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S. A. Bayitch

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FLORIDA: CONFLICT OF LAWS 1964-1966

S. A. BAYITCH*

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* Professor of Law, University of Miami.

I. GENERAL PROBLEMS

Three events mark the three year period surveyed in this article.¹ The first is Florida's adoption of the Uniform Commercial Code containing a number of conflict rules.² The second is the rather large and varied array of legislative enactments affecting conflicts law adopted by the recent Florida legislature. The third significant event, though less authoritative, is the fact that the draft of the Restatement (Second) Conflict of Laws is nearing completion.³

No recent Florida cases dealt with characterization or renvoi, hence discussion may begin with the conflict status of statutes of limitations. As a general rule, these statutes are classified as procedural⁴ and, therefore, governed by the *lex fori*. This rule is inapplicable, however, if (1) the forum's borrowing statute requires the application of the statute of limitations in force in the jurisdiction where the cause of action arose (as does Florida)⁵ or the statute of limitations in force in the defendant's domicile, or a combination of these, and (2) the period of limitations in either jurisdiction happens to be shorter than that of the forum. The general rule may also be affected by an agreement between the parties shortening the period within which an action may be brought, or by the fact that a period of limitation has been so closely interwoven into an applicable foreign substantive statute as to become an integral part of it, and, therefore, a substantive matter in cases governed by the statute.⁶

Crew members employed by an air carrier brought a diversity action in the federal district court in New York against the aircraft's manufacturer to recover for injuries sustained in Florida, allegedly caused by the manufacturer's breach of an implied warranty. The air-

1. The previous survey article, Bayitch, *Conflict of Laws in Florida, 1957-1963*, 18 U. MIAMI L. REV. 269 (1963), subsequently cited as *Survey I*, should be considered in conjunction with the present study. Generally, recent developments in the conflicts field have been discussed by Cavers, *The Choice-of-Law Process* (1965); Gorfinkel, *Conflict of Laws: A Survey of Past and Contemporary Theory*, 16 HASTINGS L.J. 21 (1964); Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 95 (Hague 1964); Reese, *Discussion of Major Areas of Choice of Law*, 111 Recueil des Cours 316 (Hague 1964); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966).

2. FLA. STAT. §§ 67.1-101-680.10-107 (1965), to take effect on January 1, 1967.

3. Reese, *Conflict of Laws & the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963).

4. See *Survey I*, at 271; CERVERA, *THE STATUTE OF LIMITATIONS IN AMERICAN CONFLICTS OF LAWS* (1966). The substantive nature of the statute of frauds was confirmed in *Miami Beach First Nat'l Bank v. Shalleck*, 182 So.2d 649 (Fla. 3d Dist. 1966).

5. FLA. STAT. § 95.10 (1965).

6. *Davis v. Mills*, 194 U.S. 451 (1904); *Maki v. George R. Cooke Co.*, 124 F.2d 663 (6th Cir. 1942); *Rodzik v. New York Cent. R.R.*, 169 F. Supp. 803 (E.D. Mich. 1959). On tolling *Friday v. Newman*, 183 So.2d 25 (Fla. 2d Dist. 1966). In *Frost v. Davis*, 346 F.2d 82, 88 (5th Cir. 1965), 356 F.2d 513 (5th Cir. 1966) the court held that in an action involving exploration and development of petroleum property in Cuba, the "cause of action accrued not when [plaintiff] first demanded payment, but when [defendant] first refused it; thus, the suit was not barred by either the Florida or the Texas statute."

craft had been manufactured and delivered in California. The case involved an interpretation of the New York borrowing statute. On appeal, the court held⁷ that the cause of action arose in California where the alleged breach occurred, and not in Florida, the situs of the accident. According to the applicable New York borrowing statute, the one-year California statute of limitations controlled the disposition of the case.

After a tortuous meandering from court to court,⁸ the United States Supreme Court finally sustained⁹ the right of a forum (Florida) to hold invalid an agreement to shorten the period of limitations within which an action could be brought in a situation where the agreement was void under the *lex fori* but valid under the *lex loci actus* (Illinois). The court found no Illinois cases "extending the rule [permitting the shortening of the limitation period by parties' agreement] into other states whenever claims on Illinois contracts are sought to be enforced there," nor did the Court consider the "activities in the State of the forum [Florida] . . . too slight and too casual . . . to make the application of local law [consistent] with due process."¹⁰ It further justified its decision on the ground that, as the defendant insurer knew, the floater policies, involved in the action, insured property anywhere in the world. "[S]ince the company was licensed to do business in Florida, it must have known it . . . [might] be sued there."¹¹ Thus, the forum state had "ample contacts with the present transaction and the parties to satisfy any conceivable requirement of full faith and credit or of due process."¹²

A different rule was applied in an action against a maritime carrier to recover for personal injuries sustained on a sea voyage. A contractual reduction of the period of limitation to one year was given effect on the ground that "although this is a common law action in a state court, it is governed by general maritime law . . . [and] the limitation provisions provided by section 95.03, Florida Statutes . . . do not apply."¹³

To illustrate the effect of incorporating a period of limitation into

7. *George v. Douglas Aircraft Co.*, 332 F.2d 73 (2d Cir. 1964); *but see* *Public Admin. v. Curtiss-Wright Corp.*, 224 F. Supp. 236 (S.D.N.Y., 1963).

8. *See Survey I*, at 273.

9. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964); *Survey I*, at 273. Query: what effect, if any, will the provision of the Uniform Commercial Code [FLA. STAT. § 672.2-725 (1965)] permitting the parties to "reduce the period of limitation to not less than one year" have on Florida public policy?

10. *Id.* at 181.

11. *Id.* at 182.

12. *Id.* at 183.

13. *Foresman v. Eastern Steamship Corp.*, 177 So.2d 887 (3d Dist. 1965). *Cf. Schwartz v. S.S. Nassau*, 345 F.2d 465 (2d Cir. 1965).

No recent Florida cases deal with public policy, except *State of Minnesota v. Taran*, 164 So.2d 893 (Fla. 3d Dist. 1964), discussed later. *Cf. McMahon v. Carribbean Mills, Inc.*, 332 F.2d 641 (10th Cir. 1964). *Gonzales v. Trujillo*, 179 So.2d 896 (Fla. 3d Dist. 1965) (promise to pay for smuggling money out of Cuba enforceable in Florida).

a statute creating a substantive right, an earlier case may be examined.¹⁴ An action was brought against an aircraft manufacturer for an alleged breach of warranty. In applying the law of the place where the accident occurred, Louisiana, the court stated that "a statute of limitations extinguishes the right [to bring an action] only when such statute is peremptive, rather than prescriptive."¹⁵ The latter merely bars the remedy; the former destroys the claim. The right to maintain the action was created by article 2315 of the Louisiana Civil Code, and the period of limitations within which the action could be brought in the Louisiana courts was delineated by articles 3536, 3537, and 3541 of the same code. The court of appeals disagreed with the appellee's argument that these articles were "so intimately and necessarily related to article 2315 creating the tort action here involved that the three should be read with the same effect as if they all constituted one statute."¹⁶ It noted that the provision fixing the period of limitation was contained in a separate article of the Louisiana Code, that the limitation statute itself used the word "prescribed," and that decisions of the Louisiana Supreme Court required a party who wished to avail himself of its provisions to specifically allege the statutory limitation. These facts indicated that the Louisiana statute "fixing a period of limitation of one year for the bringing of this action in Louisiana was one of prescription [and, therefore, procedural] and not of peremption,"¹⁷ thus opening the door for the application of the two-year period of the *lex fori*, Texas.

It may be added that Florida has not yet adopted a direct action statute, and no case has discussed the local effect of a foreign-created claim impressed with a right of direct action against the insurer. The underlying question as to the substantive or procedural nature of such claim has, however, been litigated in other jurisdictions.¹⁸

The Uniform Commercial Code

At this time, only a brief survey of the conflicts law contained in the newly enacted Uniform Commercial Code will be attempted.¹⁹ Section 671.1-105 of the Florida Statutes provides:

14. *Page v. Cameron Iron Works, Inc.*, 259 F.2d 420 (5th Cir. 1958).

15. *Id.* at 422.

16. *Id.* at 424.

17. *Id.* at 424.

18. *E.g.*, *Posner v. Travelers Ins. Co.*, 244 F. Supp. 865 (N.D. Ill. 1965); *Oltarsh v. Aetna Ins. Co.*, 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965); See Notes in 39 VA. L. REV. 655 (1953), and 74 HARV. L. REV. 357 (1960).

Failure to object to the lack of allegation as well as proof of foreign law may not be raised on appeal, *Corporación Peruana de Aeropuertos y Aviación Comercial v. Boy*, 180 So.2d 503, 506 (Fla. 2d Dist. 1965).

19. For a discussion of previous versions of the Code as well as some of the basic problems, see Rheinstein, *Conflict of Law in the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 114 (1951). Recently Nordstrom, *Choice of Law and the Uniform Commercial Code*, 24 OHIO ST. L.J. 364 (1963); Burton, *The Uniform Commercial Code & Conflict*

Territorial application of the code; parties' power to choose the applicable law.

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this code applies to transactions bearing an appropriate relation to this state.

(2) Where one of the following provisions of this code specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods (§ 672.2-402).

Applicability of the chapter on bank deposits and collections (§ 674.4-102).

Bulk transfers subject to the chapter on bulk transfers (§ 676.6-102).

Applicability of the chapter on investment securities (§ 678.8-106).

Policy and scope of the chapter on secured transactions (§§ 679.9-102 and 679.9-103).

The section caption indicates that with respect to transactions regulated by the Code, *i.e.*, sales, commercial papers, bank deposits and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading and other documents of title, as well as investment securities and secured transactions, including sales of accounts, contract rights and chattel papers, the applicable conflict rules shall be identified by either of two contacts: territory or parties' choice of applicable law. However, the body of the section contains no express provision substantiating the proclaimed territorial applicability of the Code. Instead, the Code adopted the flexible, abstract contact, termed alternatively as "reasonable relation," or as "appropriate relation" which may or may not include territorial factors. Moreover, under the same rule, set forth in section 671.1-105, the territorial contact, if any, is only a secondary method of determining the applicable law since the Code provides that it will only apply to "transactions bearing an appropriate relation to this state" if parties did not take advantage of their "power to choose applicable law."

Considering first that part of section 671.1-105 which permits the parties to choose by agreement the law that shall govern their rights and obligations, the first question concerns the types of transactions which

of Laws, 9 AM. J. COMP. L. 458 (1960); and CAVERS, *THE CHOICE-OF-LAW PROCESS* 233 (1965). For an analysis of problems involved see Bayitch, *The Connecting Agreement: A Study in Comparative Conflict Law*, 7 MIAMI L.Q. 293 (1953). For a recent opinion see *Ideal Structures Corp. v. Levine Huntsville Develop. Corp.*, 251 F. Supp. 3 (N.D. Ala., 1966).

may be subjected to the law so chosen (*lex voluntatis*). Even though the Code uses rather broad language in referring to a transaction, nevertheless, in view of the limitations inherent in the substantive coverage of the Code, making it applicable only to enumerated and defined types of transactions, it would appear that the power granted to the parties by the Code to choose the law applicable to their dealings will only be as extensive as the Code's substantive provisions. In addition it appears that if the transaction is to be governed by a legal system which the parties have chosen by agreement, it must first "bear a reasonable relation to this state." It is this relationship with Florida that brings the Code authorization into operation. In turn, the Code only gives effect to such choice of controlling law within the limitations imposed by the same Code. Once these requirement has been met, parties may choose to apply the law of Florida or that of any other "state or nation," provided the transaction bears a "reasonable relation . . . to another state or nation."

Paragraph (2) of section 671.1-105, Florida Statutes, establishes a further limitation on the parties' choice of the applicable legal system, by providing that in five enumerated situations the parties' choice of law will be effective only "to the extent permitted by the law [including the conflict of laws rules] so specified." This limitation opens a difficult question as to whether or not it aims only at matters of conflicts law contained in the respective sections, or whether it is directed also to substantive law referred to by the Code's conflict rules, *i.e.* regardless of the parties' choice of applicable law.²⁰ From the express inclusion of the phrase "conflict of laws," it is possibly suggested that only the conflict aspects of the situation must be considered. Under this view, it would follow that the conflict rules provided in the Code for these five situations take precedence over the parties' power to choose the applicable law. These conflict rules, then, as well as conflict rules of the legal system identified by them as controlling, will determine the effects of the *lex voluntatis* in regard to the specially enumerated transactions.

The other alternative is to extend the effect of paragraph (2) to the substantive law identified by the conflict rules of the Code. This would create a set of substantive law rules (the otherwise applicable law) which would, depending upon their cogent or non-cogent nature, give or deny effect to the substantive rules of that legal system which the parties' agreement had sought to establish as controlling of their transaction.

Postponing a full discussion of the specifically enumerated exceptions for later, a few peremptory remarks nevertheless seem in order. The first exception deals with the provision that the fraudulent nature of a retention by the seller of goods sold is to be determined by the "law

20. For a discussion of this notion see Bayitch, *op. cit. supra* note 19, at 298.

of the state where the goods are situated.”²¹ In interpreting this provision, it should be remembered that this particular conflict rule applies only to the characterization of the seller’s retention as fraudulent, but that no particular conflict rule is provided in the Code for the substantive contents of the section. Strict interpretation of paragraph (2) of section 671.1-105 would, therefore, prevent the parties from agreeing upon another legal system to determine the allegedly fraudulent nature of the retention. Such an interpretation seems highly impractical and suggests no reason for including the conflicts law of the situs of the property. However, if this provision is interpreted as including the substantive provision favoring the rights of the seller’s creditors against goods sold, then the otherwise applicable law would prevent the choice by parties of a legal system which grants fewer rights to one of them than does the Code. An alternative result would apply if the substantive rules of paragraph (2), section 671.1-105, are considered to be cogent, and as such not amenable to elimination or change by parties’ agreement, or, as in the present case, by selecting a legal system with different substantive rules from those provided by the Code.

The second exception limits parties’ choice of the applicable law in matters regarding the “liability of a bank for action or non-action with respect to any item handled by it for purposes of presentment, payment or collection.” Since such liability is governed, under an express provision of the Code, “by the law of the place where the bank is located [or its] branch or separate office,”²² difficulties in interpretation parallel those indicated in relation to the first exception.

The third exception applies to bulk sales. Except in regard to transfers listed in a following section,²³ “all bulk transfers of goods located within this state are subject to this chapter.”²⁴ Since this is a unilateral conflict rule, *i.e.*, one that only governs the conflict applicability of the substantive law of the Code without providing a rule for the possible application of another legal system, the inclusion of the conflict of laws rules provided in section 671.1-105 amounts to a meaningless reference to the conflict rules of the same Code.

The fourth exception deals with the “validity of a security and the rights and duties of the issuer with respect to registration of transfer,”²⁵ which are governed by the law “of the jurisdiction of organization of the issuer.” The section not only unnecessarily repeats the inclusion of conflict of laws rules, but also leaves the meaning of the term “jurisdiction of organization of the issuer” far from clear.

21. FLA. STAT. § 672.2-402 (1965).

22. FLA. STAT. § 674.4-102 (1965).

23. FLA. STAT. § 676.6-103 (1965).

24. FLA. STAT. § 676.6-102 (1965).

25. FLA. STAT. § 678.8-106 (1965).

Finally, the fifth exception applies to secured transactions.²⁶ Insofar as the latter section applies expressly to assets located within Florida, the reference to the conflicts rules again makes no sense. A further consideration of the latter section demands a special discussion, particularly in view of the fact that Florida has, at the same time, enacted a statute dealing with foreign-created interests in motor cars and given it "precedence over any provisions of this code which may be inconsistent or in conflict therewith."²⁷

"Failing such agreement this code applies to transactions bearing an appropriate relation to this state."²⁸ What such appropriate relation is, whether it means something different from a "reasonable relation," or whether a number of contacts will support either relation is left to the courts to decide.

It should be noted that references in the Code to the controlling legal system include a reference to its conflict rules as well. This may amount to an acceptance of the doctrine of renvoi. Whether or not the acceptance of the renvoi principle includes only what is termed a reference back or also a reference forward, *i.e.*, to a third legal system, has yet to be decided.

II. JURISDICTIONAL CONFLICTS

Jurisdiction²⁹ was recently re-defined as the "power conferred on a court by the sovereign to take cognizance of the subject matter of a litigation and the parties brought before it and to hear and determine the issues and render judgment."³⁰ It is obtained "by service of process or voluntary submission in order that a person may be heard,"³¹ and is not "dependent upon the correctness of the decision rendered."³² One of the methods of submission in advance is that effectuated by executing a cognovit note. Confronted by an Ohio judgment entered on the basis of a cognovit note executed by the defendant, a Florida court recently denied³³ the judgment full faith and credit on the ground that the place of its execution or delivery did not appear in the note and, further, because the reference contained therein to "any Court of Record in the United States" was "to general in [its] nature and void for uncertainty" under Ohio law.³⁴ The Florida court apparently preferred to

26. FLA. STAT. §§ 679.9-102, 679.9-103 (1965).

27. FLA. STAT. § 680.10-104(2) (1965).

28. FLA. STAT. § 671.1-105(1) (1965).

29. For a recent discussion of the international aspects of jurisdictions, see Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 9 (Hague 1964). For a discussion of service and notice requirements, see *Executive Properties, Inc. v. Sherman*, 223 F. Supp. 1011 (D. Ariz. 1963).

30. *Dyer v. Battle*, 168 So.2d 175, 176 (Fla. 2d Dist. 1964).

31. *Id.* at 176.

32. *Ibid.*

33. *Henry Bierce Co. v. Hunt*, 170 So.2d 99 (Fla. 3d Dist. 1964).

34. *Id.* at 100.

decide the question by relying on the law of the state rendering the judgment, rather than by speculating on the extra-territorial effect claimed by the applicable Florida statute.³⁵

A. Acting within Jurisdiction

Long-arm statutes have expanded jurisdictional powers of the states far beyond traditional territorial limits, provided, of course, that they meet the constitutional standards established by the Supreme Court as to the required minimum contacts with the respective jurisdiction. In Florida, all such statutes not only define, more or less precisely, the particular activity involved, they also require the cause of action to have arisen out of such activities within the state, and further, that in addition to constructive service on designated state officials, reasonable notice, as prescribed in the statute, be given to a defendant.

1. NONRESIDENT MOTORISTS

To perfect jurisdiction in accordance with section 47.29, Florida Statutes, the notice of constructive service must be forwarded by the Secretary of State³⁶ "forthwith." When such notice to defendant was delayed for thirty-four days, the court held the notice to be ineffective.³⁷ The question of whether or not a claim has arisen from an "accident or collision within the State" was litigated in *Aetna Cas. & Surety Co. v. Miller*.³⁸ In this action, between the insured and his insurer, based on an arbitration award concerning damages arising out of an automobile accident in Florida between the insured and a third party, the court held, unusual as it may seem, not only that the claim arose out of an accident, but that the dispute between the instant parties also arose out of the accident. Consequently, constructive service under section 47.29, Florida Statutes, was proper. It is obvious, however, that the claim between the parties did not arise from the accident, but out of the contract with the insurance company; and the company was not "involved" in the accident. It is clear, therefore, that the action was not one "against such operator or owner . . . entitled to control of such motor vehicle," as required by the statute.³⁹

35. FLA. STAT. § 55.05 (1965).

36. Cf., Cases Against Non-Resident Operators of Motor Vehicles, vol. I Report of the Secretary of State of Florida 291 (1959-1960).

37. *Paradis v. Cicero*, 167 So.2d 248 (Fla. 2d Dist. 1964).

38. 172 So.2d 11 (Fla. 2d Dist. 1965).

39. Service in case of concealment, *Steedman v. Polero*, 181 So.2d 202 (Fla. 3d Dist. 1965). A Georgia resident at the time of the accident who later became a resident of Florida was not amenable to Georgia jurisdiction under its non-resident motorist statute (GA. LAWS 1937, as amended in 1957, GA. CODE ANN. § 68-808). The contrary ruling of the lower court was held to be in violation of the Georgia Const. art. I, § I, ¶ III as well as of the fourteenth amendment to the federal Constitution. Noted in 39 TUL. L. REV. 342 (1965). Jox, *Non-Resident Motorists Service of Process Acts: Notice Requirements: A Plea for Realism*, 33 F.R.D. 151 (1964).

2. NONRESIDENT AIRCRAFT AND WATERCRAFT OPERATORS

The statute,⁴⁰ enacted in 1959, applicable to nonresident operators of watercraft was expanded in 1965 to include operators of aircraft with no other change in the language of the statute. Consequently, nonresidents, operating, navigating or maintaining an aircraft in the state, will be deemed to have appointed the Secretary of State as their agent for service of process in any action against them "growing out of any accident or collision in which such nonresident . . . may be involved while . . . operating, navigating or maintaining an aircraft . . . in the state."

3. BUSINESS OR BUSINESS VENTURE BY NONRESIDENTS

A further basis for long-arm jurisdiction is contained in Florida Statute, section 47.16. It provides for constructive service of process upon the Secretary of State, and notice to the defendant at his last known address, in any action brought against a nonresident who operates, conducts, engages in, or carries on a business or business venture, or has "an office or agency" within the state, provided the cause of action arose "out of any transaction or operation connected with or incidental to such business or business venture."⁴¹ As the number of cases increases, the underlying rules become clearer. In a general sense, a few rules stand out, among them the one requiring that the statutory jurisdictional grant be strictly construed since it is in derogation of the common law.⁴²

In the absence of a challenge to the constitutionality of a long-arm statute, discussion of the trial court's jurisdiction in terms of due process "minimum contacts" standards is improper⁴³ since long-arm statutes may, and generally do, require more than the bare constitutional minimum. For this reason, the court's solution to the jurisdictional issue in *Simari v. Illinois Central R.R. Co.*⁴⁴ was unsatisfactory. On the plaintiff's appeal in an action against an Illinois corporate defendant, to recover for personal injuries sustained in Missouri, the district court of appeal considered two

40. FLA. STAT. § 47.162 (1965).

41. FLA. STAT. § 47.16 (1965). On jurisdiction of small claims courts over nonresidents, see FLA. ATT'Y GEN. REP. 357 (1963-1964).

42. *Young Spring & Wire Corp. v. Smith*, 176 So.2d 903 (Fla. 1965); *Underman v. Brown*, 169 So.2d 522 (Fla. 2d Dist. 1964); *Florida Inv. Enterprises v. Kentucky Co.*, 160 So.2d 733 (Fla. 1st Dist. 1964). For a liberal construction where defendant corporations are involved, *Giannini Controls Corp. v. Eubanks*, 181 So.2d 191 (Fla. 1st Dist. 1965) (concurring opinion). Foreign corporation which has not been engaged in business in Florida since the enactment of § 47.16 FLA. STAT. is not amenable to jurisdiction in an action filed subsequently to such enactment, *Heberle v. P.R.O. Liquidating Co.*, 186 So.2d 280 (Fla. 1st Dist. 1966); *accord Mladinich v. Kohn*, 186 So.2d 481 (Miss. 1966); but see *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), and *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965).

43. *Eyerly Aircraft Co. v. McDaniel*, 172 So.2d 905 (Fla. 2d Dist. 1965); *Teeby Realty Corp. v. Gasway Corp.*, 181 So.2d 31 (Fla. 3d Dist. 1965); *Lake Erie Chem. Co. v. Stinson*, 181 So.2d 587 (Fla. 2d Dist. 1965).

44. 179 So.2d 220 (Fla. 1st Dist. 1965).

questions: (1) "whether such service comports with the due process requirement of the 14th Amendment to the United States Constitution," and (2) "if that service does so comport, whether the said service complies with the requirements of the statutory provisions in Florida . . ."⁴⁵ In discussing the first question the court completely disregarded the Florida statutory provisions which confer jurisdiction over foreign corporations only under clearly defined conditions. These conditions are statutory, that is, set out in section 47.16, Florida Statutes, and do not arise by virtue of the fourteenth amendment to the federal constitution. As has been frequently noted,⁴⁶ a jurisdictional statute may, and the Florida statute does, require more than the constitutional minimum. After all, the due process clause of the fourteenth amendment to the federal constitution is not a jurisdictional grant; it merely establishes the outer limit to which a local jurisdictional statute may go, without replacing the jurisdictional grant contained therein. If within such limits, the local jurisdictional statute will survive an attack on constitutional grounds.⁴⁷ Nevertheless, the appellate court delved into the abstract question of whether or not contacts existing in the case met the minimum standards under the due process clause as interpreted by the Supreme Court. It is submitted that in so doing, the court missed the point, particularly since the Florida jurisdictional statute neither requires "doing business," nor "presence," nor "traditional notions of fair play and substantial justice" nor that the defendant "must have certain 'minimum contacts' with it."⁴⁸ Equally unacceptable is the court's implied reliance on three factors "having to do with the [defendant company's] activities in Florida related to the cause of action,"⁴⁹ namely that plaintiff purchased her ticket in Florida, that the

45. *Id.* at 222.

46. *Survey I*, at 278.

47. In a particular case, however, there may be a positive local rule interpreting the statutory jurisdictional grant to be co-extensive with the minimum constitutional requirement under the due process clause. For example, this is the case in California where the statutory requirement of "doing business in this state" is "synonymous with the power of the state to subject foreign corporations to local process," *Henry R. Jahn & Son v. Superior Court*, 49 Cal. App. 2d 855, 858, 323 P.2d 437, 439 (1958); *Mechanical Contractors Ass'n v. Mechanical Contractors Ass'n*, 342 F.2d 393, 399 (9th Cir. 1965). However, for Pennsylvania, the court in *Greco v. Bucciconi Eng'r Co.*, 246 F. Supp. 261, 262 (W.D. Pa. 1965) observed that the local statute relating to service of process on non-resident corporations "had not gone to the limit permitted by federal due process."

48. This unwarranted shift from the express statutory jurisdictional grant to the constitutional minimum standards under the due process clause is clearly visible in *Teeby Realty Corp. v. Gasway Corp.*, 181 So.2d 31 (Fla. 3d Dist. 1965), looking for "sufficient contacts within the State . . . to subject defendant corporation to substituted service of process"; in *Lake Erie Chem. Co. v. Stinson*, 181 So.2d 587 (Fla. 2d Dist. 1965) relying on the "scholarly opinion . . . in *Simari v. Illinois Cent. R.R. Co.* . . .", and in *Harris v. Bean*, 182 So.2d 464 (Fla. 3d Dist. 1966) where the court found that defendant "had sufficient contacts with the transactions out of which this cause arose to meet the 'minimum contacts' rule."

49. *Supra* note 41. The use of the center-of-gravity method for jurisdictional purposes was expressly rejected in *Hanson v. Denckla*, 357 U.S. 235 (1958), where the Supreme Court remarked that Florida did not "acquire jurisdiction by being the 'center of gravity' of the controversy. . . . The issue is personal jurisdiction, not choice of law." *Id.* at 254. Again in *Rosenblatt v. Am. Cyanamid Co.*, 367 U.S. 957, 86 Sup. Ct. 1 (1965) the Supreme Court declined to

trip commenced in Florida, and that [defendant] maintains in Florida two permanent offices to solicit passengers and freight for interstate trips. This approach to the question of the court's jurisdiction is, of course, immaterial where an existing statute expressly delineates the terms and conditions pursuant to which judicial jurisdiction may attach.

The only questions properly before the court were, first, whether or not the alleged activities of defendant constituted what the statute clearly defined as to "operate, conduct, engage in, or carry on a business or business venture in the state, or to have an office or agency in the state."⁵⁰ The answer to this question cannot be avoided either by a discussion of possible constitutional limitations or by application of the procedural center-of-gravity method, expressly rejected in *Hanson v. Denckla*.⁵¹ The other question involved the jurisdictional effect of solicitation. Whether or not mere solicitation satisfies the requirements of the jurisdictional statute still remains a matter for judicial determination. The statute does, however, expressly provide that merely having an office within the state constitutes a sufficient contact with the state to render a nonresident defendant amenable to constructive service of process, a possibility not even noticed by the court. Finally, the court chose to completely disregard the other statutory jurisdictional prerequisite, namely that the action arises "out of any transaction or operation connected with, or incidental to such business or business venture."⁵² Whether or not the plaintiff's accident in Missouri arose from the fact that the defendant was engaged in a business or business venture in Florida, as evidenced either by his solicitation of business, or by the maintenance of an office here, is a matter of statutory interpretation, to be determined in the light of the facts of the particular case. Again, whether either statutory prerequisite to the exercise of jurisdiction over a nonresident defendant, as construed by the court, satisfied minimal constitutional due process requirements is a separate question that does not appear to have been presented to the court.⁵³

apply the center of gravity test to an alleged conspiracy in Italy in determining whether the New York court acquired jurisdiction to hear and determine the cause arising from the alleged conspiracy. It held "These facts . . . [are] not relevant, however, to the *jurisdiction* of New York . . ." (Emphasis added.). Cf., *Etzler v. Dille & McGuire Mfg. Co.*, 249 F. Supp. 1 (W.D. Va., 1965).

50. FLA. STAT. § 47.16 (1965).

51. 357 U.S. 235 (1958).

52. *Supra* note 50.

53. Compare the rationale of the court in this case with the identical reasoning—so far as minimal constitutional due process requirements are concerned—of the United States Supreme Court in *Hanson v. Denckla*, 357 U.S. 235 (1958). In the *Hanson* case, the Court discussed Florida's *in personam* jurisdiction on the basis of the constitutionally required contacts enunciated in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) and in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and failed to find such contacts in the circumstances of this case. Among other things, the Court found that the defendant lacked an office in Florida and transacted no business there, contacts expressly provided by FLA. STAT. § 47.16 (1965) as sufficient to invoke the jurisdiction of the Florida courts

It is now well established that the operative facts (contacts), required by the jurisdictional statute must be considered on a case-by-case basis.⁵⁴ The burden of proving those facts necessary to call the nonresident business statute into operation rests with the plaintiff, who must substantiate the jurisdictional allegations of his complaint by "affidavit containing statements of fact, or by other proof."⁵⁵

Again on the interstate level, the district court of appeal, in *Steel Joist Institute, Inc. v. J. H. Mann III, Inc.*,⁵⁶ agreed with the court below by holding that a foreign corporate nonprofit trade association, which periodically inspected in Florida joists manufactured by its members, was engaged in business there. Similarly, a nonresident defendant who executed a motel lease in Florida was found to be engaged in a business venture, and a subsequent action for an alleged breach of the lease was held to have resulted from such business venture; the court observed that "[T]he instant motel business would not be in existence had not [the defendant] executed the lease."⁵⁷

When the defendant is a corporation, additional difficulties may arise.⁵⁸ For example, a claim may be directed both against the nonresident corporation and against its nonresident officers personally. In *Odell v. Signer*,⁵⁹ the plaintiffs, in an action to re-establish and to recover upon a promissory note signed by the individual defendants and a nonresident foreign corporation (of which the individual defendants were officers), took an interlocutory appeal from an order dismissing the complaint as to the individual defendants for lack of jurisdiction over them. The note on

in litigation arising out of, or incidental to, the defendant's Florida operations. On the contrary, the Court in *Hanson* found that "The cause of action . . . is not one that arises out of an act done or transaction consummated in the forum state [Florida]." (*Id.* at 251).

54. *Giannini Controls Corp. v. Eubanks*, 181 So.2d 191 (Fla. 1st Dist. 1965); *James v. Kush*, 157 So.2d 203 (Fla. 2d Dist. 1963).

55. *Young Spring & Wire Corp. v. Smith*, 176 So.2d 903 (Fla. 1965). A self-serving affidavit that the foreign corporation had surrendered its permit to do business in Florida, together with a certificate of withdrawal and a letter from the Secretary of State was held not to constitute sufficient evidence, thus invalidating the service of process in a suit filed one week after withdrawal certificate had been filed, *Zucad Realty Corp. v. Sonz*, 179 So.2d 114 (Fla. 3d Dist. 1965).

56. 171 So.2d 625 (Fla. 2d Dist. 1965).

57. *Florida Inv. Enterprises, Inc. v. Kentucky Co.*, 160 So.2d 733, 740 (Fla. 1st Dist. 1964).

58. Service on a Florida corporation which had failed to designate an office for service of process, *Radiation, Inc. v. Magnetic Systems Corp.*, 173 So.2d 741 (Fla. 2d Dist. 1965). In *Pure Oil Co. v. Suarez*, 346 F.2d 890 (5th Cir. 1965) an injured seaman's action was brought under the Jones Act in the federal district court in Florida. Defendant's motion to transfer on ground that venue was not properly laid in Florida was denied, the appellate court holding that such venue is proper in any district where the carrier is incorporated or licensed to do business or is doing business. The restrictive provision of the Jones Act, 46 U.S.C.A. 688, providing that "jurisdiction . . . shall be under the court of the district in which defendant employer resides or in which his principal office is located" is to be interpreted in the light of 28 U.S.C. § 1391(c) (1949), defining venue in actions against corporations as proper in "any judicial district in which it . . . is doing business."

59. 169 So.2d 851 (Fla. 3d Dist. 1965).

which the present suit was based had been executed previously by the individual and corporate defendants in settlement of prior litigation between the same parties, arising out of the corporation's activities in Florida; it had been signed by the defendant-officers in their individual capacity as well as on behalf of the corporation. In the first suit, the individual defendants had been personally served with process, while in the instant suit service upon all of the defendants was pursuant to the provisions of Florida Statutes, section 47.16 (1965). In support of the order granting their motion to dismiss, the individual defendants contended, *inter alia*, that the execution of the note and the defense of the lawsuit were not sufficient acts, in and of themselves, to constitute carrying on or engaging in a business or business venture within the meaning of the statute; they further argued that all of the acts performed by them in Florida were done as agent, officers, or employees of the corporation, and were not attributable to them individually. Although the district court of appeal agreed that the activities of the individual defendants in Florida were insufficient to amount to engaging in business or a business venture, it nevertheless reversed the order of dismissal entered by the trial court for its supposed lack of jurisdiction over the individual defendants, since in the particular circumstances presented by this case, the corporate acts should have been imputed to the individual defendants for the purpose of acquiring jurisdiction over them. The circumstances included the fact that the note had been executed in settlement of litigation in which the defendants had been served personally. "By settling the litigation, and then refusing to honor the note given in settlement, these individuals are defeating the jurisdiction over them initially obtained."⁶⁰ The court said that it could not condone such conduct. Further, the individual officers, as agents of the corporation, would be personally liable to third persons injured by their tortious activity, notwithstanding that these acts were performed within the scope of their employment as corporate officers. "If the tortious corporate activity is attributable to them personally, then the acts of that corporation which constitute it as doing business in this state, are similarly attributable to the individuals for purposes of determining jurisdiction."⁶¹ The case contains a dissenting opinion by Judge Horton, who objected to the broad interpretation of the "doing business" statute on the ground that "statutes such as these are required to be strictly construed and cautiously applied"⁶²

The jurisdictional significance of the alleged presence in the state of a resident agent of a foreign corporation was discussed in *Lake Erie Chem. Co. v. Stinson*.⁶³ The court not only held that the mere allegation that the foreign corporation had a resident agent in Florida did not

60. *Id.* at 853.

61. *Id.* at 854.

62. *Ibid.*

63. 162 So.2d 545 (Fla. 2d Dist. 1964).

amount to an allegation that the defendant was engaged in business in the state, such allegation also precluded service of process on the Secretary of State by virtue of the last sentence of paragraph (1), section 47.16, Florida Statutes.⁶⁴

On the international level, the court in *Lake v. Lucayan Beach Hotel Co.*⁶⁵ held that mere solicitation of business in Florida by a Bahamian hotel corporation was not sufficient to meet requirements of section 47.16. Yet, the court found that the statutory requirements had been satisfied from the fact that the defendant corporation "maintained an apartment in Miami Beach where it entertained travel agents for the purpose of producing business through their office . . . [and] an office in Palm Beach, Florida, to which general business correspondence could be addressed and would be answered."⁶⁶ However, the question whether or not the damages claimed for an alleged breach of an employment contract arose from such activities was not raised. In *Inter-Ocean Commerce Corp. v. Heller*⁶⁷ the garnishees-appellees, Underwriters at Lloyd's, London, moved to dismiss

64. For cases involving the jurisdiction of the federal courts over non-resident foreign (Florida) corporations in diversity actions, see *South Carolina, Martin v. Winn-Dixie Stores*, 242 F. Supp. 533 (W.D.S.C. 1965), and *Huggins v. Winn-Dixie Greenville, Inc.*, 233 F. Supp. 667 (E.D.S.C. 1964). Jurisdiction over a Florida corporation in *Sansone v. Louisiana Power & Light Co.*, 164 So.2d 151 (La. 1st Cir. 1964). In *Personam Jurisdiction of the Federal Courts over Foreign Corporations in Diversity: State v. Federal Law under Erie R.R. v. Tompkins*, 38 ST. JOHN'S L. REV. 327 (1964); *Personal Jurisdiction over Foreign Corporations in Diversity Actions: A Tilt-yard for the Knights of Erie*, 31 U. CHI. L. REV. 752 (1964); *Diversity Jurisdiction of the Federal Courts over Foreign Corporations*, 49 IOWA L. REV. 1224 (1964); *Civil Procedure: Service of Process on the Foreign Corporation*, 18 U. FLA. L. REV. 145 (1965).

In *Punta Gorda Ready Mix Concrete, Inc. v. Green Manor Constr. Co.*, 166 So.2d 889 (Fla. 1964), reversing 159 So.2d 255 (Fla. 2d Dist. 1963), the Florida Supreme Court held that the trial court had properly entered a default judgment against a foreign corporate defendant constructively served with process pursuant to FLA. STAT. §§ 47.16 and 47.30 and failing to file a motion or responsive pleading, even though there was pending at the time of the entry of the default an undisposed of motion to dismiss the complaint for lack of jurisdiction over the foreign corporate defendant. Service of process was originally made upon one H. Greer as the alleged agent of the corporation. The defendant denied that Greer was its agent and moved to dismiss the complaint. Apparently, the plaintiff conceded the insufficiency of the service of process upon the defendant because it thereafter served the defendant constructively. Subsequently, the default was entered. On the defendant's appeal, the court of appeal had held that the trial court had erroneously entered the default while there was pending an undisposed motion in the case. The supreme court disagreed. Where an undisposed motion is pending in a cause, a default judgment may not be entered unless the determination of the motion either way would not affect the plaintiff's right to proceed with the actions. When jurisdiction of the defendant was obtained by substituted service, determination of the pending motion could in no way affect the court's jurisdiction or the right of the plaintiff to proceed with the cause. The defendant filed no motion or responsive pleading after the substituted service was effected.

The rule gives everyone his day in court. At the same time, it is likely to serve the salutary purposes of conserving the time of trial courts by making it unnecessary for them to rule on motions that present no valid issue, and of preventing delay occasioned by the filing of such motions. . . .

(*Id.* at 891).

65. 172 So.2d 260 (Fla. 3d Dist. 1965).

66. *Id.* at 261.

67. 161 So.2d 25 (Fla. 3d Dist. 1964).

the complaint because of lack of jurisdiction. In their affidavit they denied that they were engaged in any business in Florida and added that the garnishment was based "upon an alleged contract which was not entered into or negotiated in the State of Florida."⁶⁸ Relying on *Forston v. Atlantic Eng'r & Mfg. Corp.*,⁶⁹ the court held that "plaintiff has made a sufficient showing that the garnishees have engaged in a business venture in Florida" and, therefore, that they were amenable to jurisdiction. However, it is not clear whether the cause of action arose from alleged activities in Florida, which were found to exist on the basis of two contradictory affidavits, a finding possibly unnecessary under section 624.022, Florida Statutes.⁷⁰

In a number of cases, Florida courts found alleged activities to be insufficient to meet statutory requirements. In *G & M Restaurants Corp. v. Tropical Music Serv. Inc.*,⁷¹ for example, the mere fact that plaintiff billed the defendant Georgia corporation for services performed by a Florida corporation in accordance with the instructions of the latter was held insufficient to establish "doing business" in Florida on the part of defendant, particularly since no relationship of agency, or ratification on the part of defendant corporation was shown.

Substantial difficulties arise from paragraph (2), added to section 41.16, Florida Statutes, in 1957. This subsection provides:

(2) Any person, firm or corporation which through brokers, jobbers, wholesalers or distributors sells, consigns, or leases, by any means whatsoever, tangible or intangible personal property, to any person, firm or corporation in this state, shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business or business venture in this state.

In the words of a federal court "The Florida arm is not only long. It is strong and its sinews were strengthened by the legislative reflex to court decisions . . . and the muscles have been beefed up by the legislative declaration of policy stated in emphatic terms."⁷² business located in other jurisdictions directly or indirectly furnishes millions of dollars worth of tangible and intangible personal property to the people of Florida; the cost of litigating both tort and contract actions arising from these transactions is prohibitive and frequently results in "denying all rights and remedies regarding such purchase, lease, consignment, use or consumption." The policy of the legislature as expressed in the statute is

68. *Id.* at 27.

69. 143 So.2d 364 (Fla. 2d Dist. 1962).

70. *Confederation of Can. Life Ins. v. Vega y Arminan*, 135 So.2d 867 (Fla. 3d Dist. 1961), *cert. denied*, 144 So.2d 805 (1962); *Survey I*, at 287.

71. 161 So.2d 556 (Fla. 2d Dist. 1964).

72. *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*, 332 F.2d 135, 137 (5th Cir. 1964), *cert. denied*, 379 U.S. 915 (1964).

to afford Florida users a convenient forum in which to judicially determine their disputes. Nevertheless, constitutional standards of due process require additional workable criteria for the interpretation of statutory language in the light of the stated legislative intent.

These problems were brought into sharp focus in an action upon a Florida default judgment brought in a federal court in Texas.⁷³ There, the defendant, a Kansas manufacturing corporation, denied that its activities in Florida put it within the reach of section 47.16(2). It argued that a default judgment obtained thereby was not entitled to full faith and credit. The trial judge, in a lengthy and carefully written opinion, held that service upon the vice-president of defendant's Florida distributor was insufficient; the appellate court reversed.⁷⁴ Relying on *Fawcett Publications Inc. v. Rand*⁷⁵ and *Deere & Co. v. Watts*,⁷⁶ the appellate court applied the criterion of "some degree" of control by the defendant, both over the personal property involved in the situations listed in paragraph (2) of section 47.16, as well as over the "brokers, jobbers, wholesalers or distributors selling or distributing the personal property in this state." It found the "evidence overwhelming" to meet the required degree of control. In regard to the contested service of process on the vice-president of this distributor, the appellate court noted, that the process was not served on the Secretary of State, but rather on the local distributor through its vice-president, as the resident agent, according to the last sentence of paragraph (1) of section 47.16. Although the court admitted that the defendant corporation and its Florida distributor "did not stand in the traditional relationship of principal and agent," it held, nevertheless, that their close economic business ties were sufficient to satisfy the Florida standard that there be "a legal or moral duty on the part of the [agent] to report and properly handle a summons served on him as agent. . . ."⁷⁷

A more limited aspect of the statutory provision under discussion was involved in the prolonged litigation of *Young Spring & Wire Corp. v. Smith*,⁷⁸ which finally terminated in the supreme court's holding that, in the terms of *Fawcett Publications, Inc. v. Brown*,⁷⁹ the plaintiff's affidavit "lacks any material fact which would clearly show that [defendant] is doing business in Florida," since it only stated that the latter informed the

73. *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*, 217 F. Supp. 255 (W.D. Tex. 1963).

74. 332 F.2d 125 (5th Cir. 1964). *Cf.*, *Szantay v. Beech Aircraft Corp.*, 237 F. Supp. 393 (E.D.S.C. 1965).

75. 144 So.2d 512 (Fla. 3d Dist. 1962).

76. 148 So.2d 529 (Fla. 3d Dist. 1963).

77. This criterion was enunciated in *Mason v. Mason Prod. Co.*, 67 So.2d 762, 763 (Fla. 1953).

78. Various stages of the litigation have previously been reported at 168 So.2d 540 (Fla. 1964), 169 So.2d 846 (Fla. 3d Dist. 1964), and 172 So.2d 238 (Fla. 3d Dist. 1965), in addition to the opinion in 176 So.2d 903 (Fla. 1965).

79. 146 So.2d 899 (Fla. 2d Dist. 1962).

inquiring plaintiff as to its "nearest distributor," which was a Florida corporation with a Miami address. However, the supreme court found itself unable "to ascribe any significance to this. The use of the word 'distributor' in the context employed is insufficient to establish the fact that this 'distributor' is controlled by [defendant] or that [defendant] has even a modicum of control over its products while in the possession of the 'distributor.'"⁸⁰ In a similar vein, lack of control over the product involved, or over the wholesalers who handled the product after its sale in New York and shipment f.o.b. to warehouses outside of Florida, supported a motion to dismiss for lack of jurisdiction in *Cooke-Waite Labs. Inc. v. Napier*.⁸¹

4. UNAUTHORIZED INSURERS

The controlling statute⁸² which extends the state's jurisdictional powers far beyond those claimed under other long-arm statutes has not yet been judicially interpreted in these sensitive areas.

5. NONRESIDENT CHARITABLE ORGANIZATIONS

Charitable organizations which have their "principal place of business without the State, or are organized under and by virtue of the laws of a foreign state" and "solicit contributions from people in this State" are not only subject to the provisions of this Act, but also "shall be deemed to have irrevocably appointed the Secretary of State" as their agent for service of process in "any action or proceeding brought under the provisions of this Act," *i.e.* Solicitation of Charitable Funds Act, 1965.⁸³

6. PERSONAL REPRESENTATIVES

Whomsoever shall be issued letters of administration of a decedent's estate must, among others, designate "some resident of the county as his agent or attorney for the service of process." This designation shall be

80. *Young Spring & Wire Corp. v. Smith*, 176 So.2d 903, 905 (Fla. 1965). The question of the sufficiency of "control over the personal property in the hands of the brokers, jobbers, wholesalers, or distributors," also was involved in *DiGiovanni v. Gittelson*, 181 So.2d 195 (Fla. 3d Dist. 1966), the court finding that the corporate co-defendant "did exercise control over the drug which it sold to [defendant] and which was subsequently administered to plaintiff."

81. 166 So.2d 675 (Fla. 2d Dist. 1964).

82. FLA. STAT. § 626.0505 (1965); *Survey I*, at 288. Service on the vice president of the insurance company instead of the commissioner of insurance was held insufficient in *Morris v. American Bankers Ins. Co.*, 184 So.2d 906 (3d Dist. 1966) on the ground that the latter is the sole method. Service of the writ of garnishment, *United States v. St. Paul Mercury Ins. Co.*, 361 F.2d 838 (5th Cir. 1966).

83. FLA. STAT. § 496.12 (1965).

taken to constitute the consent of the person so designating that service of any process upon the designated agent or attorney shall be sufficient to bind the person so designating in any suit or action against such personal representative, either in his representative capacity or personally; provided that such personal action must have accrued in the administration of such estate.⁸⁴ This rule applies to any personal representative, whether a resident or a nonresident of Florida, but not to corporate fiduciaries.

7. PROPERTY

Florida has not adopted a statute subjecting nonresident owners of property situated in the state, to local jurisdiction in suits related to such property. However, an exception exists with respect to the ownership of aircraft and watercraft,⁸⁵ the mere "maintaining" of which in the state may subject nonresidents to the jurisdiction of Florida courts, provided, of course, that the action is "growing out of any accident or collision in which such nonresident . . . may be involved while, either in person or through others . . . maintaining an aircraft, boat, ship, barge, or other watercraft in the state. . . ."⁸⁶ It appears that the mere "maintenance" of these chattels is sufficient to establish jurisdiction over the nonresident owners. Of course, it is possible that ownership of other assets in Florida may amount to engaging in business or a business venture, provided these assets are operated as such. However, the mere fact that a defendant owned land in Florida and maintained it in compliance with municipal ordinances did not constitute a business venture in Florida. This was true even though a defendant had rented his property for one year with an option to purchase, where the venture terminated at the expiration of the option. The tenants vacated the premises, and the broker terminated his relationship with the defendant before the occurrence of the alleged injury to the child on the premises owned by the nonresident.⁸⁷ The court also added that the injury which had allegedly been caused by a dead tree did not arise out of any transaction or operation connected with or incidental to any business venture on the part of defendant.⁸⁸ Similarly, in *Unterman v. Brown*⁸⁹ the court held that the co-ownership of a restaurant in Florida by defendant did not make the defendant amenable to the jurisdiction of the Florida courts, since it was not shown that the action arose out of any transaction connected with that restaurant.

84. FLA. STAT. § 732.45(2) (1965).

85. FLA. STAT. § 47.162 (1965).

86. *Ibid.*

87. *James v. Kush*, 157 So.2d 203 (Fla. 2d Dist. 1963).

88. *Ibid.*

89. 169 So.2d 522 (Fla. 2d Dist. 1964). Florida has no single-act tort statute like, for example, New York. The constitutionality of such statute was recently upheld in *Rosenblatt v. American Cyanamid*, 86 Sup. Ct. (1965).

B. *Quasi-in-Rem Jurisdiction*

In *Payton v. Swanson*⁹⁰ two pertinent rules were re-stated. After the plaintiff in an in personam action against a nonresident defendant had perfected jurisdiction by garnishing defendant's bank account in the state, the defendant urged dismissal for lack of jurisdiction on two grounds: (1) that there had been no personal service on defendant; and (2) that a nonresident plaintiff is not entitled to sue quasi-in-rem. Both attacks were unsuccessful on the grounds, first, that "service of process on a nonresident . . . defendant is not required to gain quasi-in-rem jurisdiction over his property within the state by way of garnishment," and, second, because Florida prescribes no limitation based on residence of the plaintiff in regard to his right to bring a garnishment procedure.

C. *In Rem Jurisdiction*

In *Department of Ins. of the State of Ind. v. Highway Ins. Co.*,⁹¹ the defendant Department had moved, unsuccessfully, for dismissal for lack of jurisdiction over defendant in an in rem action pertaining to title to Florida land. The appellate court affirmed the denial of the motion on the ground that the court had jurisdiction over the subject matter, i.e., land, and that service of process had been made as provided by statute⁹² upon the defendant as the liquidator of the Indiana insurance company.

D. *Litispendency*

In *A. J. Armstrong Co. v. Romanach*⁹³ the court re-stated some of the fundamental rules in the matter of pendency. As a general rule the pendency of an action in another state involving the same subject matter is not "ground for abatement of a subsequent action in Florida."⁹⁴ However, the court has the power to "stay a proceeding until the determination of a prior pending suit,"⁹⁵ based on considerations of "comity to the courts of other jurisdictions, the prevention of multiplicity of suits, as well as the prevention of unnecessary vexation and harassment of the defendant . . . by unnecessary litigation."⁹⁶ Sometimes, the effect of litispendency is determined by statute. In *Springer v. Colburn*,⁹⁷ the provision of the Uniform Insurers Liquidation Act,⁹⁸ to the effect that "during the pendency of delinquency proceedings in this or any reciprocal state, no action or proceeding in the nature of attachment, garnishment or execu-

90. 175 So.2d 48 (Fla. 3d Dist. 1965).

91. 170 So.2d 464 (Fla. 3d Dist. 1965).

92. FLA. STAT. §§ 48.01, 48.02 (1965).

93. 165 So.2d 817 (Fla. 3d Dist. 1964).

94. *Id.* at 818.

95. *Ibid.*

96. *Id.* at 819.

97. 162 So.2d 513 (Fla. 1964).

98. FLA. STAT. § 631.201 (1965).

tion shall be commenced or maintained in the courts of this state against the delinquent insurer or its assets," was held to operate only prospectively.

E. Federal Law

Within the area of federal law, some developments of local interest are worthy of mention. For example, the venue provisions of section 1391 of title 28 of the United States Code have been expanded by the addition of the following provision:

(f) A civil action on a tort claim arising out of manufacture, assembly, repair, ownership, maintenance, use, or operation of an automobile may be brought in the judicial district wherein the act or omission complained of occurred.⁹⁹

With respect to litigation with international aspects, both titles 18 and 28 of the United States Code have been amended. The former extends the applicability of federal criminal law to perjuries committed before any tribunal, officer, or person authorized under federal law to administer an oath either here or abroad,¹⁰⁰ a rule that had already been adopted by the courts.¹⁰¹ The latter title has been improved by detailed provisions relating to service in both foreign and international litigation,¹⁰² assistance to foreign and international tribunals and to litigants before them,¹⁰³ as well as to subpoenas in foreign countries and to contempt.¹⁰⁴ Similar improvements may also be noted in the 1965 amendments to the Florida Rules of Civil Procedure.¹⁰⁵ The amended rules now contain provisions as to the persons before whom depositions may be taken in foreign countries.¹⁰⁶ It may also be noted that the recently approved Uniform Interstate and International Procedure Act has been enacted in Arkansas¹⁰⁷ and Oklahoma.¹⁰⁸

The same subjects have been discussed by the Tenth Hague Conference on Private International Law (1964). At this Conference, a draft Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters was signed by the representatives of the United States.

99. 48 U.S.C. 491 (1964).

100. 18 U.S.C. § 1621 (1964).

101. *United States v. Rodriguez*, 182 F. Supp. 479 (S.D. Cal. 1960), *aff'd*, under *Rocha v. United States*, 288 F.2d 545 (9th Cir. 1961); noted in 15 U. MIAMI L. REV. 428 (1961); *United States v. Archer*, 51 F. Supp. 708 (S.D. Cal. 1943).

102. 28 U.S.C. § 1696 (1949).

103. 28 U.S.C. § 1787 (1949).

104. 28 U.S.C. §§ 1783, 1784 (1949). Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015 (1965).

105. 178 So.2d 15 (Fla. 1965).

106. FLA. R. CIV. P. 1.23(b).

107. ARK. STAT. § 27-2501-7 (1963). *Cf.*, *Roberts v. Worthen Bank & Trust Co.*, 183 So.2d 811 (Miss. 1966).

108. OKLA. STAT. § 1701.01 (1965 Supp.).

III. FOREIGN JUDGMENTS

On the interstate level, the enforcement of the judicial decision of a sister state is resisted, in most cases, either by asserting noncompliance with the jurisdictional requirements of the adjudicating forum or by attacking their constitutional validity.¹⁰⁹ In a recent case, the lack of jurisdiction was asserted by alleging the erroneous application of the adjudicating forum's substantive law. A Florida court had entered a decree expressly granting a divorced wife the right to receive alimony payments beyond the husband's lifetime. In a subsequent suit, brought in West Virginia, to enforce the Florida decree, it was argued that the entry of the decree was erroneous under the applicable substantive law of Florida, that it constituted a judicial act beyond the court's jurisdiction and, consequently, was not entitled to full faith and credit in West Virginia. The West Virginia Supreme Court agreed.¹¹⁰ The United States Supreme Court granted certiorari and certified four questions of law to the Florida supreme court.¹¹¹ The latter court answered the first and second questions¹¹² to the effect that a decree of alimony to a divorced wife so as to bind her husband's estate was not in accordance with Florida substantive law, but that the entry of such a decree does not render the court without "subject matter jurisdiction." It would appear that certification was unnecessary in view of the generally accepted rule that erroneous application of substantive law by a court, which had otherwise properly perfected jurisdiction in regard to the parties and the subject matter, does not result in lack of jurisdiction. The argument that erroneous application of the substantive law deprives a court of jurisdiction appears to be based on the naive assumption that courts act within the scope of their jurisdiction only when properly applying the controlling substantive law. The absence of such interdependency between jurisdictional and substantive law was clearly established in Justice Holme's opinion in *Fauntleroy v. Lum*¹¹³ in which he observed that substantive law relates to the duty of the court, while jurisdictional law relates to its power. "Under the common law it is the duty of the court of general jurisdiction not to enter a judgment upon a parole promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed."¹¹⁴ In the instant case, the decision of the trial court, granting alimony, was rendered by a court having jurisdiction both over the parties and over the subject matter and became final without appeal. In a brief per curiam opinion,¹¹⁵ the Supreme Court

109. Seidelson, *The Full Faith and Credit Clause: An Instrument for Resolution of Intranational Conflicts Problems*, 32 GEO. WASH. L. REV. 554 (1964).

110. *Aldrich v. Aldrich*, 127 S.E.2d 385 (W.V. 1962).

111. 375 U.S. 249 (1963).

112. 163 So.2d 276 (Fla. 1964).

113. 210 U.S. 230 (1908).

114. *Id.* at 235.

115. *Aldrich v. Aldrich*, 375 U.S. 75 (1963).

reversed the decision of the West Virginia Supreme Court on the ground that the decision was "based on a misapprehension regarding the law of the sister State," and added that the "Florida decree must be treated as if it were perfectly correct under the substantive principles of Florida law." On the constitutional issue, the Court declined to adopt the position that a rule of law imposing a burden on the estate of a divorced man who has had his day in court violated due process.

Among the cases involving the question of full faith and credit by Florida courts to the judgment of sister states, the following deserve mention. The failure of a Michigan court to comply with its rules, regarding constructive service by publication in a foreclosure suit brought in that state, was held to be grounds for denying full faith and credit to its judgment ordering the sale of Michigan land and the payment of a deficiency.¹¹⁶ However, in *State v. Taran*,¹¹⁷ a Minnesota judgment for delinquent taxes was held entitled to full faith and credit in Florida, notwithstanding the fact that the defendant was served in Minnesota when he returned there for a criminal trial. Under Minnesota law, immunity is not granted in such situations. In regard to a contrary rule in force in Florida, the court remarked that "Lightweight contrary policies in one state will not counterbalance the top-heavy compulsion of the full faith and credit clause of the federal constitution to observe and enforce the judgments of another state."¹¹⁸

The effect of the Florida statute of limitations in an action on a sister state judgment was litigated in *Markham v. Gottsegen*.¹¹⁹ Against assignee's attempt to recover on a twenty-one-year-old Ohio judgment, two points were raised on appeal. First, the defendant argued that the statute of limitations of the forum barred the action, while the plaintiff insisted that the judgment had been kept alive in Ohio by filing it at five-year intervals according to the provisions of the applicable Ohio law. In this respect, the Florida court held that the effect, if any, of such filing was limited, according to the Ohio statute, to the judgment's remaining a "lien . . . upon the lands and tenements situated" in the respective Ohio county and that any reliance on Ohio law, according to section 92.031 of Florida Statutes, is not automatic, but depends upon proper pleading by the interested party. Even if proven, the court observed, the Ohio

116. *Henock v. Yeaman*, 340 F.2d 503 (5th Cir. 1965). A Florida judgment against an incompetent for accumulated arrears for child support was denied full faith and credit in New York because of the failure to appoint a guardian ad litem for the incompetent, as required by Florida law, *In re Raffa*, 24 A.2d 494, 261 N.Y.S.2d 423 (1965).

117. 164 So.2d 893 (Fla. 3d Dist. 1964).

118. *Id.* at 894. In *Florida Bar v. Wilkes*, 179 So.2d 193 (Fla. 1965), the supreme court held that neither comity nor full faith and credit requires that New York disbarment result in disbarment in Florida. But a California decree adjudging paternity is final and, consequently, entitled to full faith and credit in Florida, *Mocher v. Rasmussen-Taxdal*, 180 So.2d 488 (Fla. 2d Dist. 1965).

119. 179 So.2d 100 (Fla. 2d Dist. 1965).

statute would not change the result; such revival would be invalid and the bar of the statute of limitations of the Florida forum would not be removed, where "the defendant has not been served with process, had not voluntarily appeared, and had previously removed from the state where the proceedings were had."¹²⁰ The plaintiff's second contention, that the cognovit note contained a waiver, thereby dispensing with the necessity for service or notice, was dismissed by the court on the ground that "the waiver of service of process and notice applied to confession of a judgment; thereupon all error was released and all right of appeal, and nothing else."¹²¹

A New York judgment recovered against a partnership, of which the defendant was a member, was denied effect by a federal court sitting in Florida,¹²² on the ground that "a judgment against a partnership is not binding upon a partner in his individual capacity where rendered in an action without service upon him."¹²³

The degree of acceptance given by sister states to Florida judicial decisions was illustrated by several cases. In *Dunn v. Royal Bros. Co., Inc.*,¹²⁴ a Georgia court found that the Florida court had properly applied the nonresident motorist statute¹²⁵ and held that the statute complied with the constitutional requirement as to the notice. The court quoted from *Wuchter v. Pizzutti*¹²⁶ that such statute "must, in order to be valid, contain a provision making it reasonably probable that notice of service on the Secretary of State will be communicated to the nonresident defendant who is sued." Similarly, in *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*,¹²⁷ already discussed, a federal court of appeals carefully checked the underlying Florida nonresident business statute¹²⁸ and, in regard to its constitutionality, remarked that "Any lurking due process problems are . . . narrowly confined to the question of whether the Florida statutory structure reasonably assures that the nonresident will have fair notice and opportunity for a fair defense."¹²⁹ In so "assaying the federal constitutionality of the Florida statute," the court also looked at Florida procedure and found that it affords a nonresident defendant "a full and unconditional opportunity to contest jurisdiction over the person of the defendant to the bitter end."¹³⁰ Even though Rule 1.11(b) of the Florida Rules of Civil Procedure, copied from Federal Rule 12(b), has abolished the distinction between general and special appearances,

120. *Id.* at 102.

121. *Ibid.*

122. *Olsen v. Puntervold*, 338 F.2d 21 (5th Cir. 1964).

123. *Id.* at 22; *cf.*, *Stanford v. Utley*, 341 F.2d 265 (8th Cir. 1965).

124. 111 Ga. App. 322, 141 S.E.2d 546 (1965).

125. FLA. STAT. § 47.29 (1965).

126. 276 U.S. 13, 18 (1928).

127. 332 F.2d 135 (5th Cir. 1964).

128. FLA. STAT. § 47.16(2) (1965).

129. *Supra* note 127, at 141.

130. *Id.* at 144.

it nevertheless reserves, for the defendant, the right to object to jurisdiction¹³¹ and thus guarantees him a "full, unrestricted opportunity to have the Florida court pass upon its own statute and the sufficiency of the facts to support either amenability or method of service, with right of review to the United States Supreme Court thereafter as to any federal constitutional questions."¹³² On the other hand, upon the authority of *Fall v. Eastin*,¹³³ a New Jersey court¹³⁴ denied full faith and credit to that part of a Florida divorce decree which ordered a husband to convey to his wife land situated in New Jersey, but granted summary judgment for the plaintiff as to that part of the Florida decree which dealt with personal property in New Jersey.¹³⁵ The effect, in terms of res judicata and collateral estoppel, of a previous default decree for separate maintenance recovered in Florida by a wife upon the husband's subsequent divorce action brought in Nevada was in issue in *Clark v. Clark*.¹³⁶ The Nevada court held that the husband's action for divorce on the alleged ground of his wife's extreme cruelty was not barred because the Florida default decree was obtained on the basis of husband's extreme cruelty. The wife's reliance upon the Florida rule relating to compulsory counterclaims was considered unfounded since the rule is one merely of local procedure and without extra-territorial significance.¹³⁷ The dismissal of an action on a Florida default judgment, brought in a federal court in Virginia, was upheld on appeal¹³⁸ on the ground that, according to the findings of the trial court, the defendant had never been served nor was he present in Florida at the time of the original action, regardless of the return of service in Florida. The appellate court held that these findings were not clearly erroneous. Finally, in *Succession of King*¹³⁹ a Louisiana court of appeal held that a Florida divorce decree, incorporating an agreement between spouses under which the husband would pay a weekly alimony to his wife until her death or remarriage, whichever event occurs first, not final since Florida retained under section 65.15 of Florida Statutes jurisdiction to modify the decree and, consequently, was not entitled to full faith and credit. The dissenting judge forcefully indicated the fatal deficiencies of the majority opinion.

131. *Elly Lilly & Co. v. Shields*, 83 So.2d 271 (Fla. 1955).

132. *Supra* note 127, at 144.

133. 215 U.S. 2 (1909) and *Bullock v. Bullock*, 52 N.J. Eq. 561, 30 Atl. 676 (1894) *affirming* 51 N.J. Eq. 444, 27 Atl. 435 (1893).

134. *Higginbotham v. Higginbotham*, 84 N.J. Super. 232, 201 A.2d 581 (1964), *rev'd*, 35 U.S.L. WEEK 2095 (1966).

135. *But see* *McElreath v. McElreath*, 345 S.W.2d 722 (Tex. 1962), noted 9 U.C.L.A.L. Rev. 489 (1962).

136. 389 P.2d 69 (Nev. 1964).

137. *Id.* at 73. Attack on a Florida default judgment, *Caperson v. Vander*, 116 So.2d 653 (Fla. 3d Dist.), *cert. denied*, 120 So.2d 618 (Fla. 1960), was unsuccessful in New York, in spite of the defendant's contention that Florida court's determination of jurisdiction had been "made on discretionary grounds," *Vander v. Caperson*, 187 N.E.2d 109, 236 N.Y.S.2d 33 (1962).

138. *Freehill v. Benn*, 348 F.2d 911 (4th Cir. 1965).

139. 184 So.2d 583 (1966). *Cf.*, *Levantini v. Miami Beach First Nat'l Bank*, 83 So.2d 581 (Fla. 3d Dist. 1966).

The question of the effect to be given Florida court adjudications in a federal court was at issue in *In re Constructors of Florida, Inc.*¹⁴⁰ Without introducing the full faith and credit aspect of the question, the federal court relied on a number of federal cases and upon general legal principles in determining the res judicata effect of equitable decrees in Florida.¹⁴¹

International conflicts situations involved, of course, the inescapable Mexican divorce decrees¹⁴² which will be discussed elsewhere in this study. Other reported Florida cases deal with judgments recovered in Canada and in Bolivia. In the former case¹⁴³ the lower court's summary judgment on a Canadian money judgment was reversed on the ground that the motion for summary judgment was not supported by competent proof of the authenticity of the foreign judgment¹⁴⁴ since the copy of the judgment was not authenticated in any way except by the affidavit of a defendant's officer.¹⁴⁵ A Bolivian administrative confiscation decree was held valid in *Mathor v. Lloyd's Underwriters*.¹⁴⁶ The Underwriters insured certain cargo under two policies, the first excepting confiscation, and the second excluding "dispatch of any consignment . . . contrary to the laws of the country in which goods are situate or through which transit will take place." The court below found Bolivian customs authorities to have confiscated the insured goods as contraband and the decision of the customs authorities affirmed by the National Council of Customs. The appellate court concluded that "the court [below] recognized Bolivia as a sovereign government with a civilized jurisprudence and laws regulating its custom matters, and gives full effect to the findings and conclusions in their order,"¹⁴⁷ adding that plaintiffs "made no sufficient showing below to overcome the presumption of the validity of the foreign adjudication."¹⁴⁸

An agreement to arbitrate between a Florida corporation and a citizen of North Carolina was allegedly breached and the corporation brought an action for damages in a federal court in North Carolina. After denying the applicability of the Federal Arbitration Act¹⁴⁹ to the present agreement, the court held that the arbitration agreement, as well

140. 349 F.2d 595 (5th Cir. 1965).

141. *Res Judicata in the Federal Courts: Application of Federal or State Law: Possible Differences Between the Two*, 51 CORNELL L.Q. 96 (1965).

142. *Mexican Divorces: A Survey*, 33 FORDHAM L. REV. 449 (1965); BAYTCH & SIQUEIROS, *AMERICAN-MEXICAN PRIVATE INTERNATIONAL LAW* (1966). Attorney's fees in a suit attacking Mexican divorce, *Pollack v. Pollack*, 184 So.2d 915 (Fla. 1966).

143. *Jackson v. Stelco Employee's Credit Union, Ltd.*, 178 So.2d 58 (Fla. 2d Dist. 1965).

144. FLA. R. CIV. P. 1.6(c); FLA. STAT. § 92.032 (1965).

145. *Cf.*, *Cherun v. Frishman*, 236 F. Supp. 292 (D.D.C. 1964).

146. 174 So.2d 71 (Fla. 3d Dist. 1965).

147. *Id.* at 72.

148. *Id.* at 73. In the same way, the court in *Corporación Peruana de Aeropuertos y Aviación v. Boy* (180 So.2d 503, 505, Fla. 2d Dist. 1965) stated that "The presumption in law [is] that an act taken by a government agency, even the agency of a foreign government, is according to law and regular in every respect."

149. 9 U.S.C. § 1-14 (1947).

as claims arising out of it, were governed by the law of North Carolina where the agreement was made and where the work for which arbitration was intended had to be performed. Since the Uniform Arbitration Act of North Carolina applied, according to judicial interpretation, only to existing controversies, thereby making such arbitration agreements enforceable, all other arbitration agreements, including the one in the instant case, to arbitrate future controversies, remained unenforceable.¹⁵⁰

IV. ERIE-KLAXON DOCTRINE

The scope of the *Erie* doctrine¹⁵¹ is still in need of clarification. In some instances the Supreme Court has shown a marked reluctance to intervene while in others it tackled questions with opinionated zeal. The question of sufficiency of evidence to support a jury verdict remained undecided in *Dick v. New York Life Ins. Co.*¹⁵² and again in *Theriot v. Mercer*,¹⁵³ in both cases on the ground that evidence was sufficient under either standard that might be appropriate, state or federal. In other cases, clear-cut rulings have emerged. In *Van Dusen v. Barrack*,¹⁵⁴ for example, which involved tort actions arising out of the 1960 crash of a Northeast airliner over Boston Harbor, the defendants sought certiorari to review a writ of mandamus, granted on the plaintiffs' petition by the circuit court of appeals, staying an order transferring certain of the actions from a federal district court in Pennsylvania, where they had been instituted originally by the personal representatives of the decedents' estates, to the federal district court in Massachusetts, where the majority of actions arising out of the crash were then pending. The defendants had moved in the trial court for transfer pursuant to the provisions of section 1404(a) of the Judiciary Act,¹⁵⁵ which allows a change of venue "[f]or the convenience of the parties and witnesses, in the interest of justice . . . to any other district or division *where it might have been brought.*" In granting the writ, the court of appeals sustained the plaintiffs' contention that the action might not have been brought originally in the Massachusetts district court, since they had qualified as personal representatives of the decedents' estates in Pennsylvania but not in Massachusetts, and, under Rule 17(b) of the Federal Rules of Civil Procedure,¹⁵⁶ the plaintiffs' capacity to sue would be determined by the law of the state in which

150. *McDonough Constr. Co. v. Hanner*, 232 F. Supp. 887 (M.D.N. 1964).

151. FRIENDLY, IN PRAISE OF ERIE AND THE NEW FEDERAL COMMON LAW (1964); Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228 (1964); Carpenter, *Pluralistic Legislative Jurisdiction: Plaintiff's Choice under the Klaxon Rule*, 40 IND. L.J. 477 (1965); Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROB. 732 (1963).

152. 359 U.S. 437 (1959).

153. 262 F.2d 754 (1959); *cert. denied*, 359 U.S. 983 (1959); *rehearing denied*, 360 U.S. 914 (1959).

154. 376 U.S. 612 (1964); *Choice of Law After Transfer of Venue*, 75 YALE L.J. 90 (1965).

155. 28 U.S.C. § 1404(a) (1949). (Emphasis added.)

156. FED. R. CIV. P. 17(b).

the district court sat. The Supreme Court disagreed. It held that since both venue and jurisdiction were proper in the district of Massachusetts, the proposed transferee forum, "the effect of the Rule [17(b)], like the existence of different state laws in the transferee forum, is not relevant to a determination of where, as indicated by federal venue laws, the action 'might have been brought.'"¹⁵⁷ "[T]he 'might-have-been-brought' language of section 1404(a) plainly refers to the similar wording in the related federal [venue] statutes and not directly to the laws of the state of the transferee forum."¹⁵⁸ To hold otherwise ". . . would grant personal representatives bringing wrongful death actions the power unilaterally to reduce the number of permissible federal forums simply by refraining from qualifying as representatives in States other than the one in which they wished to litigate. . . . The power to defeat a transfer to the convenient federal forum should derive from rights and privileges conferred by federal law and not from the deliberate conduct of a party favoring trial in an inconvenient forum."¹⁵⁹ The effect of Rule 17(b) should be considered by a district court in connection with the determination of whether a requested transfer is "in the interest of justice." The Court then held that the motion for a change of venue from Pennsylvania to Massachusetts could not be defeated on the ground that there would be a prejudicial change in the controlling law since, under the *Erie-Klaxon* doctrine, the district court sitting in Massachusetts would be required to apply the law identified by the conflict rule of the new forum state because "[T]he transferee district court must be obligated to apply the state law that would have been applied if there had been no change in venue."¹⁶⁰ Similarly, Rule 17(b) should be so construed that the phrase "in which the district court is held" refers "to the district court which sits in the state that will generally be the source of applicable laws."¹⁶¹ It supported its position by reiterating the fundamental policy underlying *Erie*, namely, to maintain "the critical identity . . . between the federal district court which decides the case and the courts of the State in which the action was filed."¹⁶² Therefore, a change of federal venue "generally should be, with respect to state law, but a change of courtrooms."¹⁶³

The sufficiency of the service of process in a diversity action was the crucial issue in *Hanna v. Plumer*.¹⁶⁴ There, the Court was confronted with the problem of whether to apply Massachusetts law requiring service "in hand," or to apply the federal rules, which permit substituted service by leaving the summons at a defendant's residence. Relying on the "broad

157. 376 U.S., at 618.

158. *Id.* at 622.

159. *Id.* at 624.

160. *Id.* at 639.

161. *Id.* at 643.

162. *Id.* at 639.

163. *Ibid.*

164. 380 U.S. 460 (1965).

command" of *Erie v. Tompkins*, the Court started from the simple rule that in diversity cases federal courts are to "apply state substantive law and federal procedural law." However, the court concluded that subsequent cases have shown that "*Erie*-type problems were not to be solved by reference to any traditional or common-sense substance-procedure distinctions."¹⁶⁵ Rather, the policies underlying the *Erie* rule should be considered. On this basis, the Court considered the applicability of the outcome-determinative test but declined to apply it, not only because "every procedural variation is outcome-determinative,"¹⁶⁶ but also because the difference between the two rules would be of "scant, if any, relevance to the choice of the forum"¹⁶⁷ and the prevention of forum-shopping was one of the policies underlying the *Erie* decision. Finally, the Court concluded that since the *Erie* doctrine in no way invalidates a federal rule of procedure, "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act."¹⁶⁸ In the *Hanna* case, as in a few prior decisions,¹⁶⁹ the pendulum appears to swing away from the preponderance of state law and towards the controlling applicability of federal law.

Following the dictates of *Erie*,¹⁷⁰ federal courts in Florida resort to Florida conflict rules and, whenever so indicated, to Florida substantive law. In accordance with the accepted rule that the burden of proof is governed by state law, Florida substantive law regarding the construction of group insurance policies was applied in *Connecticut Gen. Life Ins. Co. v. Breslin*.¹⁷¹ In an action by a bakery corporation against a can company for breach of implied warranty,¹⁷² the court applied the Florida rule that a manufacturer's limitation upon his liability is valid against the ultimate consumer. Similarly, Florida substantive law was held to govern the liability of the manufacturer of a printing press to an employee of a publishing company for damages caused by the malfunction of a press sold to the company.¹⁷³ Florida substantive law was also used to determine the liability of a municipal corporation for its police officers;¹⁷⁴ and the validity of a contract.¹⁷⁵ In the latter case the court observed that

165. *Id.* at 465.

166. *Id.* at 468.

167. *Id.* at 469.

168. *Id.* at 473.

169. *E.g.*, *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525 (1958); *Monarch Ins. Co. v. Spach*, 281 F.2d 401 (5th Cir. 1960).

170. Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1 (1964); *Diversity Jurisdiction: A Symposium*, 40 IND. L.J. 511 (1965).

171. 332 F.2d 928 (5th Cir. 1964).

172. *American Can Co. v. Horlamus Corp.*, 341 F.2d 730 (5th Cir. 1965).

173. *Vander Cook & Sons, Inc. v. Thorpe*, 344 F.2d 930 (5th Cir. 1965).

174. *City of Green Cove Springs v. Donaldson*, 348 F.2d 197 (5th Cir. 1965).

175. *Talco Capital Corp. v. Canaveral Int'l Corp.*, 225 F. Supp. 1007 (S.D. Fla. 1964), *aff'd*, 344 F.2d 962 (5th Cir. 1965).

"since Florida was the situs of the contracts on both the loan and the guarantee involved in the case, the applicable law in determining contractual validity in this diversity case normally would be the law of Florida,"¹⁷⁶ notwithstanding the fact that a federal statute and regulation were involved, because Florida law was found to be not inconsistent with cases dealing with such federal law. In *Gauck v. Meleski*,¹⁷⁷ involving damages arising from a rear-end collision, the federal court followed the Florida rule that violation of traffic law is not always negligence per se; and in *Ross v. Stanley*,¹⁷⁸ involving a stockholders' derivative action, the Florida statute of limitations was applied against a claim for an equitable accounting in which the plaintiffs sought to recover for alleged damages and unjust enrichment which allegedly arose from the breach of a fiduciary relationship. In deciding the question of whether a materialman's claim against the surety in a public contractor's bond was a liability created by statute, and subject to the three year limitation, or to the twenty year limitation as being contractual, the appellate court did its best "utilizing all the currents which indicate the way the *Erie* . . . wind blows" but found that even dicta "blow both ways." After analyzing the pertinent Florida statute and "With the *Erie* currents being so weak and diverse," the court relied on its own analysis and held the claim to be statutory, adding that "If in the face of these contradictory expressions we have incorrectly divined the Florida law, it must be remembered that the choice of the forum, federal or state, was the articulate initial decision of the Creditor."¹⁷⁹

In other cases, federal courts sitting outside of Florida applied Florida law, as required by the conflicts rules of the forum state. A federal court, sitting in Tennessee and applying the conflict law of that state, determined the liability of an automobile insurer arising from an accident in Tennessee according to Florida law as the *lex loci contractus*.¹⁸⁰ In *Pallen v. Allied Van Lines*,¹⁸¹ a federal court applied the general New York rule that the *res judicata* effect of a sister state judgment is determined by the law of the state where the judgment was rendered in the "absence of compelling circumstances requiring the application of New York law," and decided the collateral estoppel effect of a Florida judgment according to Florida law.

In some diversity litigation, federal courts turn to federal law. The sufficiency of the evidence to raise a question for the jury was held to be controlled by federal standards in *Shirey v. Louisville & Nashville R.R. Co.*¹⁸² while substantive aspects of the plaintiff's case and of the defen-

176. 225 F. Supp., at 1014.

177. 346 F.2d 433 (5th Cir. 1965).

178. 346 F.2d 645 (5th Cir. 1965).

179. *Delduca v. United States Fid. & Guar. Co.*, 357 F.2d 204 (5th Cir. 1966). *Cf.*, *Lucom v. Atlantic Nat'l Bank*, 354 F.2d 51 (5th Cir. 1965).

180. *Carr v. American Universal Ins. Co.*, 341 F.2d 220 (6th Cir. 1965).

181. 223 F. Supp. 394 (S.D.N.Y. 1963).

182. 327 F.2d 549 (5th Cir. 1964).

dant's defense remained matters to be decided by the law of the forum state, *i.e.*, Florida, including the Florida rules regarding contributory negligence and the validity of distraction as a defense.

Outside the proper scope of *Erie*, a federal court may apply state law interstitially¹⁸³ in order to implement gaps in the controlling federal law, for example, in regard to interest,¹⁸⁴ or in order to determine state-created rights.¹⁸⁵

Increasing reliance on the doctrine of abstention by the federal courts when confronted with the application of unsettled state law has provoked serious objections to its proliferation.¹⁸⁶ In Florida, in particular, a statute provides for the certification of questions of state law to the supreme court. Even though the binding effect, as well as the very nature of these legal opinions, has been seriously questioned,¹⁸⁷ there has been no apparent reversal in the trend.

V. CHOICE-OF-LAW RULES

A. *Torts*

The new wave eroding some areas of the time-honored *lex loci delicti* has not yet reached Florida.¹⁸⁸ The few recently reported Florida cases still indicate adherence to the traditional rule.¹⁸⁹

183. *Richards v. United States*, 369 U.S. 1 (1962).

184. *United States v. Smith Eng'r & Constr. Co.*, 240 F. Supp. 189 (N.D. Fla. 1965); *Hartley & Parker v. Florida Beverage Corp.*, 348 F.2d 161 (5th Cir. 1965).

185. *Peninsula State Bank v. Thompson-Copeland, Inc.*, 346 F.2d 58 (5th Cir. 1965). *E.g.*, concerning the requirement of affirmative misrepresentation, *Azalea Meats, Inc. v. Muscat*, 246 F. Supp. 780 (S.D. Fla. 1965); *Florida Assignment of Accounts Receivable Act*, FLA. STAT. § 524.03 (1965). See also *Fleischer v. Paramount Pictures Corp.*, 329 F.2d 424 (5th Cir. 1964), concerning the abatement of corporate claims under FLA. STAT. § 608.29 (1965).

186. *Louisiana Power & Light v. City of Thibodaux*, 360 U.S. 25 (1959); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964); *United States Life Ins. Co. v. Delaney*, 328 F.2d 483 (5th Cir. 1964), *cert. denied*, 377 U.S. 935 (1964); *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943).

187. Heimbush, *Doctrine of Abstention: Need of Reappraisal*, 40 NOTRE DAME LAW. 101 (1964); *Recent Developments in the Doctrine of Abstention*, 1 DUKE L.J. 102 (1965); *Abstention: Election of Forum and Intersovereign Certification*, 18 RUTGERS L. REV. 895 (1964); *Abstention and Certification in Diversity Suits: Perfection of Means and Confusion of Goals*, 73 YALE L.J. 850 (1964); *Policy and Procedure in Abstention: Is the Pullman Retention Technique Proper*, 40 IND. L.J. 248 (1965); Kaplan, *Certification of Questions from Federal Appellate Courts to Florida Courts and Its Impact on the Abstention Doctrine*, 16 U. MIAMI L. REV. 413 (1962).

188. For recent developments note: *Tramontana v. S. A. Empresa De Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. 1965); *Goranson v. Capital Airlines, Inc.*, 345 F.2d 750 (6th Cir. 1965); *Ciprari v. Servicios Aereos Cruzeiro*, 245 F. Supp. 819 (S.D.N.Y. 1965); *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

The question whether Florida would apply the limitation under the Illinois wrongful death statute (*lex loci delicti*) in an action brought in Florida against the manufacturer brought by the executrix of a Florida citizen, on the return leg of his flight from Chicago to Tampa under a ticket bought in Florida, has been certified to the Florida supreme court, *Hopkins v. Lockheed Aircraft Corp.*, 358 F.2d 347 (5th cir. 1966).

189. *E.g.*, *Young v. Viruet de Garcia*, 172 So.2d 243 (Fla. 3d Dist. 1965).

The interrelation between the local statute creating the claim and the personal status of the persons claiming under that statute was involved in *Young v. Viruet de Garcia*.¹⁹⁰ The action was brought under the Florida Wrongful Death Statute¹⁹¹ which, as the *lex loci delicti*, would govern the substantive rights of the parties; however, the status of the claimants depended upon the existence *vel non* of a marriage and was to be decided under the law of the jurisdiction "where the contract of marriage takes place"¹⁹² while the status of the children, who had also filed claims under the Wrongful Death Statute, was to be determined by the law of their father's domicile. The determination of the status of a married couple, who were driving in a car used by them as part of the consideration for their services, was involved in the case of *Raydel, Ltd. v. Medcalfe*.¹⁹³ The wife had sued the corporate owner of the car on the ground that it was vicariously liable for her husband's negligent driving. In affirming a judgment for plaintiff, the appellate court held that the trial judge did not err in allowing plaintiff, a married woman, to recover for her own expenses. The appellate court sustained the lower trial court's ruling that the responsibility of the plaintiff for her own medical bills was governed by the law of her domicile, Quebec, under whose law she was "primarily liable for these expenses."¹⁹⁴ However, the supreme court quashed the appellate decision without reaching the conflict aspects of the case.¹⁹⁵

Turning next to the cases decided by courts outside of Florida, which applied Florida tort law, a Louisiana case may be mentioned. Without referring to a particular Louisiana conflict rule, the federal court dismissing as immaterial the distinction in the characterization of the demand as tort or contract, found that the alleged acts were committed in Florida and that "any breaches of trust or contract were based on contracts having as many, if not more, significant contacts with Florida than any other state."¹⁹⁶ The court observed that the only contact with Louisiana was that of jurisdiction, and applied Florida substantive law.¹⁹⁷

Cases arising out of the Federal Tort Claims Act¹⁹⁸ bring into play state conflict rules, in the word of the Supreme Court, interstitially. In an action for damages allegedly caused by government's delay in furnishing promised materials, the court denied recovery on the basis of an

190. 172 So.2d 243 (Fla. 3d Dist. 1965).

191. FLA. STAT. § 768.02 (1965). Collister, *Wrongful Death and the Choice-of-Law Problem*, 13 KAN. L. REV. 529 (1965).

192. *Young v. Viruet de Garcia*, *supra* note 190, at 244.

193. 162 So.2d 910 (Fla. 3d Dist. 1964).

194. *Id.* at 915.

195. *Raydel, Ltd. v. Medcalfe*, 178 So.2d 569 (Fla. 1965).

196. *Ruberoide Co. v. Roy*, 240 F. Supp. 9 (E.D. La. 1965).

197. In *Brewi v. Handrich*, 256 N.Y.S.2d 171 (1965), the New York court applied the *Babcock* rule to an accident in Florida.

198. Cross, *Federal Tort Claims Act and Conflict of Laws*, 36 MISS. L.J. 1 (1964).

express stipulation in the contract that the government did not warrant or guarantee timely delivery, a clause valid under Florida law,¹⁹⁹ apparently considered as the *locus solutionis*. However, in a subsequent case, the same court took the position that "claims based upon breach of contract are wholly alien to the Tort Claims Act,²⁰⁰ on the ground that claims arising from contracts are governed by the Tucker Act²⁰¹ and within the exclusive jurisdiction of the Court of Claims²⁰² regardless of how plaintiffs characterized their claims, whether in contract or in tort. In an action to recover damages for alleged malpractice by a government physician practicing in a Georgia hospital, a federal court sitting in Florida applied the law of the *lex loci delicti*, Georgia."²⁰³

A number of actions for compensation under the Longshoremen's and Harbor Workers' Compensation Act²⁰⁴ (made applicable to employees under the Defense Base Act)²⁰⁵ have arisen from accidents on the islands in the British West Indies. In determining the question of the scope of employment, courts have taken a most liberal attitude in view of the fact that plaintiffs are "far away from their families, in remote places where there are severely restricted recreational and social activities." Therefore, accidents related to these activities must be considered as "incident to the overseas employment relationship."²⁰⁶

199. *United States v. Croft-Mullins Elec. Co.*, 333 F.2d 772 (5th Cir. 1964).

200. *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351 (5th Cir. 1965).

201. 24 STAT. 505, 28 U.S.C. § 1491 (1949).

202. 28 U.S.C. § 1346(a)(2) (1949).

203. *Watson v. United States*, 346 F.2d 52 (5th Cir. 1965), *rehearing denied*, 348 F.2d 913 (5th Cir. 1965).

204. 33 U.S.C. §§ 901-950 (1927).

205. 42 U.S.C. §§ 1651-1654 (1942).

206. *O'Keeffe v. Pan Am. World Airways*, 338 F.2d 319 (5th Cir. 1964), *following* *Pan Am. World Airways, Inc. v. O'Hearne*, 335 F.2d 70 (5th Cir. 1964).

In a split decision, the Supreme Court held that an Alabama court had jurisdiction to award damages under Georgia Workmen's Compensation Act to an Alabama resident injured within the scope of employment in Alabama for a Georgia corporation, regardless of the holding in *Green v. J.A. Jones Constr. Co.*, 161 F.2d 359 (5th Cir. 1947), to the effect that a Mississippi state court has no jurisdiction to award damages under the Georgia Act and that the federal court was subject to the same disability, and further holding that the Georgia Act's remedy was "an exclusive one which can only" be afforded by the Georgia Compensation Board. *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965). Greenspan, *Crider v. Zurich Ins. Co.: Decline of Conceptualism in the Conflict of Laws*, 27 U. PITT. L. REV. 49 (1965). Nevertheless, on remand the federal appellate court declined to budge, *Crider v. Zurich Ins. Co.*, 348 F.2d 211 (5th Cir. 1965).

Several Florida cases may be mentioned; e.g., *Zacher v. Sun Elec. Corp.*, 4 Fla. Comp. Rep. 241 (Indus. Comm'n 1960), held that Florida had no jurisdiction since both the place of contract, as well as that of injury, were outside of the state; *Smith v. Ohmlac Paint & Ref. Co., Inc.*, 4 Fla. Comp. Rep. 296 (Indus. Comm'n 1960), *cert. denied*, 131 So.2d 204 (Fla. 1961), held that Florida had jurisdiction when an employee was killed in Alabama, but the written employment contract was between the employee, a Florida resident, and a New York corporation; *Strickland v. Triangle Constr. Co.*, 4 Fla. Comp. Rep. 380 (Indus. Comm'n 1961), Florida had no jurisdiction when the claimant was laid off, but later rehired for work in Alabama; *Dewberry v. Leonard Bros. Transfer & Storage Co.*, 4 Fla. Comp. Rep. 248 (Indus. Comm'n 1960), *cert. denied*, 131 So.2d 203 (Fla. 1961), Florida had jurisdiction since the contract was entered into in Florida, even though the injury occurred outside of the state.

B. Contracts

No change in the traditional conflict rules is noticeable in the area of contracts: the center-of-gravity doctrine adopted in *Lauritzen v. Larsen*²⁰⁷ and in some states, remains limited, in Florida, to seamen's claims. The new method, also termed "grouping of contacts," was strongly urged by the appellant in *Rutas Aereas Nacionales, S.A. v. Robinson*,²⁰⁸ but elicited from the court of appeals only a qualified answer, namely that "if Florida were to be held to have adopted the 'grouping of contacts' rule, the Venezuelan law would also control," *i.e.*, the same law as would under the traditional rule of the *lex loci actus*. Of course, there will be considerable change under the newly adopted Uniform Commercial Code.²⁰⁹

The choice-of-law issue was litigated in *Sperry Rand Corp. v. Industrial Supply Corp.*²¹⁰ in regard to a claim for rescission and damages for breach of implied warranty arising out of a sale of complex machinery. The federal court first found that the previous lease agreement for the machinery had a clause making New York law applicable. This clause was not contained in the subsequent sale agreement; thus, the *lex voluntatis* was eliminated and the court, following *Erie-Klaxon*, turned to Florida law to find the applicable conflict rule. Although Florida courts²¹¹ had approved the decision of the United States Supreme Court in *Scudder v. Union Nat'l Bank*,²¹² which dealt with contracts generally, nevertheless, the court in the instant case declined to follow that decision on the ground that implied warranty is an incident of sale arising "apart from and independent of the nature of the transaction and the situation of the parties."²¹³ It characterized warranty as a contractual right, but closer to sales than to "general rules applicable in contract situations."²¹⁴ Since the only Florida case in point²¹⁵ contained no rule, and as the place of executing the contract was also the place of performance, the court turned to recent writings and to the Restatement, which give preference to the law of the situs of the chattels involved in the transaction. In the opinion of the court, these alternative solutions did not change the applicability of

207. 345 U.S. 571 (1953).

208. 339 F.2d 265 (5th Cir. 1964).

209. It may be noted that retail installment sales, FLA. STAT. ch. 520 (1965), are governed by unilateral conflicts rules, *i.e.*, rules only determining the applicability of Florida law by referring to sales "entered into in this state" (Motor Vehicle Sales Finance Act, FLA. STAT. § 520.02(5) (1965)); Retail Installments Sales Act, FLA. STAT. § 520.31(7) (1965), and Installment Sales Act, FLA. STAT. § 520.51(2) (1965). These provisions "take precedence over any provisions of this code [Uniform Commercial Code] which may be inconsistent or in conflict therewith." FLA. STAT. § 680.10-104(2) (1965).

210. 337 F.2d 363 (5th Cir. 1964).

211. *Castorri v. Milbrand*, 118 So.2d 563 (Fla. 2d Dist. 1960); *Walling v. Christian & Craft Grocery Co.*, 41 Fla. 479, 27 So. 46 (1899).

212. 91 U.S. 406 (1895).

213. 337 F.2d 363, 368 (5th Cir. 1964).

214. *Id.* at 368.

215. *Farris & Co. v. William Schluderberg & Co.*, 141 Fla. 462, 193 So. 429 (1940), *rehearing denied*, 142 Fla. 765, 196 So. 184 (1940).

Florida substantive law since any of them, whether that of the situs, or of the place of performance, or of the center of gravity, would lead to the application of Florida law. While the trial court had decided the choice-of-law issue in favor of New York law, the appellate court considered this to be erroneous but, fortunately, added that it "does not, of course, follow that its judgment was wrong." It may also be noted that the court held the parol evidence rule to be substantive and, consequently, controlled by Florida law.²¹⁶

Conflict questions involved in usurious contracts were discussed in *Atlas Subsidiaries of Florida, Inc. v. O. & O., Inc.*²¹⁷ In order to obtain a loan, a married couple was required not only to execute a mortgage on their Florida land but also to form a corporation which undertook to pay interest in excess of twenty-five percent payable at the Pennsylvania office of the defendant Florida corporation, Pennsylvania being the domicile of its parent corporation as well. The court found a flagrant violation of Florida usury laws and ordered forfeiture of all sums payable, as well as of interest, cancelled the mortgage and granted the plaintiffs restitution of all sums paid under the usurious contract which the court branded as a "sham contrivance and device . . . so frequently . . . used in this state as to be an old acquaintance of those dealing in the lending arts."²¹⁸ The position of the defendants, that Pennsylvania law, as the *lex loci solutionis*, should control, and that the interest charged should be allowed, was rejected by the court with the tart statement that the "father should not be permitted to disavow his resemblance to the child by clothing him with foreign garments."²¹⁹ As a *coup de grace*, the court added that the promissory note submitted in the suit "specifically provides that it is to be construed according to the laws of Florida."²²⁰

Conflict problems involving employment contracts appear in two reported cases. In one²²¹ a federal court held that the employment contract of a Florida-based pilot with the defendant Venezuelan air carrier was controlled, according to Florida law, by the Venezuelan labor code. Without citing any Florida authorities, the federal court listed, in the fashion of the center-of-gravity method, nine contacts with Venezuela, among them that the employer was a Venezuelan corporation, that the contract was made in Venezuela, that the Venezuelan labor code

216. *Sperry Rand Corp. v. Industrial Supply Corp.*, 337 F.2d 363, 371 (5th Cir. 1964). An action arising out of the sale of drugs in Latin America was disposed of without resort to conflict rules, *Sanchez v. Crandon Wholesale Drug Co.*, 167 So.2d 640 (Fla. 3d Dist. 1964), *quashed*, 173 So.2d 687 (Fla. 1965).

217. 166 So.2d 458 (Fla. 1st Dist. 1964).

218. *Id.* at 461.

219. *Ibid.*

220. *Ibid. Cf.*, *Clarkson v. Finance Co. of America*, 328 F.2d 404 (4th Cir. 1964); *Consolidated Jewelers, Inc. v. Standard Fin. Corp.*, 325 F.2d 31 (6th Cir. 1963); *Rosencrantz v. Union Contractors Ltd. & Thorton*, 23 D.L.R.2d 473 (1960).

221. *Rutas Aereas Nacionales, S. A. v. Robinson*, 339 F.2d 265 (5th Cir. 1964).

was embodied by reference into the employment contract, and that the place of performance was between Miami and Venezuela, with some side-trips in Venezuela. The other case dealt with double wage penalties against a vessel for wrongful withholding of a seaman's wages.²²² The court held that in view of sections 544 and 596, 46 United States Code, the statute granting this penalty does not apply to ships engaged in trade between Miami, Florida, and Nassau or Providence in the Bahamas.

An insurance contract²²³ was indirectly involved in litigation for the payment of a trip policy.²²⁴ While the substantive demand was decided on facts found by the trial court, the denial of attorneys fees was affirmed on the ground that

a resident of New York, who purchases a policy of insurance from a New York company in that state pays all the premiums there for a contract which does not contemplate any activities by insurer or insured in Florida; and where the injury giving rise to the loss did not happen in this state, is not entitled to attorney's fees as a result of instituting the law suit in this forum. To hold otherwise would encourage parties having no connection with Florida to file suit on insurance policies in this State in order to recover attorney fees to which they would not be entitled in their own state.²²⁵

It should be noted that the recently added section 626.061 Florida Statutes, 1965, prohibits the use of credit cards in the solicitation and negotiation of insurance, as well as their use as a means of receiving or transmitting premiums or "otherwise transacting insurance in this state, or relative to a subject of insurance resident, located or to be performed in this state." The only sanction seems to be that such activities will be

222. *Watler v. M/V Sea Lane*, 232 F. Supp. 387 (S.D. Fla. 1964).

223. See generally, Unger, *Life Insurance and the Conflict of Laws*, 13 J. COMP. LEG. & INT'L L. 482 (1964). A local policy holder's claim against a deposit made in Massachusetts by a Florida insurance corporation was involved in the case of *Commissioner of Ins. v. Equity Gen. Ins. Co.*, 346 Mass. 233, 191 N.E.2d 139 (1963).

For a full discussion of insurance contracts held by Cuban refugees under art. VIII (2)(b) of the Articles of Agreement of the International Monetary Fund (60 STAT. 1401, 1944), see Paradise, *Cuban Refugee Insureds and the Articles of Agreement of the International Monetary Fund*, 18 U. FLA. L. REV. 29 (1965), and Bayitch, *Florida and International Legal Developments*, 18 U. MIAMI L. REV. 321, 348 (1963); Bayitch, *Conflicts of Laws in Fla.*, 18 U. MIAMI L. REV. 269, 275 (1963).

224. *Home, Inc. v. Denning*, 177 So.2d 348 (Fla. 3d Dist. 1965). The cash surrender value of a policy in Cuban pesos payable in the United States is determined by the free market value of pesos in the United States and not by the official rate established by a Cuban decree, *American National Ins. Co. v. de Cardenas*, 181 So.2d 359 (Fla. 3d Dist. 1965), distinguishing *Huntley v. Alejandro*, 139 So.2d 911 (Fla. 3d Dist. 1962). In *Trujillo v. Sun Life Assur. Co. of Canada*, 22 Fla. Supp. 53 (Dade Cir. Ct. 1963), *aff'd*, 166 So.2d 473 (Fla. 3d Dist. 1964), a petition for declaratory decree and for order to pay the cash surrender value was denied on unusual grounds: one, that there is "no genuine issue of any material fact" and that the issue is governed by the law of the Dominican Republic as the place of performance of the insurance contract and, consequently(?), the proper forum is that of the Dominican Republic.

225. *Home Ins. Co. v. Denning*, 177 So.2d 348, 350 (1965).

considered "doing business in this state and shall be subject to the same taxes" as insurers qualified to do business. In addition, persons engaged in the prohibited activities will be held personally liable for such taxes.

Maritime transportation was litigated in *Caterpillar Americas Co. v. S.S. Sea Road*.²²⁶ In an action brought by a shipper against a vessel for damages arising out of the alleged negligent unloading of a tractor with parts in Nassau, Bahamas, the defendant successfully pleaded the limitations of the Carriage by Sea Act.²²⁷

C. Negotiable Instruments

Only one reported case appears to deal with negotiable instruments. In an action upon a note payable in New York, but executed on a form with the words "St. Petersburg, Florida," the defendant contended that the note was usurious on its face under Florida law. The court held that defendant must present facts to overcome the presumption that the parties intended to have their note governed by the laws of the state where the note would be valid.²²⁸

D. Property

1. REAL PROPERTY

In *Colburn v. Highland Realty Co.*,²²⁹ the district court of appeal permitted a suit for the specific performance of an agreement to sell Florida land against the foreign (Michigan) corporate vendor, notwithstanding the pendency in Michigan of delinquency proceedings against the vendor, which was represented in the Florida suit by the Michigan Insurance Commissioner in his capacity as the receiver of the corporation.

2. MOVABLE PROPERTY

Vehicles of transportation: vessels,²³⁰ railroad equipment,²³¹ trucks and motor cars,²³² as well as aircraft, present complex conflict problems because of their constantly changing situs and of the varied security

226. 231 F. Supp. 647 (S.D. Fla. 1964).

227. 46 U.S.C. § 1304(5) (1936). In regard to the liability of maritime carriers to passengers, see *Schwartz v. S.S. Nassau*, 345 F.2d 465 (2d Cir. 1965); on survival of action, see *Just v. Chambers*, 312 U.S. 383 (1941), recently discussed in *United Barge Co. v. Logan Charter Serv., Inc.*, 237 F. Supp. 624 (D. Minn. 1964); on the statute of limitations, see *Safir v. Compagnie Générale Transatlantique*, 241 F. Supp. 501 (E.D.N.Y. 1965). *Sinclair, Conflict of Laws Problems in Admiralty: The Passenger Ticket*, 17 Sw. L.J. 521 (1963). See also, *Nassau Glass Co. v. Noel Roberts, Ltd.*, 249 F. Supp. 116 (S.D. Fla., 1965).

228. *Franklin Nat'l Bank v. Feldman*, 42 Misc. 2d 839, 249 N.Y.S.2d 181 (1964); *Cf.*, *Corporación Peruana de Aeropuertos y Aviación v. Boy*, 180 So.2d 503 (Fla. 2d Dist. 1965).

229. 153 So.2d 731 (Fla. 2d Dist. 1963).

230. Ship Mortgage Act of 1920, 46 U.S.C. § 911-954 (1920).

231. Railway Equip. Act of 1952, 49 U.S.C. § 20(c) (1952).

232. Interstate Commerce Act as amended 1958, 49 U.S.C. § 313 (1958).

arrangements. In many instances these problems are solved by federal, as well as state, statutory enactments. Two recent enactments shall be discussed here: one, a federally enacted conflict rule dealing with interests in aircraft; and the other, a Florida enactment dealing with motor vehicles.

The federal rule relating to aircraft was enacted as an amendment to the Federal Aviation Act²³³ by adding a new section, 506, which reads:

Law governing validity of certain instruments. The validity of any instrument the recording of which is provided for by section 503 of this Act shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified therein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified.

It appears that the *lex situs* of the aircraft was rejected in favor of the *lex loci actus*, *i.e.*, that of the delivery of the instrument affecting interests in aircraft. Some latitude was allowed for the *lex voluntatis*, *i.e.*, the law chosen by parties, by giving effect to the law of the place where the delivery was intended according to the language of the instrument.²³⁴

Before analyzing the 1965 Florida enactment dealing with interests in motor cars, a few significant prior cases might be mentioned. The practical question, regarding the rights of the purchaser of a car, for value and without notice of lien against the holder of a security interest properly recorded in another state, was clarified in *City of Cars, Inc. v. General Motors Acceptance Corp.*²³⁵ The court started from the general proposition that "motor vehicle liens valid in and registered under the law of the state wherein such liens were created will be enforced in this state. . . ."²³⁶ For bona fide purchasers without knowledge of foreign liens and for valuable consideration, protection was first sought in section 319.22(1), Florida Statutes, providing that no court of this state shall recognize any right, title or claim to a motor vehicle unless evidenced by, or on, a certificate of title issued in accordance with the provisions of that act. Such defenses have been rejected on the ground that these provisions "were not intended to and do not 'cut off the rights of holders of liens

233. 49 U.S.C. § 1401 (1958).

234. In regard to the Convention on the International Recognition of Rights in Aircraft, 4 U.S.T. & O.I.A. 1830 (Geneva 1948) the amendment expressly provides that it "shall not take precedence over the Convention." The Convention was mentioned but not discussed, in *Corporación Peruana de Aeropuertos y Aviación v. Boy*, 180 So.2d 503 (Fla. 2d Dist. 1965).

235. 175 So.2d 63 (Fla. 2d Dist. 1965).

236. *Id.* at 64.

valid in and registered under the law of the state wherein such liens were created,' and that such liens will be enforced in this state, under the principles of comity, even as against subsequent purchasers or creditors in this state, without notice."²³⁷ The particular provision of section 319.27(3)(f) prescribes the kind of inquiry a purchaser must make to protect himself against foreign-created interests and is construed as applicable only to vehicles for which no title document has been issued in Florida. In cases where title was issued in Florida, courts have developed an exception to protect the innocent purchaser of a motor vehicle in Florida against a properly recorded foreign lien in the vehicle, where the purchaser has made a reasonable and diligent inquiry in the state of prior registration in order to ascertain the existence *vel non* of any liens. If an inquiry in the state of the prior registration of the motor vehicle does not reveal the existence of any liens, Florida courts will deny enforcement of such liens, notwithstanding the rule of comity. Applying these rules to the case before it, the court recognized a foreign-created interest in a car which was first registered in Ohio, where the security interest also was created and properly registered, but which was subsequently registered in Alabama, and then in Florida. The purchaser relied on the title certificate issued in Florida, but failed to make proper and reasonable inquiries in Alabama where the vehicle was registered as a secondhand car which, in the opinion of the court, should have put the purchaser on notice that "the vehicle was registered in another state at the time the Alabama registration was sought and procured."²³⁸ Assuming that the application forms used in Alabama are similar to those in use in Florida, the court reasoned, that the records would "have revealed that at the time Alabama issued its certificate of registration, the vehicle bore Ohio license plates."²³⁹ Since the purchaser omitted to make these precautionary inquiries, the court held that he had failed to protect himself and was, therefore, in no position to complain.

Another action in replevin was brought by a mortgagee-bank against a motor car dealer with whom the mortgagor has exchanged his car which had been previously mortgaged in Missouri.²⁴⁰ The court declined to enforce the Missouri-created lien on the ground that while the "nature, validity and interpretation of contracts are governed by the laws of the state or country where the contracts are made or to be performed, matters of procedure and remedy in the enforcement of contracts depend upon the forum or the place where suit is brought."²⁴¹ Taking also into consideration that to hold otherwise would put holders of contracts executed or to

237. *Id.* at 66, quoting from *Vincent v. General Motors Acceptance Corp.*, 75 So.2d 778 (Fla. 1954).

238. *Id.* at 69.

239. *Ibid.*

240. *Fincher Motors, Inc. v. Northwestern Bank & Trust Co.*, 166 So.2d 717 (Fla. 3d Dist. 1964).

241. *Id.* at 719.

be performed outside [of] the state of Florida in a preferential class to that of holders of contracts executed or to be performed in Florida,²⁴² the court held that the mortgagee had "an adequate remedy in equity to foreclose its mortgage and can protect its security by appropriate means in the equity court."²⁴³

A comprehensive statute, enacted in 1965, dealing with interests in motor vehicles appears as amended section 319.27 Florida Statutes, 1965. In addition to rules regulating the notation of liens, mortgages and encumbrances on motor vehicles titled in Florida, the amendment also provides for interests in motor vehicles "previously titled or registered outside of this state upon which no certificate of title has been issued in this state."²⁴⁴ Holders of interests in such motor vehicles "may use the facilities of the office of the motor vehicle commissioner for the recording of such lien as constructive notice of such lien to creditors and purchasers of such motor vehicle in Florida, provided such lien holder files a sworn notice of such lien in the office"²⁴⁵ containing the information prescribed in the statute. Whenever a Florida certificate is first issued on a motor vehicle previously titled or registered outside of this state, the commissioner "shall note on the Florida certificate of title the following liens: (1) any lien shown on the application for Florida certificate of title; (2) any lien filed in the office of the motor vehicle commissioner in accordance with paragraph (a) of this subsection; and (3) any lien shown on the existing certificate of title issued by another state."²⁴⁶ After a certificate has been issued in Florida on a motor vehicle "previously titled or registered outside of this state, liens valid in and registered under the law of the state wherein such liens were created are not valid in this state unless filed and noted upon the certificate of title under the provisions of this section."²⁴⁷

Additional conflict provisions generally applicable to security interests in chattels will come into force with the Uniform Commercial Code.²⁴⁸ However, in relation to the statute summarized above, and other provisions contained in chapter 319 Florida Statutes relating to title certificates, the latter will "take precedence over any provisions of the Code which may be inconsistent or in conflict therewith."²⁴⁹

3. ESCHEAT

In the wake of *Western Union Tel. Co. v. Commonwealth of Penn.*²⁵⁰ the state of Texas brought an original action in the Supreme Court against

242. *Ibid.*

243. *Id.* at 720.

244. FLA. STAT. § 319.27(3)(a) (1965).

245. *Ibid.*

246. FLA. STAT. § 319.27(3)(b) (1965).

247. FLA. STAT. § 319.27(3)(c) (1965).

248. FLA. STAT. § 679.9-103 (1965).

249. FLA. STAT. § 680.10-104 (1965).

250. 368 U.S. 71 (1961); *Survey I*, at 303.

New Jersey, Pennsylvania and the Sun Oil Company, for the declaration of its right to escheat personal property.²⁵¹ With Florida intervening in the proceedings, the Court adopted the Florida rule that a debt is property of the creditor, rather than of the debtor, and held that the power to escheat is to be accorded to the state of creditor's last known address as shown by debtor's records. Where there is no such record, or the creditor's last known address is in a state which does not provide for escheat, the state of the corporate domicile of the debtor may escheat such property, subject to the right of the state of the last known address of the creditor to recover it, if and when it should enact such a law.²⁵²

The handling of unclaimed funds held by personal representatives is regulated by a 1965 amendment to section 723.221, Florida Statutes.

E. Family Law

1. MARRIAGE

The rule that the existence of a marriage is determined by the law of the place "where the contract of marriage takes place" was applied in *Young v. Viruet de Garcia*²⁵³ to an alleged marriage between two Puerto Rican domiciliaries who lived together there, planned to perform a formal marriage ceremony in Florida, but never did. Since the law of Puerto Rico requires a formal marriage, and thus the intent alone to celebrate such ceremony does not make such relationship a marriage in the legal sense, the court held that there was no marriage either under Puerto Rican or Florida law. The status of the children of such union, in an action brought in Florida for the husband's wrongful death was to be decided under the rule of the domicile of their father, in this case under the laws of Puerto Rico.

2. SEPARATE MAINTENANCE

In spite of the human considerations in favor of the defendant's second wife, however commendable they may have been, the court denied the claim for alimony unconnected with divorce²⁵⁴ in *Dawson v. Dawson*²⁵⁵ upon finding that the defendant's Mexican divorce from his first wife was spurious. Distinguishing the *Astor* case,²⁵⁶ the court held that a suit under

251. *Texas v. New Jersey*, 379 U.S. 674 (1965), noted in 18 U. FLA. L. REV. 154 (1965).

252. *A Survey of State Abandoned or Unclaimed Property Statutes*, 9 ST. LOUIS L. REV. 85 (1964); Sentell, *Escheat, Unclaimed Property and the Supreme Court*, 17 W. RES. L. REV. 50 (1965).

Interests in a joint savings account are governed by the law of the place where the deposit was made and the account kept, *Helfritz v. Riegle*, 24 Fla. Supp. 95 (1965).

253. 172 So.2d 243 (Fla. 3d Dist. 1965).

254. The 1965 legislature has amended FLA. STAT. § 65.09 and repealed FLA. STAT. § 65.10. On tax aspects, see *Leggett v. Commissioner*, 329 F.2d 509 (2d Cir. 1965).

255. 164 So.2d 536 (Fla. 1st Dist. 1964).

256. 107 So.2d 201 (Fla. 1st Dist. 1958), *cert. denied*, 119 So.2d 793, *reaff'd on rehearing*,

section 65.09, Florida Statutes, exists only by operation of the statute and requires the existence of a valid marriage between the parties.

3. DIVORCE JURISDICTION

Domicile of at least six months' duration is required for bringing a divorce action in Florida.²⁵⁷ This was questioned in a divorce action between Cuban refugees residing in Florida in *Perez v. Perez*.²⁵⁸ The court held that "domicile of choice can be acquired on presence plus intent to make one's home permanently or for an *indefinite period*."²⁵⁹ Aliens may also acquire such domicile to satisfy the jurisdictional requirements for divorce, regardless of their hope to return to their home country "when the political situation which prompted [their] leaving is removed."²⁶⁰

When a nonresident wife, divorced *ex parte* by a Florida decree, attempted to elect dower after the death of her former husband and the election was disallowed, she brought an action against the executor of her ex-husband's estate to set aside the divorce alleging, *inter alia*, her husband's lack of domicile in Florida at the time of divorce, as well as a previous New York separate maintenance decree in her favor.²⁶¹ The court denied the claim and rejected both grounds. It held that "by choosing not to appear in the Florida divorce suit, the nonresident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit"²⁶² while the New York maintenance decree constituted no bar to a subsequent divorce action.

120 So.2d 176 (Fla. 1959), *Survey I*, at 306, n.286. In *State v. Kehoe*, 179 So.2d 403 (Fla. 3d Dist. 1965), the defendant's suggestion of prohibition in a suit for alimony unconnected with divorce on the ground that, subsequent to the filing of the suit, he obtained a divorce in Puerto Rico thus leaving plaintiff wife only the alternative of suing under § 65.04(8) FLA. STAT.,—for which action she lacked the required six months local residence—was unsuccessful; the court held that the writ of prohibition is "available only to a party without other adequate means of redress for the wrong about to be inflicted by an act of the inferior court." In the instant case, however, the court below had "jurisdiction over the subject matter of the suit," and the writ of prohibition will "not lie to review the correctness of an order of the trial court overruling the challenge to its jurisdiction. Under the Florida Rules of Civil Procedure, the appellate court continued, "a person who raises questions of jurisdiction of his person is not prejudiced by participating in the trial and defending the matter on the merits and [he] may obtain a review of the question of jurisdiction upon appeal." (*Id.* at 405.)

257. FLA. STAT. § 65.02 (1965).

258. 164 So.2d 561 (Fla. 3d Dist. 1964).

259. *Id.* at 562.

260. *Id.* at 563.

261. *Simons v. First Nat'l Bank*, 157 So.2d 199 (Fla. 3d Dist. 1963); see note 295 *infra*.

262. *Id.* at 210. *Cf.*, *Simmons v. Miami Beach First Nat'l Bank*, 381 U.S. 81 (1965), discussed *infra* notes 286-288, and accompanying text. On constructive service *Walton v. Walton*, 181 So.2d 715 (Fla. 2d Dist. 1966), and *Corrigan v. Corrigan*, 184 So.2d 664 (Fla. 2d Dist. 1966).

4. GROUNDS FOR DIVORCE

While the eighth statutory ground for a divorce in Florida²⁶³ was discussed in the previous survey,²⁶⁴ only the ninth ground²⁶⁵ has been litigated lately. It provides that if it shall appear that "either party had a husband or wife living at the time of the marriage sought to be annulled," a divorce may be granted. In *Burger v. Burger*,²⁶⁶ both parties remarried after obtaining a Mexican mail-order divorce. The court held this divorce "totally invalid," the invalidity arising "out of a fraud perpetrated upon them by a purported Mexican magistrate who, in fact, was totally without authority and who conducted a divorce racket at the expense of innocent victims."²⁶⁷ In view of this fact, the supreme court found that the circuit court had jurisdiction to grant a divorce on the basis of the ninth statutory ground, and that it had the power to dispose of matters relating to the custody and maintenance of children and property jointly owned.

The impact of a previous New Jersey decree for separate maintenance upon grounds for a divorce litigated in Florida was determined in *Hohweiler v. Hohweiler*.²⁶⁸ The defendant urged both res judicata and estoppel by judgment. Nevertheless, the court held that res judicata requires the identity of the cause of action, which was lacking here since the New Jersey proceeding was for separate maintenance, while the instant Florida action was for divorce. In regard to estoppel by judgment, the court admitted that the parties to the prior proceedings would be prevented from re-litigating factual issues, even though the cause of action in the second proceedings was different. However, this second ground was also held insufficient because the defendant offered no proof as to what factual issues had been actually litigated and decided in the New Jersey suit, even though she submitted a copy of the New Jersey decree.

5. FOREIGN DIVORCE DECREES

The effect in Florida of a divorce decree rendered in a sister state was at issue in *Grace v. Grace*.²⁶⁹ The defendant attempted to challenge the validity of an Alabama divorce decree obtained by the plaintiff wife before she married defendant. In accordance with Florida law on collateral attacks,²⁷⁰ the court held that defendant could not successfully

263. FLA. STAT. § 65.04(8) (1965).

264. Bayitch, *Conflicts of Law in Florida, 1957-63*, 18 U. MIAMI L. REV. 269, 311 (1963).

265. FLA. STAT. § 65.04(9) (1965).

266. 166 So.2d 433 (Fla. 1964), *quashing*, 156 So.2d 905 (Fla. 3d Dist. 1963).

267. *Id.* at 434.

268. 167 So.2d 73 (Fla. 2d Dist. 1964). *Cf.* Harless v. Harless, 185 So.2d 728 (Fla. 4th Dist. 1966).

269. 162 So.2d 314 (Fla. 1st Dist. 1964).

270. The district court relied upon the authority of *Gaylord v. Gaylord*, 45 So.2d 507 (Fla. 1950) expressly rejecting the appellant's position that a collateral attack in Florida

attack the Alabama divorce decree, not only because he had not been a party to the proceedings, but also because "he had not shown . . . that he occupied a status or had a right at the time of the entry of the Alabama decree which was, or could be, affected thereby. A stranger to a decree rendered by a foreign court may impeach such decree only when it is attempted to be enforced against him so as to affect rights or interests acquired by him prior to its rendition."²⁷¹

As to the effect that Florida divorce decrees are given in other jurisdictions, a few instances may be illustrative. Where the plaintiff, in a subsequent declaratory judgment action, has sought to collaterally attack a Florida *ex parte* divorce decree by alleging that she was still the defendant's wife, the *ex parte* decree was sustained on grounds of estoppel.²⁷² A Florida *ex parte* decree was also sustained against an allegation that the plaintiff, a Florida domiciliary at the time of divorce, had failed to apprise the divorce court of a prior New York separation decree.²⁷³ Where the wife has filed an answer in a Florida divorce proceedings, in a subsequent action for divorce and alimony brought by her, she will be estopped from litigating matters which she might have litigated in the Florida proceedings.²⁷⁴

Mexican divorces appeared in two Florida cases already discussed. In a third case, *Kittel v. Kittel*,²⁷⁵ the wife brought an action for a declaratory judgment to deny validity to a Mexican divorce obtained by her husband after she had been awarded separate maintenance by a Florida court. The court took the position that in Florida a "declaratory

upon an Alabama divorce decree was governed by Alabama law on the ground that under the full faith and credit clause of the federal constitution Florida courts are without jurisdiction to entertain a collateral attack on an Alabama divorce decree and only Alabama courts may entertain such an attack.

271. 162 So.2d 314, 318 (Fla. 1st Dist. 1964).

272. *Weiner v. Weiner*, 18 App. Div. 2d 986, 238 N.Y.S.2d 545 (1963). *In re Locke's Will*, 21 App. Div. 2d 248, 250 N.Y.S.2d 181 (1964), held that a Florida divorce decree was not open to collateral attack by a wife who had appeared in the Florida action through an attorney. The order of a Florida court vacating a prior Florida divorce decree, on the petition of the state's attorney general,—based on the fact that the divorce had been obtained by a fraud upon the court since the wife was a domiciliary of New York, and not of Florida, as required by statute, at the time she filed her complaint in Florida divorce proceedings—was held binding on the New York court in *Williams v. Williams*, 17 App. Div. 2d 958, 234 N.Y.S.2d 103 (1962).

273. *Chenu v. Board of Trustees*, 12 App. Div. 2d 422, 212 N.Y.S.2d 818 (1961).

274. *Wood v. Wood*, 174 Ohio St. 318, 189 N.E.2d 54 (1963). In an action in New York for separation court dismissed action upon the ground that the parties are no longer married by reason of a Florida divorce decree, regardless of a subsequent Florida decree made on plaintiff wife's application, but without notice to husband, *John v. John*, 22 App. Div. 2d 804, 209 N.E.2d 289, 254 N.Y.S.2d 828 (1964), with two judges dissenting. *Cf.*, *Ragovis v. Ragovis*, 124 N.Y.S.2d 655 (1950). After two subsequent *ex parte* Florida divorces husband was held liable for tax deficiencies arising from deductions to the first wife, *Wondsel v. C.I.R.*, 350 F.2d 339 (2d Cir. 1965), on the authority of *Borax's Estate v. C.I.R.*, 349 F.2d 666 (2d Cir. 1965).

275. 164 So.2d 833 (Fla. 3d Dist. 1964).

decree may not be used to attack the validity of a judgment or decree,"²⁷⁶ but it allowed a direct attack when the "amended complaint alleged that the same was void."²⁷⁷

It should be noted that special conflict rules are contained in the federal statute to determine the family status for social security purposes.²⁷⁸

6. ALIMONY

Alimony claims arising out of foreign decrees will be enforced in Florida courts on the basis of full faith and credit or of comity. Another method is to establish the foreign decree as the decree of a Florida court so that it may be "enforced by those remedies customary in the enforcement of our local decrees for alimony and support money."²⁷⁹ However, as indicated in *Tischler v. Tischler*:²⁸⁰

[T]here is no such cause of action known to our jurisprudence. An action based on a foreign money judgment is an action of debt or assumpsit and the foreign judgment is the basis or ground for relief in the forum court, which relief, if granted, will be our court's own money judgment according to our practice and procedure. If the action is to recover alimony or support money, grounded on a foreign decree, the final decree here should be complete, since it is the local decree that is to be enforced. The foreign decree has no extra-territorial effect, and to merely adopt it by reference leaves the decree incomplete, and such practice is disapproved.

In *Mocher v. Rasmussen-Taxdal*,²⁸¹ another qualification, relating to the right to future support, was grafted upon the effect of a foreign alimony decree. The court recognized that past-due installments, final under the law of the state where the decree was rendered, were entitled to full faith and credit, and locally enforceable by equitable remedies, but it nevertheless held that a foreign (California) decree granting alimony to an illegitimate child may only be modified in Florida as to future support payments after the decree whose modification is sought has been domesticated as a Florida decree. "Once established, the chancellor has jurisdic-

276. *Id.* at 834.

277. *Id.* at 835.

278. 42 U.S.C. § 416 (1961). *Moots v. Secretary, U.S. Dept. of Health, Educ. & Welfare*, 349 F.2d 518 (4th Cir. 1965); *Pace v. Celebrezze*, 243 F. Supp. 317 (S.D. W. Va. 1965); *Starace v. Celebrezze*, 233 F. Supp. 452 (W.D. Pa. 1964); *Rivera v. Celebrezze*, 248 F. Supp. 807 (D.P.R. 1966); *Cupler v. Secretary of Health, Educ. & Welfare*, 252 F. Supp. 178 (W.D. Pa. 1966). Recognition of divorce under Seminole tribal law, *FLA. ATT'Y GEN. OP.* 10 (1961-62).

279. *Sackler v. Sackler*, 47 So.2d 292 (Fla. 1950). On extradition under the Uniform Reciprocal Enforcement of Support Law (FLA. STAT. § 88.011, 1965), *Cox v. State*, 180 So.2d 467 (Fla. 2d Dist. 1965); and *Clarke v. Blackburn*, 151 So.2d 325 (Fla. 2d Dist. 1963).

280. 173 So.2d 769, 770 (Fla. 2d Dist. 1965).

281. 180 So.2d 488 (Fla. 2d Dist. 1965).

tion to modify the decree by way of supersession of its terms and provisions in accordance with Section 742.06 Fla. Stats." This the court would be willing to do regardless of the fact that both mother and child reside in California and only the father is a Florida resident.

Jurisdictional aspects in relation to a foreign alimony decree arose in *Borst v. Borst*²⁸² which involved an action by a divorced husband against his nonresident former wife to modify a New York alimony decree under section 65.15, Florida Statutes. The appellate court affirmed an order of dismissal on the ground that "where the Florida court has no jurisdiction over the marriage, the divorce, the alimony decree, or the wife, the court is unable, under due process of law, to affect alimony rights vested in the wife, these rights being personal and subject only to the in personam jurisdiction over the wife."²⁸³ The court reached this decision on the authority of the trilogy of *Estin v. Estin*,²⁸⁴ *Armstrong v. Armstrong*,²⁸⁵ and *Vanderbilt v. Vanderbilt*.²⁸⁶

The effect, in Florida, of a separation agreement incorporated by reference into a Nevada divorce decree, by which the now deceased husband agreed to pay a monthly sum to his divorced wife as alimony "during her life or until she remarried," was discussed in *Hazlewood v. Hazlewood*.²⁸⁷ Difficulties apparently arose from a Nevada statute²⁸⁸ providing that:

In the event of the death of either party or the subsequent remarriage of the wife, all alimony awarded by the decree shall cease unless it shall have been otherwise ordered by the court.

Both the trial and the appellate courts thought that this statute would apply if the Nevada court had awarded alimony, but without considering the question of Nevada law in cases where the parties have made a different agreement. However, after finding that alimony had not been awarded by the Nevada decree and also finding that "this statute is the same as the law of Florida,"²⁸⁹ the appellate court held that the "decree of the Nevada court did not order alimony but was, in effect, an approval of the property settlement made between the parties."²⁹⁰ The court, therefore, affirmed judgment for plaintiff. It is interesting to note that the court did not explain why it tested the alimony agreement against both

282. 161 So.2d 693 (Fla. 2d Dist. 1964).

283. *Id.* at 696.

284. 334 U.S. 541 (1948).

285. 350 U.S. 568 (1956).

286. 354 U.S. 416 (1957).

287. 178 So.2d 752 (Fla. 2d Dist. 1965).

288. NEV. REV. STAT. § 125.150(4) (1963).

289. 178 So.2d 752, 755 (Fla. 2d Dist. 1965).

290. *Id.* at 757.

Nevada and Florida law, and why it omitted to consider the Nevada decree in the light of the full faith and credit clause.

7. MARITAL PROPERTY

The impact of divorce on the property held by the former spouses may be effected by a judicial decision included in the divorce decree or as an automatic consequence of that decree. In Florida, the mere fact of a valid divorce decree transforms an estate by entirety into a joint tenancy,²⁹¹ and, under section 731.101, Florida Statutes, a former spouse loses the right to take under a will executed by the other spouse. On the death of one of the spouses, alimony will also stop unless there has been an agreement between the spouses, binding upon the estate of the promisor.²⁹²

A divorced wife elected dower under section 731.34, Florida Statutes, and pressed her claim against the executor of the deceased husband's estate, demanding that the *ex parte* Florida divorce decree recovered by the husband be set aside and that the divorce be declared so as not to affect her claim to dower. After the trial court dismissed the demand, its decision had been affirmed on appeal.²⁹³ The Florida supreme court declined to review the case,²⁹⁴ but the United States Supreme Court granted certiorari and held²⁹⁵ that the previous New York separation decree could not be construed as "creating or preserving any interest in the nature of or in lieu of dower in any property of the decedent wherever located,"²⁹⁶ nor did the plaintiff show that New York law supports her position. The court held that denial of dower by Florida courts was not a violation of the full faith and credit clause insofar as the New York decree. In regard to the plaintiff's argument that the Florida divorce court had no power to extinguish her dower rights since the divorce court did not have in personam jurisdiction over her, the Court retorted that "under Florida law, no dower right survives the [divorce] decree" and concluded that "Florida courts transgressed no constitutional bounds in denying petitioner's dower in her ex-husband's Florida estate."²⁹⁷

The enforceability of a Florida divorce decree ordering a transfer of title to land in a sister state was discussed elsewhere in this study. It may be added that an *ex parte* Florida divorce was held not to convert title to real property in New York held by the spouses as tenants by the entireties, into a tenancy in common.²⁹⁸

291. *Burns v. Burns*, 174 So.2d 432 (Fla. 2d Dist. 1965).

292. *Aldrich v. Aldrich*, 163 So.2d 276 (1964).

293. *Simmons v. Miami Beach First Nat'l Bank*, 157 So.2d 199 (Fla. 3d Dist. 1963).

294. 166 So.2d 151 (Fla. 1964).

295. 381 U.S. 81 (1965).

296. *Id.* at 84-85.

297. *Id.* at 86. Sufficiency of constructive service of process in action by spouse to establish title to interest in realty awarded to wife by divorce decree, *Hennig v. Hennig*, 178 So.2d 603 (Fla. 3d Dist. 1965), *petition for cert. dismissed*, 185 So.2d 457 (Fla. 1966).

298. *Huber v. Huber*, 26 N.Y. Misc. 2d 539, 209 N.Y.S.2d 637 (1960).

8. CUSTODY

Surprisingly few cases have been reported lately dealing with conflict problems of custody. Two cases deal with custody problems triggered by habeas corpus proceedings subsequent to a sister state custody decree. In both cases,²⁹⁹ the appellate courts held that trial courts, having jurisdiction over the children and over the other interested parties, had erroneously declined to consider the question of custody anew on the merits, but had instead simply enforced a foreign decree. In one case, the court advised the trial judge that he "may properly consider the New Jersey decree as a factor in deciding the custody issue;" however, the court continued, "he is not bound by the full faith and credit clause to automatically enforce the New Jersey decree."³⁰⁰ Of course, the court may, in its discretion, enforce the foreign decree, but only after having determined whether it is in the "best interests of the child to do so."³⁰¹ The court also supplied the trial judge with several guidelines for "determining whether a foreign decree is entitled to recognition under the comity principle in a custody case." Factors to be considered include: "(1) the length of time which has elapsed since the decree; (2) whether the custody issue was actively litigated by the same parties now before the court; and (3) whether there has been a change in any material circumstances affecting the fitness of the parties relevant to the custody of the child."³⁰² Similarly, in the other case, the appellate court held "that when a court of this state has jurisdiction of the parties and of the children in such a contest relating to their custody, notwithstanding a final order conferring custody on the one or the other may have been made in a foreign state, . . . it is the duty of the court to decide the issue as to custody on its merits."³⁰³

9. ADOPTION

The holding of the Supreme Court in *Armstrong v. Manzo*³⁰⁴ regarding the due process requirement of the notice owed to a divorced father deserves mention. The substantive effects of adoption have recently

299. *Morris v. Kridel*, 179 So.2d 130 (Fla. 2d Dist. 1965); *Fox v. Fox*, 179 So.2d 103 (Fla. 3d Dist. 1965).

300. *Morris v. Kridel*, 179 So.2d 130, 133 (Fla. 2d Dist. 1965).

301. *Ibid.*

302. *Ibid.*

303. *Fox v. Fox*, 179 So.2d 103, 104 (Fla. 3d Dist. 1965). In *Cassidy v. Cassidy*, 181 So.2d 179 (Fla. 3d Dist. 1965), the court restated the rule that "A wife may proceed in a common law action in this state to secure a money judgment for delinquent alimony or child support, awarded by a divorce decree entered in another state, as to all installments which have accrued and are not subject to subsequent modification." However, under the circumstances presented by the particular case, the court rejected the wife's claim in view of the fact that, subsequent to the support decree, the Illinois divorce court had transferred custody to the father. This result was reached notwithstanding the fact that at the time of the custody transfer, the child was outside of Illinois.

304. 380 U.S. 545 (1965).

been extended by including among the rights and duties passing from the natural parents to the adoptor "any cause of action for wrongful death."³⁰⁵

10. ILLEGITIMATE CHILDREN

It may be noted in passing that an action to determine the paternity of an illegitimate child against the former president of a Latin American republic, about to be extradited, was dismissed because of the plaintiff's failure to allege in her complaint the exact statutory elements of such an action, *i.e.*, that she was unmarried and that the child was born out of wedlock.³⁰⁶

According to section 856.04 of the Florida Statutes, as amended in 1965, the charge of desertion may also be brought on behalf of the illegitimate child "of a man who has been adjudged or decreed to be the father of such illegitimate child by a court of competent jurisdiction in this state or in any other jurisdiction."³⁰⁷

F. Decedents' Estates

The determination of the law controlling a contract to make a will was involved in *Sawyer v. Inglis*.³⁰⁸ The plaintiff-son contended that his parents had made such contract in their mutual will, executed in Wisconsin, and, in the instant suit, demanded the specific performance of that agreement. However, applying the law of the place where the mutual wills had been executed (Wisconsin), the court found that Wisconsin law, like that of Florida, the last domicile of the decedents recognized the validity of contracts to make a will, but, as in Florida, the validity of such agreements was subject to satisfying specific requirements. In Florida, such an agreement must be in writing, and, in Wisconsin, "in order for wills, other than joint wills, to constitute a contract, such agreement must affirmatively appear in expressed language on the face of a joint will."³⁰⁹ The court dismissed the complaint because it did not find sufficient proof that an agreement to make a will had been concluded.

The escheat of an allegedly heirless estate to the state of Florida was litigated *In re Tim's Estate*.³¹⁰ Starting from the general rule that escheat is not favored by law, the appellate court reversed a lower court decision in favor of the state. It held that, as against the state, New York court proceedings had established the relationship of some of the claimants

305. FLA. STAT. § 72.22 (1965).

306. *Lorenz v. Jiminez*, 163 So.2d 500 (Fla. 3d Dist. 1964).

307. FLA. STAT. § 856.04(2) (1965). *Cf.*, *In re Adoption of Lee*, 174 So.2d 87 (Fla. 2d Dist. 1965). A Greek adoption was involved in *Corbett v. Stergios*, 137 N.W.2d 266 (Iowa 1965); see *Survey I*, *supra* note 264, at 318.

308. 174 So.2d 760 (Fla. 2d Dist. 1965).

309. *Id.* at 766.

310. 161 So.2d 40 (Fla. 3d Dist. 1964), *quashed*, 180 So.2d 161 (Fla. 1965).

to the estate. However, the court found that Florida was the decedent's last domicile and held that Florida had jurisdiction to determine succession to the decedent's personal property wherever it might be situated, and that it was not bound by the laws of any other state.³¹¹

G. Corporations

In *Crane Co. v. Richardson Constr. Co.*,³¹² the court discussed the application of the Florida statute which imposes personal liability for corporate obligations upon the corporate directors or officers whenever the corporation pays the claims of the latter against it, while it refuses to pay other claims.³¹³ Interpreting the statute in regard to its application to a foreign (Bahamian) corporation, the court noted that the provision imposing liability was first enacted in Florida in 1925, and that it was patterned after a New York corporation law of 1893. After a New York court had decided, in 1894, that their statute applied only to domestic corporations, the New York Legislature, in 1897, and long before the enactment of the Florida statute involved in the instant case, expressly extended the applicability of its statute to foreign corporations transacting or doing business in New York State. In view of this fact, the appellate court concluded that the earlier, not the later, New York statute had been adopted in Florida and that, consequently, the Florida statute is inapplicable to foreign corporations even though they may engage in or transact business in Florida.³¹⁴

H. Criminal Conflict Law

In *Rogers v. United States*,³¹⁵ the fifth circuit affirmed a conviction for the illegal transportation of counterfeit debentures from Miami to Nassau, Bahamas, in violation of section 2314, 18 United States Code. In another case, the accused had been returned to Florida from the Bahamas on a warrant not signed by the governor, nor on accused's waiver of extradition.³¹⁶ The court ruled that in view of *Ker v. Illinois*³¹⁷ and *Frisbie v. Collins*³¹⁸ the defendant was not entitled to relief; the court quoted from the latter case and held that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of 'forcible abduction' . . . There is nothing in the Constitution that requires a court to permit a guilty

311. Taxation of Florida estates, *Green v. State*, 166 So.2d 585 (Fla. 1964).

312. 312 F.2d 269 (5th Cir. 1965).

313. FLA. STAT. § 608.55 (1965).

314. See also *Hausman v. Buckley*, 299 F.2d 696 (2d Cir. 1962), involving a stockholders' derivative action on behalf of a Venezuelan corporation.

315. 334 F.2d 83 (5th Cir. 1964).

316. *Hunter v. State*, 174 So.2d 415 (Fla. 3d Dist. 1965).

317. 119 U.S. 436 (1886).

318. 342 U.S. 519 (1952).

person rightfully convicted to escape justice because he was brought to trial against his will."³¹⁹

I. *Tax Conflict Law*

The amenability of foreign corporations to Florida tax was litigated in two reported cases. One³²⁰ involved the payment of a gross receipts tax by a New York corporation; the other³²¹ was concerned with the taxation of equipment manufactured and sold by a taxpayer to a foreign purchaser. The amenability of a Florida corporation, engaged in government contract work in the Virgin Islands, to local taxation was in issue in *Jefferson Constr. Overseas, Inc. v. Government of Virgin Islands*.³²²

319. 174 So.2d 415, 416 (Fla. 1965).

320. *Green v. Sesac, Inc.*, 177 So.2d 752 (Fla. 1st Dist. 1965).

321. *State v. Green*, 177 So.2d 490 (Fla. 1st Dist. 1965).

322. 237 F. Supp. 125 (D.V.I. 1964).