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Conflict of Laws: Florida 1968-69

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CONFLICT OF LAWS: FLORIDA 1968-69

S.A. BAYITCH*

I. GENERAL PROBLEMS	434
II. JURISDICTIONAL CONFLICTS	438
A. <i>Long-Arm Statutes</i>	442
1. NONRESIDENT MOTORISTS	443
2. NONRESIDENT AIRCRAFT AND WATERCRAFT OPERATORS	444
3. BUSINESS BY NONRESIDENTS	444
4. UNAUTHORIZED FOREIGN INSURERS	455
5. NONRESIDENT CHARITABLE ORGANIZATIONS AND SOLICITORS	456
6. NONRESIDENT PARTNERSHIPS	456
7. FOREIGN LAND DEVELOPERS	456
8. FOREIGN NONPROFIT CORPORATIONS	456
9. FOREIGN SAVINGS AND LOAN ASSOCIATIONS	457
10. FOREIGN DEALERS IN SECURITIES	458
B. <i>Jurisdiction In Rem and Quasi In Rem</i>	458
C. <i>Forum Non Conveniens</i>	459
D. <i>Access to Courts</i>	460
E. <i>Federal Courts</i>	463
F. <i>International Service of Process</i>	465
III. FOREIGN JUDGMENTS	467
IV. ERIE-KLAXON DOCTRINE	469
A. <i>General Problems</i>	469
B. <i>Abstention</i>	472
V. CHOICE-OF-LAW RULES	476
A. <i>Torts</i>	476
B. <i>Contracts</i>	479
C. <i>Negotiable Instruments</i>	483
D. <i>Property</i>	483
1. REAL PROPERTY	483
2. PERSONAL PROPERTY	485
E. <i>Family Law</i>	487
1. MARRIAGE	487
2. SEPARATE MAINTENANCE	487
3. DIVORCE JURISDICTION	487
4. FOREIGN DIVORCE DECREES	488
5. ALIMONY	489
6. CUSTODY	490
7. MARITAL PROPERTY	491
F. <i>Decedents' Estates</i>	492
G. <i>Corporations</i>	494
H. <i>Taxation</i>	495
I. <i>Criminal Law</i>	496
VI. AVIATION LAW	497
VII. ADMIRALTY	500

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During the period under consideration here,¹ the most significant event was Florida's adoption of a new constitution (1968) which, like its predecessor, has few provisions affecting conflict law. The recent legislature, convened in 1969, was mainly concerned with education, criminal law, and administration. But there may still be hope that at some future time the most unsatisfactory matters, among them jurisdiction and service, will be given proper attention by Florida lawmakers.

I. GENERAL PROBLEMS

The rule that the limitation of actions is a matter of the *lex fori* still stands, with the understanding that some other statute of limitations may apply whenever the forum's borrowing statute so orders. In *Lescard v. Keel*,² this rule was coupled with the doctrine of *lex loci delicti*, so that the law applicable under the Florida borrowing statute was that of Georgia, where the cause of action arose.

The borrowing statute was also applied in *Beasley v. Fairchild Hiller Corporation*,³ an action brought by a pilot against the manufacturer for damages arising out of an accident in Louisiana. Under Florida Statutes section 95.10, the shorter statute of limitations prevails. The answer to the question of which statute of limitations was shorter, that of Florida or of Louisiana, depended on the characterization of the cause of action as one in contract or in tort. The court started from the "general rule of law that the law of the forum will characterize the cause of action for conflicts of law purposes"⁴ and found that under Florida law the action was one *ex contractu* and barred in three years, a period not yet elapsed. Following the dictates of section 95.10, however, the court turned to the law of Louisiana to "determine whether this count could have been maintained in the Louisiana courts on the date it was filed in Florida."⁵ The Louisiana Civil Code bars actions *ex contractu* after ten years but distinguishes breach of warranty actions into two types, one of which is based on liability to a consumer and characterized as a tort action. This tort action carries a one-year statute of limitations. Since plaintiff "was not the owner of the helicopter and had not purchased it . . ."⁶ from the defendant manufacturer, the court concluded that he was a consumer whose cause

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

2. 211 So.2d 868 (Fla. 2d Dist. 1968).

3. 401 F.2d 593 (5th Cir. 1968).

4. *Id.* at 596.

5. *Id.*

6. *Id.*

of action would be classified as *ex delictu* by the Louisiana court.⁷ Thus, the Louisiana period of limitations would be one year, shorter than the Florida forum's three year period, and the Louisiana statute would bar the action.

The problem of characterization was involved in *Beasley*⁸ which followed the generally accepted rule of the *lex fori*. The device known under the name of *renvoi*, frequently considered un-American,⁹ seems to be looking forward to more propitious times if frequent statutory adoptions are any indication.¹⁰

A belatedly advanced defense of the statute of limitations proved fatal to the defendant in an action¹¹ brought by a passenger against the manufacturer for damages resulting from an unsafe seatbelt on an aircraft. After unsuccessful attempts to litigate the matter in Pennsylvania and Delaware, the action was filed in 1962 in a New York federal court.¹² Four years later, the trial court granted the corporate defendant leave to amend its answer, thus enabling it to present the defense of the California statute of limitations, applicable as the law of the state where the aircraft was sold and delivered to the air carrier (not involved in this litigation).¹³ Noticing the unusual delay in presenting a vital defense, the appellate court found that if the defendant had pleaded the California statute of limitations as a defense when it first answered, the plaintiff would have had ample time to initiate his litigation in Florida¹⁴ and take advantage of her three-year limitation period. Because of the "substantial prejudice to plaintiff caused by defendant's excessive delay in raising the statute of limitations defense, the court below abused its discretion in permitting defendant to amend its answer."¹⁵ The case was remanded for retrial.

The question of how to deal with foreign law was involved in two interstate and one international conflict cases. In *Cordrey v. Cordrey*,¹⁶ the court held that "in the absence of specific pleading and proof of any foreign law applicable . . . the law of Florida should obtain and control."¹⁷ In *Movielab, Inc. v. Davis*,¹⁸ the court applied Florida law because the plaintiff did not comply with the requirements of Florida Statutes section 92.031, which requires specific pleading and proof of

7. *Id.*; cf. *Gaston v. B.F. Walker, Inc.*, 400 F.2d 671 (5th Cir. 1968).

8. *Beasley v. Fairchild Hiller Corp.*, 401 F.2d 593 (5th Cir. 1968).

9. *Hobbs v. Firestone Tire & Rubber Co.*, 195 F. Supp. 56, 63 (N.D. Ind. 1961).

10. See ch. V. *infra* (Uniform Commercial Code); 49 U.S.C. § 313(d) (1965).

11. *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152 (2d Cir. 1968).

12. *Id.* at 1158.

13. See page 1155 of the appellate court's opinion for an explanation of the events which occurred at the trial of the *Strauss* case. Cf. *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451 (2d Cir. 1969) and 424 F.2d 427 (2d Cir. 1970).

14. *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152, 1157 (2d Cir. 1968).

15. *Id.*

16. 206 So.2d 234 (Fla. 2d Dist. 1968).

17. *Id.* at 239.

18. 217 So.2d 890 (Fla. 3d Dist. 1969).

foreign law. The court held that a mere memorandum of foreign law in opposition to defendant's request to amend his answer, did not meet the "test of a pleading, which appears to be the requirement imposed by the . . . authorities in the State of Florida for one who attempts to seek benefits of Fla. Stat. § 92.031."¹⁹ The international case involved the law of Honduras. In *Banco de Honduras, S.A. v. Prenner*,²⁰ the court held that Honduran law controls. The court added that the "recital of the facts with reference to Honduran law would be lengthy and without conceivable value as a Florida precedent," contenting itself with saying that they approved the comprehensive and careful order.²¹

The effect of the Act of State doctrine was crucial in *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Company*.²² A Cuban corporation and its sole stockholder, an assignee of the claim, brought an action against a Florida corporation to obtain payment for tobacco from Cuba delivered to the corporate defendant before Castro's takeover. The defense urged the Act of State doctrine which would, if successful, take the claim out of plaintiff's hands in view of the fact that the plaintiff corporation was "intervened," i.e., sequestered, in Cuba and put in the hands of an official intervenor. The general principle of the doctrine is well known: No country may by its own acts disregard governmental dispositions of a foreign government, provided such dispositions are done within its (the foreign country's) territory.²³ In deciding whether or not to apply the *Sabbatino* rule,²⁴ the court found two distinctions: first, that in *Sabbatino* the act of the Cuban government was direct and open confiscation, while in the present case the action of the Cuban government took on the form of an intervention which does not amount to outright confiscation; second, in *Sabbatino*, the act of the Cuban government took effect within Cuban territory in regard to a res located there, while in the present case, the potential Cuban governmental disposition would be directed toward intangible property, namely a credit relationship between the parties. Thus, being outside of the proper scope of the *Sabbatino* rule, the issue took on a double aspect: First, whether the intervenor's authority or actions prevented the enforcement of the claim in a federal court, which was answered in the negative after a careful check of the intervenor's au-

19. *Id.* at 892.

20. 211 So.2d 600 (Fla. 4th Dist. 1968).

21. *Id.* See also *Western Life Ins. Co. v. Nanney*, 296 F. Supp. 432 (E.D. Tenn. 1969) (Florida law applied in Tennessee); *First Nat'l City Bank v. Compania de Aguaceros, S.A.*, 398 F.2d 779 (5th Cir. 1968) (regarding Fed. R. Civ. P. 44.1); *Simmons v. Continental Cas. Co.*, 410 F.2d 881 (8th Cir. 1969) (impact of the Erie Doctrine).

22. 392 F.2d 706 (5th Cir. 1968), noted in 23 U. MIAMI L. REV. 243 (1968). On general conflict problems involved see Mann, *International Corporations and National Law*, 42 BRIT. Y.B. INT'L L. 145 (1967), and Seidl-Hohenveldern, *The Impact of Public International Law on Conflict of Laws Rules on Corporations*, 123 RECUEIL DES COURS 7 (1968).

23. Bayitch, *Florida and International Legal Developments: 1962-1963*, 18 U. MIAMI L. REV. 321, 345 (1963).

24. *Banco Nacional v. Sabbatino*, 376 U.S. 398 (1964).

thority. The other question was broader in scope; namely, whether the doctrine applies when it may be shown that the plaintiff would have no chance in Cuba to recover. Even if the court only impliedly answered this question, it is clear that the mere possibility of a certain type of action or of the probability of a certain decision does not present an act of a foreign government and is utterly immaterial. Finally, the court held that the Cuban government did not have the necessary "physical control over [the] species of property represented by this claim . . . and, consequently, there could be no violation of the doctrine even if the Cuban government would have taken all steps" which "its unlimited power would have permitted it to take . . ." ²⁵ in order to reach and control the claim.

Among recent treaties, the Protocol Relating to the Status of Refugees, signed at New York in 1967 and ratified (with reservations) by the United States,²⁶ deserves mentioning. The Protocol has brought into effect, with some modifications, the United Nations sponsored Convention Relating to the Status of Refugees, signed at Geneva in 1951. Here only a few fundamental questions will be discussed. One affects the definition of refugees within the scope of the Protocol. In this respect the limitation contained in the Convention mainly including refugees whose status resulted from events prior to January 1, 1951, has been eliminated while the substantive definition has been retained. A refugee is a person who

[o]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside of the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.²⁷

The Protocol applies to all such persons regardless of whether the "country of [their] nationality" has ratified the Protocol; provided they have not lost their refugee status²⁸ or been disqualified.²⁹

The Protocol also contains what is termed the federal clause,³⁰ providing that for federal (nonunitary) states the "obligations of the Federal Government shall . . . be the same as those of States Parties

25. *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 714 (5th Cir. 1968); *cf. French v. Banco Nacional*, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968).

26. [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577. Weis, *The 1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties*, 42 BRIT. Y.B. INT'L L. 39 (1967).

27. *Id.* art. 1(A)(2).

28. *Id.* art. 1(C)(1)-(2).

29. *Id.* art. 1(F).

30. *Id.* art. VI.

which are not Federal States" in regard to those articles of the Convention (incorporated into the Protocol) which "come within the legislative jurisdiction of the federal legislative authority."³¹ Since in this country such authority exists in view of the necessary and proper clause,³² the Protocol is directly enforceable and no action by the constituent states is necessary.³³

Generally, the Convention grants refugees the general alien treatment, except where the Convention contains more favorable provisions.³⁴ In case such treatment is, by treaty or otherwise, subject to reciprocity, such requirement expires after three years residence by the refugee in the host country.³⁵ Other provisions of greater interest will be mentioned at the proper places in this *Survey*.

II. JURISDICTIONAL CONFLICTS

Two factors determine the exercise of the court's power to take cognizance of cases—whether the parties or the thing involved are amenable to the court and whether the court is competent to adjudicate the particular type of litigation. Either factor may shift the judicial jurisdictional problem to the international level whenever the parties or the object of litigation transcend international boundaries.³⁶ The jurisdictional problem may be interstate in nature or a simple intrastate proposition.

From this point of view, venue appears to be an intrastate matter, distinct from jurisdiction. The difference was restated in *Steward v. Carr*.³⁷ The court defined venue as the "privilege to be accountable to a Court of a particular location," which refers to a "geographic area in which the defendant to a suit has generally the right to be sued" while jurisdiction is "the power to act, the authority to adjudicate the subject matter."³⁸

Jurisdiction is based on contacts between the parties, the thing involved, or the cause of action, and the particular jurisdictional unit of a state or of a country. Whenever jurisdiction is properly perfected, not only the defendant becomes amenable to adjudication, but also the plaintiff, who, by bringing the action, submits himself to any decisions which result from the proceedings he initiated. The capacity in which he instituted the action, however, may vary this rule. For example, in *Fidelity-*

31. *Id.*

32. See *Missouri v. Holland*, 252 U.S. 416 (1920).

33. Protocol Relating to the Status of Refugees art. VI(a), [1967] 19 U.S.T. 6223, T.I.A.S. No. 6577.

34. *Id.* art. 7, para. 1.

35. *Id.* art. 7, para. 2.

36. Deddish, *Judicial Jurisdiction: A Study in International and Comparative Law*, 6 COMP. JURID. REV. 55 (1969).

37. 218 So.2d 525 (Fla. 2d Dist. 1969). See also *United States ex rel. Rudick v. Laird*, 412 F.2d 16, 20 (2d Cir. 1969) (for a restatement of differences).

38. 218 So.2d 525, 527 (Fla. 2d Dist. 1969).

Philadelphia Trust Company v. Ball,³⁹ where an action was brought by nonresident trustees, the court ruled that the fact that they have "submitted themselves . . . to the jurisdiction of the Florida courts does not amount to a submission of themselves to the jurisdiction of the court for purposes of adjudicating claims against them personally."⁴⁰

Consent by parties to abide by the jurisdiction of a chosen court is still frowned upon by courts. This is apparently because by so doing parties have ousted a court from the jurisdiction it potentially had, and transferred the case to a court which—but for the parties' agreement—would have no jurisdiction. Florida still maintains this traditional attitude as shown in *Sausman Diversified Investments, Inc. v. Cobbs Co.*:⁴¹

Generally in Florida parties to a contract cannot confer jurisdiction on a particular court by contract and conversely they cannot oust the courts of jurisdiction vested in them by law or irrevocably debar themselves from appealing to the established tribunals of justice.⁴²

The court concluded:

Since *Dade County, Florida*, in and of itself, has no specific jurisdictional power, we find that this provision in the franchise agreement does not confer exclusive jurisdiction of this cause on the *appropriate courts* in and for Dade County, Florida.⁴³

A device to establish jurisdiction, which is very suspect, is the cognovit note. Under Florida law, the cognovit note is void regardless of whether it was agreed upon within or without the state.⁴⁴ The same policy found expression in two additional statutes, namely Florida Statutes section 516.16⁴⁵ and the recently enacted section 520.74.⁴⁶ The Uniform Commercial Code leaves the Florida rule invalidating the confession of judgment intact.⁴⁷

The effect of the clause for confession of judgment on the basic underlying transaction between the litigants, *i.e.*, on two promissory notes containing the clause, was at issue in *Vineberg v. Brunswick Corporation*.⁴⁸ The defendant relied on *Pearson v. Friedman*⁴⁹ which,

39. 208 So.2d 282 (Fla. 3d Dist. 1968).

40. *Id.* at 285. *Huntley v. Alejandre*, 139 So.2d 911 (Fla. 3d Dist. 1962) (an international conflict case).

41. 208 So.2d 873 (Fla. 3d Dist. 1968).

42. *Id.* at 875.

43. *Id.*

44. FLA. STAT. § 55.05 (1967); see *Survey I*, at 276.

45. This regards the small loan business.

46. "No home improvement contract may contain . . . (8) Any power of attorney to confess judgment or any power of attorney." FLA. STAT. § 520.74 (1969).

47. The Code refers to the clause as not affecting the negotiability of commercial documents in which it appears with the proviso that this provision shall not "validate any term which is otherwise illegal," FLA. STAT. 673.3-112(2) (1967).

48. 391 F.2d 184 (5th Cir. 1968).

erroneously interpreting the full faith and credit clause, held that the Illinois judgment recovered on the strength of the cognovit clause is unenforceable in Florida. The *Pearson* court added that the scope of the statutory rule is "more than a prohibition of the use of a procedural device; it concerns the validity of the contracts themselves."⁵⁰ Distinguishing the *Pearson* case on the fact that in the present case judgment was not obtained nor sued upon, the federal court held that the cognovit note is void under the Florida statute but "severable so long as judgment has not been sought or obtained by virtue of it."⁵¹ This position seems eminently sound. Not only does a careful reading of the Florida statute show that it affects only the "powers of attorney for confessing or suffering judgment by default or otherwise,"⁵² and not the basic transaction, but also, there is no reason why such a clause dealing with matters outside of the basic transaction should be a kiss of death. It would be senseless to hold that the basic transaction is unenforceable in an action in the defendant's domicile in Florida just because a cognovit note in favor of potential Illinois courts happens to be attached.

In transactions with the cognovit note attached, two different sets of conflict problems arise.⁵³ One problem is that of the law governing the basic transaction; the other is that of the law governing the cognovit clause, including its jurisdictional effect. Limiting the discussion here to the jurisdictional aspect, it should be noted that the jurisdiction is achieved through a blank grant of agency to the effect that such agent, usually appointed by the plaintiff creditor, not only selects the forum (in some jurisdictions), but also has the power to plead a confession of judgment independently and without notice to his principal. These devices seem patently incompatible with the standards of due process as understood today. Not only is the defendant (principal) in fact prevented from interposing any defenses which may have accrued to him during or since his signing of the form, but he will also have to face the judgment so confessed by his agent, now transformed into something almost insuperable under the full faith and credit clause. Such procedure is violative of standards of fair play and substantial justice articulated by *International Shoe Co. v. Washington*⁵⁴ and other cases dealing with closely related situations. Among them, only two should be mentioned. A statutory provision for appointment of an agent for service was held unconstitutional

49. 112 So.2d 894 (Fla. 3d Dist. 1959).

50. *Id.* at 895.

51. *Vineberg v. Brunswick Corp.*, 391 F.2d 184, 187 (5th Cir. 1968).

52. FLA. STAT. § 55.05 (1969).

53. Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111 (1961); Hunter, *The Warrant of Attorney to Confess Judgment*, 8 OHIO ST. L.J. 1 (1941); Shuchman, *Confession of Judgment as a Conflict*, 36 NOTRE DAME LAW. 461 (1961); Note, *Confession of Judgments*, 102 U. PA. L. REV. 524 (1954).

54. 326 U.S. 310 (1945).

in *Wuchter v. Pizzutti*⁵⁵ because it did not provide for notice to the defendant from the statutory agent. In *National Equipment Rental, Ltd., v. Szukhent*,⁵⁶ service was saved only because the defendant had received factual notice from the agent for service "appointed" by him in an adhesion contract, a relationship considered patently lacking "intrinsic and continuing reality."⁵⁷ Such appointment was, as expressed by the dissent, "buried in a multitude of words [and] too weak an imitation of a genuine agreement to be treated as a waiver of so important a constitutional safeguard as is the right to be sued at home."⁵⁸

There is, of course, the additional question of choice of laws. In other words, what law applies to the cognovit clause: is it the law applicable to the basic transaction as the *lex cause*; or is the controlling law to be determined independently as the law chosen by the parties (*lex voluntatis*), the law of the place of making, or the *lex fori* in cases where parties have identified the court of jurisdiction. While in *Vineberg* the place of making does not appear in the opinion, there is a choice of law by parties' agreement which provides that the promissory notes are to be "construed and interpreted according to the laws of the State of Illinois."⁵⁹ The first task for the court would be to determine whether this *lex voluntatis* was intended to apply only to the basic transaction to the cognovit clause as well. Accepting the latter alternative, the law of Illinois would also determine the requirements for the validity and effects of the clause. Since it appears that the law of Illinois would hold the clause valid and enforceable, the federal court in Florida, following *Erie-Klaxon*,⁶⁰ should have ascertained Florida's law regarding the *lex voluntatis* in general and with regard to cognovit notes in particular. This was not done. Instead, the court simply applied Florida law invalidating cognovit clauses and turned to the Florida substantive law of contracts. The choice-of-laws issue was noticed but neatly sidestepped on the ground that in the court below "a decision was never reached with respect to this question."⁶¹ The court added that it is "apparent from the briefs and from our independent research that there is neither any Florida nor Illinois authority directly in point, and we need not reach the conflict of laws in question."⁶² This argument is not persuasive, however, since it is well-settled that a correctly or an erroneously assumed gap in the law does not dispense with the solution of a legal question which may be crucial to the outcome. Of course, by opening this aspect of the case, the

55. 276 U.S. 13 (1928) (New Jersey nonresident motorist statute); cf. *Combs v. Chambers*, 302 F. Supp. 194 (N.D. Okla. 1969).

56. 375 U.S. 311 (1964).

57. *Id.* at 314.

58. *Id.* at 332.

59. *Vineberg v. Brunswick Corp.*, 391 F.2d 184, 186 (5th Cir. 1968).

60. See ch. IV *infra*.

61. *Vineberg v. Brunswick Corp.*, 391 F.2d 184, 186 (5th Cir. 1968).

62. *Id.*; cf. *United Mercantile Agencies v. Bissonnette*, 155 Fla. 22, 19 So.2d 466 (1944); *Carroll v. Gore*, 106 Fla. 582, 143 So. 633 (1932).

complex issues of the *Clay*⁶³ litigations would emerge, leading into a constitutional quicksand in which the Supreme Court left no clear footprints to lead the weary seeker of the law.

It is unfortunate that the court in *Pearson*⁶⁴ failed to notice the opportunities open in full faith and credit situations. It could have found that jurisdictional requirements in Illinois have not been met, or that Illinois law allows the "opening up"⁶⁵ of cognovit judgments on equitable or other grounds. Instead, the court used the assumed substantive invalidity of the basic transaction to avoid its duty under the full faith and credit clause, a patently erroneous solution.⁶⁶

A. Long-Arm Statutes

Long-arm statutes⁶⁷ have expanded the traditional jurisdiction based on presence, individual or corporate, by accepting other jurisdiction-creating acts on the part of nonresident defendants. In addition to questions of statutory interpretation, and intertemporal issues as to what time is decisive regarding the application of changing jurisdictional statutes or changes in the jurisdiction-creating acts, long-arm statutes also raise constitutional questions because of their expansive aims.⁶⁸ As was ex-

63. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964); *Survey I*, at 273.

64. *Pearson v. Friedman*, 112 So.2d 894 (Fla. 3d Dist. 1959); see notes 48-49 *supra* and accompanying text. Cf. *Henry Bierce Co. v. Hunt*, 170 So.2d 99 (Fla. 3d Dist. 1964), *Survey II*, at 502; also *Atlas Credit Corp. v. Ezrine*, 25 N.Y.2d 219, 303 N.Y.S.2d 382, 250 N.E.2d 474 (1969).

65. *Thrifty-Pak Home Appliance, Inc. v. Kowalczyk*, 22 Ill. App. 2d 536, 161 N.E.2d 344 (1959); *L. & N. Sales Co. v. Stuski*, 188 Pa. Super. 117, 146 A.2d 154 (1958); *Barrow v. Phillips*, 250 Ill. App. 587 (1928), *relying on* *Forsyth v. Barnes*, 228 Ill. 326, 81 N.E. 1028 (1907). *Accord*, *McDade v. Moynihan*, 330 Mass. 437, 115 N.E.2d 372 (1953). An Ohio cognovit judgment was recently "opened" in *Canada, Hughes v. Sharp*, 68 W.W.R. 706 (1969), *reversing* 66 W.W.R. 103, 70 D.L.R. 2d 298 (1968).

66. *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *McDade v. Moynihan*, 330 Mass. 437, 115 N.E.2d 372 (1953).

67. Long-arm statutes are expressions of a legislative attempt to create a new basis of jurisdiction which within constitutional limitations, will afford the citizens of a State a forum for causes of action arising from the activities of nonresidents within the State . . . These statutes codify a new type of personal jurisdiction based on activities deemed more relevant than mere physical presence of a defendant or his agent in a State. As long as constitutional limits are not crossed, a court should interpret the statute to effectuate a State's legitimate desire to protect its citizens, . . .
deLeo v. Childs, 304 F. Supp. 593 (D. Mass. 1969). See Seidelson, *Jurisdiction over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-arm Statutes*, 6 DUQUESNE U.L. REV. 221 (1967-68).

68. See *Survey III*, at 514. As stated in *Uppgren v. Executive Aviation Serv., Inc.*, 304 F. Supp. 165, (D. Minn. 1969), there are two separate issues in deciding in personam jurisdiction over a foreign corporation:

First, does the local statute as construed by the courts of the pertinent state subject the foreign corporation to in personam jurisdiction under the circumstances of the case? Second, if the forum has attempted to exercise in personam jurisdiction, does such action comport with the due process requirements of the 14th Amendment of the United States Constitution?

In *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969), the court reversed the sequence and turned first to the constitutional aspect of the long-arm statute and then to the statute itself. Exploring the reach of "forum tentacles," grabbing a foreign corporation

pressed well in a recent case,⁶⁹ there are two questions: The first is "whether as a matter of state law, the Court would gain jurisdiction over the defendants."⁷⁰ The other is "whether the statute in all cases requires sufficient minimum contacts to afford due process,"⁷¹ since this is not necessarily determined by compliance with state law.

1. NONRESIDENT MOTORISTS

An unusual case involving jurisdiction over the nonresident motorist who is responsible for damages arising out of a local car accident was *Marion County Hospital District v. Namer*.⁷² The local Florida hospital brought an action for services rendered to a nonresident motorist, the victim of a car accident in Florida. Substituted service was had on the Secretary of State under Florida Statutes section 48.171, and on the motion to quash service, the question arose as to whether the action fell within the scope of the statute which provides that:

[A] nonresident who operates a motor vehicle in Florida designates the secretary of the state as his agent for service of process in any *civil suit* . . . instituted in the courts of the state against such operator or owner . . . entitled to control of such motor vehicle, *arising out of or by reason of any accident or collision* occurring within the state in which such motor vehicle is involved. (Emphasis added.)

It is significant that this action did not involve the participants in the accident or collision, nor did it involve any claim between these parties. Instead, the action was brought by the hospital, an outsider who has only a remote connection with the consequences of the accident. The hospital did not have a claim "arising out of or by reason of any accident or collision" but one arising out of a contract entered into by the victim of the accident. The court, however, saw the issue as only involving the question of whether contract claims as well as tort claims are within the scope of the statute. The court answered the question so formulated in the affirmative, finding its answer to be "in accord with the general weight of authority prevailing in this country."⁷³ The court also interpreted the word

on the basis of one act (injury from defective amusement device operated in the jurisdiction), the court was satisfied, particularly in view of the fact that the foreign corporation "introduced this [device] into interstate commerce with reason to know that the [device] would probably eventually nomadize through the state," adding that "where a nonresident corporation engages in a single isolated transaction in a state and a tort claim arises out of the activity, the state may assert jurisdiction over the nonresident corporation without contravening due process." *Id.* at 597.

69. *Williams v. Vick Chem. Co.*, 279 F. Supp. 833 (S.D. Iowa 1967).

70. *Id.* at 836.

71. *Id.* at 836; *cf. Uppgren v. Executive Aviation Serv., Inc.*, 304 F. Supp. 165, 167 (D. Minn. 1969).

72. 225 So.2d 442 (Fla. 1st Dist. 1969).

73. *Id.* at 447. *See also* Fla. Laws 1970, ch. 70-90, § 48.182, dealing with jurisdiction over nonresidents who commit wrongful acts outside of Florida which cause injury within the state.

"any" literally as meaning "every" or "unlimited" and concluded that the expression "any civil action" ordinarily includes "actions ex contractu, as well as actions ex delicto, unless other language in the statute clearly indicates a contrary intent."⁷⁴ Of course, there can be no quarreling with the policy followed by the court that:

[t]his construction will rebound to the advantage of non-residents injured in highway accidents in Florida and obtaining emergency treatment of their injuries in the hospitals, which can afford to extend them credit, knowing that, if the non-resident motorist drives on out of the state, and then defaults, the hospital will not be forced to seek him in his home state and file the action in that state.⁷⁵

In *Green v. Nashner*,⁷⁶ the appellate court found error in the denial of defendant's motion to quash service because although the plaintiff mailed the notice of service on the secretary of state and a copy of the complaint and summons to the defendant at an address in Michigan the plaintiff "failed to show any connection between the defendant and the address. . . ."⁷⁷ It appears that the letter was returned unclaimed. In this respect the court, relying on *Zazcone v. Lesser*,⁷⁸ held that such a fact presents a justiciable question whether the failure to claim the letter expresses the defendant's rejection or may have resulted from a cause not chargeable to him.

2. NONRESIDENT AIRCRAFT AND WATERCRAFT OPERATORS

As reported in the previous *Survey*,⁷⁹ the 1967 Florida Legislature reenacted the prior Florida Statutes section 47.162 as Florida Statutes section 48.19, without noticing that the 1963 legislature had amended this provision so as to exclude nonresident operators of aircraft.⁸⁰ The 1969 legislature apparently forgot to correct this faux pas.

3. BUSINESS BY NONRESIDENTS

Long-arm statutes subject nonresident businesses, individual and corporate, to those jurisdictions where their profitable activities take or have taken place under the premise that by taking advantage of the local business opportunities they make themselves amenable to local courts. As expressed in a recent case,⁸¹ a "nonresident [who] wishes to afford itself

74. *Marion County Hosp. Dist. v. Namer*, 225 So.2d 442, 447 (Fla. 1st Dist. 1969).

75. *Id.*; cf. *Penn. v. Ashley*, 226 So.2d 351 (Fla. 1st Dist. 1969).

76. 216 So.2d 492 (Fla. 3d Dist. 1968).

77. *Id.* at 493.

78. 190 So.2d 805 (Fla. 3d Dist. 1966). See *Survey* III, at 516; cf. *Massengill v. Campbell*, 391 F.2d 233 (5th Cir. 1968).

79. See *Survey* III, at 517.

80. See *Survey* II, at 504. The omission was corrected by Fla. Laws 1970, ch. 70-90.

81. *Hubsch Mfg. Co. v. Freeway Washer & Stamping Co.*, 205 So.2d 337 (Fla. 1st Dist. 1967).

of the privilege of the Florida markets," creates thereby "attendant obligations which justice requires [to] be determined in the local forum."⁸² The Florida statute is directed at those who, "having his or their principal place of business in this state engage in business."⁸³ Another section of the statutes describes the nonresidents amenable to process as those who "operate, conduct, engage in, or carry on a business or business venture in the state or have an office or agency in the state."⁸⁴ Furthermore, such activities will suffice provided that there is connexite in the sense that the action arises "out of any transaction or operation connected with or incidental to the business or business venture."⁸⁵ There is one exception to the connexite rule however.⁸⁶ It is dispensed with if the non-resident corporation has "a business office within the state" and is "actually engaged in the transaction of business therefrom."⁸⁷

Before undertaking a survey of cases applying these statutory provisions, some general problems should be discussed. One is the question of their intertemporal application, particularly whether they apply retroactively to jurisdiction-creating acts which occurred prior to the statute's coming into force. Florida's courts have consistently held that these statutes must not be given retroactive effect.⁸⁸ However, in *Donnelly v. Kellogg Company*,⁸⁹ the federal court sitting in diversity overlooked the decisive intertemporal problem. Even though the aviation accident out of which the claim arose occurred in November 1966, the court nevertheless considered the question of whether the case fell within the scope of the Simari amendment, not enacted until 1967.⁹⁰ A related problem was at issue in *Masters, Inc. v. Corley*,⁹¹ where service on the secretary of state, according to section 48.181 of the Florida Statutes was attacked on the ground that the jurisdiction-creating activity on the part of the New York corporation operating a department store in Miami existed at the time the claim arose but had ceased at the time of the substituted service. Using the criterion of "minimum business contacts," the court held the service to be effective since the corporate defendant was "doing business in the state during the time when the cause of action arose,"⁹²

82. *Id.* at 339.

83. FLA. STAT. § 48.071 (1967). For a definition of business, see *Southern Machine Co. v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968).

84. FLA. STAT. § 48.181(1) (1967).

85. FLA. STAT. § 48.081(1) (1967).

86. This was the Simari Amendment enacted in 1967; see *Survey III*, at 525.

87. FLA. STAT. § 48.181(5) (1967).

88. See *Zirin v. Charles Pfizer & Co.*, 128 So.2d 594 (Fla. 1961), *Survey I*, at 282. There is no constitutional prohibition against retroactivity, *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

89. 293 F. Supp. 53 (S.D. Fla. 1968).

90. FLA. STAT. § 48.081(5) (1967).

91. 222 So.2d 465 (Fla. 3d Dist. 1969); cf. *Herpst v. S.B.I. Liquidating Corp.*, 279 F. Supp. 928 (E.D. Pa. 1968).

92. *Id.* at 466.

even though it did not "maintain minimal business contacts within the state"⁹³ at the time of service, on the ground that the long-arm statute was "in full force and effect at the time of the injury"⁹⁴ which the plaintiff suffered in defendant's store. The dissenting judge,⁹⁵ relying on a substantially identical set of precedents, reached the opposite conclusion. It appears, however, that the solution reached by the majority represents the better rule. First of all, the statute expressly subjects defendants who "subsequently became nonresidents of the state" to local jurisdiction. Furthermore, in all cases of one-act transactions, jurisdiction would be simply unavailable. Finally, the basis of this type of long-arm statute is the "acceptance . . . of the privilege extended by law to nonresidents"⁹⁶ to engage in local business, the jurisdictional "incident" of which, once accrued, does not evaporate because the privileged party has left the state.⁹⁷

It is well established that the jurisdiction-creating acts must not only be properly alleged but also supported by affidavits attached to the complaint in order to "substantiate the jurisdictional allegation."⁹⁸ The motion to quash service must be similarly supported.⁹⁹

Turning now to jurisdiction-creating acts, the following cases may illustrate judicial attitudes. A corporation sending its officers, engineers, and salesmen into Florida and making sales within the state provided sufficient contacts in an action for damages resulting from delivery of defective hardware.¹⁰⁰ In *Woodham v. Northwestern Steel & Wire Co.*,¹⁰¹ the facts that both foreign corporate defendants leased office space in the state, owned office furniture and paid state taxes on it, maintained resident business agents who worked in Florida for about fifteen years and additional clerical personnel actively soliciting business, and had telephone listings in the state in their own name, out of which activities a large volume of business was generated, persuaded the court that the constitutional standard of minimum contacts was met.

In a number of cases the courts failed to find the necessary jurisdictional contacts. In *Sausman Diversified Investments, Inc. v. Cobbs Company*,¹⁰² the mere fact that the plaintiff executed a franchise agreement with the defendant in Florida while the latter signed it in Pennsyl-

93. *Id.*

94. *Id.*

95. *Id.* at 467.

96. FLA. STAT. § 48.181(1) (1967).

97. *Hess v. Pawloski*, 274 U.S. 352 (1927).

98. *Industrial Lub., Inc. v. Ceco Steel Prod. Corp.*, 214 So.2d 507 (Fla. 3d Dist. 1968); *Hydronaut, Inc. v. Litton Systems, Inc.*, 208 So.2d 494 (Fla. 3d Dist. 1968).

99. *Viking Superior Corp. v. W.T. Grant Co.*, 212 So.2d 331 (Fla. 1st Dist. 1968).

100. *Hubsch Mfg. Co. v. Freeway Washer & Stamping Co.*, 205 So.2d 337 (Fla. 1st Dist. 1967).

101. 390 F.2d 27 (5th Cir. 1968). That same constitutional approach was applied in *Dickinson v. Gracy*, 210 So.2d 270 (Fla. 3d Dist. 1968) and *Hoffman v. Air India*, 393 F.2d 507 (5th Cir. 1968).

102. 208 So.2d 873 (Fla. 3d Dist. 1968).

vania and permitted plaintiff to supervise his activities in Florida, did not amount to doing business. In another case, an Israeli corporation owning a motor vessel, the Jamaica Queen, and maintaining an office in England while its president, a Canadian, resided in Texas, was held not to have the necessary "minimum contacts" with Florida.¹⁰³ Following *Williams v. Duval County Hospital Authority*,¹⁰⁴ it was held in *Fine v. Snyder*¹⁰⁵ and in *Rumsch v. DeVaney*¹⁰⁶ that practicing the medical profession in Florida did not amount to engaging in business under Florida Statutes section 47.16(1), nor does the mere solicitation of business.¹⁰⁷

While courts interpret engaging in business to mean a more or less continuous activity, the notion of business venture is preferably used in one-act situations. A promissory note executed by Tennessee residents and delivered in Florida was held not to amount to a business venture regardless of the fact that one of the nonresident purchasers of stock in a Florida corporation came to Florida for the closing of the deal.¹⁰⁸ Neither did the additional fact that the defendant purchasers made the investment for profit nor the fact that the defendants now owned stock in the Florida corporation and that one of them attended a stockholders meeting in Florida persuade the court. A recent case considering the meaning of the term business venture deviated from the usual one-act type of interpretation. In *McCarthy v. Little River Bank and Trust Company*¹⁰⁹ the defendant, a resident of Minnesota, was unsuccessful with his motion to quash service urging that his activities in connection with his uncle's estate in Florida were not business in the statutory sense. In this respect, the appellate court abandoned the one-act connotation and held that the term business venture does not apply "exclusively to commercial transactions for benefit,"¹¹⁰ citing no authority for the proposition. The court also found that the defendant's acts in Florida were "done for the purpose of realizing a pecuniary benefit or otherwise accomplishing an objective."¹¹¹ In pursuance of this aim, defendant

[p]ersonally hired an attorney, signed notes, endorsed checks, paid the balance of his uncle's account at the hospital, took

103. *Goffer v. Weston*, 217 So.2d 896 (Fla. 3d Dist. 1969).

104. 199 So.2d 299 (Fla. 1st Dist. 1967).

105. 207 So.2d 695 (Fla. 3d Dist. 1968).

106. 218 So.2d 238 (Fla. 1st Dist. 1969).

107. *Service Station Aid, Inc. v. National Hose Co.*, 210 So.2d 257 (Fla. 3d Dist. 1968), *quashed and remanded*, 228 So.2d 904 (Fla. 1969); *cf. Marotta v. Pittsburg*, 27 Fla. Supp. 125 (Broward County Cir. Ct. 1966). Regarding amenability of Florida corporations to long-arm statutes of foreign jurisdictions, *see Marival, Inc. v. Planes, Inc.*, 302 F. Supp. 201 (N.D. Ga. 1969); *Platt Corp. v. Platt*, 17 N.Y.2d 234, 217 N.E.2d 134, 270 N.Y.S.2d 408 (1966); *Rose v. Sans Souci Hotel, Inc.*, 51 Misc. 2d 1099, 274 N.Y.S.2d 1000 (1966); *DiLido Hotel v. Nettis*, 257 A.2d 643 (Pa. 1969).

108. *Uible v. Landstreet*, 392 F.2d 467 (5th Cir. 1968).

109. 224 So.2d 338 (Fla. 3d Dist. 1969). Business venture as meaning a "lesser involvement"; *see Lomas & Nettleton Fin. Corp. v. All Coverage Underwriters, Inc.*, 200 So.2d 564 (Fla. 4th Dist. 1967).

110. *Id.* at 341.

111. *Id.*

possession of the personal papers and property of his uncle, and examined the uncle's business property and real estate, demanded access and obtained the contents of his uncle's safety deposit box by signing his uncle's name, and took possession of his uncle's car, watch and ring.¹¹²

The court concluded that defendant was "engaged in a series of similar acts done for the purpose of realizing a pecuniary benefit within the State of Florida or otherwise accomplishing an object and that service of process upon him under Fla. Stat. § 48.181, F.S.A., was proper."¹¹³ There are no reported cases dealing with jurisdictional fact of having "an office or agency in the state" under section 48.181(1), Florida Statutes.

The long-arm statute was expanded in 1957¹¹⁴ to include engaging in business by proxy. This alternative is frequently used in an attempt to show that nonresident corporate defendants engage in business in Florida through their closely related or even wholly owned subsidiaries. Even though the Florida subsidiary in *Hermetic Seal Corporation v. Savoy Electronics, Inc.*¹¹⁵ had interlocking officers and directors with the parent corporation which made several loans to the subsidiary, guaranteed some of its loans and filed a consolidated tax return, the court nevertheless maintained that the "mere existence of a parent-subsidary relationship" and even the fact of "owning the stock of a corporation"¹¹⁶ does not amount to doing business in the state on the part of the parent corporation. The holding was further supported by the facts that the subsidiary used its physical plant in Florida for which it paid rent to an independent lessor, maintained its own bank accounts, employed its own personnel, and was administered by its own board of directors who met and acted independently from the parent corporation's board. Admitting the possibility that the Florida subsidiary might be acting as a jobber or distributor through which the parent corporation sells its products in Florida, the court found no proof to support this conclusion. Finally, the attempt by the plaintiff to show that the subsidiary was but an alter ego or an instrumentality of the parent corporation also failed. Instead, the court found that the subsidiary "sets its own policies and operates its own business—a business which is foreign to the [parent's] oil business."¹¹⁷ The plaintiff in *Industrial Lubricants, Inc. v. Ceko Steel Products Corporation*,¹¹⁸ had even less of a chance to prove that the subsidiary was an alter ego of the parent. In that case, the relationship between the two

112. *Id.*

113. *Id.* For constitutional problems involved in one-act situations see *Everly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969); *Adams Dairy Co. v. National Dairy Prod. Corp.*, 293 F. Supp. 1135 (W.D. Mo. 1968); and note 68 *supra*.

114. See *Survey I*, at 283.

115. 290 F. Supp. 240 (S.D. Fla. 1967).

116. *Id.* at 243.

117. *Id.*

118. 214 So.2d 507 (Fla. 3d Dist. 1968).

corporations was only one of the buy-and-sell type, and the court held that such a relationship did not suffice to make a local corporation an agent of the dependent foreign corporation.

The interpretation of Florida Statutes section 48.181(3) was squarely before the court in *Donnelly v. Kellogg Company*.¹¹⁹ The plaintiff claimed damages for his wife's death in the crash of a plane owned by the defendant company, a foreign corporation. In view of the fact that the foreign defendant sold and distributed its products through the wholly owned Kellogg Sales Company, a Florida corporation, the court held that "it would be presumed that Kellogg Company was doing business in Florida"¹²⁰ under section 48.181(3). As it will be shown later, however, the requirement of connexite was lacking and the action was dismissed for this reason.

In addition to the jurisdiction-creating acts on the part of the defendant, Florida long-arm statutes in general, and those dealing with nonresident business in particular, require connexite in the sense that the cause of action must arise from or in connection with such acts. In *Sausman Diversified Investments*,¹²¹ the court not only found a lack of jurisdictional facts but also, illogically and unnecessarily, a lack of connexite. In contrast, in *Hermetic Seal Corporation*¹²² the court properly did not reach the question of connexity once it found that there were no jurisdiction-creating acts on the part of the corporate defendant. In *Curtiss-Wright Corporation v. King*,¹²³ the court sustained jurisdiction on the ground that service was had on a "business agent of the defendant, resident in the State" without considering the existence vel non of jurisdiction-creating acts. The defendant's insistence that there was no connexite was brushed aside by the statement that "there is nothing presented which would show that the cause of action did not arise out of the activity of the [defendant] in Florida,"¹²⁴ as if there were a presumption in favor of connexite.

As already indicated, the requirement of connexite does not apply to cases within the scope of the Simari Amendment.¹²⁵ The statute provides that a foreign corporation having "a business office within the state and . . . actually engaged in the transaction of business therefrom" is amenable to local jurisdiction without the necessity that such action "shall have arisen out of any transaction or operation connected with or incidental to the business being transacted within the state."¹²⁶ In the

119. 293 F. Supp. 53 (S.D. Fla. 1968).

120. *Id.* at 54.

121. 208 So.2d 873 (Fla. 3d Dist. 1968). See note 102 *supra* and accompanying text.

122. 290 F. Supp. 240 (S.D. Fla. 1967). See note 117-18 *supra* and accompanying text.

123. 207 So.2d 294 (Fla. 3d Dist. 1968).

124. *Id.* at 295.

125. FLA. STAT. § 48.081(5) (1967); *Survey III*, at 525.

126. *Id.*

previously mentioned *Donnelly* case,¹²⁷ the court felt it "necessary to consider the alternative method employed by the Plaintiff to obtain jurisdiction over Kellogg Company, under section 48.081, Florida Statutes."¹²⁸ The consideration of the Simari Amendment was misplaced, however, since at the time of the accident the Simari Amendment was not yet in force and, according to Florida law, jurisdictional statutes have no retroactive effect.¹²⁹

This invites a general discussion of interrelations between the jurisdiction-creating acts and the qualifications of persons who under the statutes may be served on behalf of the corporate defendant. These qualifications also use, in some instances, the activities within the state of the persons to be served as determinative factors.

In view of some recent opinions, it seems appropriate to bring the classroom into the law review. Historically, jurisdiction was—and is still being—perfected by service on the defendant found within the forum's territory (at least in actions in personam). Properly analyzed, such service contains two elements: 1) the jurisdiction-creating act, consisting of the court's adjudicatory power over the defendant for the purposes of the particular action; and 2) providing the defendant, in this case *uno actu*, with notice about the action coupled with an order to appear and defend. Once jurisdiction was expanded to include defendants not physically available to *capias*, the former unity of the act of service disintegrated into two phases: 1) the jurisdiction-creating acts on the part of the non or no longer present defendant; and 2) a need for notice to him about the action. Consequently, in these cases proper service does not perfect jurisdiction unless it is founded on the jurisdiction-creating acts on the part of the defendant. In the words of a recent case: "Effective service of process is first conditioned on the power of the court properly to acquire jurisdiction over a defendant."¹³⁰

The difference between these two phases of perfecting jurisdiction under the long-arm statutes is clearly visible in light of controlling constitutional standards. While standards with regard to jurisdiction follow the development from *International Shoe*¹³¹ to *McGee*¹³² to *Hanson*¹³³ and

127. *Donnelly v. Kellogg Co.*, 293 F. Supp. 53 (S.D. Fla. 1968). See notes 87-89 and accompanying text.

128. 293 F. Supp. at 55. The premise used by the court, however, that the "Fifth Circuit has recently considered the connexity requirement and the so-called Simari Amendment" in *Woodham v. Northwestern Steel & Wire Co.*, 390 F.2d 27, 29 (5th Cir. 1968), is untenable, since there the federal court sidestepped the requirement of connexity by using improperly, as will be shown later, the back door of Florida Statutes section 48.081.

129. *Cf. State ex rel. Riverside Bank v. Green*, 101 So.2d 805 (Fla. 1958).

130. *McNeely v. Clayton & Lambert Mfg. Co.*, 292 F. Supp. 232, 235 (D. Minn. 1968).

In addition to the requisite jurisdictional "basis", the second requirement for the exercise of in personam jurisdiction is that a reasonable method be used to notify a defendant of the proceedings and that he be given a reasonable opportunity to be heard.

Franklin National Bank v. Krakow, 295 F. Supp. 910, 919 (D.D.C. 1969).

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

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

133. *Hanson v. Denckla*, 357 U.S. 235 (1958); *Survey I*, at 281.

express a combination of minimum contacts, fair play, and substantive justice, the constitutional standards testing the adequacy of service, for the purpose of notice, require only a "reasonable method for apprising such an absent party of the proceedings against him,"¹³⁴ or, as expressed in a later opinion, notice must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."¹³⁵

A brief survey of pertinent statutory provisions also will show the differences between the jurisdiction-creating acts and the requirements on the part of persons qualified to accept service. Limiting examples to those involving corporate defendants, it is evident that service, according to Florida Statutes section 48.081(1)(a) to (c), may be had on top corporate officers, *i.e.*, president, vice-president, or other heads of the corporation; on the cashier, treasurer, secretary, or general manager; or on any director, irrespective of the nature or the purpose of their presence in the state on the assumption that, in view of their position of trust, they will forward the process to the proper corporate authorities. The statute exhibits a different attitude with regard to lesser officers or mere agents of the corporation. In these cases, their residence in the state is required or they must be "transacting business in this state" on behalf of the defendant. This activity must increase the probability that they communicate with the proper corporate officers.

With all this hornbook wisdom in mind, it is not difficult to discuss the interrelations between jurisdiction-creating acts on the part of the corporate defendant and qualifications required from some officers and agents when they are to be used as agents for service. The requirements imposed on agents for service do not replace or modify jurisdiction-creating acts required on the part of the corporate defendant. This basic principle was disregarded in *Woodham v. Northwestern Steel & Wire Co.*¹³⁶ The court bypassed section 47.16(1), the then valid Florida statute defining jurisdiction-creating activities, including connexite, by turning directly to the statute governing the second phase of perfecting jurisdiction, namely service. Not finding the requirement of connexite in the activity supposedly qualifying an agent for accepting service, the court held the service of process to be sufficient by itself. In so doing, the court relied on *H. Bell & Associates, Inc. v. Keasbey & Mattison Co.*¹³⁷ not only to distinguish it from *Zirin*¹³⁸ but also to hold that service in its notice-giving function was sufficient to perfect jurisdiction irrespective of the lack of required jurisdiction-creating acts on the part of the defendant. However, the reliance on *Bell* is misplaced not only in view of the analysis given above but also because it shows a lack of knowledge of Florida law. *Bell* was strongly criticized in subsequent

134. *Milliken v. Meyer*, 311 U.S. 457, 464 (1940).

135. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

136. 390 F.2d 27 (5th Cir. 1968).

137. 140 So.2d 125 (Fla. 3d Dist. 1962).

138. *Zirin v. Charles Pfizer & Co.*, 128 So.2d 594 (Fla. 1961).

decisions, and was expressly declined in *Illinois Central Railroad Co. v. Simari*.¹³⁹ In *Simari* the Florida Supreme Court was faced with service on the district manager of the foreign corporate defendant and had to determine the effects of service upon him according to section 47.17(5) of the Florida Statutes. The supreme court emphatically maintained the requirement of connexite as part of the jurisdiction-creating activity, adding that:

It is true that the *Zirin* decision dealt in terms only with Sec. 47.171, whereas the court below held that service herein was authorized by both that section and Sec. 47.17. However, the subparagraph (5) of Sec. 47.17, which is applicable here, contains the same language that was construed in *Zirin*; there is therefore no reason why the same condition should not apply to service attempted under Sec. 47.17.¹⁴⁰

The ruling in *Woodham*¹⁴¹ was followed in *Hoffman v. Air India*¹⁴² involving a claim arising from an airplane crash in France. Again, the court dispensed with the requirement of connexite in view of service on a business agent, resident of this state. The court did not strengthen its decision by concluding that "the Florida arm, short or long, is long enough to reach the one-third mile from the United States Courthouse, 300 N.E. First Avenue, Miami, to nearby 100 Biscayne Boulevard, North."¹⁴³ Alas, it is not a question of geography but one of law.

All this discussion is, at present, mostly of theoretical interest since the *Simari* Amendment¹⁴⁴ has—subsequently to both *Woodham* and *Hoffman*—dispensed with the requirement of connexity in regard to corporate defendants involved in jurisdictional acts that the amendment defines. In any case, the very existence of the amendment proves that the ruling in both federal cases is erroneous.

Other cases dealing with service correctly denied effect to the mere fact that service was performed according to former Florida Statutes section 47.17 without the concomitant jurisdiction-creating acts. As already reported, lack of connexite was fatal in the *Sausman*¹⁴⁵ case, as

139. 191 So.2d 427 (Fla. 1966); *Survey* II, at 504; *Survey* III, at 523.

140. *Id.* at 428. A federal court sitting in Florida found that "the statutory requirement that the cause of action arise out of or to be incidental to the foreign corporation's Florida activities has recently been re-affirmed by the Florida Supreme Court in three cases: *Zirin v. Charles Pfizer & Co.* . . .; *Illinois Central R. Co. v. Simari* . . .; and *Giannini Controls Corp. v. Eubanks* . . .," *Federal Ins. Co. v. Michigan Wheel Co.*, 267 F. Supp. 639, 640 (S.D. Fla. 1967), and added 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 on its long arm statute. This Court is bound by that choice.

141. *Woodham v. Northwestern Steel & Wire Co.*, 390 F.2d 27 (5th Cir. 1968).

142. 393 F.2d 507 (5th Cir. 1968), *cert. denied*, 393 U.S. 924 (1968).

143. *Id.* at 509.

144. FLA. STAT. § 48.081(5) (1967).

145. *Sausman Div. Invs., Inc. v. Cobbs Co.*, 208 So.2d 873 (Fla. 3d Dist. 1968).

was lack of jurisdictional acts in *Goffer v. Weston*.¹⁴⁶ In the previously mentioned case of *Donnelly v. Kellogg Company*,¹⁴⁷ service of the agent of the defendant's local subsidiary was held ineffective since both the subsidiary and the parent company acted as "independent, viable concerns." A similar question was before the federal court in *Hermetic Seal Corporation*.¹⁴⁸ There the court held that the existence of a mere parent-subsidiary relationship was insufficient to uphold service on the subsidiary as being effective against the parent corporation.

Persons qualified to accept service on behalf of the foreign corporate defendant are listed in section 48.081 of the Florida Statutes. They are amenable to service only in the descending order of the classes established there. It is well accepted that:

a return showing service upon an inferior officer or agent or a corporation, in order to bind the corporation, must show the absence of all officers of a superior class designated in the statute as those upon whom service shall be had, before resort is had to service upon one of the inferior class is a condition precedent to the validity of service upon a member of an inferior class.¹⁴⁹

Following this rule, the court in *Pentecostal Holiness Church, Inc. v. Mauney*¹⁵⁰ held service according to Florida Statutes section 48.081(2) to be valid since "there was sufficient evidence before the lower court from which it might reasonably be found that there were no members of any superior class to be served in the State of Florida at the time of service of process."¹⁵¹

The underlying ranking also appeared in the previously discussed *Woodham*¹⁵² opinion. The court correctly noticed that the old section 47.17(1) to (4) of the Florida Statutes "provides for service upon certain named corporate officers in descending order of management responsibility," adding that paragraph (4) "allows service to be made on a *resident* business agent if none of the corporate officials named in the preceding sections are present in the state."¹⁵³ However, it does not appear that such a finding was ever made.

In attempting to bring some order into the statutory chaos dealing with service, the second phase of perfecting jurisdiction over to non-

146. 217 So.2d 896 (Fla. 3d Dist. 1969).

147. 293 F. Supp. 53 (S.D. Fla. 1968).

148. 290 F. Supp. 240 (S.D. Fla. 1967).

149. *Largay Enterprises, Inc. v. Berman*, 61 So.2d 366 (Fla. 1962); *cf. Drew Lumber Co. v. Walter*, 45 Fla. 252, 34 So. 244 (1903).

150. 220 So.2d 25 (Fla. 4th Dist. 1969).

151. *Id.* at 26.

152. 390 F.2d 27 (5th Cir. 1968).

153. *Id.* at 29.

resident business through long-arm statutes,¹⁵⁴ the following dismal picture emerges:

(1) Process against *individuals* "not residing or having his or their principal place of business in this state" who engage in business, may be served "on the person who is in charge of any business in which the defendant is engaged within the state at the time of service, including agents soliciting orders for goods, wares, merchandise, or services" according to Florida Statutes section 48.071, on the secretary of state.¹⁵⁵

(2) *Partnerships* "not residing or having . . . their principal place of business in this state" may be served like individuals according to Florida Statutes section 48.071 quoted under (1). Another alternative, available in Florida Statutes section 48.181(1) is service on the secretary of state as agent of "co-partnerships or any other type of association, who are residents of any other state or country."

For foreign limited partnerships a special provision is available. They may be served according to section 622.04 of the Florida Statutes on "any general partner found in Florida;" in case "no general partner can be found in Florida, service of process may be effected upon the secretary of state as agent of said limited partnership as provided in § 48.181," whatever this reference may mean.

(3) *Foreign unincorporated associations* shall maintain "an office for the service of process" and appoint "a resident agent upon whom process may be served."¹⁵⁶ In addition, service may be had on the secretary of state according to section 48.181 of the Florida Statutes assuming that such association falls within the term of "any other type of association which is a resident of any other state or country." The latter alternative is not covered by Florida Statutes section 622.02.

(4) *Foreign corporations* which have not qualified to engage in local business may be served on the secretary of state according to section 48.181(1) of the Florida Statutes. A new paragraph, section (2), was added to this section in 1967 providing that "if a foreign corporation has a resident agent or officer in the state, process shall be served on the resident agent or officer." It would seem that this provision limits the availability of the secretary of state to situations where no such officers or agents are available for service.

A second alternative is offered in section 48.081 of the

154. Cf. *Survey III*, at 526, for an outline of jurisdiction-creating facts. It is self-evident that nonresident individual corporate officers and stockholders cannot be served through service on agents acting for local corporations. *Meiselman v. McKnight*, 226 So.2d 437 (Fla. 1st Dist. 1969).

155. FLA. STAT. §§ 48.161(1), 48.181 (1967).

156. FLA. STAT. § 622.04 (1967).

Florida Statutes. Agents for service of process are available in the descending order established by the statute.¹⁵⁷ Difficulties are bound to arise as to how to accommodate the new Florida Statutes section 48.181(a). A similar question will arise from section 48.081(3), providing that "as an alternative to all of the foregoing, process may be served on the agent designated by the corporation under § 48.091," an alternative not available against nonqualifying foreign corporations.

Third, the Simari Amendment¹⁵⁸ has introduced still another mode of service on corporations within the scope of the Amendment by providing that service may be had "upon any officer or business agent resident in the state." The statute adds, in language lacking clarity, that such service "may personally be made, pursuant to this section." There will also be questions regarding the relationship between this paragraph (5) and the provisions of paragraph (1). Finally, are all these provisions "cumulative to all existing laws" as provided in Florida Statutes section 48.22?

(5) *Unauthorized foreign insurance companies* and service on them is discussed in Chapter II § A(4) *infra*.

(6) There are additional service rules applicable to service on special types of *corporate defendants*, among them foreign building and loan associations,¹⁵⁹ nonprofit corporations (scholarship funds)¹⁶⁰ and agricultural cooperative marketing associations.¹⁶¹

4. UNAUTHORIZED FOREIGN INSURERS

Locally authorized "foreign or alien" insurers appoint the Commissioner of Insurance as their sole agent for service. The authority of the Commissioner is retained "as long as there is outstanding in this state any obligation or liability of the insurer resulting from its insurance transactions therein."¹⁶² Unauthorized insurers, however, as defined in section 624.09(2) of the Florida Statutes are amenable to local jurisdiction on the strength of jurisdiction-creating acts listed in Florida

157. FLA. STAT. § 48.081(1)(a) to (d) (1967). FLA. STAT. § 608.21, as amended in 1969, allows Florida corporations to merge or consolidate with corporations organized under the laws "of any other state, territory, possession or jurisdiction of the United States," provided their laws permit consolidation or merger, adding that such "agreement shall also contain such other facts as shall be required to be set forth in articles of incorporation by the laws of the jurisdiction which is stated therein to be the domicile of the consolidated or merged corporation and which can be stated in the case of consolidation or merger." *Cf.* *Damon Alarm Corp. v. American Dist. Tel. Co.*, 304 F. Supp. 83 (S.D.N.Y. 1969).

158. FLA. STAT. § 48.081(5) (1967), added a section dealing mainly with modes of service, thus being the only provisions also containing a rule establishing jurisdiction-creating facts.

159. *See* ch. II, § A(9) *infra*.

160. FLA. STAT. § 617.80 (1967).

161. FLA. STAT. § 618.26 (1967).

162. FLA. STAT. § 624.0221(1) (1967).

Statutes section 626.0505, including connexite, with service of process available according to section 626.0506, cumulative with other modes. No recent cases have been reported dealing with this kind of long-arm statute.

5. NONRESIDENT CHARITABLE ORGANIZATIONS AND SOLICITORS

Since the amendment was enacted in 1967,¹⁶³ no new developments have occurred.

6. NONRESIDENT PARTNERSHIPS

A brief outline of service provisions was already given. It may only be added that the amenability to the Florida courts of a New York limited partnership prior to the enactment of section 520.49 and paragraph (3) of section 48.061 of the Florida Statutes was litigated as a full faith and credit issue in New York.¹⁶⁴

7. FOREIGN LAND DEVELOPERS

The jurisdiction of Florida courts established in Florida Statutes section 478.27, enacted in 1967,¹⁶⁵ may be affected by interstate transactions falling within the scope of the Federal Interstate Land Sales Full Disclosure Act of 1968.¹⁶⁶ Section 1719 of the Act provides:

(a) The district courts of the United States . . . shall have jurisdiction of offenses and violations under this chapter and under rules and regulations prescribed by the Secretary, and concurrent with the state courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter.

In addition to venue provisions which follow, this section prohibits removal of cases from state to federal courts "except where the United States or any officer or employee of the United States in his official capacity is a party."¹⁶⁷

8. FOREIGN NONPROFIT CORPORATIONS

Even though section 617.11 of the Florida Statutes provides that corporations "incorporated under the laws of any other state or territory" may file with the Secretary of State a copy of their charter, the statute does not provide for service of process. In a recent action¹⁶⁸

163. See *Survey* III, at 528.

164. *Esser v. Cantor*, 55 Misc. 2d 235, 284 N.Y.S.2d 914 (Civ. Ct. 1967).

165. See *Survey* III, at 528.

166. 15 U.S.C. §§ 1701-20 (1969).

167. *Id.*

168. *Indian Lake Club v. Hainsworth*, 212 So.2d 915 (Fla. 2d Dist. 1968).

against a Florida nonprofit corporation some of its nonresident officers were served, apparently according to Florida Statutes section 48.181. The court held¹⁶⁹ that the nonresident "secretary-treasurer and directors of an association of owners of lots in Florida, the co-trustee of a fund for the benefit of its members, are all amenable to the jurisdiction of our courts in a controversy arising out of this matter."¹⁷⁰

9. FOREIGN SAVINGS AND LOAN ASSOCIATIONS

The 1969 legislature amended chapters 665, 666 and 667 of the Florida Statutes dealing with corporations which qualify as savings and loan associations. These foreign associations are defined in section 50(1) as

any person, firm, company, association, fiduciary, partnership or corporation, by whatever name called, actually engaged in the business of savings association, which is not organized under the provisions of this act or the laws of the United States, as now or hereafter amended, the principal business office of which is located outside the territorial limits of this state.¹⁷¹

In order to "do any business . . . within this state or maintain an office within this state for the purpose of doing such business," the foreign association must secure permission from the State Comptroller. There are certain activities which are not considered as doing business and they are listed in paragraph (4). In regard to jurisdiction and service paragraph (5) provides as follows:

Any foreign association or federal association described in subsection (4) which engages in any of the activities described in paragraph (a) thereof pursuant to the provisions of this section shall in any connection therewith be subject to suit in the courts of this state and the citizens of this state, and service on such association shall be effected by serving the secretary of state of this state, provided that the provisions of this section shall have no other application to the question of whether any foreign association or federal association is subject to service of process and suit in this state as a result of the transaction of business or other activities in this state.¹⁷²

It may be gleaned from this deplorable language that the actions under this section are available only to Florida citizens, that connexite is required, and that some kind of saving clause was attempted.

169. The court relied on the authority of State *ex rel.* Weber v. Register, 67 So.2d 619 (Fla. 1953).

170. Indian Lake Club v. Hainsworth, 212 So.2d 915, 916 (Fla. 2d Dist. 1968).

171. Fla. Laws 1969, ch. 69-39, § 50(1)-(2).

172. *Id.* at § 50(5).

10. FOREIGN DEALERS IN SECURITIES

Since the Uniform Sale of Securities Act¹⁷³ not only remained in force but takes precedence over the Uniform Commercial Code,¹⁷⁴ its provisions should be quoted. In regard to jurisdiction, section 517.25 of the Florida Statutes provides:

When not in conflict with the constitution or laws of the United States, the courts of this state have the same jurisdiction over civil suits instituted in connection with the sale or offer of securities under any laws of the United States as they have under similar circumstances under the laws of the state.

As to service, Florida Statutes section 517.10 provides that an issuer or registered dealer, as defined in Florida Statutes section 517.02(4) and (5), not domiciled in Florida, shall file an irrevocable written consent that:

in suits, proceedings and actions growing out of the violation of any provision of this chapter, the service on the chairman of the Securities Commission . . . of any notice, process or pleading therein, authorized by the laws of this state, shall be as valid and binding as if due service had been made on the issuer.

A venue provision is provided by Florida Statutes section 517.10(2).

B. *Jurisdiction In Rem and Quasi In Rem*

"As a general proposition, jurisdiction is either in rem, quasi in rem, or in personam. The former two are based on the location of property within the jurisdiction of the state while the latter is traditionally grounded upon personal service within the state."¹⁷⁵ Starting from here with this general proposition, the court in *Cooper v. Gibson*¹⁷⁶ tackled the problem posed by an action brought by county commissioners to enjoin the nonresident defendants from maintaining a junkyard in violation of a county zoning resolution. The court classified the remedy, available under Florida laws ch. 63-1716 as a personal one and not in rem, and held that the constructive service authorized in chapter 49 of the Florida Statutes was unavailable and personal service necessary. In so doing, the court distinguished *Vanstone v. Whitelaw*,¹⁷⁷ involving abatement of a nuisance. In the opinion of the court "it did not appear [in *Vanstone*] that no relief sought under the complaint could be granted on constructive service." The *Cooper* court added that the

173. FLA. STAT. § 517 (1967). Cf. *Southern Brewing Co. v. May*, 122 Fla. 443, 165 So. 627 (1936).

174. FLA. STAT. § 680.10-104(2) (1967).

175. *Cooper v. Gibson*, 208 So.2d 117, 118 (Fla. 4th Dist. 1968).

176. *Id.*

177. 196 So.2d 425 (Fla. 1967); *Survey III*, at 529.

court in *Vanstone* held that suit "could not be terminated merely because certain of the remedies requested might exceed the jurisdiction acquired through constructive service."¹⁷⁸ Further, the court concluded that "had [the] injunction been the only relief prayed for, constructive service would not have sufficed," and observed that the dissent in *Vanstone* differed from the majority only on the question of "whether or not the complaint did in fact seek nonpersonal relief and, if so, whether the fact permitted a wait-and-see approach to dismissal on jurisdictional grounds."¹⁷⁹

An action by a resident stockholder in a closely held Florida corporation against the other (nonresident) stockholder to determine the ownership of certain shares of stock was characterized in *Brown v. Blake*¹⁸⁰ as a suit quasi in rem, thus permitting substituted service under Florida Statutes section 48.01. The court simply held that such a suit "over agreements entered into in Florida as to the delicate balance of majority ownership of this Florida corporation"¹⁸¹ was a suit quasi in rem.¹⁸²

C. *Forum Non Conveniens*

Some of the fundamental considerations involved in the doctrine of forum non conveniens¹⁸³ were elaborated in *Adams v. Seaboard Coast Line Railroad Company*.¹⁸⁴ There the court distinguished between the primary ("ultimate") and secondary factors to be weighed by a court exercising discretion in using the doctrine. The primary factors restricting the applicability of the doctrine are that both parties to the action must be nonresidents and that the cause of action must arise outside of the state. Only if both circumstances are present may the court consider secondary grounds. Some of these secondary grounds are possible forum shopping, undue harassment of the defendant by use of a remote court, and convenience of parties and witnesses. In the present case the court found that the defendant, a Virginia corporation, maintained its official headquarters and principal place of business in Florida. In view of this fact the appellate court treated the defendant "as if it were a citizen of Florida"¹⁸⁵ and reversed the dismissal of the suit.

178. *Cooper v. Gibson*, 208 So.2d 117, 119 (Fla. 4th Dist. 1968).

179. *Id.*

180. 212 So.2d 47 (Fla. 1st Dist. 1968).

181. *Id.* at 49.

182. New prospects have been opened in *Farrell v. Piedmont Aviation, Inc.* 411 F.2d 812 (2d Cir. 1969), *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968); *Varady v. Margolis*, 303 F. Supp. 23 (S.D.N.Y. 1968), *Podolsky v. Devinney*, 281 F. Supp. 488 (S.D.N.Y. 1968); *Victor v. Lyon Asso's., Inc.*, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967); *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967); and *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

183. See *Survey III*, at 530.

184. 224 So.2d 797 (Fla. 1st Dist. 1969); cf. *Ganem v. Issa*, 225 So.2d 564 (Fla. 3d Dist. 1969).

185. 224 So.2d at 802.

Even though the plaintiff was a resident of Georgia and the cause of action arose outside of Florida, the court did not apply forum non conveniens because the election by the plaintiff of a Florida court did not constitute harassment or forum shopping.

In an action against the same corporate defendant, other factors ruled out the forum non conveniens doctrine. In *Bell v. Seaboard Coast R.R.*,¹⁸⁶ the court felt that the Florida Constitution guaranteed access to courts as did Florida's public policy in accordance with principles adopted by the United States Supreme Court. The court held that a Florida based corporation simply could not invoke the doctrine since it failed to demonstrate

sufficient expenses or inconvenience or harassment to outweigh the substantial right of the initial selection of venue [sic] that the federal and state laws accord to the plaintiff. Distance *per se* is not alone sufficient. The affidavits show that employees and affiliated physicians of the defendant may ride defendant's regularly scheduled trains, without additional cost to defendant, to any point where litigation may be brought against the defendant. Parenthetically, the court will note that no claim is made that this defendant is vexatiously exposed to the "wholesale importation" of actions similar to this, nor is there any claim that this particular case is not filed in good faith or is filed for ulterior reasons of any kind.¹⁸⁷

The operation of the doctrine on the international level was tested in *Faulkner v. S.A. Empresa de Viaco Airea Rio Grandense*.¹⁸⁸ The court of appeals affirmed dismissal of a tort action brought by nonresident administrators and next of kin against the air carrier and the manufacturer for damages arising from an accident in Peru. The court found that the plaintiffs, in addition to being nonresidents "had no contact with this country; they did not purchase their tickets here; their journeys were solely outside of the United States. . . ."¹⁸⁹ For these reasons the court found "no abuse of discretion in the trial judge dismissing the action upon the doctrine of forum non conveniens,"¹⁹⁰ noticing that the plaintiffs also had an identical action pending in the New York courts.

D. Access to Courts

Foreign corporate plaintiffs may be denied the right to appear in local courts as plaintiffs unless they qualify to engage in local business.

186. 31 Fla. Supp. 129 (Cir. Ct. 1968); *cf.* *Gentry v. Louisiana Power & Light Co.*, 27 Fla. Supp. 143 (Dade County Cir. Ct. 1966).

187. 31 Fla. Supp. 131 (Dade County Cir. Ct. 1968); *cf.* *Ganem v. Issa*, 225 So.2d 564 (Fla. 3d Dist. 1969).

188. 222 So.2d 805 (Fla. 3d Dist. 1969).

189. *Id.* at 806.

190. *Id.*

The access of foreign corporations to courts is regulated by Florida Statutes section 613.04.

The failure of any such foreign corporation to comply with the provisions of this chapter shall not affect the validity of any contract with such foreign corporation, but no action shall be maintained or recovery had in any of the courts of this state by any such corporation, or its successors or assigns, so long as such foreign corporation fails to comply with the provisions of this chapter.

This statute was discussed in three recent cases. In *Belair Associates v. Glaros-Carpenter Drug Co.*,¹⁹¹ a nonqualifying Pennsylvania corporation brought an action against a domestic corporation to recover the value of three acceptances for goods sold and delivered by a New Jersey corporation, the plaintiff's assignor. On the authority of *Rubin v. Kapell*,¹⁹² the court held that the prohibition contained in Florida Statutes section 613.04 does not apply for the following three reasons: first, the transaction was interstate in nature; second, the suit was for "debts due a foreign corporation for goods sold;"¹⁹³ and third, it was a single transaction. A corollary case is *Kar Products, Inc. v. Acker*¹⁹⁴ in which the fact that the cause of action did not arise from interstate commerce was decisive. The nonqualifying foreign corporation sought to enforce in the Florida courts an agreement not to compete. The suit was held to be barred by the statute and the fact that the cause of action did not arise from interstate commerce was decisive of the statute's application. In a carefully written opinion, reading constitutional limitations into the statute, the court found, first, that the claim did not involve an "action for goods sold in interstate commerce" which would prevent the "imposition of unreasonable conditions on such right, such as the requirement that the nonresident creditor qualify to do business in the state as a requisite to maintaining an action in the courts of the state," since this would operate as a "burden and restraint upon interstate commerce,"¹⁹⁵ The second question is whether or not the fact that the transaction involved is not interstate in nature will prevent the nonqualifying corporate plaintiff from maintaining this suit without first complying with requirements set out in chapter 613 of the Florida Statutes. The court answered in the negative on the ground that this statute does not preclude the plaintiff from seeking the adjudication of its rights in the court of his state, which is

191. 212 So.2d 903 (Fla. 2d Dist. 1968); cf. *Stafford-Higgins Indus. v. Gaytone Fabrics, Inc.*, 300 F. Supp. 65 (S.D.N.Y. 1969).

192. 105 So.2d 28 (Fla. 3d Dist. 1958); cf. *Overstreet v. Frederick B. Cooper Co.*, 134 So.2d 225 (Fla. 1961); *Schwartz v. Frango Co.*, 44 So.2d 292 (Fla. 1950).

193. *Belair Ass'n v. Glaros-Carpenter Drug Co.*, 212 So.2d 903, 905 (Fla. 2d Dist. 1968).

194. 217 So.2d 595 (Fla. 1st Dist. 1969); cf. *Frantz v. McBee Co.*, 77 So.2d 796 (Fla. 1955).

195. *Id.* at 597.

acquired under the Federal Constitution or laws in interstate commerce.¹⁹⁶ The third, and final question of whether the claim underlying the plaintiff's demand is one "acquired under the Federal Constitution or laws in interstate commerce,"¹⁹⁷ was answered in the negative¹⁹⁸ on the ground that the plaintiff who "seeks enforcement of a private right growing out of a contract of employment between it and the appellee resident of Jacksonville, Florida,"¹⁹⁹ cannot maintain the action "without first complying with the mandatory provisions of Florida Statutes Chapter 613, F.S.A."²⁰⁰

In *Tornado Southern, Inc. v. Harry's Auto Parts, Inc.*,²⁰¹ plaintiff was a foreign trustee in bankruptcy of a nonqualifying foreign corporation. The court held that the statute did not apply because:

The purpose and intent of the statute is penal in nature directed against foreign corporations doing business in this state without complying with the state law and the clause "or its successors or assigns" was to prevent an evasion of the statute by subterfuge, but such statute has no application to trustees in bankruptcy under the federal law. A trustee in bankruptcy under federal law acquires title to the bankrupt's estate by operation of law and the language of the statute "or its successors or assigns" is not comprehensive of trustees in bankruptcy in the federal system or vendees claiming through such a trustee.²⁰²

Nonqualifying foreign corporations may not only be deprived of access to courts; the statute also imposes penalties for unauthorized engagement in local business.²⁰³ There are statutory exceptions, however, which grant such foreign corporations the privilege to engage in certain carefully listed transactions with impunity.²⁰⁴ Nevertheless, such activities may bring the corporations within the scope of one or another type of long-arm statutes. It should be added that some or all of these limitations regarding access to courts by corporations established in other countries may have to yield to contrary treaty provisions.²⁰⁵

196. *Id.* at 598.

197. *Id.*

198. The court based its holding on *Eli Lilly & Co. v. Savy-On-Drugs, Inc.*, 366 U.S. 276 (1961).

199. *Kar Products, Inc. v. Acker*, 217 So.2d 595, 598 (Fla. 1st Dist. 1969); *cf. Kirkeby-Natus Corp. v. Campbell*, 210 So.2d 103 (La. 4th Cir. 1968); *Humboldt Foods, Inc. v. Massey*, 297 F. Supp. 236 (N.D. Miss. 1968); *Gates v. Green*, 214 So.2d 828 (Miss. 1968).

200. *Id.*

201. 222 So.2d 29 (Fla. 4th Dist. 1969); *cf. Waterman Bic-Pen Corp. v. Mancraft Exhibitors Service, Inc.*, 30 Fla. Supp. 110 (Dade County Civ. Ct. Rec. 1968).

202. *Id.* at 30.

203. FLA. STAT. § 48.091(5) (1967); FLA. STAT. § 613.11 (1967).

204. *E.g.*, Fla. Laws 1969, ch. 69-39 (savings & loan associations); FLA. STAT. § 659.57 (1967) (foreign banking corporations).

205. S. BAYITCH, *CONFLICT LAW IN UNITED STATES TREATIES* 29 (1955). *E.g.*, Convention of Establishment Between the United States of America and France, Nov. 25, 1959,

In some states, including an isolated provision in Florida,²⁰⁶ nonqualifying corporations may not enforce their locally concluded contracts. For the most part, however, such discrimination has been abolished.²⁰⁷

The access to courts by refugees under the Protocol Relating to the Status of Refugees²⁰⁸ is guaranteed:

(1) A refugee shall have free access to the courts of law on the territory of all Contracting States.

(2) A refugee shall enjoy in the Contracting States in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.

(3) A refugee shall be accorded in the matters referred to in paragraph 2 in the countries other than in which he has habitual residence the treatment granted to a national of his habitual residence.²⁰⁹

E. Federal Courts

The area of jurisdiction based on federal questions was recently expanded by two enactments. The Interstate Land Sales Full Disclosure Act has already been mentioned.²¹⁰ The other is the Consumer Credit Protection Act of 1968.²¹¹ Civil liabilities arising from the violation of consumer credit cost disclosure may be enforced against the creditor by an action for which concurrent federal-state jurisdiction is provided:

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year of the date of the occurrence of the violation.²¹²

Among cases dealing with federal question jurisdiction, *United*

11 U.S.I. 4398, T.I.A.S. No. 4625, signed at Paris provides in art. III that nationals and companies of either country "shall be accorded with respect to access to courts of justice . . . in all degrees of jurisdiction, both in pursuit and in defense of their rights. Companies of either High Contracting Party not engaged in activities within the territories of the High Contracting Party shall enjoy such access therein without any requirement of registration." The control-test admissible under art. XIII might affect "advantages of the present Convention, except with respect to recognition of juridical status and access to the courts."

206. FLA. STAT. § 617.11 (1967); FLA. STAT. § 626.0502 (1967) (unauthorized insurers), with exceptions in § 624.0201 and § 624.0202 (1967).

207. Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433 (1968); Note, *Sanctions for Failure to Comply with Corporate Qualifications Statutes: An Evaluation*, 63 COLUM. L. REV. 117 (1963); cf. *Stafford-Higgins Indus. v. Gaytone Fabrics, Inc.*, 300 F. Supp. 65 (S.D.N.Y. 1969).

208. [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577.

209. *Id.* art. 16.

210. See note 172 *supra*.

211. 15 U.S.C. § 1601-77 (1969).

212. *Id.* § 1640(e).

*States v. Ray*²¹³ may be mentioned. In that case, the United States enjoined imaginative developers from utilizing coral reefs situated on the continental shelf off the eastern Florida coast. The challenge to federal jurisdiction was met by the court's ruling that its jurisdiction was based on the fact that the action was brought by the United States,²¹⁴ that the controversy arose under the laws of the United States,²¹⁵ and that the Outer Continental Shelf Lands Act²¹⁶ granted federal district courts original jurisdiction over controversies arising out of or in connection with any operations on the outer continental shelf.

In diversity cases, federal courts

look to state law to determine a foreign corporation's amenability to suit within the state and thus in federal courts. A state may choose not to exercise its full constitutional power in this area and it may impose limitations beyond those of due process. A federal court in a diversity case must abide by these limitations.²¹⁷

Consequently, the amenability to suit under state law becomes the "threshold question to be decided by a federal court in a diversity suit."²¹⁸ By comparison, the sufficiency of service is to be determined by federal law.²¹⁹ Some cases of this type have already been discussed. Only a few dealing with other jurisdictional problems need be added. In *O'Donnell v. Dunspaugh-Dalton Foundation, Inc.*,²²⁰ the federal court held that it had no jurisdiction to impose a constructive trust upon the assets of the defendant, a charitable trust, which was created and was appointed a legatee by a will admitted to probate in a Florida state court. Similarly, a federal court in *Phoenix Insurance Company v. Harby Marina, Inc.*²²¹ declined to exercise jurisdiction in an action for

213. 294 F. Supp. 532 (S.D. Fla. 1969).

214. 28 U.S.C. § 1345 (1964).

215. 28 U.S.C. § 1331 (1964).

216. 43 U.S.C. § 1333(b) (1964).

217. *McNeely v. Clayton & Lambert Mfg. Co.*, 292 F. Supp. 232, 235 (D. Minn. 1968); *cf. Wilshire Oil Co. v. Riffe*, 409 F.2d 1277 (10th Cir. 1969).

218. *Id.* at 237. See Foster, *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in Federal Courts*, 47 F.R.D. 73 (1969).

219. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964); *Jennings v. McCall Corp.*, 320 F.2d 64 (8th Cir. 1963). *But see Harry Winston, Inc. v. Waldfogel*, 292 F. Supp. 473 (S.D.N.Y. 1968).

220. 391 F.2d 226 (5th Cir. 1968).

221. 294 F. Supp. 663 (N.D. Fla. 1969). For an action to remove cloud on title under the Swamp and Overflowed Lands Act, 43 U.S.C. § 982 (1964) dismissed for want of substantial federal question, *see Mays v. Kirk*, 414 F.2d 131 (5th Cir. 1969); *cf. Copeland v. First Fed. Sav. & Loan Ass'n*, 414 F.2d 274 (5th Cir. 1969). For an action dismissed for lack of jurisdiction in view of a final determination of a constitutional question submitted and decided by state courts, *see Brown v. Chastain*, 416 F.2d 1012 (5th Cir. 1969). *But see Machesky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969), where injunctive relief was granted against a state court for issuing injunction against picketing on the ground that the state injunction was overbroad.

declaratory judgment where the issue was being litigated in a Florida state court.

An interesting jurisdictional question in connection with removal arose in *Bobby Jones Garden Apartments, Inc. v. F.R. Suleski*.²²² The federal court was faced with a petition for removal of an action from a Florida state court. The defendant alleged that the foreign corporate defendant's local agent was fraudulently joined in order to prevent diversity. The court believed the crucial point to be the existence vel non of Florida law establishing the agent's liability for misrepresenting and therefore "tangential to removability and hence jurisdiction."²²³ Since, as a general proposition, there can be "no fraudulent joinder unless it is clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of the law,"²²⁴ the court ruled that:

This is an Erie problem in part, but only part. In the usual diversity situation a Federal Court, no matter how difficult the task, must ascertain (and then apply) what the state law is But here the question is whether there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved. If that possibility exists, a good faith assertion of such an expectancy in a state court is not a sham, is not colorable and is not fraudulent in fact or in law.²²⁵

Thus the court reached the crucial question of the existence of "a reasonably good chance that Florida today will hold the agent to some liability."²²⁶ In so doing the court followed "*Erie* lights, of significant, but not decisive, importance . . ." which it found "for a change, rather bright."²²⁷ After carefully exploring Florida law, the court found "a reasonable possibility . . . that plaintiff could persuade Florida Courts that he has a cause of action against the Agent"²²⁸ and denied removal, adding; "thus requiring remand the case ends as it began: A Florida suit involving Florida law to be determined by a Florida Court."²²⁹

F. *International Service of Process*

Two areas of international civil litigation remain particularly unsatisfactory: letters rogatory and service of judicial documents. In regard to the latter, improvements may be expected not only from domestic legislation, represented by the Uniform Interstate and International

222. 391 F.2d 172 (5th Cir. 1968); cf. *Atkins v. Schmutz mfg. Co.*, 401 F.2d 731 (4th Cir. 1968).

223. *Id.* at 174.

224. *Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962).

225. *Bobby Jones Garden Apts., Inc. v. Suleski*, 391 F.2d 172, 176 (5th Cir. 1968).

226. *Id.* at 177.

227. *Id.*

228. *Id.* at 178.

229. *Id.* at 179. Federal jurisdiction involving unconstitutionality of the Florida vagrancy statute, *Lazarus v. Faircloth*, 301 F. Supp. 266 (S.D. Fla. 1969).

Procedure Law²³⁰ but also from the multilateral Convention on Service Abroad of Judicial and Extrajudicial Documents (The Hague, 1965),²³¹ ratified by the United States and a rather disappointing number of other countries. In summary, the Convention applied to "civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."²³² Each contracting country designates a central authority to receive such requests.²³³ In this country, a declaration upon ratification of the treaty designates the United States Department of State as the receiver of these requests.²³⁴ This Authority will serve the document, or cause it to be served according to "its internal law for the service of documents in domestic actions, upon persons who are within its territory"²³⁵ or by a different method if it is not "incompatible with the law of the State addressed."²³⁶ Moreover, each contracting country is free to send documents through the mail or to "effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents,"²³⁷ provided that the other country has not declared itself opposed to such service and with the exception of service on a national of the country from which the document comes. If the country where service is to be performed does not object, judicial documents may be sent by mail or served by "judicial officers, officials or other competent persons of the State of destination."²³⁸ Any person "interested in a judicial proceeding" may effect service "directly through the judicial officers, officials or other competent persons of the State of destination."²³⁹ The country of destination may refuse to comply only "if it deems that compliance would infringe its sovereignty or security."²⁴⁰ It may not refuse, however, on the ground that "it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based."²⁴¹

230. Adopted in Arkansas, Michigan, Nebraska, Oklahoma and the Virgin Islands.

231. [1969] 20 U.S.T. 361, T.I.A.S. No. 6638. Downs, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 2 CORNELL INT'L L.J. 125 (1969). As of October 16, 1969, the Convention was adopted by the United Kingdom, United Arab Republic, Denmark, Norway, Sweden, Finland, Botswana, Barbados, and the United States (letter of the Netherlands Ministry of Foreign Affairs, October 16, 1969).

232. *Id.* art. 1.

233. *Id.* art. 2, para. 1.

234. A document entitled "Designations and Declarations Made on the Part of the United States in Connection with the Deposit of the United States Ratification." It is not referred to in the Presidential Proclamation nor has it any indication from what authority it originates.

235. Art. 5(a) [1969] 20 U.S.T. 361, T.I.A.S. No. 6638.

236. *Id.* art. 5(b).

237. *Id.* art. 8.

238. *Id.* art. 10(b).

239. *Id.* art. 10(c).

240. *Id.* art. 13, para. 1.

241. *Id.* art. 13, para. 2.

Unfortunately, the Convention went beyond its scope by reaching into matters of default judgments recovered pursuant to service under the Convention. On the basis of the declaration,²⁴² the second paragraph of article 15 applies in this country so that a judgment may be rendered, if the defendant did not appear, "even if no certificate of service has been received," provided

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.²⁴³

In any case, "the judge may order, in case of urgency, any provisional or protective measures."²⁴⁴ Whenever such judgment is entered against a defendant who has not appeared, the judge may not, according to the United States choice in the declaration, entertain an application "to relieve the defendant from the effects of the expiration of the time for appeal from the judgment"²⁴⁵ if such application is filed

(a) after the expiration of the period within which the same may be filed under the procedural rules of the court in which the judgment has been entered, or

(b) after the expiration of one year following the date of the judgment, whichever is later,²⁴⁶

provided

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

(b) the defendant has disclosed a prima facie defense to the action on the merits.²⁴⁷

III. FOREIGN JUDGMENTS

As stated in a recent case,²⁴⁸ "courts of one state within our federal system are bound to give full faith and credit to the judgments

242. See note 234 *supra*.

243. *Id.* art. 15, para. 2(a)-(c).

244. *Id.* art. 15, para. 3.

245. *Id.* art. 16, para. 1.

246. *Id.* Declaration, para. (4).

247. *Id.* art. 16, para. 1(a) and (b); except judgments concerning status or capacity of persons.

248. *Franklin Nat'l Bank v. Krakow*, 295 F. Supp. 910, 916 (D.D.C. 1969). For full faith and credit given to state judgments in federal courts see *First Am. Ins. Co. v. O'Connor*, 392 F.2d 588 (5th Cir. 1968).

of the courts of another," provided that the former court had "jurisdiction of the subject matter or of the parties in the constitutional sense." Therefore the clause "does not preclude an inquiry into the jurisdiction of the court which pronounced the judgment," even if the record "purports to show jurisdiction."²⁴⁹ What counts is that the judgment-rendering court has "properly claimed jurisdiction under its own law in accordance with constitutional due process;" the latter factor makes the "applicability and the effect of the full faith and credit clause . . . a matter to be determined as a matter of and according to federal law."²⁵⁰

Among cases requiring Florida courts to give full faith and credit to foreign judgments, the following are illustrative. In *Hecht Rubber Corporation v. Meckler*,²⁵¹ the court recognized a New York money judgment after rejecting the defendant's contention that the judgment was void because of lack of jurisdiction in New York and because the judgment was "tainted with fraud practiced by appellee upon the court in procuring the judgment."²⁵² The first defense was disposed of by finding that the New York court had jurisdiction under section 302(a), paragraph (1) of its Civil Practice Law.²⁵³ The second was rejected on the ground that the proceedings in New York were "free from the taint of fraud."²⁵⁴ In a contrary decision, *Barsotti v. Jaffe*,²⁵⁵ the Florida court reversed a summary judgment for plaintiff relying on a New York judgment for lack of jurisdiction in New York. The record, in the court's opinion failed to "demonstrate that a material fact—the validity of the alleged service upon the appellant—was not genuinely in issue."²⁵⁶ In another case,²⁵⁷ the court had to rule on the effect of a general release after judgment. The court held that in a case of defendants jointly and severally liable, a general release given one of them was full satisfaction of the judgment against the others. Finally, a New York judgment which confirmed an arbitration award requiring the liquidation of a Florida corporation was held to qualify for full faith and credit in *Mendelsund v. Southern-Aire Coats of Florida, Inc.*²⁵⁸

The fate of Florida judgments in other jurisdictions may be dem-

249. *Id.*

250. *Holm v. Shilensky*, 388 F.2d 54, 56 (2d Cir. 1968); *cf. Seaboard Coast Line R.R. v. Gulf Oil Corp.*, 409 F.2d 879 (5th Cir. 1969).

251. 208 So.2d 838 (Fla. 1st Dist. 1968); *cf. Seaboard Coast Line R.R. v. Gulf Oil Corp.*, 409 F.2d 879 (5th Cir. 1969); *Puro v. Puro*, 225 So.2d 462 (Fla. 3d Dist. 1969).

252. *Id.* at 839; *cf. Marotta v. Pittsburg*, 27 Fla. Supp. 125 (Broward County Cir. Ct. 1966).

253. *Id.*

254. *Id.* at 840; *cf. Horowitz v. United Investors Corp.*, 227 So.2d 719 (Fla. 3d Dist. 1969).

255. 216 So.2d 27 (Fla. 3d Dist. 1968).

256. *Id.* at 28.

257. *MovieLab, Inc. v. Davis*, 217 So.2d 890 (Fla. 3d Dist. 1969).

258. 210 So.2d 229 (Fla. 3d Dist. 1968), *cert. denied*, 225 So.2d 524 (Fla. 1969).

onstrated by *Esser v. Cantor*.²⁵⁹ In that case, a New York court gave full faith and credit to a Florida judgment against a limited partnership, organized under the laws of New York, brought into a Florida court under the general nonresident business statute. According to the evaluation of the statute's constitutionality, the New York court found that the "minimum contracts required by the Florida statute do not offend traditional notions of fair play and substantial justice,"²⁶⁰ and the defendant was "given adequate notice of the action and reasonable time to appear and defend."²⁶¹

IV. THE ERIE-KLAXON DOCTRINE

A. General Problems

Following the guiding light of *Erie*²⁶² and *Klaxon*,²⁶³ federal courts in diversity litigation get their bearings from the conflict law of the forum and then apply the statutory and decisional law of the jurisdiction so identified, domestic or foreign. Difficulties usually arise, however, on the second step of the process involving the applicable state law. On the one hand, federal courts are bound to apply, no matter how difficult the task, "state law as it is [and] not as we might wish that it were."²⁶⁴ On the other hand, there are situations where the controlling state law cannot be ascertained or is simply nonexistent. For example, in cases of first impression, federal judges, not being judges of the respective states, frequently feel inhibited to create decisional state law even if only for the case before them. "We [the federal judges] are compelled to follow existing law and not shunt it aside in favor of a rule which we might regard more just and flexible."²⁶⁵ Therefore, federal courts "bound as they are by state law, must await change, not initiate it," and accept and apply the existing state laws "with whatever shortcomings and contradictions they may possess."²⁶⁶ Their only consolation is to express a "visionary hope" that the respective state courts will "some day toll the knell of [the case's] parting day and grant it, at long last, a grateful demise."²⁶⁷

At most, a federal judge may attempt to second-guess his brother on the state bench. An "*Erie*-bound Court" may "make an educated

259. 55 Misc. 2d 235, 284 N.Y.S.2d 914 (Ct. Ct. 1967), *aff'd*, 55 Misc. 2d 720, 286 N.Y.S.2d 389 (1967).

260. *Id.* at 238, 284 N.Y.S.2d at 917.

261. *Id.* For full faith and credit given by Louisiana to a judgment rendered by a federal court sitting in Florida see *Collector of Revenue v. Tenneco Oil Co.*, 206 So.2d 302 (La. App. 1968).

262. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

263. *Klaxon Co. v. Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487 (1941).

264. *Sheppard Fed. Credit Union v. Palmer*, 408 F.2d 1369 (5th Cir. 1969).

265. *Bannowsky v. Krauser*, 294 F. Supp. 1204, 1205 (D. Colo. 1969).

266. *Mouton v. Sinclair Oil & Gas. Co.*, 410 F.2d 717, 725 (5th Cir. 1969).

267. *Id.*

guess as to what the Florida court would decide if this case were presented to them."²⁶⁸ In such a "perennial quandary of the *Erie* syndrome, viz., [where] the application of state law . . . is vague and uncertain, if not nonexistent," the court will "fall back on formulary surrogates to account for our mysterious application of an uncoined code."²⁶⁹ Where the applicable state law "eludes the researcher, the [federal] court must attempt to ascertain the policy inclination of the state's highest tribunal with regard to the matter in controversy. Failing that, the court may assume that the state courts would adopt the rule which, in its view, is supported by the thrust of logic and authority."²⁷⁰ In a similar vein, the same court of appeals ruled that whenever there are no Florida cases directly on point "we must decide this case as we believe the Florida courts would decide if confronted with these facts."²⁷¹

In any event, changes in state law should not be anticipated as justification for sidestepping state law in force in favor of a better rule. "It would be highly presumptuous for [a federal] court, sitting as a state trial court in a diversity suit, to anticipate this change."²⁷² Instead, the court's duty to "follow existing [state] law is . . . absolute and [one] which prohibits a change of existing conflicts rules in advance of action by the state courts," except maybe in a "particular instance [where] the evidence of change might justify a projection."²⁷³ A different question arises where a change in the controlling state law in fact occurred.²⁷⁴

Nevertheless, even in diversity cases, federal law may prevail, particularly in matters considered to be procedural. The rule that sufficiency of evidence for submission to the jury is controlled by federal and not state law was restated in *Vandercook and Son, Inc. v. Thorpe*²⁷⁵

268. *Trail Bldrs. Supply Co. v. Reagan*, 409 F.2d 1059, 1061 (5th Cir. 1969), *cert. of S. Ct. of Fla.*, 410 F.2d 763 (5th Cir. 1969).

269. *Stool v. J.C. Penney Co.* 404 F.2d 562, 563 (5th Cir. 1968).

270. *Id.* at 563. The court continued:

It is nevertheless patent that any rule which we vicariously adopt on behalf of the state courts will be substantially the product of conjecture. Accordingly, we are hesitant to attempt to second-guess the district court which has already ventured intrepidly into the phantom-law wonderland. Since our view of the state law is probably as much a guess as the district court's, the latter cannot be designated categorically as wrong. Ironically enough, however, the district court can be erroneous. We cannot accept the premise that one guess is as good as another, for that would effectively eliminate appellate review in a substantial portion of the cases which come before this court. When a federal court of appeals is of the opinion, as we are in this case, that the district court's view of the applicable state law is against the more cogent reasoning of this best and most widespread authority, it must reverse the judgment of the lower court.

271. *International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Serv.*, 400 F.2d 465, 467 (5th Cir. 1968).

272. *Bannowsky v. Krauser*, 294 F. Supp. 1204, 1205 (D. Colo. 1969).

273. *Id.* at 1205-206; *cf.* *Development Corp. of America v. United Bonding Ins. Co.*, 413 F.2d 823 (5th Cir. 1969).

274. *American Acceptance Corp. v. Schoenthaler*, 391 F.2d 64, 75 (5th Cir. 1968); *Tiernan v. Westtext Transp., Inc.*, 295 F. Supp. 1256, 1261 (D.R.I. 1969).

275. 395 F.2d 104 (5th Cir. 1968); *cf.* *Allstate Ins. Co. v. Winnemore*, 413 F.2d 858 (5th Cir. 1969).

and *Markham v. Holt*.²⁷⁶ The same rule prevailed in *Ricketson v. Seaboard Airline Railroad Co.*²⁷⁷ which ruled on removing the case from the jury.

A final question may be raised as to the precedent value of federal rulings in matters of state law. Generally, federal courts give such rulings the full effect of case law; so do state courts in many instances. This practice, however, is not unopposed.²⁷⁸

In *Erie*-bound cases, federal courts sitting in Florida apply Florida substantive law, frequently without express reference to the *Erie-Klaxon* doctrine. Such cases involve torts;²⁷⁹ contracts;²⁸⁰ insurance;²⁸¹ interest rates;²⁸² labor;²⁸³ surety arrangements;²⁸⁴ interests in land;²⁸⁵ nego-

276. 409 F.2d 542 (5th Cir. 1969); cf. *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969); *Vandercook & Son, Inc. v. Thorpe*, 395 F.2d 104 (5th Cir. 1968); *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841 (5th Cir. 1968); *Planters Mfg. Co. v. Protection Mut. Ins. Co.*, 380 F.2d 869 (5th Cir. 1967).

277. 403 F.2d 836 (5th Cir. 1968).

278. *Peterson v. U-Haul Co.*, 409 F.2d 1174, 1177 (8th Cir. 1969).

279. *Hester v. New Amsterdam Cas. Co.*, 412 F.2d 505 (4th Cir. 1969) (Florida law on frauds applied); *Green v. American Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969) (implied warranty for cigarettes); *Charleston Nat'l Bank v. Hennessy*, 404 F.2d 539 (5th Cir. 1968) (collision); *Southland Corp. v. Venere*, 404 F.2d 1011 (5th Cir. 1968) (*res ipsa loquitur*); *Aerosonic Corp. v. Trodyne Corp.*, 402 F.2d 223 (5th Cir. 1968) (unfair competition); *Caswell v. Manhattan Fire & Marine Ins. Co.*, 399 F.2d 417 (5th Cir. 1968) (libel); *Keating v. Jones Dev., Inc.*, 398 F.2d 1011 (5th Cir. 1968) (swimming pool); *Longbottom v. Swaby*, 397 F.2d 45 (5th Cir. 1968) (wrongful death statute); *Bobby Jones Garden Apts., Inc. v. F.R. Suleski*, 391 F.2d 172 (5th Cir. 1968) (misrepresentation); *Belli v. Orlando Daily News, Inc.*, 389 F.2d 579 (5th Cir. 1968) (libel) *Hertz Corp. v. Ralph M. Parsons Co.*, 292 F. Supp. 108 (M.D. Fla. 1968) (joint tort-feasors).

280. *Canada v. Allstate Ins. Co.*, 411 F.2d 517 (5th Cir. 1969) (commissions); *Hungerford Const. Co. v. Florida Citrus Expo., Inc.*, 410 F.2d 1229 (5th Cir. 1969) (liquidated damages); *Roger Lee, Inc. v. Trend Mills, Inc.*, 410 F.2d 928 (5th Cir. 1969); *Brick & Okaloosa Title & Abstract Co.*, 404 F.2d 889 (5th Cir. 1968) (abstractor's liability); *International Erectors, Inc. v. Wilhoit Steel Erectors & R. Serv.*, 400 F.2d 265 (5th Cir. 1968) (parol evidence); *Southern Bell Tel. & Tel. Co. v. Florida East Coast Ry. Co.*, 339 F.2d 854 (5th Cir. 1968) (contracts); *Center Chem. Co. v. Auril, Inc.*, 392 F.2d 289 (5th Cir. 1968) (contracts).

281. *Liberty Mut. Ins. Co. v. Davis*, 412 F.2d 475 (5th Cir. 1969); *Travelers Ins. Co. v. Davis*, 411 F.2d 244 (5th Cir. 1969); *Consolidated Systems, Inc. v. Allstate Ins. Co.*, 411 F.2d 157 (5th Cir. 1969); *Jefferson Realty v. Fidelity & Deposit*, 410 F.2d 847 (5th Cir. 1969); *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974 (5th Cir. 1969); *American Empire Ins. Co. v. Fidelity & Deposit Co.*, 408 F.2d 72 (5th Cir. 1969); *Battisti v. Continental Cas. Co.*, 406 F.2d 1318 (5th Cir. 1969); *Commercial Union Ins. Co. of New York v. Reichard*, 404 F.2d 868 (5th Cir. 1968); *American Nat'l Ins. Co. v. Motta*, 404 F.2d 167 (5th Cir. 1968); *Jones v. State Farm Mut. Auto. Ins. Co.*, 402 F.2d 65 (5th Cir. 1968); *Moore v. John Hancock Mut. Life Ins. Co.*, 398 F.2d 154 (5th Cir. 1968); *Wissner v. Metropolitan Life Ins. Co.*, 395 F.2d 204 (5th Cir. 1968); *Seward v. State Farm Mut. Auto. Ins. Co.*, 392 F.2d 723 (5th Cir. 1968); *Lumbermans Mut. Cas. Co. v. Renauart-Bailey-Cheely Lumber & Supply Co.*, 392 F.2d 556 (5th Cir. 1968); *Celanese, Coatings Co. v. American Motorist Ins. Co.*, 297 F. Supp. 598 (S.D. Fla. 1969); *Hershey v. Kennedy & Ely Ins., Inc.*, 294 F. Supp. 554 (S.D. Fla. 1967), *aff'd*, 405 F.2d 888; *Allstate Ins. Co. v. Mole*, 291 F. Supp. 489 (S.D. Fla. 1968).

282. *American Accept. Corp. v. Schoenthaler*, 391 F.2d 64 (5th Cir. 1968); *Kellogg Co. v. Aetna Cas. & Sur. Co.*, 282 F. Supp. 955 (S.D. Fla. 1968).

283. *Ferguson v. Seaboard Air Line R.R.*, 400 F.2d 473 (5th Cir. 1968).

284. *Continental Cas. Co. v. Westinghouse Elec. Supply Co.*, 403 F.2d 761 (5th Cir. 1968); *United States v. Skipper Smith's Marina, Inc.*, 283 F. Supp. 408 (S.D. Fla. 1968); *Florida v. Marvin*, 280 F. Supp. 1019 (S.D. Fla. 1967).

285. *Gregory v. Lloyd*, 284 Supp. 264 (N.D. Fla. 1968) (homestead).

tiable instruments;²⁸⁶ status of women;²⁸⁷ and landlord and tenant relationships.²⁸⁸

State law controls where federal statutes refer to it, *e.g.*, in the Federal Tort Claims Act.²⁸⁹ In other situations there may be an interplay between state and federal law when Florida law fills a gap in the federal law²⁹⁰ or is determinative of state-created interests.²⁹¹ There is, of course, an alternative open to federal courts when faced with difficulties in ascertaining state law—abstention with or without certification to state courts.

B. Abstention

The equitable doctrine of abstention enables federal courts in diversity as well as in nondiversity cases to abstain from exercising their adjudicatory function, either fully or partially. Only in rare cases do these courts abstain so completely as to dismiss an otherwise properly instituted action. In other cases, they may stay proceedings and send parties to the state courts in order to secure an authoritative ruling by state courts on points of state law. A federal court also may abdicate its law-finding function in favor of the state courts and initiate steps to obtain from courts an extra-procedural ruling on matters of state law. Such certification procedure is available in Florida under Section 25.031 of the Florida Statutes.²⁹²

Lately, the United States Supreme Court has further clarified some of the problems involved in abstention situations. In *Zwickler v. Koota*, involving the constitutionality of a New York criminal statute, the

286. *First Nat'l Bank v. Sogaard & Debo, Inc.*, 406 F.2d 1128 (5th Cir. 1969).

287. *Gaston v. Pittman*, 285 F. Supp. 645 (N.D. Fla. 1968) (Married Women Emancipation Act).

288. *Precisionware, Inc. v. Madison County Tobacco Whse., Inc.*, 411 F.2d 42 (5th Cir. 1969). A ruling by the State Comptroller "may sometimes constitute the only 'law' of the state . . . and we should follow it when, as here, it appears consistent with the policy of the state statute." *Dickinson v. First Nat'l Bank in Plant City, Plant City, Florida*, 400 F.2d 548, 558 (5th Cir. 1968), appeal pending 393 U.S. 1079 (1969). For dismissal in diversity litigation based on Florida law, *see Webb v. Standard Oil Co.*, 414 F.2d 320 (5th Cir. 1969); *Equity Capital Co. v. Sponder*, 414 F.2d 317 (5th Cir. 1969).

289. *Adams v. United States*, 411 F.2d 603 (5th Cir. 1969) (aerial spraying); *Emelwon, Inc. v. United States*, 391 F.2d 9 (5th Cir. 1968) (negligent spraying from air).

290. *Lehigh Valley Trust Co. v. Central Nat'l Bank*, 409 F.2d 989 (5th Cir. 1969) (violation of SEC rule); *York Corp. v. Brock*, 405 F.2d 759 (5th Cir. 1969) (reorganization); *Webb's City, Inc. v. Remington Arms Co.*, 404 F.2d 250 (5th Cir. 1968) (retailer's antitrust action); *Miami Parts & Spring, Inc. v. Champion Spark Plug Co.*, 402 F.2d 83 (5th Cir. 1968) (release in federal antitrust action); *United States Fid. & Guar. Co. v. Hendry Corp.*, 391 F.2d 13 (5th Cir. 1968) (Miller Act); *J.J. Henry Co. v. United States*, 411 F.2d 1246 (Ct. Cl. 1969) (classification of laborer).

291. *United States v. Gurley*, 415 F.2d 144 (5th Cir. 1969) (marital property interests); *Carver v. United States*, 412 F.2d 233 (Ct. Cl. 1969) (Florida corporation); *Willard v. Petruska*, 402 F.2d 756 (5th Cir. 1968) (liens); and *Huxford v. United States*, 299 F. Supp. 218 (N.D. Fla. 1969) (sale of timber).

292. *See Survey III*, at 537; *Mattis, Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717 (1969).

Court held that the better way to deal with such cases is to retain jurisdiction rather than to dismiss the case, repeating the principle that the "judge-made doctrine of abstention sanctions escape only in narrowly limited special circumstances."²⁹³ Nevertheless, the same Court preferred dismissal in *Provident Tradesmens Bank and Trust Co. v. Patterson*²⁹⁴ when the same issue of state law was simultaneously presented to a state court. In *Kaiser Steel Corp. v. W.S. Ranch Co.*,²⁹⁵ the Supreme Court, faced with the far-reaching issue of whether coal mining was a matter of public interest justifying the taking of land by eminent domain in order to secure water for mining operations, held that the court below should have stayed the proceedings and retained jurisdiction in view of the fact that the issue was a truly new one and an action for declaratory judgment was already pending in a New Mexico court. "Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource."²⁹⁶

Limiting the discussion to diversity cases, it may be pointed out that the difficulties in ascertaining the applicable state law may not be used as justification for denial of justice. Consequently, federal courts have, in regard to Florida law, two alternatives: to ascertain Florida law themselves or to certify the legal question to the Florida Supreme Court. As shown in a previous survey,²⁹⁷ courts have vacillated between both alternatives. The former appeals to their professional pride in being able to deal with such an esoteric matter as Florida law, while the latter suits pragmatic motives. Choice of the first alternative may be strengthened by hidden doubts as to the intrinsic value of advisory opinions on certified questions since they do not measure up to the standards required for binding stare decisis.

Generally, federal courts have found the Florida certification procedure effective and helpful. The court in *Martinez v. Rodriguez*²⁹⁸ extolled its virtues:

No matter how many Federal Judges, trial appellate, three-Judge panel, or the full panoply of the court en banc, any decision would have been an *Erie*-guess. Now the guesswork has been eliminated, and we are quickly presented with a definitive explication of Florida law.

There are, to be sure, purists who somehow feel that a struggle of uncertainty leading even to the likelihood of an erroneous but speedy result is better than the slight time it

293. 389 U.S. 241 (1967).

294. 390 U.S. 102 (1968).

295. 391 U.S. 593 (1968).

296. *Id.* at 594. For a recent discussion see *Urbano v. Board of Managers of New Jersey State Prison*, 415 F.2d 247 (3d Cir. 1969).

297. *Survey* III, at 539.

298. 410 F.2d 729 (5th Cir. 1969).

takes to get an authoritative answer. But so long as Florida is with us and has this responsive mechanism that not only lights our lights but keeps us straight at the same time, this tribunal is grateful for the substitution of certainty for the sometimes scholastic, always uncertain exploration into what local judges would say they would say the local law is.²⁹⁹

An equally favorable recognition was bestowed in *Hopkins v. Lockheed Aircraft Corp.*³⁰⁰ The federal court of appeals felt that even if the Florida Supreme Court was divided as to what the Florida law was and one opinion was superseded by another, the "value of this device is spectacularly demonstrated."³⁰¹ The opinion continues, "Florida's procedure gives a clear, positive, final decisive answer," which, in the mind of the court:

is not just a bright clear light showing the *Erie*-way, or a sign post pointing an *Erie* direction. Not only is it all of these things, it is much more. For it is what the law actually is on the precise point presented to us and certified for answer. It is Florida law binding on us as we perform our *Erie* role.³⁰²

A specially concurring judge, however, raises doubts as to the validity of the certification method and as to the "soundness of the enthusiastic and emphatic statements in the opinion."³⁰³ His reluctance is due to his realization that while the federal court has jurisdiction over the parties and the subject matter, the Florida Supreme Court has neither and, consequently, has "no power to make or enforce any adjudication of the controversy." The action of the Florida court, continues the same judge, was "not an adjudication, since only the Federal court could enter and enforce judgment. Hence, the action of the Florida court was not an exercise of judicial power," but only an "expression of an opinion on the law of Florida by judges well qualified to give an opinion," and as such not "res judicata in the cause or as a judicial decision entitled to acceptance under the rule of *stare decisis*."³⁰⁴

299. *Id.* at 730.

In the same vein, the dissenting judge in *W.S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 264 (10th Cir. 1967) wrote that "more damage is done to the states' jurisprudence and its policies by a headstrong, resolute, inflexible determination on the part of a federal court to barge ahead in a sort of ascetic, misguided *Winter Haven* [320 U.S. 228 (1943)] impulse, than will likely result from the slight delay occasioned by involving state adjudication of the controlling issues. For the simple fact is that more and more federal courts are being overruled by more state courts on local issues upon which such federal courts have undertaken to read the *Erie* signs in the quest of the *Winter Haven* grail And the experience in Florida demonstrates that state court reversals of Federal appellate decisions occur both in appeals of state cases and on Clay certification [363 U.S. (1960)] to the Supreme Court of Florida, the latter with some spectacular results. (footnotes omitted).

300. 394 F.2d 656 (5th Cir. 1968).

301. *Id.* See *Survey* III, at 544.

302. 394 F.2d at 657.

303. *Id.* at 658.

304. *Id.*

As already indicated, difficulties may arise in *Erie* situations where, during protracted litigations, state law not only changes, but the crucial issues shift, appearing more clearly or in a different perspective. This happened in *Green v. American Tobacco Co.*,³⁰⁵ pending since 1957, which involves a widow's claim for breach of implied warranty in the sale of defendant's cigarettes smoked by her late husband. Recently, the federal court of appeals reversed its prior decision³⁰⁶ to reverse the judgment for defendant by affirming en banc the lower court's decision³⁰⁷ on the opinion of the previously dissenting judges.³⁰⁸ As to the question certified to the Florida Supreme Court regarding Florida's tort law, the dissenting judges in the most recent decision felt that the question certified was "too limited, too restrictive, too narrow" and added that it remains a "mystery wrapped in an enigma why we did not recertify an appropriate question."³⁰⁹ They further insisted that Florida had "the right to determine for its ever increasing millions and for the millions of coveted perennial visitors whether a product that subjects one in ten to the terrible disease can ever be fit or wholesome, reasonably or otherwise," and rejected the idea that the "enlightened Supreme Court of Florida will tolerate a commercial system that sells with impunity ostensibly innocuous products, but which in fact have lethal consequences."³¹⁰ Therefore, Florida should be "given the opportunity to fashion its own policy standards through the available, workable mechanism of certification."³¹¹ Being one of the "pedagogical purists"³¹² this writer cannot help observing that as well meaning as these suggestions may be, the certification procedure is not a law-making or policy-determining device but merely a law-as-it-is declaring device, operating within strict statutory limits.

It is true that in most instances the certification procedure operates smoothly. After the Florida Supreme Court answered³¹³ that the Florida Death by Wrongful Act Statute does not apply to acts on Florida navigable waters, the federal court affirmed dismissal.³¹⁴ In *Martinez v. Rodriquez*,³¹⁵ the question involved a father's claim for the death of his minor son in view of the mother's contributory negligence. After the answer from the Florida Supreme Court,³¹⁶ the federal court again affirmed the ruling of the trial court.³¹⁷ It is indeed interesting that in

305. The most recent decision is 409 F.2d 1166 (5th Cir. 1969), with prior opinions listed in footnotes.

306. *Id.*

307. *Green v. American Tobacco Co.*, 391 F.2d 97 (5th Cir. 1968).

308. *Green v. American Tobacco Co.*, 154 So.2d 169 (Fla. 1963).

309. *Green v. American Tobacco Co.*, 409 F.2d 1166, 1169 (5th Cir. 1969).

310. *Id.* at 1170.

311. *Id.*

312. See *S.W. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 267 (10th Cir. 1968).

313. *Moragne v. State Marine Lines, Inc.*, 211 So.2d 161 (Fla. 1968).

314. *Moragne v. States Marine Lines, Inc.*, 409 F.2d 32 (5th Cir. 1969), *rev'd*, 90 S. Ct. 1772 (1970).

315. 394 F.2d 156 (5th Cir. 1968).

316. *Martinez v. Rodriquez*, 215 So.2d 305 (Fla. 1968).

317. *Martinez v. Rodriquez*, 410 F.2d 729 (5th Cir. 1969).

both cases the federal trial courts correctly ascertained Florida law. In *Gaston v. Pittman*,³¹⁸ the Florida Supreme Court answered in the affirmative the question of a divorced woman's right of action against her former husband for a tort committed by him prior to their marriage.³¹⁹ In another case,³²⁰ a question involving the Workmen's Compensation Act was certified. In a few cases certification was denied. This happened unfortunately in the *Woodham* case;³²¹ and, as already indicated, in *Green v. American Tobacco Co.*³²² the dissenting judges regretted that a second certification was omitted.

V. CHOICE OF LAW RULES

During the last decade significant changes have occurred in some areas of choice of law rules. Critical reappraisal of traditional maxims, initiated by writers on the cathedra or on the bench, resulted in welcome adjustments to the needs of a constantly changing society, particularly in the area of torts and contracts. In other areas, locally strong rumblings predict a spread of the reformation.

In Florida, however, prevailing judicial attitudes accompanied by legislative inertia still prefer the traditional over the new. The only significant changes are due to the conflict provisions of the Uniform Commercial Code³²³ adopted in 1965.

A. Torts

The disintegration of the time-honored *lex loci delicti*, initiated in *Haumschild v. Continental Casualty Co.*³²⁴ and spreading in earnest since *Kilberg v. Northeast Airlines, Inc.*³²⁵ and *Babcock v. Jackson*,³²⁶ continued at a more cautious pace once courts became aware of the side-effects of these cases. The overall situation is well presented in a recent case:

A majority of the states still adhere to the *lex loci delicti* rule. Several of those states have considered recently the question of whether to adopt the new principles advanced but have concluded to continue the *lex loci delicti* rule. Some have done so on

318. 405 F.2d 869 (5th Cir. 1969).

319. *Gaston v. Pittman*, 224 So.2d 326 (Fla. 1969).

320. *Trail Bldrs. Supply Co. v. Reagan*, 409 F.2d 1059 (5th Cir. 1969); *cert. of S. Ct. of Fla.*, *Trail Bldrs. Supply Co. v. Reagan*, 410 F.2d 763 (5th Cir. 1969).

321. *Woodham v. Northwestern Steel & Wire Co.*, 390 F.2d 27 (5th Cir. 1968).

322. 409 F.2d 1166, 1170 (5th Cir. 1969); *cert. of S. Ct. of Fla.*, 410 F.2d 763 (5th Cir. 1969).

323. See *Survey II*, at 498. Nordstrom, *Choice of Law and the Uniform Commercial Code*, 24 OHIO S.L.J. 364 (1963).

324. 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

325. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

326. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); see *Woodward v. Stewart*, — R.I. —, 243 A.2d 917 (1968) (on constitutional issues involved); cf. *Pooton v. Berutich*, 199 So.2d 139 (Fla. 2d Dist. 1967).

the basis of the rule of *stare decisis*. Others have stated that they were unwilling to change because they felt too many uncertainties existed at the time with reference to possible application of the proposed flexible rule. However, an increasing number of jurisdictions have abandoned the inflexible application of the rule of *lex loci delicti* in favor of a more flexible choice of law in tort cases. The majority of these cases have involved the application of host-guest statutes or the question of inter-spousal liability for injuries received in automobile accidents.³²⁷

The new, flexible methods of implementing general principles expressed in modern choice-of-laws rules are being rationalized by courts in different ways:

[M]any courts have abandoned mechanical rules and have instead selected the appropriate law by relying on forum policy, analyzing governmental interests, or determining which state has "the most significant relationship" with the litigated matter. Whatever the difficulties attendant upon such flexible approaches to choice of law, courts are at least free to make a reasoned choice among potentially applicable rules of decision.³²⁸

These needs for a reevaluation of the traditional rule have arisen mainly from two factors: the varied kinds of relationships and dangers arising out of modern transportation;³²⁹ and the lag in state statutory and decisional law, which in most instances has remained embarrassingly antiquated and parochial. From such a variety of substantive and conflicts tort rules a situation developed where the two factual forces in tort litigation clashed, namely the plaintiff striving for the law most favorable to him, and the defendant (and his insurer) for that which favors him. This leads to an unparalleled jockeying by the parties, both in regard to the selection of the forum and in their preference for the controlling choice-of-laws rules. Courts practically never touch upon this real aspect of the issue but prefer to retreat into more distant, rather abstract considerations involving the elusive idea of governmental interest or the difficult to obtain ideal of "most reasonable relationship." One thing seems certain—only a uniform nation-wide statute regulating liabilities arising from interstate and international transportation of people by the various means promises a fair solution.

Florida has—after some vacillation—remained true to the *lex loci delicti*, at least in *Kilberg* situations.³³⁰ Recently reported cases offered

327. *Kennedy v. Dixon*, 349 S.W.2d 173, 182 (Mo. 1969).

328. *Brendle v. General Tire & Rubber Co.*, 408 F.2d 116, 119 (4th Cir. 1968). It appears that some twenty jurisdictions have abandoned the strict *lex loci delicti* rule. Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202 (1969).

329. See *Survey III*, at 543.

330. *Kilberg v. Northeast Airline, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); see *Survey III*, at 545. For a case where the Florida guest statute [FLA. STAT.

no opportunity or temptation to join the ride on the new wave. An accident on board a Caribbean cruise ship was involved in *McGauley v. Eastern Steamship Lines, Inc.*,³³¹ however, the litigation did not progress beyond the question of liability of the steamship lines for the cruiseship.

Equally unproductive in the conflict sense was the federal case of *Time, Inc. v. McLaney*,³³² a libel action brought for *Time's* reporting on the influx of domestic gangsters into the Bahama Islands. Guided by the rule of *New York Times Co. v. Sullivan*³³³ and its progeny, the court found that the plaintiff, although he did not have any official position, had injected himself into the Bahamian election campaign and "thus lent a direct influence to the election of a national government for the country."³³⁴ Therefore, he was held to be a "proper subject of inquiry and public interest."³³⁵

The application of Florida or New York law regarding misrepresentation was at issue in a recent diversity case litigated in New York.³³⁶ The court adopted the conflict rule of the forum state, expressed in *Auten v. Auten*,³³⁷ and found the center of gravity to be located in New York for the following reasons:

The alleged misrepresentations were made and received both in Florida and New York. Insofar as the laws of each are regulatory rules aimed at preventing misrepresentation, both states would have equal interest in the matter. However, insofar as these laws are aimed at compensating persons who suffered injury because of reliance on misrepresentations, only New York is concerned with the resolution of this issue. Plaintiff is a New York corporation with its sole place of business in New York. Its assets are situated in or at least channeled through New York. The burden of any financial loss to plaintiff would, therefore, fall most heavily on New York. Florida has no comparable interest. The fact that defendant corporation is a Florida corporation is irrelevant to consideration of the consequences of its alleged misconduct. Thus, New York has "the greatest concern with the specific issue . . ." under consideration here.³³⁸

§ 320.59 (1967)] was applied to a claim arising from a car accident in Germany due to a stipulation, see *Kuklis v. Hancock*, 304 F. Supp. 336 (S.D. Fla. 1969).

331. 211 So.2d 72 (Fla. 4th Dist. 1968).

332. *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969).

333. 376 U.S. 254 (1964).

334. 406 F.2d at 573.

335. *Id. Cf. Holmes v. Curtiss Publishing Co.*, 303 F. Supp. 522 (D.S.C. 1969).

336. *Federated Capital Corp. v. Florida Capital Corp.*, 280 F. Supp. 301 (S.D.N.Y. 1968).

337. 308 N.Y. 155, 124 N.E.2d 99 (1954).

338. *Federated Capital Corp. v. Florida Capital Corp.*, 280 F. Supp. 301, 302 (S.D.N.Y. 1968).

B. Contracts

In transactions covered by the Uniform Commercial Code the *lex voluntatis* determines the applicable law, provided that the transaction "bears a reasonable relation to this state and also to another state or nation."³³⁹ In such instances parties may adopt as the controlling legal system the "law of this state or such other state or nation"³⁴⁰ except in situations listed in paragraph 2 (discussed later). If there is no choice of law by parties, "this code applies to transactions bearing an appropriate relation to this state."³⁴¹ There are no reported Florida cases dealing with these provisions.

In a pre-Uniform Commercial Code case,³⁴² the *lex voluntatis* was included in promissory notes with a *cognovit* clause attached. The court simply brushed aside the complex conflict issues involved on the ground that "there is neither any Florida nor Illinois authority directly in point, and we need not reach the conflict of laws in question."³⁴³ In another pre-Uniform Commercial Code case,³⁴⁴ the dissenting judge pointed out, apparently not contradicting the majority opinion in this respect,

The parties have stipulated that Florida law only is applicable in this case. The facts occurred in 1965, prior to the effective date of the Uniform Commercial Code, January 1, 1967. Therefore, the Uniform Trust Receipts Law (Ch. 673) and Motor Vehicle titling laws control.³⁴⁵

A third case giving effect to the parties' choice of the controlling law, in this instance the law of California, was *Seaboard Finance Co. v. Mutual Bankers Corp.*³⁴⁶ The action arose between two Delaware corporations and concerned the breach of warranty in a contract for the sale of majority stock holdings in a Florida corporation. The court noticed that article XVII(3) of the contract provided that California law shall govern the construction and enforcement of its provisions and applied California decisional law.

In the area of insurance contracts, sporadic cases involving Cuban claimants are still being litigated. In one case,³⁴⁷ the main issue turned

339. FLA. STAT. § 671.1-105(1) (1967). Weintraub, *Choice of Laws in Contracts*, 54 IOWA L. REV. 399 (1968).

340. *Id.*

341. *Id.*

342. *Vineberg v. Brunswick Corp.*, 391 F.2d 184 (5th Cir. 1968).

343. *Id.* at 186.

344. *Barnett First Nat'l Bank v. Custom Fin. Co.*, 210 So.2d 291 (Fla. 1st Dist. 1968).

See note 22 *supra*.

345. *Id.* at 295.

346. 223 So.2d 778 (Fla. 2d Dist. 1969).

347. *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir. 1968).

on the act of state doctrine. In *Confederation Life Association v. Vega y Arminan*,³⁴⁸ various aspects of international conflict law were involved. The claim was for the cash surrender value of an insurance contract entered into in Cuba between a Cuban resident and the defendant Canadian insurance company. The corporate defendant urged the application of the strict *lex loci contractus*, which would bring into operation present Cuban law. The court mentioned that there are four "most generally recognized" tests: grouping of contracts or center of gravity; the intent of parties; the place of contract; and the place of performance.³⁴⁹ Finding no authority which would specifically reject the other tests, the court stated that "the *lex loci contractus* is preferable."³⁵⁰ Thus the court laid the ground rule and turned to the particular nature of the claim itself. In this respect, it distinguished between the insurance contract and the "continuing, irrevocable offer of the company, which offer matures into a contractual obligation only upon its being accepted by the insured,"³⁵¹ namely the offer of the cash surrender value of the policy. Since the "acceptance by the insured of the company's offer was also the last act necessary to complete the contract, and it was performed in Florida,"³⁵² Cuba cannot be "the situs of this contract."³⁵³ The attempt by the defendant to bring into play the Bretton Woods Agreement was unsuccessful in view of the fact that Cuba had withdrawn from the International Monetary Fund.³⁵⁴ In concluding its opinion, the court turned also to the equitable nature of the action and observed that the result is equitable in view of the fact that the plaintiff "would have an absolute right to a meaningful recovery were it not for the revolution in Cuba," adding:

Applying the maxim that equity looks at the substance rather than the form of the transaction and since the primary purpose of this transaction is the payment of the cash surrender value of the policy after a period of twenty (20) years, and the provision being made in Havana is merely for the convenience of the parties, there is no equitable reason why the plaintiff should not recover.³⁵⁵

An issue involving interplay between Florida and Idaho law arose in *Rungee v. Allied Van Lines, Inc.*³⁵⁶ decided by the Idaho Supreme Court on the point of reasonable attorney's fees for the plaintiff. The plaintiff

348. 207 So.2d 33 (Fla. 3d Dist. 1968).

349. *Id.*; relying on *Brown v. Case*, 80 Fla. 703, 86 So. 684 (1920) which quotes from *Parry v. Lewis*, 6 Fla. 555, 685 (1856).

350. *Confederation Life Ass'n v. Vega y Arminan*, 207 So.2d 33, 36 (Fla. 3d Dist. 1968).

351. *Id.* at 37.

352. *Id.*

353. *Id.*

354. See Bayitch, *Florida and International Legal Developments: 1962-1963*, 18 U. MIAMI L. REV. 321, 348 (1963).

355. *Confederation Life Ass'n v. Vega y Arminan*, 207 So.2d 33, 38 (Fla. 3d Dist. 1958).

356. 449 P.2d 378 (Idaho 1968); cf. *Castellano v. Bader Bros. Van Lines, Inc.*, 225 So.2d 439 (Fla. 3d Dist. 1969).

moved from Florida to Idaho, shipping his household goods via the defendant carrier. The goods were damaged in transit by the carrier. The plaintiff's claim for damages was based on an insurance contract made with the carrier in Florida. The court sought the law controlling the attorney's fees by exploring the choice-of-law rules applicable to insurance contracts. Even though the contract was delivered in Florida, the court interpreted Idaho statutory provisions under the assumption that the Idaho legislature "could not have intended to exclude . . . the cases in which policies have been delivered outside of Idaho to persons who thereafter take up residence in Idaho and subsequently find it necessary to sue their insurers in Idaho courts."³⁵⁷ Then, probing the question of whether Idaho's statute allowing attorney's fees applied, the court decided that it had a choice between Florida and Idaho laws, both allowing such fees. Applying Florida law to grant attorney's fees was doubtful, however, since section 627.0127 of the Florida Statutes applies only to proceedings in Florida courts. The court dismissed using a procedural or substantive characterization to solve the problem. It relied instead on *Babcock*,³⁵⁸ *Kilberg*,³⁵⁹ *Clark*,³⁶⁰ *Casey*,³⁶¹ and *Reich*,³⁶² as well as the *Restatement Second*,³⁶³ and surveyed choice-influencing factors involved. The only fact in favor of applying Florida law was that the contract was negotiated and concluded in Florida, since even the plaintiff's Florida residence was abandoned due to his transfer. Contacts with Idaho were significant and many. Idaho appeared as the place of performance of the insurance contract since plaintiff would have to conduct his efforts to settle his claims there; the plaintiff also paid the costs of shipments there, including the additional insurance; goods had been shipped to Idaho; damage was discovered there; and plaintiff was a resident of Idaho at the time of the suit. The place where the damage to the goods occurred was held immaterial, as was the fact that the shipment crossed a number of state lines. In view of all this the court concluded that the law of Idaho applied and granted the attorney's fees. It supported this ruling by noting that federal law in the area of interstate carriers had not preempted the point in issue.

Two labor cases had foreign contacts: one involving Jamaican agricultural workers;³⁶⁴ the other an injunction against the picketing of a foreign vessel.³⁶⁵ In both cases Florida law was applied.

357. *Id.* at 381.

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

359. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

360. *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966).

361. *Casey v. Manson Constr. & Eng'r Co.*, 247 Ore. 274, 428 P.2d 898 (1967).

362. *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

363. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (Proposed Official Draft, 1968).

364. *Atkinson v. Florida Sugar Corp.*, 28 Fla. Supp. 135 (Dade County Cir. Ct. 1967).

365. *International Longshoremen's Ass'n v. Ariadne Ship Co.*, 215 So.2d 51 (Fla. 3d Dist. 1968).

Conflict rules governing sales contracts are now found among the general provisions of the Uniform Commercial Code.³⁶⁶ Two qualifying exceptions, however, must not be overlooked. One affects the rights of creditors against goods sold and provides:

A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after the sale or identification is not fraudulent.³⁶⁷

Pursuant to Florida Statutes, section 671.1-105(2) this provision may not be changed by the *lex voluntatis* unless such agreement is effective under the law of the situs of the goods, including its conflict rules, thus admitting renvoi.

The other exception affects bulk transfers. Except for instances listed in section 676.6-103 of the Florida Statutes, "all bulk transfers of goods located within this state are subject to this chapter,"³⁶⁸ *i.e.*, the Uniform Commercial Code. Consequently, it would seem that the *lex situs* imposed by this section may not be eliminated by parties' choice of law. However, in this instance the provision simply makes no sense, because it refers to a unilateral conflict rule limiting the scope of the substantive rules regulating bulk transfers, *i.e.*, goods situated within Florida. Of course, if one would prefer to interpret this provision in a facetious spirit, the startling conclusion might be reached that by applying the law of the situs (Florida), "including the conflict of laws rules," a complete circle would be closed and the originally qualified first paragraph of Florida Statutes section 671.1-106, including the *lex voluntatis*, would reappear on the scene.

In an action³⁶⁹ against the debtor and the surety, the question arose as to what law shall determine the application of payments received by the creditors. The court relied on Florida law on the strength of payments having been made there.

It may be added that the Uniform Commercial Code contains a conflict rule regarding a bank's liability, separate from the general conflict rules contained in section 671.1-106 of the Florida Statutes. The rule applies to actions or non actions in regard to items "handled by it [the bank] for purposes of presentment, payment or collection."³⁷⁰ The

366. FLA. STAT. § 671.1-105 (1967). "Appropriate relation" and "significant contract" have the same meaning, *Gen. Electric Credit Corp. v. Heintz Constr. Co.*, 302 F. Supp. 958 (D. Ore. 1969).

367. FLA. STAT. § 672.2-402(2) (1967).

368. FLA. STAT. § 676.6-102(4) (1967).

369. *Turner Prod. Co. v. Lake Shore Growers Coop. Ass'n*, 217 S.2d 856 (Fla. 4th Dist. 1969).

370. FLA. STAT. § 674.4-102(2) (1967).

liability of the bank is determined by the law of the place where it is located. If the liability-creating act occurred in a branch or separate office, "its liability is governed by the law of the place where the branch or separate office is located." In both cases the proviso of paragraph (2) of section 671.1-106 applied, namely that the law chosen by the parties will prevail only if its provisions are "permitted" by the law of the situs, including its conflict law, thus raising difficulties already indicated.

C. Negotiable Instruments

In *Banco de Honduras, S.A. v. Prenner*³⁷¹ two checks had been stopped to the disadvantage of the plaintiff. The court held that all signers of the checks, including those who did not sign in a representative capacity, even though they were members of what is termed in Honduran law an "irregular society," were liable for payment. However, the controlling Honduran law was, in the opinion of the court, lengthy and "without conceivable value as a Florida precedent,"³⁷² and therefore was not recited.

D. Property

1. REAL PROPERTY

The new Florida Constitution of 1968 guarantees, among other basic rights, the right "to acquire, possess and protect property."³⁷³ This guarantee is now qualified by the exception that the "ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law,"³⁷⁴ thus granting the legislature the authority to enact discriminatory legislation against aliens. However, the provision replacing a previously nondiscriminatory clause³⁷⁵ may become open to a successful attack on Federal Constitutional grounds. In any case, the criterion of eligibility for United States citizenship has become, due to statutory changes in the immigration and naturalization acts,³⁷⁶ a rather unwieldy device. Of course, treaties may supersede both the new constitutional authority and the legislation emanating from it. Among treaties in force,³⁷⁷ the Protocol Relating to the Status of Refugees³⁷⁸ may be mentioned. It accords to aliens within the scope of the Protocol a treatment

371. 211 So.2d 600 (Fla. 4th Dist. 1968).

372. *Id.*

373. FLA. CONST. Art. I, § 2 (1968).

374. *Id.*

375. Bayitch, *Aliens in Florida*, 12 U. MIAMI L. REV. 129, 145 (1958).

376. *Hughes v. Kerfoot*, 175 Kan. 181, 263 P.2d 226 (1953).

377. Bayitch, *Conflict Law in United States Treaties*, 9 MIAMI L.Q. 9 (1955).

378. Protocol Relating to the Status of Refugees, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577.

as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.³⁷⁹

This provision guarantees refugees treatment equal to that enjoyed by aliens generally and does not conflict with the constitutional change in Florida since the latter does not impose on aliens in the status of refugees a treatment less favorable than that granted to aliens generally.³⁸⁰

After a procedural skirmish reported in the previous Survey,³⁸¹ the matter of protection to be granted to substantive interests in the area of the continental shelf, located off the eastern coast of Florida was litigated in *United States v. Ray*.³⁸² The action was instituted by the government against a latter-day conquistador who planned to take possession of reefs off Florida, settle them with people and defend the new nation against all newcomers. This was to be done in alliance with four investors. On their part, the investors had more rewarding plans in mind: to utilize millions of dollars worth of newly created real estate, coupled with gambling, radio and television rights, stamps, banking in the Swiss mode and a government palace with a congress building. The government obtained a temporary injunction in 1965. In order to make the injunction permanent, the government relied on two counts: one in trespass and the other urging lack of a necessary permit on the part of the defendants. The government failed on the first count, the court holding that defendants' work on the continental shelf did not amount to *quare clausum fregit* in view of the fact that the plaintiff was "not in actual possession of these reefs, and since it apparently has not claimed their title."³⁸³ But it succeeded on the second count, lack of a permit required under the Rivers and Harbors Act of 1899³⁸⁴ which granted authority to the Secretary of the Army and was extended by the Outer Continental Shelf Land Act.³⁸⁵ In regard to defendants' claim of ownership by occupation, the court held that such claim was inconsistent not only with the latter Act but also with the Convention on the Continental Shelf.³⁸⁶ The court concluded that "whatever proprietary interests exist with respect to these reefs,

379. *Id.* art. 13.

380. *Survey* III, at 553-54.

381. FLA. CONST. Art. I, § 2 (1968).

382. 294 F. Supp. 532 (S.D. Fla. 1969); *aff'd* in part and *rev'd* in part under *United States v. Ray*, 423 F.2d 16 (5th Cir. 1970). The appellate court held that the United States has a personal property interest in the resources of the outer continental shelf sufficient to support an action against trespass thereto.

383. *Id.* at 541.

384. 33 U.S.C. § 403 (1964).

385. 43 U.S.C. § 1333(f) (1964).

386. April 29, 1968, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578 (effective June 10, 1964).

belong to the United States;" and although these interests may be limited, they are nevertheless the only interests recognized by the law.³⁸⁷

2. PERSONAL PROPERTY

Litigation involving chattels predominately involves motor vehicles moving in interstate commerce and subject to changing titles and liens. Except for two exceptions,³⁸⁸ there are no federal statutes covering conflict problems arising in personal property law. Thus the issues are determined by state conflict law and the resulting state substantive law. However, as a result of the practically nationwide adoption of the Uniform Commercial Code, its conflict provisions became the primary source with regard to security transactions.³⁸⁹

With respect to conflict rules, security transactions under the Uniform Commercial Code fall into two main classes. The first class includes transactions defined in section 679.9-102, paragraph (1)(a) and (b), and paragraphs (2) and (3). They are controlled by the Code provided that they concern "any property and fixture within the jurisdiction of this state," *i.e.* by the *lex situs* as long as it is within Florida. The other class are termed multiple transactions according to section 679.9-103 of the Florida Statutes and, depending on additional factors, are governed by the law of the state where the commercial records are kept, by the law at the chief place of business, by the law of the situs, or by the law of the jurisdiction which issued the certificate.³⁹⁰ However, Florida's law regarding motor vehicle title certificates in chapter 319 of the Florida Statutes was not repealed. On the contrary, it takes "precedence over any provision of this code which may be inconsistent or in conflict therewith."³⁹¹

How much these conflict rules may be affected by party choice of law is difficult to determine. As was mentioned before, the general conflict rule of the Uniform Commercial Code, giving effect to the *lex voluntatis*, is qualified by provisos contained in paragraph (2) of the same section, one of which refers to the "policy and scope of the chapter on secured transactions." This provision shall prevail so that "a contrary agreement is effective only to the extent permitted by the law (including

387. *United States v. Ray*, 294 F. Supp. 532, 542 (S.D. Fla. 1969). For action on a check as downpayment for a Georgia farm, see *Popwell v. Abel*, 226 So.2d 418 (Fla. 4th Dist. 1969); lease governed by the *lex situs*, *Americana Hotel, Inc. v. Zable*, 226 So.2d 272 (Fla. 3d Dist. 1969).

388. 49 U.S.C. § 313(d) (1964) (motor vehicles); 49 U.S.C. § 1401 (1964) (aircraft), see *Survey II*, at 532.

389. There are exceptions in Florida which will be discussed *infra*. See generally Weintraub, *Choice of Law in Secured Personal Property Transactions: the Impact of Art. 9 of the U.C.C.*, 68 MICH. L. REV. 683 (1970); Bayitch, *Aircraft Mortgage in the Western Hemisphere: Recent Developments*, 2 LAWYER OF THE AMERICAS 137, 152 (1970).

390. FLA. STAT. § 679.9-103(1)-(3); cf. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

391. FLA. STAT. § 680.10-104(2) (1967).

conflict of laws rules) so specified." Difficulties in reaching a reasonable interpretation of these provisions are discussed in this section (choice-of-law rules) topic B (contracts) *supra*.

The law in force prior to the adoption of the Uniform Commercial Code in Florida may be illustrated by four reported cases. In *Steingold v. L & L Motors, Inc.*,³⁹² the outcome depended on the effect to be given a Michigan decree dealing with the lien on the car. Even though the court found this decree not binding because of lack of privity, it nevertheless held that

the proceedings [in Michigan] by the lienor against the party holding possession for the plaintiff resulted in a declaratory ruling that there was outstanding a lien for the amount in excess of the price paid for the car by the plaintiff, and in the enforcement of the lien by an award of possession of the car to the lien claimant.³⁹³

Consequently, the plaintiff was entitled to judgment for the damages caused by breach of warranty of the title to the car. In *Gelfo v. General Motors Acceptance Corp.*,³⁹⁴ the prospective buyer of a car failed to check with the proper authority in New York as to whether there were any outstanding liens. Therefore, he was held to be in the position of "an ordinary purchaser of chattels covered by an outstanding retain-title contract, to wit, subject to all outstanding conditional sale contracts or prior liens."³⁹⁵ In *Brinkly v. Freedom National Bank*,³⁹⁶ a summary judgment in favor of the assignee of a conditional sales contract, recorded in New York, replevying the encumbered car was reversed for failure to show the nonexistence of material facts. The situation arose prior to the 1965 enactment of the statutory provision covering interests in motor vehicles.³⁹⁷ The case was solved on the authority of *City of Cars, Inc. v. General Motors Acceptance Corp.*,³⁹⁸ holding that a lien would not be enforced if the innocent purchaser made a proper and reasonable inquiry into the state of prior registration, and the inquiry failed to disclose the existence of a prior lien.

Finally, the Protocol Relating to the Status of Refugees³⁹⁹ provides in article 30:

(1) A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its country, to another country where they have been admitted for the purposes of resettlement.

392. 207 So.2d 19 (Fla. 3d Dist. 1968).

393. *Id.* at 20.

394. 206 So.2d 247 (Fla. 3d Dist. 1968).

395. *Id.* at 249.

396. 210 So.2d 465 (Fla. 4th Dist. 1968).

397. FLA. STAT. § 319.27(3) (1967); see *Survey II*, at 534.

398. 175 So.2d 63 (Fla. 2d Dist. 1965); *Survey II*, at 532.

399. See note 26 *supra*.

It is to be noted that this provision contains a full reservation in favor of local law.⁴⁰⁰ The following paragraph recommends that contracting states "give sympathetic consideration to the application of refugees" in regard to the transfer of assets "wherever they may be" and whatever is necessary for resettlement in a country where they have been admitted.

E. Family Law

1. MARRIAGE

Even though common-law marriages cannot be established in Florida any more,⁴⁰¹ such marriages will still be recognized provided the "present mutual consent" took place in Florida prior to the effective date of the 1967 amendment. Thus in 1969, a Delaware federal court in *Cook v. Carolina Freight Carriers Corp.*⁴⁰² recognized a Florida common-law marriage by finding that in 1962 Florida recognized common-law marriages as valid between parties who moved to Florida from a state which denied such recognition.⁴⁰³

In regard to refugees within the scope of the Protocol Relating to the Status of Refugees,⁴⁰⁴ their status shall be "governed by the law of the country of their domicile or, if he has no domicile, by the law of the country of his residence." Previously acquired status, particularly marriage, "shall be respected by the Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee."⁴⁰⁵

2. SEPARATE MAINTENANCE

The rule that separate maintenance is available only where there is a marital relation between parties in existence was decisive in *Brandt v. Brandt*.⁴⁰⁶ The action by the wife was unsuccessful since she was unable to prove that the Missouri divorce decree obtained by her husband on constructive service was faulty and constituted a fraud on the divorce court.

3. DIVORCE JURISDICTION

Florida's requirement of "residence" of at least six months⁴⁰⁷ was at issue in *Rosborough v. Rosborough*,⁴⁰⁸ where dismissal of the action

400. Bayitch, *Conflict Law in United States Treaties*, 9 *MIAMI L.Q.* 9 (1955).

401. See *Survey III*, at 553.

402. 299 F. Supp. 192 (D. Del. 1969).

403. *Navarro, Inc. v. Baker*, 54 So.2d 59 (Fla. 1951).

404. [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577.

405. *Id.* art. 12.

406. 217 So.2d 573 (Fla. 1st Dist. 1969).

407. FLA. STAT. § 61.021 (1967).

408. 208 So.2d 470 (Fla. 1st Dist. 1968).

against the nonresident wife was affirmed on the basis that the alleged residence was not proven by a preponderance of evidence. Similarly, a New York court found a Florida divorce decree to be invalid due to lack of a bona fide domicile on the part of the plaintiff.⁴⁰⁹ In *Rosenstiel v. Rosenstiel*,⁴¹⁰ the fact that a Florida divorce decree was obtained by the defendant husband five hours prior to an order issued by a federal court in New York restraining the husband from prosecuting his Florida divorce action saved him from possible contempt of court. The action, brought in New York by the wife, demanded a declaratory judgment regarding her rights under an ante-nuptial agreement and other remedies. The federal court accepted jurisdiction over the declaratory part but denied other relief against the defendant, now a Florida resident. In addition to the time element, the federal court believed that the plaintiff's motion to enjoin the defendant was, in fact, an effort to enjoin the Florida divorce court from proceeding in the same action, which would constitute a measure barred under section 2283 of the Judiciary Act.⁴¹¹

4. FOREIGN DIVORCE DECREES

Opposing the wife's claim for arrears based on an Indiana divorce decree, the defendant husband in *Harrington v. Harrington*⁴¹² urged that the decree incorporating a property settlement should not be given full faith and credit in Florida on the ground that the Indiana divorce court still had the power to cancel the arrears or to modify the decree retrospectively. The Florida court found, however, that the Indiana court only retained jurisdiction to "enforce the obligations of the parties under the separation agreement, which obligations the parties are directed to perform,"⁴¹³ which does not amount, expressly or impliedly, to the power to cancel or modify. The divisible nature of divorce decrees was decisive in *Orlowitz v. Orlowitz*.⁴¹⁴ The Florida court, faced with a Pennsylvania "ex parte" decree, restated the rule that "a divorce proceeding has two separate aspects, *i.e.*, that relating to the marriage and that relating to the personal property rights and obligations of the parties," adding that "while domicile of the plaintiff alone is sufficient for determination of the former, personal jurisdiction is required for the latter."⁴¹⁵ Consequently, the court held that a collateral attack on the validity of the foreign decree regarding property rights prevents the establishments of this part of the decree as a local decree.

A defense of *res judicata* and estoppel, based on a New Jersey

409. *Krieger v. Krieger*, 29 App. Div. 2d 43, 285 N.Y.S.2d 811 (1967).

410. 278 F. Supp. 794 (S.D.N.Y. 1967).

411. 28 U.S.C. § 2283 (1964).

412. 213 So.2d 744 (Fla. 1st Dist. 1968).

413. *Id.* at 746.

414. 208 So.2d 849 (Fla. 3d Dist. 1967).

415. *Id.* at 951.

separate maintenance decree, was advanced in *Aufseher v. Aufseher*,⁴¹⁶ a divorce action brought by the husband on the grounds of extreme cruelty and desertion. The wife's defense was held to be untimely since it was raised only on appeal.

5. ALIMONY

The power of a Florida court regarding an extrajudicial separation agreement including alimony, entered into in Ohio, was the subject of litigation in *Cordrey v. Cordrey*.⁴¹⁷ Even though the wife subsequently obtained a Pennsylvania divorce decree which made no mention of the previous agreement, the Florida court, relying on section 63.15 of the Florida Statutes, held that it had the "power and duty to review and adjudicate the reasonableness and fairness"⁴¹⁸ of the separation agreement, provided that there are two grounds to do so: either the "circumstances of the parties have been changed since the execution of such agreement or the financial ability of the husband shall have changed since the execution of such agreement."⁴¹⁹ Since there was overwhelming evidence of a change in circumstances of the parties, the court reviewed the agreement and declared it unfair.

Claims based on a Florida separate maintenance decree were pressed against the husband in the federal court in Alabama in *Maner v. Maner*.⁴²⁰ While the court was willing to enforce the Florida decree as to accrued arrears, it denied full faith and credit to future installments on the ground that they were not final and, under Florida law, may be modified as circumstances require. Even though the Alabama courts may, as a matter of comity, enforce future installments, the federal court "sitting in effect as an Alabama court in a diversity case"⁴²¹ felt bound by what it called Alabama law. In a subsequent action affirmed on appeal the plaintiff again succeeded despite the defendant's insistence that the judgment was still on appeal, that separate maintenance awards are inherently not final and therefore unenforceable under the full faith and credit clause, and that the defendant was not personally served with process in the proceedings instituted by the plaintiff in Florida to reduce the arrears to judgment.⁴²² In respect to the first defense, the court held that according to Florida law maintenance arrears are enforceable although appeal

416. 217 So.2d 868 (Fla. 3d Dist. 1969).

417. 206 So.2d 234 (Fla. 2d Dist. 1968).

418. *Id.* at 239.

419. *Id.* For an example of garnishment of salary against a "head of a family residing in this state" under FLA. STAT. §§ 61.12 and 222.11 (1967) to enforce a private agreement entered into in Georgia and reduced to judgment in Florida, see *Healey v. Toolan*, 227 So.2d 55 (Fla. 4th Dist. 1969); La Grone, *Recovery of a Florida Judgment by Garnishing Wages of the Head of a Family*, 17 U. FLA. L. REV. 196 (1964).

420. 401 F.2d 616 (5th Cir. 1968). The prior litigation is found in *Maner v. Maner*, 279 Ala. 652, 189 So.2d 336 (1966), and *Maner v. Maner*, 302 F. Supp. 894 (M.D. Ala. 1968).

421. 401 F.2d at 618.

422. *Maner v. Maner*, 412 F.2d 449 (5th Cir. 1969).

was pending unless the defendant posts a supersedeas bond, which was not the case here. Since the arrears involved had been reduced to judgment in Florida and as such entitled to full faith and credit, the court found it unnecessary

to determine the question it begged: whether, under Florida law, accrued installment payments are subject to such retroactive modification as would vitiate a foreign suit on the judgment. Although we note that Florida courts generally hold that separate maintenance payments are vested rights not subject to modification [*e.g.*, *English v. English*, 117 So.2d 559 (Fla. 3d Dist. 1960); *Goff v. Goff*, 151 So.2d 294 (Fla. 3d Dist. 1963)], we also find it unnecessary to determine this elusive question of Florida law since [plaintiff] has reduced the accrued payments to a judgment for a sum certain.⁴²³

Finding no substantial support in statute or case law for the second proposition that a Florida court can modify such a judgment, it held that the judgment was final and entitled to full faith and credit. Finally, regarding personal service in this action, the court found that the defendant was apprised of the proceedings and was therein represented by a retained counsel, and added:

Under Florida law, enforcement of alimony decrees can be had on "reasonable notice which affords an opportunity to be heard." *Kosch v. Kosch*, 113 So.2d 547, 550 (Fla. 1959). We hold that the arrearage judgments . . . do not offend Florida's doctrine of fair notice. *Id. accord*: *Prensky v. Prensky*, 146 So.2d 604, 605 (Fla. 3d Dist. 1962); *Arrington v. Brown*, 116 So.2d 461, 462 (Fla. 3d Dist. 1959).⁴²⁴

6. CUSTODY

The jurisdictional issue was raised in *Rich v. Rich*,⁴²⁵ an action by the resident mother against the nonresident father involving custody of their nonresident children. The appellate court considered such matter to be "in the nature of an in rem action," and held that the court "within whose territorial jurisdiction the children reside has jurisdiction to adjudicate an issue of custody even though a parent resides in another state."⁴²⁶ The court admitted that in a custody case constructive service of process on one of the nonresident parents "should be sufficient to accord him the process of law."⁴²⁷ However, in *Rich*, it was not the mode of service on the nonresident father but rather the absence of the children

423. *Id.* at 451.

424. *Id.* at 452.

425. 214 So.2d 777 (Fla. 4th Dist. 1968).

426. *Id.* at 779.

427. *Id.*

from the territorial jurisdiction of the court that made the disposition of the lower court reversible.

A similar jurisdictional issue was presented in *Nieburger v. Nieburger*.⁴²⁸ Suing for divorce, the minor's mother asked for the return of the child who was living with his aunt in New Mexico. Her motion was denied on the authority of *Smith v. Davis*,⁴²⁹ which held that "courts have no jurisdiction to initially adjudicate the custody of a minor child unless such child is physically present within the territorial jurisdiction of the court at the time the suit seeking adjudication is filed."⁴³⁰ This rule prevails even when "personal service of process is had upon the defendant who had the custody of the child in a foreign jurisdiction."⁴³¹

A custodial arrangement, included in a Tennessee divorce decree, may be modified in Florida only if the petitioner is able to prove that there has been "a material change in conditions since the decree, or that there were material facts bearing on the question of custody that were unknown to the Tennessee court at the time it entered the decree," provided that such change is in the "best interest of the children."⁴³²

7. MARITAL PROPERTY

The wife's interest in a Maryland farm was at issue in *Fuller v. Fuller*.⁴³³ When the spouses ended their separation and agreed to a marital reconciliation, the husband deeded to the wife his interest in the farm, until then held by the spouses as tenants by the entirety. After the parties moved to Florida, apparently some time prior to March 1966, they executed a note to a local bank with the understanding that this would be paid from the proceeds of the Maryland farm. The subsequent litigation involved the remainder of the proceeds from the farm after payment of the debt. The lower court ordered it divided equally between the parties. The appellate court reversed, declaring the wife to be the sole owner. The method that the court used in solving the conflict issues involved is difficult to understand. It found that the farm was located in Maryland and that the agreement of reconciliation was reached when both parties still resided there. Nevertheless, the only reference to Maryland as the *lex situs* is the statement that the "validity and enforceability of a reconciliation contract has been upheld in Maryland."⁴³⁴ From this point on, Florida law was applied. The court found that the transaction was a contract rather than a gift and held that the presumption in favor

428. 214 So.2d 382 (Fla. 1st Dist. 1968).

429. 147 So.2d 177 (Fla. 1st Dist. 1962).

430. *Nieburger v. Nieburger*, 214 So.2d 382, 383 (Fla. 1st Dist. 1968).

431. *Id.*

432. *Brownlow v. Earthman*, 220 So.2d 28, 29 (Fla. 4th Dist. 1969).

433. 215 So.2d 507 (Fla. 4th Dist. 1968).

434. *Id.* at 509.

of a gift was not overcome.⁴³⁵ The court did not explain why Florida law prevailed.

F. Decedent's Estates

Among the conflict problems pertaining to assets left by the deceased and claims under the will and the laws of descent and distribution, problems of probate and administration are not only the most frequent but also the most diffuse. In two recent Florida cases some of the fundamental rules have been restated.

The probate of a will is a "judicial proceeding to establish the legal status of the purported will and to furnish the means of establishing by record evidence the validity of rights existing thereunder," and as such it is considered a "proceeding in rem."⁴³⁶ In regard to conflict problems, the following rules prevail:

Probate of a will must be made primarily at the domicile of the decedent, the will being governed by that law. Probate there is binding on all questions as to the legality of the will with regard to personal estate elsewhere, but not on the existence of domicile there, if it is disputed in another court by anyone not a party to the prior proceedings, for the question of domicile being jurisdictional so far as establishing the validity of the will outside the state of domicile is concerned, that cannot be established if the domicile is disputed.⁴³⁷

Further conflict considerations are stated in *Biederman v. Cheatham*:⁴³⁸

As between different states or nations, jurisdiction to admit to probate the will of a decedent depends upon his domicile at the time of his death or upon the location of his property at that time, or both.⁴³⁹

In *Curtiss v. McCall*,⁴⁴⁰ the decedent died in Santa Rosa County, Florida and was buried there. An administrator was appointed by a Georgia court. At the request of the Georgia administrator, ancillary letters of administration were issued to the petitioner in Florida. Thereafter, the Florida court issued domiciliary letter of administration to respondent. The ancillary administrator applied for a writ of prohibition to prevent the Florida court from proceeding to probate the estate. The ancillary administrator relied on the following grounds: 1) the Florida court lacked jurisdiction since the Georgia court was "vested with

435. *Id.* at 510.

436. *Biederman v. Cheatham*, 161 So.2d 538, 541 (Fla. 2d Dist. 1964), *cert. denied*, 168 So.2d 146 (Fla. 1965).

437. *Lowenthal v. Mandell*, 125 Fla. 685, 698, 170 So. 169, 173 (1936); *cf.* *Nelson v. Miller*, 201 F.2d 277 (9th Cir. 1952); *Nelson v. Miller*, 160 Fla. 410, 35 So.2d 288 (1948).

438. 161 So.2d 538 (Fla. 2d Dist. 1964).

439. *Id.* at 541.

440. 224 So.2d 354 (Fla. 1st Dist. 1969).

priority of jurisdiction;" 2) the Florida court was, in effect, "entertaining an unlawful collateral attack;" and 3) the Florida court was "embarrassing and hindering the ancillary administration" granted by the Georgia court.⁴⁴¹ The appellate court denied the writ of prohibition in view of the following facts: the deceased died a resident of Santa Rosa County; the administrator with Florida domiciliary letters represented decedent's brother, the only known heir; the decedent had property in the county; the decedent's funeral bill "was before the court;" the decedent's debts and expenses incurred in the same county exceeded the value of assets located there; and the decedent was buried in a Florida county.⁴⁴² The court based its holding on the rule granting jurisdiction to the domicile at the time of death and the place wherein property was located. It ruled that the Georgia court's issuance of letters of administration to the ancillary administrator did not conclusively establish that the court had adjudicated its jurisdiction but was only prima facie evidence of an adjudication. The full faith and credit clause did not preclude a court in another state from investigating the question of domicile.

The place of domicile at the time of death is a jurisdictional question of fact which is not conclusively established by the appointment of an administrator, and in a proper collateral action the true place of residence of the deceased may be shown to disprove jurisdiction in the court assuming to administer the estate. Probate courts, not being courts of general jurisdiction in the course of common law, are not subject to the rule of presumptions as to jurisdiction, but jurisdiction must appear on their records.⁴⁴³

An additional ground for the court's decision was the rule that the full faith and credit clause does not "preclude a court in another state from investigating and determining the question of the decedent's domicile" unless a party is estopped by res judicata "by having previously unsuccessfully contested the issue in the court of another state."⁴⁴⁴ The record did "not reflect any contest of the issue of residence or domicile ever raised in either state,"⁴⁴⁵ i.e., Florida or Georgia.

The perennial question of whether an administrator has standing to sue in a jurisdiction other than that in which he was appointed, was involved in *Blum v. Salyer*.⁴⁴⁶ The action was brought by a Florida

441. *Id.* at 356.

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

446. 299 F. Supp. 1074 (W.D. Mo. 1969). Alabama administratrix may sue in Florida. *Florida C. & P.R. Co. v. Sullivan*, 120 F. 799 (5th Cir. 1903).

The holding in *Zschemig v. Miller*, 389 U.S. 429 (1968) will affect the Florida Iron Curtain rule enacted in 1959; see *Survey I*, at 319. For possible impact of the *Zschemig* ruling on jurisdictional long-arm statutes, see *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231, 239 (9th Cir. 1969).

appointed administratrix against the decedent's former wife for accounting and reconveyance of title to property in Missouri. Since the action was brought in a federal court in Missouri, based on diversity, any limitation imposed on this kind of action in state courts would be binding on federal courts as well. The federal court dismissed the action on the ground that according to Missouri law a personal representative of a deceased can maintain an action in his official capacity outside of the state where he is appointed only by express permission granted by statute.⁴⁴⁷ It was lacking in this case.

G. Corporations

Even though the Uniform Commercial Code is not concerned with business associations as institutions, it contains a choice of laws rule worth mentioning here. It deals with investment securities and provides that:

The validity of a security and the rights and duties of the issuer with respect to registration of transfer are governed by the law (including the conflict of laws rules) of the jurisdiction of organization of the issuer.⁴⁴⁸

This rule is subject to two qualifications. One originates from the Uniform Commercial Code, namely, from its general conflict rule contained in section 671.1-105(1) of the Florida Statutes. The Code section provides that with regard to the "applicability of the chapter on investment securities (678.8-106)" these provisions apply and a "contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified."⁴⁴⁹ Difficulties arising from this provision have already been indicated. The second qualification to the rule in section 678.8-102(1) is due to the fact that this conflict rule remains subject to the conflict rule in the Uniform Act for Simplification of Fiduciary Security Transfers,⁴⁵⁰ adopted in Florida in 1961. The uniform act was not repealed, but "shall take precedence over any provisions of this code which may be inconsistent or in conflict therewith."⁴⁵¹

The legal nature of an unincorporated entity under the laws of Honduras was litigated in *Banco de Honduras S.A. v. Prenner*.⁴⁵² It may be gleaned from the cryptic opinion that an action was brought against three individuals, two corporations and an unincorporated entity, because payment of two checks had been stopped to the disadvantage of the plaintiff. The main difficulty apparently centered around a partnership

447. *Id.* at 1076.

448. FLA. STAT. § 678.8-102(1) (1967).

449. FLA. STAT. § 671.1-105(2) (1967).

450. FLA. STAT. § 610.091 (1967).

451. FLA. STAT. § 680.10-104(2) (1967).

452. 211 So.2d 600 (Fla. 4th Dist. 1968).

formed by the two corporate defendants which was doing business under the name of "Southern General." The court found Southern General to be an irregular company under Honduran law⁴⁵³ and not a partnership as initially indicated, an irregular company being a "corporation not meeting the requisites of a corporation under Honduran law." This conclusion was reached on the fact that Southern General did not register in Honduras nor did it "add an abbreviation to its name, such as S.A., S.A.R., or L.R.,⁴⁵⁴ to indicate its corporate status,"⁴⁵⁵ as if the mere addition of any of these abbreviations would make it an association designated by such abbreviation. The court found the rule that "Honduran law would hold liable the drawers of the checks and all those persons who appear to be forming or acting members of such company,"⁴⁵⁶ is uncontradicted and judgment was entered "against all of the defendants who were acting as members of this irregular company as the defendant."⁴⁵⁷

H. *Taxation*

The Protocol Relating to the Status of Refugees⁴⁵⁸ provides in art. 29 that:

The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

This provision grants refugees equal national treatment subject to a reservation on the part of the United States that this provision will be construed as "applying only to refugees who are resident in the United States, so that nonresident refugees may be taxed in accordance with its general rules relating to nonresident aliens."⁴⁵⁹

Florida's power to tax was successfully challenged when the sales tax incident was food and drinks sold to fishermen in the Gulf of Mexico beyond the three leagues limit.⁴⁶⁰ The plaintiff, the owner of a fleet of boats who, for a fee, took fishermen on fishing trips in the Gulf, was able to prove that the equipment and tackle were used and the food

453. *Codigo de Comercio*, art. 17 (1950) provides that irregular societies even though not inscribed in the commercial register, but holding themselves out as such, have juridical personality, meaning that they may be subjects and objects of duties and obligations. Moreover, according to paragraph (3) of the same article, persons who act as their representatives or agents are responsible to third persons in solidum.

454. Under the Honduran Commercial Code, however, there are no societies whose abbreviations would be S.A.R. or L.R.

455. *Banco de Honduras, S.A. v. Prenner*, 211 So.2d 600, 601 (Fla. 4th Dist. 1968).

456. *Id.*

457. *Id. Cf. Yarnall Warehouse & Transfer, Inc. v. Three Ivory Brothers Moving Co.*, 226 So.2d 887 (Fla. 2d Dist. 1969).

458. [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577. See note 26 *supra*.

459. *Id.*, No. 6577, at 35.

460. *Straughn v. Kelly Boat Service, Inc.*, 210 So.2d 266 (Fla. 1st Dist. 1968).

and drinks were sold beyond the state's territorial waters. The Florida appellate court held the rule that no state may "tax persons, property, or interests which are not within the territorial jurisdiction"⁴⁶¹ also applied to sales taxes, and the injunction against such taxing was upheld. The federal court, however, dismissed an action to enjoin the seizure under customs laws of a yacht brought from the Bahamas to Miami for want of jurisdiction in federal courts.⁴⁶²

I. Criminal Law

The principle expressed in the *lex loci criminis* makes the application of substantive criminal law comparatively simple. The issue of the *locus criminis* was raised in *State v. Potter*,⁴⁶³ involving shrimping in a prohibited area of Monroe County. In his defense, the defendant alleged that the act took place beyond the boundaries of both the county and Florida and requested a ruling on this point. Pursuant to this request, the trial court certified the question, concerning Florida's territorial waters around the Dry Tortugas and the boundaries between the Dry Tortugas and the mainland, to the Florida Supreme Court. Since the trial court had ruled on the question, however, the supreme court held that the question was reviewable only on appeal. Another conservation case⁴⁶⁴ dealt with the Florida statute which not only establishes a closed season for crawfish but also limits transportation of crawfish during this period, regardless of where taken, except—under certain conditions—imports from foreign countries.⁴⁶⁵ The statute survived an attack on constitutional grounds because the court found that domestic and foreign crawfish are practically indistinguishable, making a general precautionary rule imperative in the interests of the domestic crawfish industry.

In *State v. Darnell*,⁴⁶⁶ involving the failure to support a wife and children, the criminal desertion statute was interpreted so as to demand that both the delinquent father and the victims be present within Florida.⁴⁶⁷ Since the defendant was in Arkansas and the statute was criminal in nature and therefore calling for restrictive interpretation, the mere fact that the victimized children resided in Dade County did not suffice.⁴⁶⁸

461. *Id.* at 267.

462. *Argosy Ltd. v. Henningan*, 404 F.2d 14 (5th Cir. 1968).

463. 224 So.2d 291 (Fla. 1969).

464. *Kenny v. Kirk*, 212 So.2d 296 (Fla. 1968).

465. FLA. STAT. § 370.14(4), (5) (1967).

466. 217 So.2d 127 (Fla. 3d Dist. 1969).

467. FLA. STAT. § 856.04 (1967).

468. See also *Fearing v. United States*, 403 F.2d 60 (10th Cir. 1968) (transportation of stolen motor car from Florida to Wyoming); *Stewart v. United States*, 395 F.2d 484 (8th Cir. 1968) (transportation of stolen aircraft from Florida to Iowa); *Bush v. United States*, 389 F.2d 485 (5th Cir. 1968) (seizure of aircraft exported from United States for bombing Cuba); *United States v. Black*, 291 F. Supp. 262 (S.D.N.Y. 1968) (operation of vessel on high seas for gambling).

VI. AVIATION LAW

Recently the United States ratified the Convention on Offences and Certain Other Acts Committed on Board Aircraft signed in Tokyo in 1963.⁴⁶⁹ The Convention is rather limited in scope; nevertheless, some of its provisions deserve a brief summary. The Convention deals with two main topics: criminal jurisdiction of member countries⁴⁷⁰ and the authority of aircraft commanders in criminal and related situations.⁴⁷¹ The latter is implemented by provisions dealing with powers and duties of contracting countries in relation to the exercise of this authority, particularly in cases of delivery or disembarking of passengers.⁴⁷² Furthermore, there are a number of collateral matters included, among them air piracy⁴⁷³ and certain aspects of extradition.⁴⁷⁴ Limiting this summary to conflict rules, it must be emphasized that the Convention did not create a uniform law of the air nor establish generally applicable conflict rules regarding criminal acts on board aircraft. Instead, the Convention has authorized member countries to exercise criminal jurisdiction over acts committed on board aircraft registered in their country, provided that they occur "while the aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State."⁴⁷⁵ In exercising criminal jurisdiction within these limits, a member country may not interfere with aircraft in flight (within the area just identified), except when the aircraft involved is of the same nationality or in the following cases:

- (a) the offence has effect on the territory of such State;
- (b) the offence has been committed by or against a national or permanent resident of such State;
- (c) the offence is against the security of such State;
- (d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;
- (e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.⁴⁷⁶

469. Sept. 14, 1963, [1970] — U.S.T. —, T.I.A.S. No. 6768. As of January 1, 1970, the Convention was adopted by the following countries: Canada; Republic of China; Denmark; Ecuador; Germany; Israel; Italy; Madagascar; Mexico; Netherlands; Niger; Norway; Philippines; Portugal; Saudi Arabia; Spain; Sweden; United Kingdom; United States, and Upper Volta. See generally Boyle & Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 30 J. AIR. L. & COM. 305 (1964); Denaro, *In-Flight Crimes, the Tokyo Convention, and Federal Judicial Jurisdiction*, 35 J. AIR. L. & COM. 171 (1969); Mendelsohn, *In-Flight Crime: The International and Domestic Picture under the Tokyo Convention*, 53 VA. L. REV. 509 (1967).

470. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, ch. II., [1969] — U.S.T. —, T.I.A.S. No. 6768.

471. *Id.*, ch. III.

472. *Id.*, ch. V.

473. *Id.*, ch. IV.

474. *Id.*, ch. VI.

475. *Id.*, art. 1(2).

476. *Id.*, art. 4.

It is indeed interesting that hot pursuit of a foreign aircraft for criminal acts committed on board within the airspace of a member country is not a ground for the otherwise authorized interference. It is also a pity that the method of permissible interference is not described.

The second matter covered by the Convention is the authority granted to aircraft commanders in matters of safety and in regard to criminal acts on board. For this part of the Convention, however, a different area of application has been adopted. The authority granted may be exercised only in regard to

offences and acts committed or about to be committed by a person on board an aircraft in flight in the airspace of the State of registration or over the high seas or any other area outside the territory of any State unless the last point of take-off or the next point of intended landing is situated in a State other than that of registration, or the aircraft subsequently flies in the airspace of a State other than that registration with such person still on board.⁴⁷⁷

A Chilean bank sued two air carriers, two Florida banks, and an armoured service corporation for the loss of currency transported by air from Miami to Santiago.⁴⁷⁸ Only a procedural question was before the appellate court; whether the pleadings were sufficient to state a cause of action. The court held that the inability of the plaintiff to pinpoint the exact link in the chain of events at which the negligence occurred did not render the pleadings insufficient.⁴⁷⁹ The United States was sued for releasing a "repossessed" aircraft to the Venezuelan authorities in *Four Star Aviation, Inc. v. United States*.⁴⁸⁰ The aircraft, mortgaged in Florida, was later sold to a Venezuelan air carrier which assumed the mortgage and agreed to pay the remaining installments. When the Venezuelan air carrier defaulted, the plaintiff creditor simply sent two pilots to Venezuela where they "repossessed" the aircraft and brought it to Puerto Rico. The Venezuelan authorities demanded it from the Chief of Aviation in Puerto Rico as stolen property. The Chief first consulted the Federal Aviation Agency as to what to do. The Agency correctly answered that it had no jurisdiction in the matter. The Chief then turned to the Secretary of State of Puerto Rico who, in turn, contacted the Head of the Office of Caribbean Affairs at the United States Department of State. This officer, in turn, consulted the Director of Columbian and Venezuelan Affairs in the same Department.⁴⁸¹ The court found that the Head of the Office of Caribbean Affairs gave the following Delphic answer, over the phone to the Puerto Rican Chief of Aviation:

477. *Id.*, art. 5(1).

478. *Banco Cont'l v. Curtiss Nat'l Bank*, 406 F.2d 510 (5th Cir. 1969).

479. *Id.*, at 514.

480. 409 F.2d 292 (5th Cir. 1969).

481. Why was the Office of the Legal Advisor bypassed?

"As far as the Department of State was concerned, there was no objection to it (the airplane) being returned to the Venezuelan government."⁴⁸² Acting on this advice, Puerto Rican authorities released the plane to Venezuelan officials. In spite of plaintiff's urging that the advice on the part of the United States constituted a "negligent or wrongful act or omission" in the terms of the Federal Tort Claims Act, he did not succeed, mainly because of fatal discrepancies in the testimony of the officials involved.

For having operated a helicopter some eight miles off Port Everglades, Florida, in a "manner and in such close proximity to a Coast Guard helicopter engaged in a search and rescue operation, as to endanger lives and property of the Coast Guard crew and that of the operator himself and his passenger," the operator was given a 30-day suspension of his pilot certificate under section 91.1(b) of the Federal Aviation Regulations and under sections of Annex 2 to the Convention on International Civil Aviation.⁴⁸³ The latter point was questioned by the operator on the ground that the Annex has no force as a treaty but is foreign law and has to be proven as fact, which was not done. The National Transportation Safety Board held the Annex to be

an agreement which is drawn up pursuant to the terms of the Convention and in no way can be considered to be foreign law. It represents an international agreement to which the United States is a party; and to the extent the United States participates in the agreement, it is, at the least, a document resulting from the executive action of the U.S. Government, as well as that of other signatory governments. Consequently, this document cannot be analogized to foreign law . . . However, the question still remains whether Annex 2 can be considered part of the Chicago Convention and hence possesses all the legal incidents of a treaty. It clearly is authorized by that Convention.⁴⁸⁴

Nevertheless, the Board continued to explore the legal authority of Annex 2 in the following way:

While it is true that the standards contained in the Annex are authorized to be established by the provisions of the treaty, it by no means follows that the Congress has ratified the provisions of the Annex, so that it may be considered part of the treaty. However, it is self-evident that the Annex, and the standards established therein, are authorized by the treaty and become effective unless rejected by executive action of the U.S. Government. Since the U.S. Government has not rejected

482. *Four Star Aviation, Inc. v. United States*, 409 F.2d 292, 294 (5th Cir. 1969). Why was this important answer never confirmed by telegram?

483. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, U.N.T.S. 295 (effective April 14, 1947).

484. National Trans. Safety Bd., (No. SE-1027, December 18, 1968).

these provisions, they, therefore, have become effective by executive action.⁴⁸⁵

A bill has been introduced in Congress to provide federal substantive law and exclusive federal jurisdiction for all claims arising out of the air accidents.⁴⁸⁶

VII. ADMIRALTY

From the conflict viewpoint, admiralty law presents both jurisdictional and choice of laws issues. Jurisdictional problems in most cases revolve around state-federal relations in adjudicating admiralty matters. Three bodies of law, however, state, federal, and maritime, may clash in choice of laws situations. The line of demarcation between the application of substantive admiralty law or state law is not always as simple as it seems. It is well-recognized that in contract matters admiralty law depends upon the nature of the transaction, while in tort matters the locality of the tort, whether on land or on the sea, is decisive.⁴⁸⁷ There are twilight zones, however, which include not only internal waters, waterways, rivers, and lakes, but also territorial waters and the epicontinental sea, *i.e.*, the sea over the continental shelf and the structures erected thereupon.

Regarding fatal torts which occur on navigable waters within Florida, the Florida Supreme Court held that recovery may be had for wrongful death under the state statute.⁴⁸⁸ Consequently, the common law defense of contributory negligence is available, not the admiralty defense of comparative negligence.

485. On technical annexes under art. 12 of the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, U.N.T.S. 295 (effective April 4, 1947), see Ljostad, *The Technical Annexes of the Chicago Convention*, 1 ARKIV FOR LUFTRETT 43 (1958); Carroz, *International Legislation on Air Navigation over the High Seas*, 26 J. AIR. L. & COM. 158 (1959); ICAO: *International Standards in the Technical Annexes—Their Effect within the United States and Validity under the Constitution*, 21 GEO. WASH. L. REV. 86 (1952); T. BUERGENTHAL, *LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION* 80 (1969).

486. Presently S. 961, introduced by Senator Tydings, is being discussed before a subcommittee of the Committee on the Judiciary [Aircraft Crash Litigation: *Hearings on S. 961 Before the Subcomm. on Improvement of the Judiciary*, United States Senate, 91st Cong., 1st Sess. (1969)]. This bill originated from S. 3305 and S. 3306 submitted during the past session [Aircraft Crash Litigation: *Hearings on S. 3305 and S. 3306 Before the Subcomm. on Improvement in Judicial Administration of the Committee of the Judiciary*, United States Senate 90th Cong., 2d Sess. (1968)]. The present bill provides, *inter alia*, for exclusive jurisdiction of federal courts in aviation accident actions, except for concurrent jurisdiction over claims arising from ground activities and over claims not within exclusive federal jurisdiction. The bill also introduces federal substantive law for claims arising from air accidents, including general liability, contributory negligence, contribution, survival of actions and wrongful death claims.

487. *Rodrique v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, (1969); *Grant Smith-Porter Ship Co. v. Rhode*, 257 U.S. 469 (1922).

488. *Bilbrey v. Weed*, 215 So.2d 479 (Fla. 1968).

In *Empire Seafoods, Inc. v. Anderson*,⁴⁸⁹ a shrimper struck a bridge, under construction, which spanned the Florida Intercoastal Waterway and injured two operators. Relying on admiralty law which could exonerate or limit liability of the boat owner, the court denied exoneration or limitation of the owner's liability because of his failure to provide for a lookout and because of the boat captain's negligence in navigation.

Another accident on Florida's navigable waters (the St. John's River in Duval County), was the subject of state court litigation in *Roundtree v. A.P. Moller Steamship Co.*⁴⁹⁰ In that case, the defendant operated its seagoing vessel with such speed and power as to cause a strong wake which, in turn, capsized the plaintiff's boat and resulted in injuries to him. The court found jurisdiction under section 1333 of the Judiciary Act⁴⁹¹ which, in the court's interpretation, grants state courts concurrent jurisdiction. Turning to the substantive aspect of the case, the court admitted that "maritime law, not state law, is the substantive law that is applied in cases of maritime tort occurring on the navigable waters of this country, whether an action thereon is brought in a state or federal court."⁴⁹² Yet, the court relied on Florida's Motorboat Safety Law enacted in 1959.⁴⁹³ In a similar case,⁴⁹⁴ the defendant and his wife petitioned for exoneration or limitation of liability for damages, invoking the federal statute.⁴⁹⁵ The court found that the damage did not occur without the defendant's privity or knowledge⁴⁹⁶ since he operated the boat and his wife knew it, and thus ruled adverse to the petition.

Maritime liens appeared in a number of cases litigated in Florida. In *Camper v. Nicholsons, Ltd. v. Yacht "Fontainebleau II,"*⁴⁹⁷ a British corporation tried to enforce a maritime lien for goods and services furnished to the vessel in an action in rem. A Bahamian corporation claimed ownership and filed a counterclaim against the corporate plaintiff, alleging damages due to misrepresentation by the corporate plaintiff in the sale of the yacht. The court, in dismissing the counterclaim, held that a contract for the sale of a vessel is not maritime in nature and is therefore unenforceable in admiralty, and that a claim for breach of warranty in such sale does not constitute a cause of action cognizable

489. 398 F.2d 204 (5th Cir. 1968).

490. 218 So.2d 771 (Fla. 1st Dist. 1969).

491. 28 U.S.C. § 1333 (1964). On jurisdiction recently: *Smith v. Guerrant*, 290 F. Supp. 111 (S.D. Tex. 1968); *American Mfg. Mut. Ins. Co. v. Manor Inv. Co.*, 286 F. Supp. 1007 (S.D.N.Y. 1968).

492. *Roundtree v. A.P. Moller Steamship Co.*, 218 So.2d 771, 774 (Fla. 1st Dist. 1969).

493. FLA. STAT. § 371.52 (1967).

494. *Fecht v. Makowski*, 406 F.2d 721 (5th Cir. 1969).

495. 46 U.S.C. § 183(a) (1964); cf. *Waterman Steamship Corp. v. Gay Cottons*, 414 F.2d 724 (9th Cir. 1969); *Ross, Shipowners' Limitation of Liability Revisited*, 10 S. Tex L.J. 1 (1969).

496. *Fecht v. Makowski*, 4006 F.2d 721 (5th Cir. 1969).

497. 292 F. Supp. 734 (S.D. Fla. 1968).

in admiralty. In *Stern, Hays & Lang, Inc. v. M/V Nili*⁴⁹⁸ a number of participants enlivened the scene. The vessel *Nili*, sponsored by the State of Israel, built by the British, financed by the Scots, owned by an Israeli corporation, chartered by a New York corporation, and operating from the port of Miami, "apparently developed certain financial problems including an alleged failure to make payments against an alleged maritime mortgage."⁴⁹⁹ In an opinion written in a sparkling style, the court found itself in the role of "an effective resource for settling at least this mild international financial crisis between the vessel's sovereign, her corporate subject, a ship of her flag, and such flotsam creditors of all nations as might follow in *M/V Nili's* wake,"⁵⁰⁰ Regardless of the fact that the ship was "thoroughly seized by Israel's libel of foreclosure and generally under a series of plasters of intervening and hopeful creditors, the orders of consolidation confected a glorious Donnybrook Fair, with each turning on the other as he felt the exigencies of the moment warranted."⁵⁰¹ Out of all this, one claim emerged for adjudication: the claim of a corporate agency for a maritime lien as a result of advertising work for the vessel. Against a well-documented position taken by the vessel, the court held that printing on behalf of a vessel is already recognized as a lien-creating activity and that labor in this connection may also create a lien. The difference between the two activities is only one of degree.⁵⁰²

A case with real international flavor developed in *In re Unterweser Reederei, GMBH*.⁵⁰³ These proceedings started with an action filed by the Zapata Off-Shore Company against the Unterweser Reederei for damages sustained by plaintiff's rig *Chaparral* while in tow of defendant's *Bremen*. Subsequently, the defendant used a prorogation clause in the towage contract to institute an action against the plaintiff in the High Court of Justice in London for monies due under the towage contract and for breach of contract. Defendant also filed a petition for exoneration or limitation in the federal courts, followed by an action identical with the one filed in London. After further procedural moves, the question clearly emerged: On the plaintiff's motion, may the federal court in the case pending before it enjoin the defendant from prosecuting its action against the plaintiff in a foreign country, *i.e.*, England. Since the petition for limitation or exoneration is equitable in nature, the court reasoned, it may, once it has acquired jurisdiction over the parties, proceed and determine all matters relating to the controversy

498. 407 F.2d 549 (5th Cir. 1969).

499. *Id.* at 550.

500. *Id.*

501. *Id.*

502. *Id.* at 551.

503. 296 F. Supp. 733 (M.D. Fla. 1969). Two other maritime cases litigated in federal court were: *Joseph L. Wilmote & Co. v. Cobelfret Lines*, 289 F. Supp. 601 (M.D. Fla. 1968) (carriage of goods); *Fort Myers Shell & Dredging Co. v. Barge NBC 512*, 404 F.2d 137 (5th Cir. 1968) (salvage of a vessel).

and enjoined the defendant. Admitting freely that a federal court seized with the litigation "cannot act extraterritorially,"⁵⁰⁴ it does, nevertheless, have the power to control the action of the parties properly before it. Since the defendant was not only properly brought before the court but also had affirmatively invoked its jurisdiction, it was subject to the court's power.⁵⁰⁵

504. *Id.* at 736.

505. Recent decisions concerning liability to passengers: *Silvestri v. Italia Societa per Azioni di Navigazione*, 388 F.2d 11 (2d Cir. 1968); *Traub v. Holland-America Line*, 278 F. Supp. 814 (S.D.N.Y. 1967).