurance company by the Castro government did not of itself affect the rights of the insured to enforce their contractual claims in accordance with the stipulated place and currency of payment. In regard to currency in which insurance payments shall be made, it was held that amounts agreed in Cuban pesos but payable in this country shall be paid in dollars at the prevailing rate of exchange here. Similarly, life insurance policies originally issued in the United States with premiums and benefits payable in dollars in Louisiana should be paid in the same currency regardless of the fact that they have been later changed to Cuban pesos.<sup>214</sup>

This position has also been taken by Florida courts.<sup>215</sup> They have held that a Cuban refugee residing in Florida will recover the cash value of an insurance policy issued in Havana in the legal currency of Cuba, *i.e.*, pesos, in American dollars at the market value of pesos at the time of demand rather than at the rate of one American dollar for one Cuban peso.<sup>216</sup>

Hebrew law was recently urged by the plaintiff, an "internationally renowned opera singer and equally renowned cantor," as determinative of his contract with a Miami Beach hotel.<sup>217</sup> His contract contained an express provision that if a "second Seder service to be held, same price as first night." The hotel cancelled a second service despite the plaintiff's understanding that according to prevailing religious custom there are always two Sedars. The court acknowledged that a different conclusion may have been reached "were the issues herein decided on religious or moral grounds," but under the applicable "legal principles and not by religious, moral or ethical considerations alone,"<sup>218</sup> it affirmed dismissal of

166 (2d Cir. 1967) *cert. denied*,—U.S.—(1968), 88 S. Ct. 1038 (1968); *Banco Nacional de Cuba v. First Nat'l City Bank*, 270 F. Supp. 1004 (S.D.N.Y. 1967).

212. 60 Stat. 1401 (1945), T.I.A.S. No. 1501. J. GOLD, *THE CUBAN INSURANCE CASES AND THE ARTICLES OF THE FUND* (1966); Bayitch, *Florida and International Legal Developments, 1962-1963*, 18 U. MIAMI L. REV. 321, 349 (1963); Paradise, *Cuban Refugee Insureds and the Articles of Agreement of the International Monetary Fund*, 18 U. FLA. L. REV. 29 (1965).

213. *Alvarez v. Pan American Life Ins. Co.*, 375 F.2d 992 (5th Cir. 1967).

214. *Pan American Life Ins. Co. v. Alvarez*, 374 F.2d 92 (5th Cir. 1967).

215. *American Nat'l Ins. Co. v. Cardenas*, 181 So.2d 359 (Fla. 3d Dist. 1965); *Pan American Life Ins. Co. v. Del Valle*, 201 So.2d 610 (Fla. 3d Dist. 1967); *United States Ins. Co. v. Alonso*, 201 So.2d 577 (Fla. 3d Dist. 1967).

216. *Pan American Life Ins. Co. v. Blanco*, 362 F.2d 167 (5th Cir. 1966). On the definition of "area of United States of America" in an insurance policy, see *Bolen Int'l, Inc. v. Medow*, 191 So.2d 51 (Fla. 3d Dist. 1966); *cf. United States Lines Co. v. Eastburn Marine Chem. Co.*, 221 F. Supp. 881 (S.D.N.Y. 1963).

217. *Tucker v. Forty-Five Twenty-Five, Inc.*, 199 So.2d 522 (Fla. 3d Dist. 1967).

218. *Id.* at 525.

the action for breach of contract and tort, accepting the determination of the lower court that there was no binding contract for a second Sedar.

An action for declaratory judgment to construe a contract not to compete in the tomato produce market was before Florida courts in *C. & D. Farms, Inc. v. Cerniglia*. The contract, nationwide in scope, was entered into in Georgia and expressly subject to Georgia law. The appellate court<sup>219</sup> held that the contract was valid—at least for the purposes of its opinion—under the law of Georgia, but found it unreasonable and, therefore, unenforceable in Florida, due to Florida's public policy against contracts in restraint of trade.<sup>220</sup> On certiorari, the supreme court in a per curiam opinion<sup>221</sup> agreed with this holding on the ground that "if the performance in Florida of a foreign made contract is repugnant to our public policy it is unenforceable here," adding that it is not "necessarily void or voidable in other jurisdictions."<sup>222</sup> By basing its decision only on the ground of public policy, the court below sidestepped the plaintiff's argument that the lack of mutuality affected the very validity of the contract. In this respect the supreme court took the position that the validity of the "contract everywhere," as distinguished from its unenforceability due to the forum's public policy, may be settled in Florida courts on the issue of mutuality, on the ground that "if, under the applicable law, the contract is found to be lacking in mutuality of obligation, the contract can be void in its entirety and everywhere,"<sup>223</sup> without indicating what such "applicable law" might be. By contrast, if the plaintiff "must rely on public policy relating to such contracts, he will be required to litigate the unenforceable nature of the contract in each state covered therein."<sup>224</sup>

It appears that the supreme court approached the complex choice-of-law problem of a contract multistate in its performance, by first using the distinction between validity and enforceability. On this basis, the court agreed with the holding by the appellate court that the contract is valid but unenforceable, at least in a Florida forum, adding the caveat that the plaintiff would have to relitigate the issue of enforceability of the contract in each jurisdiction where the contract applies. This position, however, is patently erroneous since the question of the application *vel non* of the public policy in force in another jurisdiction is not a jurisdictional but a choice-of-law question, provided proper pleadings have imposed on the court the duty to make a decision in this point of foreign law. In any event, this issue could have been decided by a Florida court having jurisdiction over the parties in an *in personam* action to determine their con-

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219. *C. & D. Farms, Inc. v. Cerniglia*, 189 So.2d 384 (Fla. 3d Dist. 1966).

220. FLA. STAT. § 542.12 (1967).

221. *Cerniglia v. C. & D. Farms, Inc.*, 203 So.2d 1 (Fla. 1967).

222. *Id.* at 2. *Cf. May v. Mulligan*, 36 F. Supp. 596 (W.D. Mich. 1936), *aff'd*, 117 F.2d 259 (6th Cir. 1940), *cert. denied*, 312 U.S. 691 (1941).

223. *Cerniglia v. C. & D. Farms, Inc.*, 203 So.2d 1, 3 (Fla. 1967).

224. *Id.*

tractual relations wherever they may take effect, always in accordance with the applicable laws, including public policy, controlling under the conflict rules of the forum.

The appellate decision involving another aspect of the issue, however, did not meet with approval on the part of the supreme court. The appellate determination limited to the enforceability of the contract in Florida did not meet, in the opinion of the supreme court, the plaintiff's demand that he was "entitled to a decision on the issue of mutuality of obligation."<sup>225</sup> In this respect, the court probably assumed that a decision based on this common law doctrine would make the solution look as if it were reached under a nationwide uniform substantive rule and, consequently, effective "everywhere." This solution, however, lacks persuasiveness. Not only does the doctrine vary from jurisdiction to jurisdiction, but it appears from the opinions in the present case that there was not even an allegation on the part of the plaintiff that the doctrine is, throughout the area covered by the contract, identical with the law of the forum.

This is not the end of the difficulties. Once the reasonable chance has been discarded to determine the validity of the contract by the law of Georgia (chosen as controlling by the parties) which is, at the same time, the law of the place of making as well as the law of the state "wherein most of the corporate entities involved had their center of interest,"<sup>226</sup> the alternative to decide this question by the law of a single jurisdiction was lost. If the mention by the supreme court of the "applicable law" regarding mutuality is to be taken as pointing toward the law applied by the appellate court, namely the law of performance, then the validity of the contract would have to be tested against the laws in force in all jurisdictions covered by the contract. But even in adopting this solution, it may happen that, in turn, these jurisdictions may, in determining the controlling substantive law, rely on the law of the place of making or on the law chosen by parties which, in this case, fortunately is the same.

This solution appears also to be the one agreed upon by the parties themselves. They made the contract not only severable in regard to its spacial extent but subjected it, thus severed, to the laws of the particular jurisdictions, by providing that:

[E]ach area is divisible and separable so that in the event the covenants not to compete shall be invalid or unenforceable in any geographic area described, they shall be *valid and enforceable in those geographic areas in which the same are valid and enforceable by law*, the intention of the parties being that the companies be given the broadest protection allowed by law as respects the covenants not to compete herein contained and wherever necessary the areas which may be protected by law

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225. *Id.*

226. *C. & D. Farms, Inc. v. Cerniglia*, 189 So.2d 384, 385 (Fla. 3d Dist. 1966).

may be determined and proved by facts and evidence. (Emphasis added).<sup>227</sup>

This, again, represents a choice of the applicable law by parties to the contract which, as a rule, is to be given effect,<sup>228</sup> particularly in view of the fact that the laws so chosen have reasonable connections with the very operation of the contract. Of course, the spectre of the fifty jurisdictions lurking behind such piecemeal treatment of the contract seems more menacing than ever.<sup>229</sup>

### C. *Negotiable Instruments*

A demand for contribution by a co-maker of negotiable instruments was at issue in *McMahon v. Weesner*<sup>230</sup> because of a judgment rendered against the present plaintiff in Oklahoma.<sup>231</sup> There the court, finding that the notes were executed in Haiti, made payable in Florida, and transferred to the plaintiff in Texas, held that:

The question whether a holder is a holder in due course is governed by the laws of the state where the note was transferred, or of the forum, need not to be decided . . . .<sup>232</sup>

and approved the application of Oklahoma law which it found to be essentially the same as the law of Texas.

### D. *Property*

#### 1. REAL PROPERTY

In a litigation<sup>233</sup> involving "a little bit of oceanography, a little bit of marine biology, a little bit of tidelands oil controversy, a little bit of international law, a little bit of latter day Marco Polo exploration,"<sup>234</sup> the court found itself facing the unimaginative procedural question of intervention, with coral reefs some ten miles off the coast of Florida providing the background. Interests asserted by private individuals and corporations based on discovery and occupation clashed with the position taken by the federal government asserting in this area "sovereign's exclusive domain and control" according to the Outer Continental Shelf Lands Act of 1953.<sup>235</sup> The demand by the government for an injunction raised three

227. *Id.*

228. *Cf. Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961).

229. *Cf. National Fruit Prod. Co. v. Dwinell-Wright Co.*, 47 F. Supp. 499 (D. Mass. 1942); *Davis v. Ebsco Indus., Inc.*, 150 So.2d 460 (Fla. 3d Dist. 1963); *see also* 70 A.L.R.2d 1292.

230. 254 F. Supp. 839 (S.D. Fla. 1966).

231. *Caribbean Mills, Inc. v. McMahon*, 217 F. Supp. 639 (N.D. Okla. 1963), *aff'd*, 332 F.2d 641 (10th Cir. 1964).

232. *McMahon v. Caribbean Mills*, 332 F.2d 641, 644 (10th Cir. 1964).

233. *Atlantis Dev. Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967).

234. *Id.* at 819.

235. 43 U.S.C. §1331-1343 (1964). *Cf. United States v. Florida*, 363 U.S. 121 (1960).

immediate issues: federal jurisdiction; the proof of the alleged trespass; and the nature of the defendant's activities in the area of the reefs without a governmental permit. In this respect the federal court of appeals identified the basic substantive questions underlying the controversy,

whether these coral reefs built by accretion of marine biology are "submerged lands" under the Outer Continental Shelf Land Act. . . . The second basic question is whether, assuming both from the standpoint of geographical location and their nature they constitute "lands," does the sovereignty of the United States extend to them with respect to any purposes not included in or done for the protection of the "exploring for, developing, removing and transporting. . . ." natural resources therefrom.<sup>236</sup>

The intervention was granted by the court and the deck was cleared for alitigation and adjudication on the merits.

## 2. MOVABLES

The effect of a transfer of title to an automobile executed in Alabama in accord with the *lex loci actus* as a notarized bill accompanied with transfer of possession to a Florida dealer was at issue in *General Finance Corporation v. East Lake Auto Sales, Co.*,<sup>237</sup> decided under Florida law prior to the 1965 amendment.<sup>238</sup> In the action for conversion brought by the Alabama wholesaler, the district court of appeals held, on the authority of *Trumbul Chevrolet Sales Co. v. Seawright*,<sup>239</sup> that in view of evidence of ownership, *i.e.*, the notarized bill of sale, handed over to the Florida dealer coupled with the transfer of possession, the wholesaler was estopped to claim superior title because under the provision of the bill of sale the title remains in the wholesaler "until all checks clear the banks and clearing houses . . . ." As to the local buyers, the court relied on the maxim that "where one of two innocent persons must suffer from the act or negligence of a third, he who by his conduct created the circumstances which made the wrongful act possible, must bear the loss."<sup>240</sup>

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236. *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 826 (5th Cir. 1967). *Cf.* *United States v. Ray*, 281 F. Supp. 876 (S.D. Fla. 1965) (injunction against dredging operations in the area of outer continental shelf).

237. 190 So.2d 339 (Fla. 1st Dist. 1966).

238. *See* Survey II, at 532.

239. 134 So.2d 829 (Fla. 1st. Dist. 1961).

240. *General Fin. Corp. v. East Lake Auto Sales Co.*, 190 So.2d 399, 403 (Fla. 1st Dist. 1966). In regard to notice and liens of motorboats, FLA. STAT. § 371.81 (1967) provides that "no liens for purchase money or as security for a debt in the form of retain title contract, conditional bill of sale or chattel mortgage, or otherwise, on a motorboat" will be enforceable "in any courts of this state against creditors or subsequent purchasers for a valuable consideration and without notice unless a sworn notice of such lien is recorded." However, there is no statutory rule dealing with foreign created security interests, unless FLA. STAT. § 679.9-103 (1967) is deemed controlling. *See* Survey II, at 534.

Situs of intangible personal property is determined by the domicile of its owners; this being Florida, a mortgage is a chose in action under Florida law, amenable to a creditor and also to a federal tax lien, *United States v. Cohen*, 271 F. Supp. 709 (S.D. Fla. 1967).

E. *Family Law*

## 1. MARRIAGE

The recent Florida legislature decided<sup>241</sup> to deny validity to common law marriages entered into after January 1, 1968. There is a saving clause to the effect that "nothing contained in this act shall affect any marriage which, though otherwise defective, was entered into, by the party asserting such marriage, in good faith and in substantial compliance with chapter 741, Florida Statutes." Without going into the meaning of "otherwise defective" and the new requirement of "good faith" on the part of the spouse "asserting such marriage," it suffices to point out that the new enactment does not appear to be a statement of a public policy so strong as to demand denial of recognition to common law marriages which are valid under the law of the place of conclusion.

## 2. DIVORCE JURISDICTION

Divorce jurisdiction over a husband who was personally served in the state in an action for separate maintenance, which was subsequently amended to include a prayer for divorce based upon the same grounds, was litigated in *Gilbert v. Gilbert*.<sup>242</sup> Notice given to the defendant's attorney in the original suit was held sufficient even without additional constructive service on the nonresident husband. The defendant's argument that the plaintiff had not satisfied the six months residence requirement "until immediately preceding the filing of the amended complaint," was dismissed by the court on the ground that

Length and character of residence do not affect jurisdiction over the person but only jurisdiction over the subject matter. Section 65.02 . . . requires that the complainant reside six months in Florida before filing a complaint for divorce. Unless the requirement is satisfied the court lacks jurisdiction over the subject matter.<sup>243</sup>

Despite the defendant's allegation to the contrary, the court found that the plaintiff had resided in the state for six months before filing the amended complaints and concluded that the court "had jurisdiction over the subject matter of the divorce action."<sup>244</sup>

In an Alabama divorce suit which was instituted but not prosecuted, the defendant husband executed a sworn statement that both spouses were bona fide residents of Florida. When subsequently the wife obtained a Florida divorce, and the husband instituted a divorce action in Ala-

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241. FLA. STAT. § 741.211 (1967). Common law marriage in social security, Gardner v. Oldham, 381 F.2d 804 (5th Cir. 1967).

242. 187 So.2d 49 (Fla. 3d Dist. 1966).

243. *Id.* at 51.

244. *Id.*

bama,<sup>245</sup> alleging his Alabama residence, the court took notice of his prior sworn allegation that "he had been a resident of Florida less than a year before he filed his bill for divorce in Alabama" and decided that it lacked jurisdiction.<sup>246</sup>

### 3. FOREIGN DIVORCE DECREES

The *res judicata* effect of a Massachusetts divorce decree obtained by the wife and urged in a Florida divorce action brought by the husband was denied in *Harless v. Harless*<sup>247</sup> on the ground that the defendant wife had not carried the burden of proof by submitting only a copy of the foreign decree.

The recognition of a New York divorce decree was at issue in *Mirras v. Mirras*<sup>248</sup> in view of Florida's ground eight.<sup>249</sup> After marrying in New York and residing there for two years, the wife returned to her mother in Florida. One month later the husband filed in New York an action for divorce on the ground of adultery and, with both parties participating, obtained a divorce which also forbade the wife to "remarry any other person during the lifetime of the plaintiff except with the permission of the court."<sup>250</sup> In the meantime, the wife filed a divorce action of her own in Florida which resulted, some ten months after the New York divorce, in an unqualified divorce on the ground of extreme cruelty.

It appears that the divorcee may have instituted her action in Florida for two reasons, (1) to obliterate the marital quarantine imposed on her by the New York court, and (2) to obtain the custody of the child denied her in New York. In Florida, her native state, the plaintiff was successful on both points. Limiting the discussion here to the divorce aspect of the case, it is essential to bear in mind that the appellate court admitted the "jurisdiction of the New York court [in regard to divorce] and that its decree is entitled to full faith and credit under the Federal Constitution."<sup>251</sup> Since this finding prevented an outright denial of its effect in Florida, the court selected the back door to be opened by ground eight which provides that a divorce may be granted if the defendant "has obtained a divorce from the complainant in any other state or country."<sup>252</sup> The crucial issue whether or not the plaintiff divorcee is entitled to "obtain a divorce in the State of Florida based upon the New York divorce in

245. *Maner v. Maner*, 279 Ala. 652, 189 So.2d 336 (1966).

246. Court declined jurisdiction to order husband to participate in Jewish ceremony to obtain divorce, *Turner v. Turner*, 192 So.2d 787 (Fla. 3d Dist. 1967).

247. 185 So.2d 728 (Fla. 4th Dist. 1966).

248. 202 So.2d 887 (Fla. 2d Dist. 1967).

249. FLA. STAT. § 61.041(8) (1967).

250. *Mirras v. Mirras*, 202 So.2d 887, 889 (Fla. 2d Dist. 1967). See N.Y. DOM. REL. LAW § 8 (McKinney Supp. 1967) (repealed by N.Y. Laws 1966, ch. 254 § 1, effective Sept. 1, 1967), *id.* at § 15. Also 1 FOSTER & FREED, LAW AND THE FAMILY: NEW YORK 263 (1966).

251. *Mirras v. Mirras*, 202 So.2d 887, 890 (Fla. 2d Dist. 1967).

252. FLA. STAT. § 61.041(8) (1967).

favor of the other party"<sup>253</sup> was first considered by the appellate court in view of several factors pointing to a favorable decision, namely the possible modification of the prohibiting clause contained in the decree, its alleged "incompleteness," and its limited finality under the law of New York. However, none of these points was substantiated nor were reasons given as to how and why they support the decision in favor of the divorced wife. Instead, the court couched its opinion in the language of *Keener v. Keener*,<sup>254</sup> the leading case on the meaning of ground eight. Italicizing the passage from that case that the decree involved there was "not effective as to both parties or is for other reasons invalid" the court held the New York decree not to be binding on the plaintiff wife who, as a consequence, is now "in position to invoke the provision of the statute in question to be relieved from it,"<sup>255</sup> *i.e.*, from the New York divorce decree. While there is no satisfactory explanation why the decree is not effective or for some other reason invalid, the reliance on the additional cases is patently misplaced. The *Pawley* case<sup>256</sup> is an international rather than an interstate case and, consequently not in point in a situation where the command of full faith and credit is crucial; similarly, the *Givens*<sup>257</sup> case deals not with a sister state divorce but with a mere separation which, of course, does not prevent a subsequent divorce.

It would appear from the language of the court that the marital quarantine imposed upon the divorcee was considered as affecting the very essence of the divorce granted, thus making the decree "incomplete" or, at least, of doubtful "finality." However, the court admitted the validity of the New York divorce decree regarding the plaintiff's marital status and was disturbed only by the prohibition against remarriage. By taking this position, the court already indicated that both parts of the divorce decree were severable and, therefore, independent as to their validity and effects.<sup>258</sup> The court probably felt that the quarantine imposed upon the

253. *Mirras v. Mirras*, 202 So.2d 887, 890 (Fla. 1967).

254. 152 Fla. 13, 11 So.2d 180 (1942); *see* Survey I, at 331.

255. *Mirras v. Mirras*, 202 So.2d 887, 890 (Fla. 1967). *Cf.* *Theatre Time Clock, v. Stewart*, 276 F. Supp. 593 (E.D. La. 1967).

256. *Pawley v. Pawley*, 46 So.2d 464 (Fla. 1950).

257. *Givens v. Givens*, 121 Fla. 270, 163 So. 574 (1935).

258. In regard to the prohibition to remarry, two better ways to find a reasonable solution seem to exist. First, a Florida court of proper jurisdiction may lift the restriction under the adage that what New York "could do in modifying the decree," Florida may do since

[W]hatever may be the authority of a State to undermine a judgment of a sister state on grounds not cognizable in the State where the judgment was rendered . . . , it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.

*Halvey v. Halvey*, 330 U.S. 610, 615 (1947). It is also probable that most jurisdictions, among them New York [*Fisher v. Fisher*, 250 N.Y. 313, 165 N.E. 460 (1929); *Beaudoin*, 270 App. Div. 631, 62 N.Y.S.2d 920 (1946); *Almodovar v. Almodovar*, 284 N.Y.S.2d 910 (1967)], will deny any extraterritorial effect to the one-sided marital quarantine ordered not by statute but by a court; this would apply in this case to Florida since the party to be affected is a woman who became "unhappy and disillusioned" in another state and "departed

guilty party tainted the marriage-dissolving function of the otherwise valid divorce decree to such an extent as to make it unacceptable in spite of the admitted qualification for full faith and credit. A hint indicating a possible ground appears in the court's statement that a divorce coupled with a unilateral prohibition against remarriage is "not permitted under Florida law."<sup>259</sup> Reading between the lines one may guess that the court considered this difference to be of decisive significance. Following this guess, it must be said that such differences are of no consequence since every jurisdiction is free to determine any remedy, including those available in status actions. These remedies may range from none to divorce or separation or both. No other state has any say in the matter, but must give them full faith and credit. It is quite possible that the court saw in the differences some question of public policy. But this ground is equally ineffective since it is generally admitted that a mere difference between the laws of jurisdictions involved in a full faith and credit relationship will not, by itself, elevate the different rule in the second jurisdiction to the level of public policy.<sup>260</sup> Even if this should be the case, it is equally well established that contrary public policy in the second jurisdiction will not justify a denial of duties imposed upon sister states by the full faith and credit clause.<sup>261</sup>

Taking a final look at the opinion, it is apparent that the court was not "writing upon a clean slate inasmuch as there have been many opposite, painstaking and articulate decisions placed upon the record by our appellate courts."<sup>262</sup> However, it seems doubtful that the court while "realizing that in retracing former tracks [it] also run[s] the risk of smearing and obscuring," and finding it "helpful to apply to the facts in the instant case the rules enunciated in the previous pronouncement" has achieved its goal to "further mold and refine their scope and distinction."<sup>263</sup>

The validity of a Mexican divorce was at issue in *Kittel v. Kittel*.<sup>264</sup> As in a recent Louisiana case,<sup>265</sup> the Florida court held that the rule of

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from the marital domicile and returned to her native state and birthplace at Orlando, Florida, to reside with her mother," *Mirras v. Mirras*, 202 So.2d 887, 889 (Fla. 2d Dist. 1967).

259. *Mirras v. Mirras*, 202 So.2d 887, 891 (Fla. 2d Dist. 1967).

260. *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918).

261. *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943).

262. *Mirras v. Mirras*, 202 So.2d 887, 890 (Fla. 2d Dist. 1967).

263. *Id.* A Florida ex parte divorce granted to wife did not prevent her claiming property settlement and child support against the divorced husband in Minnesota, in spite of the fact that the Florida court retained jurisdiction to enter further orders, and this on the ground that the Florida court "intended only to keep its doors open to plaintiff, not to foreclose her from seeking relief elsewhere." *Gridzicki v. Quast*, 149 N.W.2d 8 (Minn. 1967).

264. 194 So.2d 640 (Fla. 3d Dist. 1967).

265. *Clark v. Clark*, — La. —, 192 So.2d 594 (Ct. App. 1966). On Mexican divorces,

comity toward foreign divorce decrees presupposes jurisdiction in the foreign court. The recognition of such decrees is not a matter of obligation but rather one of deference and respect to the acts of a foreign jurisdiction. Here the court denied recognition on the ground that

To hold the alleged divorce decree to be valid as was obtained in Mexico [by the husband] would permit any party desiring to shed himself of a wife to simply go to a state or country several thousands of miles away, remain there a few days, and secure a divorce on grounds not even recognized in this State. Should this be permitted, it would violate all principles of morality and justice. Certainly it is not an abuse of discretion, under the facts of this case, to refuse to recognize the validity of the Mexican decree.<sup>266</sup>

The following cases will illustrate how Florida divorce decrees have fared in other jurisdictions. A divorce obtained by a wife who abandoned her marital domicile in Alabama and established a separate domicile in Florida was given full faith and credit in Alabama in spite of the fact that the husband continued to be domiciled in Alabama and never submitted to the jurisdiction of the Florida court.<sup>267</sup>

A Florida divorce decree was held not open to attack by a wife who appeared in Florida through her attorney.<sup>268</sup> A similar decree incorporating a property settlement was also held free from collateral attack. Similarly, a Florida divorce decree obtained after personal appearance of both spouses was given full faith and credit in New York in the wife's action for separation.<sup>269</sup> However, a Florida divorce decree was open to attack in New York for alleged lack of jurisdiction<sup>270</sup> while another decree was held invalid because it was obtained without personal service on the defendant husband and without his appearance.<sup>271</sup>

A Florida lump sum alimony decree was held not to relieve the husband from alimony awarded by a New York separation decree granted prior to the Florida divorce.<sup>272</sup> During a suit for separate maintenance in Louisiana, at issue was the effect of a prior Florida divorce decree which was coupled with a lump sum alimony to the wife and granted after both spouses had appeared.<sup>273</sup> The Louisiana court held the Florida divorce

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*see generally* BAYTCH & SIQUIEROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES, A BILATERAL STUDY (1968).

266. *Kittel v. Kittel*, 194 So.2d 640, 642 (Fla. 1967).

267. 195 So.2d 960 (Fla. 1967).

268. *In re Locke's Will*, 21 App. Div. 2d 248, 250 N.Y.S.2d 181 (1964).

269. *Zeitlan v. Zeitlan*, 27 App. Div. 2d 846, N.Y.S.2d 86 (1967).

270. *Austin v. Austin*, 25 App. Div. 2d 710, 268 N.Y.S.2d 586 (1966). Lack of bona fide domicile was held fatal in *Krieger v. Krieger*, 285 N.Y.S.2d 811 (1967); lack of challenge of domicile in Florida upheld a Florida divorce decree in *Kram v. Kram*, 98 N.J. Super. 274, 237 A.2d 271 (1967).

271. *Russel v. Russel*, 27 App. Div. 2d 563, 276 N.Y.S.2d 49 (1966).

272. *Katz v. Katz*, 26 App. Div. 2d 521, 270 N.Y.S.2d 786 (1966).

273. *Bozarth v. Bozarth*, — La. —, 199 So.2d 544 (Ct. App. 1967).

decree valid and the local separation proceedings abated. On the wife's appeal from the portion of the Louisiana judgment denying her demand for a partition of the marital property, the court held that according to section 82 of the Louisiana Code of Civil Procedure "an action to partition community property shall be brought . . . as an incident of the action which would result in a dissolution of the community," and concluded that since the dissolution of community between the parties "did not arise from any judgment in the instant suit, hence the demand therein for the partition must fall as would all other issues in the separation suit."<sup>274</sup>

#### 4. ALIMONY

In an action by the divorced wife against her former husband for past due child support awarded in a Georgia divorce decree, the Florida court held that such claims are locally enforceable and subject to equitable defenses (such as a subsequent modification by the parties).<sup>275</sup> It denied an increase of support "during the pendency of the case, because at the time it was presented the foreign decree had not been established in this state," but allowed the wife to seek "modification [pursuant to the provisions of section 65.15 of the Florida Statutes] of the decree as ultimately rendered by the chancellor, provided the [wife] justifies the need for change."<sup>276</sup>

#### 5. MARITAL PROPERTY

An international conflict of laws problem was involved in an action by the children of a prior marriage of the deceased father, against his widow to determine their rights in his estate.<sup>277</sup> The couple, both Cuban nationals, was married in Cuba and lived there until moving to Florida in 1960. In 1952 and 1958 the late husband acquired shares in a Florida corporation which he sold in 1963, receiving in exchange a promissory note which is now the main asset in his estate. The appellate court reversed the lower court judgment for the plaintiffs and held that interests of one spouse in movables acquired by the other during the marriage are determined by the law of the domicile of the parties at that time, *i.e.*, Cuba, regardless of the fact that the monies used for the purchase may have been earned outside the domicile. Consequently, under the controlling Cuban Civil Code,<sup>278</sup> the stock acquired by the husband must be con-

274. *Id.* at 199 So.2d 541. A collateral attack in Louisiana upon a Florida divorce decree was held dependent on Florida's requirements for such attack on the authority of *Johnson v. Muelberger*, 340 U.S. 581 (1951) in *Gay v. Gay*, — La. —, 203 So.2d 379 (Ct. App. 1967).

275. *Smith v. Smith*, 197 So.2d 16 (Fla. 3d Dist. 1967).

276. *Id.* at 17.

277. *Quintana v. Ordonez*, 195 So.2d 577 (Fla. 3d Dist. 1967).

278. CIVIL CODE §§ 1401, 1407 (1899) (Cuba). Lay, *Community Property in Common Law States: A Comparative Analysis of its Treatment in Foreign Jurisdictions*, 41 TEMPLE L.Q. 1 (1967).

sidered "as community property, until proven to be separate property" of either spouse. Therefore, the stock did not vest in the husband but in the *sociedad de gananciales*, in the community of acquisitions, under which the wife acquired a vested interest in the stock equal to that of her husband, an interest not affected by the subsequent change of domicile to Florida. When the husband sold this stock and received the promissory note in Florida (a transaction controlled by Florida law), a resulting trust arose in favor of his wife to the extent of the consideration, (*i.e.*, her interest in the stock used in this transaction) even though the title was taken in the husband's name alone. The court concluded that the estate holds legal title to the note, and the administrators are trustees regarding his widow's equitable interest therein.

#### 6. CUSTODY

The fate of two little girls sacrificed to the whims of unstable parents and to changing judicial attitudes is the background for the case of *Hoffman v. Linley*.<sup>279</sup> The record indicates that their parents were divorced in Texas in 1964 with custody being awarded to the mother. The next year, on the father's petition, custody was shifted to his sister in Florida. A few months later the father succeeded in having the Florida decree modified and custody awarded to him. Early in 1966 the father "remarried his present wife for the third time," after she had, in the meantime, married another man "by whom she had one child." The remarriage, however, did not prevent the mother from marrying again in 1966 in Texas a man other than the father of the two little girls. In the instant proceedings in Florida where she sought the return of custody of the little girls, the court granted the petition on the ground of changed circumstances, finding the mother to be a "proper and fit person to have the permanent . . . custody . . . of said children."<sup>280</sup> On appeal the decision was affirmed on the ground that the father was awarded custody only under "a post decree modification order," which relieved the mother from the burden of "showing unfitness of the husband or that his stewardship is improper, as would have been required of her had the husband been awarded the custody of the children in the final decree of divorce."<sup>281</sup> The court added that

[A]n award of custody in a final decree of divorce is to be regarded as *res judicata* as of the time of the decree, and that after the right to custody has thus been fixed by the divorce decree in one parent, on consideration of a subsequent petition for a change of the custody of the children [the court] does not have the same degree of discretion to choose between the parties regarding the matter of custody, as it had on the occasion of the

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279. 201 So.2d 638 (Fla. 3d Dist. 1967).

280. *Id.* at 639.

281. *Id.* at 640.

final custody decree determination made in the final decree of divorce.<sup>282</sup>

In *Lindsey v. Lindsey*,<sup>283</sup> a California custody decree was given effect by comity, "even though the decree was not formally introduced into evidence," but had been made a part of the record of which the court took judicial notice.

In *Mirras v. Mirras*,<sup>284</sup> discussed earlier,<sup>285</sup> the litigation turned also around the New York divorce decree granting custody of the child to the plaintiff father. In the Florida relitigation of the divorce, the appellate court granted custody to the divorced plaintiff mother. Following the assumption that custody decrees "being universally subject to modification"<sup>286</sup> are not final, the court declined to give the New York custody decision any weight because, in the opinion of the court, New York lacked jurisdiction, having proceeded "without the presence of the child within the jurisdiction,"<sup>287</sup> and because the issue was "not truly litigated."<sup>288</sup> In regard to the first ground it suffices to note that the lack of jurisdiction was found on the basis of Florida law in the matter, and not the *lex fori*, *i.e.*, New York. In any case, the argument lacks persuasiveness particularly since both parents were subject to the jurisdiction of the New York court. Furthermore, there is no express finding that Florida has a more substantial interest in the custody of the child, or that circumstances changed so as to induce the court to take steps furthering the child's interests.

An attempt by a mother who had been awarded custody of the child by a Massachusetts divorce decree, to prevent a Florida juvenile court from ruling on the father's petition for a change of custody was unsuccessful in *State v. Yergey*.<sup>289</sup>

## 7. ADOPTION

Florida law regarding equitable adoptions was applied in a District of Columbia litigation involving the distribution of the estate of a decedent who was an illegitimate child born in Florida and who died intestate in the District of Columbia.<sup>290</sup> To decide the question of claims by the

282. *Id.*

283. 200 So.2d 643 (Fla. 4th Dist. 1967). A final Florida divorce decree granting custody to mother will be enforced in North Carolina unless change of conditions "since the entry of the Florida decree" is shown, *In re Marlowe*, 268 N.C. 197, 150 S.E.2d 204 (1966).

284. 202 So.2d 887 (Fla. 2d Dist. 1967).

285. *See* p. 554 *supra*.

286. *Mirras v. Mirras*, 202 So.2d 887, 892 (Fla. 1967).

287. *Id.*

288. *Id.* at 893.

289. 188 So.2d 833 (Fla. 4th Dist. 1966).

290. *In re Estate of McConnell*, 268 F. Supp. 346 (D.D.C. 1967).

decedent's relatives by informal (equitable) adoption, the court held that "Florida being the situs of the alleged adoption in this case, the law of the state on equitable adoptions has significance." After considering the leading Florida case of *Sheffield v. Barry*,<sup>291</sup> the court found that the fact that Florida does recognize equitable adoption was not decisive of this case. Instead, the issue in this instance was whether the natural children of the foster parent could inherit from the adoptee. The court felt that the law is "not kindly disposed toward claims to the estate of a deceased adoptee where they are made by the heirs of an adoptive parent who did not take legal steps to formalize the adoption"<sup>292</sup> and sustained the objection of the District of Columbia claiming escheat.

#### F. Taxation

The constitutionality of the Virgin Island gross receipt tax imposed on a Florida corporation was again<sup>293</sup> contested to no avail in *Port Construction Company v. Government of Virgin Islands*.<sup>294</sup> The company's argument that the statute applies to receipts from business done both within and without the territory, was countered by the court by way of a simple reminder that the plaintiff corporation was assessed only on receipts derived from local business. Consequently, it was not "injured by what it asserts is the unconstitutional breadth of the statute." The attack based on the equal protection clause of the Constitution was equally in vain, since the court found that the legislature of the Virgin Islands has the "widest latitude selecting the subjects of taxation and in granting exemptions" to domestic corporations. The standard, in the words of the court, does not prohibit "those inequities which may result from singling out one particular class for taxation or exemption therefrom." "Only if it appears," the court continued, "that there is no rational basis for the classification so that it is patently arbitrary, may it be set aside as unconstitutional."<sup>295</sup> This was not the case here, since it was

clearly not irrational or arbitrary for the Legislature in enacting its industrial incentive program to limit corporate tax exemptions and subsidies to those corporations which are organized under the laws of the Territory and which, by reason of their local organization and the control of the Territory over them, could be expected to remain as permanent participants in the economic life of the community.<sup>296</sup>

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291. 153 Fla. 144, 14 So.2d 417 (1943).

292. *In re Estate of McConnell*, 268 F. Supp. 346, 349 (D.D.C. 1967).

293. *See* Survey II, at 545.

294. 359 F.2d 663 (3d Cir. 1966).

295. *Id.* at 668.

296. *Id.* A Florida trust agreement was involved in *United States v. Van der Horst*, 270 F. Supp. 365 (D. Del. 1967) discussing the Tax Convention with the Netherlands, April 29, 1948, 62 Stat. 1757, T.I.A.S. No. 1855.

G. *Criminal Law*

In no other area of the conflict of laws is the principle of territoriality as strictly followed as in criminal law. Even there, however, forces arising from various quarters have eroded the once axiomatic territorial monopoly. The presently prevailing principles are well stated in the recent case of *Rivard v. United States*<sup>297</sup> as follows:

[T]he law of nations permits the exercise of criminal jurisdiction by a nation under five general principles. They are the territorial, national, protective, universality and passive personality principles . . . . There are, however, two views as to the scope of the territorial principle. Under the subjective view, jurisdiction extends over all persons in the state and there violating its laws. Under the objective view, jurisdiction extends over all acts which take effect within the sovereign even though the author is elsewhere.<sup>298</sup>

Keeping in mind that, at least in criminal cases, jurisdiction is identical with the application of the criminal *lex fori*, the court concluded that "mere presence of the . . . alien defendants before the court did not give [the court] jurisdiction. The question remains whether their conduct within the United States had such a deleterious effect within the United States to justify this country in prohibiting"<sup>299</sup> and punishing such conduct under its own laws.

The following Florida cases may appear in better perspective in the light of this background. They deal with criminal acts committed in the twilight zone beyond the territorial waters of Florida where the usefulness of the strict territorial principle ceases and other justification must be found for the application of the law of the coastal state, such as the citizenship of the defendant or the protective principle. In cases where the criminal statute was expressly made applicable to the "salt waters of Monroe County, Florida," the court granted the motion to dismiss relying on the provision of section 6.11 of the Florida Statutes establishing the boundary of Florida into the Atlantic Ocean as "a line three geographical miles distant from the said coast line," and on the undisputed fact that the traps had been set beyond this boundary.<sup>300</sup> The same position was taken by the Supreme Court of Florida in *Mounier v. State*,<sup>301</sup> involving spearfishing in a prohibited area beyond the Monroe County boundary line.<sup>302</sup> Since it was not questioned that the "offense was committed beyond this line (*i.e.*, Florida's boundary line in the Atlantic), it follows that the conviction was a nullity and that these defendants should have

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297. 375 F.2d 882 (5th Cir. 1967).

298. *Id.* at 885.

299. *Id.*

300. *United States v. Hill*, 266 F. Supp. 670 (S.D. Fla. 1965).

301. 178 So.2d 714 (Fla. 1965).

302. FLA. STAT. § 379.172(2) (1963).

been discharged.”<sup>303</sup> The dissenting opinion by Justice Ervin foreshadowed future trends favoring a functional approach to the understanding of state boundaries.<sup>304</sup>

The majority of the *Mounier* court prevailed again in *Burns v. Rozen*.<sup>305</sup> In spite of the statutory provision contained in section 370.02(5) of the Florida Statutes that the Board of Conservation has the power to regulate fishing activities “within or without the boundaries of such state waters,” the court maintained the restrictive attitude on the ground that the statutory provision cited

merely recognizes what has been said previously, that the state has the power to regulate activities of its citizens and vessels outside of its territorial limits. However, this power does not come into play automatically in each statute dealing with conservation of natural resources. There is no presumption that the legislature intended that a statute exercise or apply all the power which a state may possess over a given subject. Extraterritorial effect of an enactment is not to be found by implication.<sup>306</sup>

However, the weight of the arguments in the dissenting opinion in *Mounier* was felt in *Felton v. Hodges*.<sup>307</sup> There the federal court of appeals affirmed the dismissal of an action against Florida conservation officials for arrests when enforcing the Florida statutory protection of crawfish beyond state territorial waters. The court distinguished the holding in *Mounier* on the ground that it dealt with spearfishing in a specified area of Monroe County, and the State had failed to prove that the alleged offense occurred within that specified area. It also took comfort from the *Mounier* dissent by pointing to section 370.02(5) of the Florida Statutes charging the Conservation Board with the duty to regulate fishermen and vessels “of this state engaged in the taking of such fishery resources within and without the boundaries of such state waters.” In the words of the court,

Florida has sought by legislative enactment to extend the jurisdiction of its conservation officials to activities such as those which appellant claims to have been engaged in here. If the State can properly do so under the federal constitution, the dismissal of this complaint must be affirmed.<sup>308</sup>

This was achieved on the authority of *Skiriotes v. State of Florida*.<sup>309</sup> The court first inquired whether Florida had a legitimate interest in con-

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303. *Mounier v. State*, 178 So.2d 714, 717 (Fla. 1965).

304. *Id.*

305. 201 So.2d 629 (Fla. 1st Dist. 1967).

306. *Id.* at 631.

307. 374 F.2d 337 (5th Cir. 1967).

308. *Id.* at 338.

309. 313 U.S. 69 (1941).

trolling the activities involved since they took place in a "group of reefs adjacent to the Florida Keys [where] the crawfish in this area move freely in and out of Florida's territorial waters, so that any taking of them would clearly have an effect upon the State's conservation efforts,"<sup>310</sup> even though this may amount to an "extraterritorial regulation," provided the state's interest in conservation is thereby protected. In this respect, the court held that it was "apparent that the State has an interest sufficient to enable it to subject appellant, one of its own citizens, to the conservation regulations which it sought to enforce here."<sup>311</sup> In conclusion the court reached the question of whether arrests made outside of Florida's territorial waters are acts under the color of a state statute, depriving citizens of the United States of basic constitutional rights. The court admitted that "no state is at liberty to abridge the rights of persons not subject to its jurisdiction by indiscriminate arrests, effected beyond its territorial limits, under the guise of attempted exercise of the extraterritorial regulatory powers which it enjoys under the rule of *Skiriotes*."<sup>312</sup> Nevertheless, the court held that the arrests were

an integral part of the efforts of the State of Florida to regulate the conduct of one of its own citizens in a matter in which the State clearly had a legitimate interest. In our opinion, the added fact that one or more of these arrests may have taken place a few miles outside Florida's seaward boundary line cannot transmute the otherwise proper efforts of these State officials into a violation of appellant's constitutional rights.<sup>313</sup>

It may be added that the Florida Territorial Waters Act of 1963 competes with the federal enactment of 1964 in regard to licensing and to criminal sanctions.<sup>314</sup> It is also noteworthy that in 1966 by act of Congress a contiguous zone was established beyond states' territorial waters thus claiming for the United States in regard to fisheries the "same exclusive rights . . . in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States"<sup>315</sup> with the proviso that

310. *Felton v. Hodges*, 374 F.2d 337, 339 (1967).

311. *Id.*

312. *Id.*

313. *Id.* at 340. In October, 1967, a federal judge in Miami directed in a trial against five Cubans indicted for piracy on the high seas committed two miles off Miami Beach, a verdict of acquittal relying on the Convention on the High Seas, [1958] 13 U.S.T. 2312, T.I.A.S. No. 5200, defining in art. 1 high seas as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State." *Miami Herald*, Oct. 24, 1967, at 1.

314. *Prohibition of Foreign Fishing Vessels in the Territorial Waters of the United States*, 16 U.S.C. 1081-1085 (1964).

315. *Fisheries Zone Contiguous to Territorial Sea of the United States*, 16 U.S.C.A. § 1091-1094 (Supp. 1967). The language appears to be inconsistent with the section-by-section analysis supplied in the House Report No. 2086 that the United States would "exercise the same exclusive rights as *its coastal States* now exercise in respect to fisheries in the zone of its territorial waters" (emphasis added).

Nothing in this Act shall be construed as extending the jurisdiction of the States to the natural resources beneath and in the waters within the fisheries zone established by this Act or as diminishing their jurisdiction to such resources beneath and in the waters of the territorial seas of the United States.<sup>316</sup>

## VI. AVIATION

The most significant developments occurred in the area of international air transportation insofar as it is regulated by the Warsaw Convention.<sup>317</sup> Strong pressures brought to bear on the federal authorities (including the Department of State) by a small but persuasive group of attorneys specializing in aviation negligence cases, have succeeded in securing an unusual modification of the Convention through adhesion agreements drafted by federal authorities and presented to domestic and foreign carriers for acceptance. Air passengers within the scope of the Warsaw Convention whose trips touch the territory of the United States—regardless of their nationality—became entitled to invoke absolute liability against the air carriers up to the amount of 75,000 dollars. However it is surprising to find that both intrastate and interstate passengers on domestic flights must still prove negligence on the part of the carrier and in quite a few jurisdictions see their claims cut down to the statutory maximum of some 20,000 dollars.

Relying on article 22, paragraph (1) of the Warsaw Convention, the United States Government, through the Civil Aeronautics Board, has approved an agreement<sup>318</sup> to be adopted by domestic and foreign air car-

316. *Id.* at § 1094.

317. Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000 (1939). See generally on treaty law of aviation, Bayitch, *El Actual Derecho Convencional de la Aviación*, 18 BOLETIN DEL INSTITUTO DE DERECHO COMPARADO DE MÉXICO 723 (1965).

An action arising out of a crash in Jacksonville, Florida, in 1955, involving the Warsaw Convention, *Berguido v. Eastern Air Lines, Inc.*, 317 F.2d 628 (3d Cir. 1963), rehearing denied, 317 F.2d 633 (1963); cert. denied, 375 U.S. 895 (1963), 35 F.R.D. 200 (E.D. Pa. 1964), *aff'd*, 369 F.2d 874 (3d Cir. 1966), 378 F.2d 369 (3d Cir. 1967) has been decided, the Supreme Court denying certiorari,—U.S.—(1968), 88 S.Ct. 194.

318. 31 F. Reg. 7302 (1966). Fitz-Gerald, *Liability Rules in the International Carriage of Passengers by Air and the Notice of Denunciation of the Warsaw Convention by the United States*, 4 CAN YB. INT'L L. 210 (1966); Lacey, *Recent Developments in the Warsaw Convention*, 33 J. AIR L. & COMM. 385 (1967); Lowenfield & Mendelson, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967); Riggs, *Termination of Treaties by the Executive without Congressional Approval: the Case of the Warsaw Convention*, 32 J. AIR L. & COMM. 526 (1966); Sinkoff, *Absolute Liability and Increased Damages in International Aviation Accidents*, 52 A.B.A.J. 1122 (1966); Stephen, *The Adequate Award in International Aviation Accidents*, 1966 INS. L.J. 711; Weiner, *The 1966 Carrier Agreement: the United States Retains the Warsaw Convention*, 7 VA. J. INT'L L. 140 (1966). See also Bayitch & LeRiverend, *La Convención de Varsovia en la Actualidad*, 17 REVISTA DE LA FACULTAD DE DERECHO DE MÉXICO 845 (1967), also in FOLCHI (ed.), CUESTIONES ACTUALES DE DERECHO AERONAUTICO 98 (Buenos Aires, 1968); and Mankiewicz, *Le Statut de l'Arrangement de Montreal (Mai 1966) et la Décision du Civil Aeronautics Board du 13 Mai 1966 . . .*, 21 REVUE FRANÇAISE DE DROIT AÉRIEN 384 (1967). See symposium in 33 J. AIR L. & COMM. no. 4 (1967).

riers operating in and out of the United States, after the United States has withdrawn its initial denunciation of the Warsaw Convention. The agreement is expressly designed to operate within the general framework of the Convention with some modifications. The definition of an international flight still stands as determining the coverage by the Convention;<sup>319</sup> however, the agreement has added as a further limitation that in order to be affected by the agreement, a flight which is international according to article I, paragraph 2 of the Convention, must also be a flight "which includes a point in the United States as a point of origin, point of destination, or agreed upon stopping place." In regard to flights meeting these requirements, the agreement provides a new, higher limit of liability imposed upon cooperating air carriers for "death, wounding or other bodily injury" of passengers within the scope of article 17 of the Convention. The agreement has replaced the original limitation of 8,300 dollars under article 22 (which remains in force for all international flights which only meet requirements of article 1, paragraph 2 of the Convention, but not the additional set up by the agreement) with a raised limit of 75,000 dollars, exclusive of legal fees, and up to 58,000 dollars for jurisdictions "where provision is made for separate award of legal fees and costs." Nevertheless, passengers on flights covered by the agreement retain the right to claim full damages in cases of willful misconduct or if they have not been provided with a ticket while carriers retain the defense of contributory negligence in accordance with the *lex fori* as provided by the Convention. Under the agreement, however, carriers are deprived of their defense under article 20, paragraph 1 of the Convention providing,

The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damages or that it was impossible for him or them to take such measures.

This defense remains if the flight is governed by the Warsaw Convention alone. Finally, the agreement allows carriers to stipulate that their rights and liabilities will remain unaffected "with regard to any claim brought by, on behalf of, or in respect to any person who has wilfully caused damage which results in death, wounding, or other bodily injury of a passenger," a provision intended to discourage sabotage.<sup>320</sup>

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319. Difficulties arising in cases where cooperating air carrier are registered and operate from and to countries not members of the Warsaw Convention, may be solved by applying the Convention as *lex voluntatis*. See Bayitch & LeRiverend, *supra* note 318.

320. It is interesting to note that during the ICAO Conference in Montreal (1966) the United States delegate made the following surprising statement: "It is the judgment of his delegation that any limits of liability applicable at the place of accident would likewise be disregarded. In awarding damages, the applicable law in the courts of the United States would either be the one where the air journey began or the one at the domicile of the victim or his survivors. In general, this means for United States citizens, American law would govern the awarding of damages," Special ICAO Meeting on the Limits for Passengers under the Warsaw Convention and the Hague Protocol 81 (Montreal, 1966). *Cf.* *Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966), and recently *Armiger v. Real S.A. Transportes Aereos*, 377 F.2d

The changing fortunes to which the *Kilberg* doctrine was exposed in Florida have already been described.<sup>321</sup> The following are some of the noteworthy reported cases involving aviation. In *Sims v. Northwest Airlines, Inc.*<sup>322</sup> an action was brought by an airline employee and his wife for damages to the wife and children riding on passes, for injuries resulting from the defendant air carrier's negligence. The court held that the matter of free passes in interstate transportation is governed by federal law allowing waiver of liability, notwithstanding anything in state law to the contrary. The fact that the plaintiff had paid a "service charge" and had not signed the trip pass containing the waiver was held irrelevant. In another case<sup>323</sup> a Florida corporation claimed that money was owed it by the corporate Panamanian owner of an aircraft which the plaintiff had repaired. The substantive issue of agency was held to be controlled by Florida law, thus bypassing a possible conflict aspect.

A jurisdictional question was raised in *Horton v. J. & J. Aircraft, Inc.*<sup>324</sup> A libel in admiralty for personal injuries not resulting in death was filed by a plaintiff injured in a plane crash in the Atlantic on a flight from Florida to Georgetown, British West Indies. The case was held to be within federal admiralty jurisdiction on the ground that "admiralty jurisdiction depends entirely on locality," even where a "tort occurred in an airplane over the ocean and there was no contact with the water,"<sup>325</sup> and even though the claim did not arise from a maritime wrong.

## VII. ADMIRALTY

The four Geneva conventions signed in 1958 unified large areas of the international law of the seas, mainly the territorial waters,<sup>326</sup> continental shelf,<sup>327</sup> and high seas,<sup>328</sup> including fishery conservation.<sup>329</sup> Among these Conventions the one on territorial waters is of immediate interest to Florida since it includes provisions regulating the exercise of civil and criminal jurisdiction within this area of the sea.

943 (D.C. Cir. 1967); also *Ciprari v. Servicios Aereos Cruzeiro*, 245 F. Supp. 819 (S.D.N.Y. 1965), *aff'd*, 359 F.2d 855 (2d Cir. 1966).

321. See V(A), *supra*.

322. 269 F. Supp. 272 (S.D. Fla. 1967).

323. *Aerovias Panama v. Air Carrier Engine Serv., Inc.*, 195 So.2d 230 (Fla. 3d Dist. 1967).

324. 257 F. Supp. 120 (S.D. Fla. 1966).

325. *Id.* at 121. A suit for damages to passenger caused by air turbulence over Florida on an interstate flight was decided without conflict aspects, *Strauss v. Delta Air Lines, Inc.*, 266 F.2d 559 (E.D. Pa. 1967). Damages to a competing airline from a nonlicensed airline were litigated in *Caribbean Atlantic Airlines v. Leeward Islands Air Trans.*, 269 F. Supp. 231 (D.P.R. 1967).

326. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639.

327. Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578.

328. Convention on the High Seas (Geneva, 1958), 13 U.S.T. 2312.

329. 52 AM. J. INT'L L. 851 (1958).

The exercise of civil jurisdiction over foreign vessels and persons thereon passing through territorial waters is regulated in article 20 of the Convention on the Territorial Sea and the Contiguous Zone, ratified by the United States and presently in force.<sup>330</sup> In regard to persons on board such vessels, the Convention prohibits the coastal country from stopping or diverting a foreign ship for the purpose of "exercising civil jurisdiction in relation to a person on board ship."<sup>331</sup> A different rule applies in regard to civil proceedings against a vessel passing through the territorial waters. The Convention denies the coastal country the right to "levy execution against or arrest the ship for the purposes of any civil action," except for claims "assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State."<sup>332</sup> However, these provisions do not affect the "right of the coastal State, in accordance with its laws, to levy execution against or arrest, for the purpose of civil proceedings, a foreign ship lying in the territorial sea or passing through the territorial sea after leaving internal waters."<sup>333</sup> It follows that these restrictions upon the sovereignty of coastal states over territorial waters do not apply to foreign vessels when in internal waters as defined in article 5 of the Convention.<sup>334</sup>

In regard to criminal jurisdiction, the same Convention grants coastal countries different jurisdictional powers depending on the place where the crime was committed. In case the crime was committed on board ship when within the territorial waters of such country, its powers further depend on the fact that the foreign vessel did or did not enter that country's internal waters. In regard to foreign vessels passing through territorial waters after leaving the internal waters, the Convention imposes no limitations on the coastal country's criminal jurisdiction, provided the exercise of such acts is "authorized by its laws," and aims at an "arrest or investigation."<sup>335</sup> However, if the foreign vessel is only passing through the territorial seas, without entering territorial waters, the coastal country may exercise criminal jurisdiction "on board a foreign ship . . . to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage," only in cases listed in the Convention, namely: (a) if the "consequences of the crime extend to the coastal State"; or (b) if the crime is of a "kind to disturb the peace of the country or the good order of the territorial sea"; or (c) if the "assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies"; or (d) if it is

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330. See note 285 *supra*.

331. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, art. 20, para. 1, 15 U.S.T. 1606, T.I.A.S. No. 5639.

332. *Id.* art. 20, para. 2.

333. *Id.* art. 20, para. 3.

334. "Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State." *Id.* art. 5, para. 1.

335. *Id.* art. 19, para. 2.

"necessary for the suppression of illicit traffic in narcotic drugs."<sup>336</sup> In regard to crimes committed on board ship before the ship entered the territorial waters, even though it is presently passing through them, the coastal country has no criminal jurisdiction, unless the vessel has entered its internal waters.<sup>337</sup>

The 1965 Yarmouth Castle disaster on the high seas off the coast of Florida swamped the federal district court in Miami with some 440 claims for damages against the shipowner, a Panamanian corporation. The first question to be decided was the possibility of limiting the shipowner's liability. In *Petition of Chadade Steamship Co.*<sup>338</sup> the court decided to apply Panamanian law as codified in article 1078 of the Panamanian Commercial Code, since the law of the flag governs "not only criminal conduct but also the substantive rights of the crew, passengers and the shipowner in civil causes of action arising thereon,"<sup>339</sup> provided there is no overriding public policy of the forum which would make the law of the flag unacceptable. Faced with substantial differences in the limitation provisions of the Panamanian law as contrasted with the federal Limitation of Liability Act of 1851, the shipowner urged that limitation provisions are procedural and that the law of the forum should control. On both points the court ruled in favor of applying Panamanian law, pointing out that limitation provisions are substantive, that there is no public policy of the forum contrary to the Panamanian Code provision and that the Limitation of Liability Act was designed primarily to apply to American flag vessels. The court added that:

American courts should and would apply the monetary limit of the American statute only when referred thereto by choice-of-law rules. Conflict of law doctrines are based essentially on the concept of justice corresponding to the moral and social values which are held by the society. People frame their expectations with reference to the legal system with which their legal relationships have the most significant contacts at the time of the event in question and expect that the law of that jurisdiction will govern these relationships. If the parties' justified expectations are dependent upon foreign law for substantive rights, that law should be applied.<sup>340</sup>

The *Yarmouth Castle* disaster triggered a flurry of activities aimed

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336. *Id.* art. 19, para. 1.

337. *Id.* art. 19, para. 5.

338. 226 F. Supp. 517 (S.D. Fla. 1967). *Cf.* *Bancroft Nav. Co. v. Chadade Steamship Co.*, 349 F.2d 527 (2d Cir. 1965).

339. *Id.* at 519.

340. *Id.* at 523. The law of the flag also determines the law regarding general average after stranding off the coast of the Dominican Republic, *Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.*, 274 F. Supp. 884 (D. Md. 1967). Definition of an "ocean tramp" operating between Miami and the Dominican Republic in *United States v. Stephen Brothers Line*, 384 F.2d 118 (5th Cir. 1967).

at strengthening international safety standards.<sup>341</sup> These efforts have resulted within the United States in a number of federal and state enactments. The federal act<sup>342</sup> imposed on domestic and foreign shipowners, operators and travel agents the duty to disclose in their advertisements the safety standards of the respective vessels whenever sea passage takes place on vessels over one hundred gross tons or having births for fifty or more passengers "embarking at United States ports for a coastwise or an international voyage."<sup>343</sup> Furthermore, owners or charterers of domestic and foreign vessels with accommodations for fifty or more passengers, and embarking passengers at United States ports, must establish their "financial responsibility to meet any liability [they] may incur for death or injury to passengers or other persons on voyages to or from the United States," in amounts ranging from 5,000 dollars to 20,000 dollars, depending on the number of passenger accommodations.<sup>344</sup> Such amounts "shall be available to pay any judgment for damages, whether in amount less than or more than \$20,000.00 for death or injury occurring on such voyages to any passenger or other person."<sup>345</sup> Since these provisions aim only at establishing and securing financial responsibility on the part of ship owners or charterers in accord with statutory standards, they are not to be construed as limitations upon such responsibility.

Following in the footsteps of national legislation, Florida, in 1967, enacted similar provisions dealing with the sale of passage tickets to a "passage or conveyance upon any vessel, or a berth or stateroom in any vessel" domestic or foreign.<sup>346</sup> Owners or agents involved are subject to criminal responsibility for false or misleading information regarding vessels. Moreover, tickets as well as advertisements for passage or conveyance "aboard any foreign vessel" must disclose "the country of registry of such vessel." Any ticket or similar instrument for a "passage upon the high seas, from any port of this state, to any port of any other state or nation," or any receipt of money therefor must state not only the name of the vessel, of the owner, of the company, or of the line, but also the vessel's country of registry, the place of departure and destination, the date of departure, the name of the passenger and the amount of money paid. Violations are "punishable by law."<sup>347</sup>

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341. Miller, *New International Rules for Passenger-Ship Safety*, 56 DEP'T STATE BULL. 173 (1967); Mortimer, *Recent Responses to the Problem of Passenger Vessel Safety*, 8 HARV. INT'L L.J. 339 (1967); Clingan, *Legislative Flotsam and International Action in the Yarmouth Castle's Case*, 35 GEO. WASH. L. REV. 675 (1967); and 61 AM. J. INT'L L. 800 (1967).

342. 46 U.S.C. § 362, as amended, 80 Stat. 1356 (1966).

343. *Id.* 80 Stat. 1356(b).

344. *Id.* 80 Stat. 1356(2)(a).

345. *Id.*

346. FLA. STAT. § 358.06 (1967).

347. Similar statutes have been enacted in California, Illinois, Maryland, Massachusetts, New Jersey and Pennsylvania. The New Jersey statute was held unconstitutional in *Cunard Steamship Co. v. Lucci*, 92 N.J. Super. 148, 222 A.2d 522 (1966), *aff'd*, 94 N.J. Super. 440, 228 A.2d 719 (1967).

Maritime liens on a Panamanian vessel were litigated in *Freedom Line Incorporated v. Vessel Glenrock*.<sup>348</sup> The perennial question of seaworthiness<sup>349</sup> was litigated in *Symonette Shipyards, Ltd. v. Clark*.<sup>350</sup> The case involved a choice between the law of the Bahamas as the place of the injury and country of the flag, or law of the United States based on the nationality of the injured seaman and on the fact that the ship's articles were signed in the United States as was the contract between the businessman and the shipowner. Admitting that the "seven factors listed in *Lauritzen*"<sup>351</sup> as influencing the choice of law . . . lend some support to [the defendant's] argument" in favor of Bahamian law, nevertheless, the court felt the "most significant choice of law factor to be the nationality of the injured and deceased seaman"<sup>352</sup> and applied the law of the United States. This choice was further supported by the court's emphasis on the fact that the law of the United States is "well established and easily determined, whereas the evidence of the Bahamian law is vague and indefinite," adding that "even if Bahamian law were held to govern this case, the district judge correctly applied American maritime law in light of his finding, amply supported by the record, that [the defendant] had failed to prove the pertinent principles of Bahamian law,"<sup>353</sup> particularly regarding the proof of negligence and available defenses.<sup>354</sup>

A petition for a license to wreck off the coast of Florida was denied in *In re Andrews*<sup>355</sup> after a careful interpretation of the controlling statute.<sup>356</sup>

348. 268 F. Supp. 7 (S.D. Fla. 1967).

349. Foley, *A Survey of the Maritime Doctrine of Seaworthiness*, 46 ORE. L. REV. 369 (1967); Note, *The Warranty of Seaworthiness: An Appraisal of Longshoremen's Remedies for On-the-Job Injuries*, 42 N.Y.U.L. REV. 331 (1967).

350. 330 F.2d 554 (5th Cir. 1964), *aff'd*, 365 F.2d 464 (5th Cir. 1966). Cf. Gibbs v. Kiesel, 382 F.2d 97 (5th Cir. 1967).

351. *Lauritzen v. Larsen*, 345 U.S. 571 (1953). Listed as the place of the wrongful act, law of the flag, allegiance of the injured, allegiance of the shipowner, place of the contract, inaccessibility of the foreign forum, and the law of the forum (at 467), overlooking the law chosen by parties.

352. *Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464, 468 (1966), *cert. denied*, 378 U.S. 908 (1967). See generally Bue, *Admiralty Law in the Fifth Circuit: a Compendium for Practitioners*, 4 HOUSTON L. REV. 347 (1966).

353. *Id.*

354. It is refreshing to read in another seaworthiness case the court's description of the jury charge as their "once-in-a-lifetime-law-school-for-a-day." *United States Lines Co. v. Williams*, 365 F.2d 332, 335 (5th Cir. 1966).

The law of admiralty and not the Florida Wrongful Death Statute applies in an action for damages resulting from an airboat collision on the Kissimmee River, *Weed v. Bilbrey*, 201 So.2d 771 (Fla. 2d Dist. 1967). Removal of action arising from injuries on board a yacht in Nassau, *Preston v. Grant Advertising, Inc.*, 275 F.2d 439 (5th Cir. 1967). Action for damages suffered on a Caribbean cruise, *Alpert v. Zim Lines*, 370 F.2d 115 (2d Cir. 1966).

355. 266 F. Supp. 162 (M.D. Fla. 1967).

356. 46 U.S.C.A. § 724 (1967 Supp.).