



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 48 | Number 2

Article 2

2-1-1970

Choice of Law Rules in North Carolina

Seymour W. Wurfel

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Seymour W. Wurfel, *Choice of Law Rules in North Carolina*, 48 N.C. L. REV. 243 (1970).

Available at: <http://scholarship.law.unc.edu/nclr/vol48/iss2/2>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

CHOICE OF LAW RULES IN NORTH CAROLINA

SEYMOUR W. WURFEL*

Purpose and Scope.....	243
Conflict of Laws Flexibility.....	244
Torts in General.....	247
Lex Loci and its Alternatives.....	250
Interspousal Tort Liability.....	264
Guest Statute Cases.....	268
Wrongful Death Cases.....	269
Loss of Consortium.....	272
Choice of Contracts Law.....	273
Uniform Commercial Code Conflicts Provisions.....	279
Federal Tax Matters.....	291
Criminal Law.....	292
Workmen's Compensation Cases	292
Family Law.....	293
Divorce Jurisdiction.....	293
Recognition of Foreign Divorces.....	294
Support and Alimony.....	297
Custody	299
Separation Agreements.....	306
Conclusion	308

PURPOSE AND SCOPE

Academic writings on conflict of laws frequently consist of earnest expositions setting forth the author's views as to what the law should be in a given conflicts area. This legal evangelism provides a vehicle for

* Professor of Law, University of North Carolina School of Law. This article was prepared in cooperation with the North Carolina Law Center.

erudition, foments legal cerebration, and on occasion results in a state supreme court adopting into its conflicts law a principle or principles thus enunciated. These exhortations to re-evaluate and the resulting re-examinations of various conflicts problems are valuable and commendable. However, the legal technician, whether he be lawyer, judge, teacher or legislator, does well to start from a firm foundation of what the law is when he essays to change that law to make it comport to his views of what it should be. Further, the present state of the law often has the support not only of stare decisis but also of reason.

Accordingly, the precise purpose of this article is to present, with a minimum of embellishment, the North Carolina choice of law conflicts rules as they actually were on January 1, 1970. Choice of law problems that have arisen since February 1, 1963, will provide the principal vehicle for this discussion.

No effort will be made either to flagellate or to laud the court or the legislature for purported insufficiencies or excellences in their conflicts output. Changes, if any are appropriate, are most likely to result from ingenious advocacy by the bar, judicial wisdom, and legislative sagacity. The author will endeavor to remember that these meritorious jurisprudential qualities are primarily autogenous and are by no means engendered solely by academic exhortations.¹

CONFLICT OF LAWS FLEXIBILITY

State courts and legislatures are uniquely free to work out their own destinies in the area of choice of law rules. A federal or state constitutional restraint is the rare exception rather than the rule. Neither full faith and credit nor due process considerations² preclude rejection of damage limitations in the wrongful death statute of the locus state as

¹ A different approach has been taken by one scholar. Professor Baade of Duke University Law School has written: "Conflict of laws questions are amazingly complicated and they are, probably in good part for this very reason, rather infrequently litigated. It thus seems essential that the scholar pave the way for the judge in this area." Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Covers, The Choice-of-Law Process*, 46 TEXAS L. REV. 141, 145 (1967).

² In *Richards v. United States*, 369 U.S. 1 (1962), former Chief Justice Warren encouraged state courts to be flexible in the fashioning of state conflict of laws rules and thereby indicated that conformity is not necessary:

Where more than one State has sufficiently substantial contact with the activity in question, the forum State by analysis of the interests possessed by the States involved could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.

Id. at 15.

inapplicable to a plaintiff residing in the forum state³ or, when the forum state has some real contact with the transaction, application of local law to a contract entered into in another state in which the law is different.⁴

In the exercise of diversity of citizenship jurisdiction the federal district courts must apply the substantive law of the state in which they sit,⁵ including its conflicts law.⁶ If the conflicts rule has not been decided by the state court, the federal court must decide as it believes the supreme court of the state would rather than as it deems best.⁷ If the state law changes while a diversity case is on appeal, a federal appellate court must apply the new state rule.⁸ Since, by definition, diversity cases involve parties from different states, they frequently present conflicts problems the resolution of which composes a substantial part of the lore of conflict of laws. However, if another federal ground of jurisdiction is present, the federal courts must apply federal conflict of laws rules.⁹

Furthermore, the normal restraint upon innovation imposed by the doctrine of *stare decisis* seems singularly non-inhibitive in conflicts cases.¹⁰ Since substantial contact of the forum state with the matter in controversy meets federal constitutional requirements and since state constitutions

³ *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963), *rev'g* 307 F.2d 131 (2d Cir. 1962).

⁴ *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

⁵ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

⁶ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). This requirement includes applying the public policy of the state where this factor constitutes an element of its conflict of laws rule. *Griffin v. McCoach*, 313 U.S. 498 (1941). See Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

⁷ *Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co.*, 319 F.2d 469 (4th Cir. 1963); *Stentor Elec. Mfg. Co. v. Klaxon*, 125 F.2d 820 (3d Cir. 1942) (on remand). For an interesting discussion of this duty of a federal court, see *Hopkins v. Lockheed Aircraft Corp.*, 394 F.2d 656 (5th Cir. 1968).

⁸ *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941).

⁹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

¹⁰ See *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), in which the court said:

[R]econsideration of the inflexible traditional rule persuades us, as already indicated, that, in failing to take into account essential policy considerations and objectives, its application may lead to unjust and anomalous results. This being so, the rule, formulated as it was by the courts, should be discarded.

Id. at 484, 191 N.E.2d at 285, 290 N.Y.S.2d at 751-52. See also *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Mellk v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967); *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

and statutes rarely prescribe conflicts rules, a state supreme court is relatively free to change its conflicts rules. Of course, a state legislature may by subsequent legislation undo judicial conflicts changes and may, in any event, establish rules binding upon the state courts, subject only to constitutional limitations.¹¹

The Congress of the United States has been remarkably restrained in refraining from enacting conflict of laws legislation. Where only state interests are involved, as in conflicting exercise of the power to tax based on domicile, Congress has abstained and the Supreme Court has normally held that no federal question is involved.¹² Even in the matter of multistate defamation, by radio or television broadcasts or by nationally distributed publications, Congress has not provided a solution to the complex conflicts problem presented.¹³

The North Carolina General Assembly, in common with the great majority of state legislatures in the United States, has exercised quite sparingly its power to enact conflict of laws statutes. In a few notable instances it has done so, and these will be examined under appropriate classifications.

Academic writing has in recent years had a substantial influence in some states in reshaping certain areas of conflict of laws.¹⁴ North Carolina conflicts decisions have as yet been influenced little, if at all, by these writings or by recent drafts of the *Restatement (Second) of Conflict of Laws*, which in some states have received judicial acceptance.¹⁵ Reference

¹¹ Ehrenzweig, *A Proper Law In A Proper Forum; A "Restatement" of the "Lex Fori Approach"*, 18 OKLA. L. REV. 340 (1965); Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679, 682 (1963).

¹² Hill v. Martin, 296 U.S. 393 (1935); *In re Dorrance's Estate*, 115 N.J. Eq. 268, 170 A. 601 (Prerog. Ct. 1934); 116 N.J. Eq. 204, 172 A. 503 (Prerog. Ct. 1934), *aff'd*, 116 N.J.L. 362, 184 A. 743 (Ct. Err. & App. 1935), *cert. denied*, 298 U.S. 678 (1936). However, in a case in which the conflicting state inheritance tax claims in aggregate exceeded the total assets of the estate, and Texas as one of the contesting states filed an original bill in the Supreme Court, the Court exercised jurisdiction and determined Massachusetts to be the state of domicile. *Texas v. Florida*, 306 U.S. 398 (1939). Also, when states were competing to take by escheat the same unclaimed funds, original jurisdiction was exercised and rules to resolve the conflict were prescribed by the Supreme Court. *Texas v. New Jersey*, 379 U.S. 674 and 380 U.S. 518 (1965).

¹³ A strong recommendation made by Professor William Prosser that federal conflicts legislation was necessary to resolve the multistate defamation problem has not produced Congressional action. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 1000 (1953).

¹⁴ See cases cited note 10 *supra*.

¹⁵ See *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968); *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *McSwain v. McSwain*, 420 Pa. 86,

will be made to pertinent provisions of the proposed *Restatement*,¹⁶ in spite of the strong feeling of some academic writers that the whole effort to compile a conflict of laws restatement for choice of law is misguided, inappropriate, and should be scuttled.¹⁷

TORTS IN GENERAL

Practically all tort actions, with the exception of trespass to real estate,¹⁸ are transitory and may be brought wherever the plaintiff may obtain valid service on the defendant. This is the North Carolina rule.¹⁹

Where the tort occurs in another state the North Carolina choice of law rule is to apply the *lex loci delicti* to all substantive questions. The *lex loci* rule adopts the vested-rights doctrine espoused by Joseph Henry Beale, the late Royal Professor of Law at Harvard and Reporter for the original *Restatement of Conflict of Laws*. The concept is that an act has legal significance only if, and to the extent that, the law of the

215 A.2d 677 (1966); *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

¹⁶ For an authoritative account of the purpose and concept of RESTATEMENT (SECOND) OF CONFLICT OF LAWS, see Reese, *Conflict of Laws and The Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963). Professor Reese is the Reporter for this Restatement undertaking.

¹⁷ Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1235 (1963): "[T]he decision, rightly understood, spells the doom of all attempts, such as that of the *Restatement*, to solve the problems of conflict of laws by a compendium of choice-of-law rules and in particular of the *Restatement (Second)*'s attempt to solve them by reference to the 'law of the state which has the most significant relationship with the occurrence and with the parties.'" Ehrenzweig, *The "Most Significant Relationship" In The Conflicts Law of Torts: Law and Reason Versus The Restatement Second*, 28 LAW & CONTEMP. PROB. 700 (1963): "Only the remaining hope to induce the Restaters to withdraw their latest draft on the conflicts law of torts has prompted me to offer these comments despite my misgivings." See also Ehrenzweig, *Restitution In The Conflict Of Laws: Law and Reason versus the Restatement Second*, 36 N.Y.U.L. REV. 1298 (1961); Ehrenzweig, *Miscegenation in the Conflict of Laws: Law and Reason Versus The Restatement Second*, 45 CORNELL L.Q. 659 (1960).

¹⁸ But see *Reasor-Hill Corp. v. Harrison*, 220 Ark. 521, 249 S.W.2d 994 (1952), where a resident of Missouri was permitted in a cross-complaint to recover in Arkansas for injuries to real property situated in Missouri inflicted by the plaintiff, a resident of Arkansas who was not subject to service in Missouri.

¹⁹ *Fulcher v. Smith*, 249 N.C. 645, 107 S.E.2d 68 (1959); *Howle v. Twin States Express, Inc.*, 237 N.C. 667, 75 S.E.2d 732 (1953); *Rodwell v. Camel City Coach Co.*, 205 N.C. 292, 171 S.E. 100 (1933); *Ledford v. Western Union Tel. Co.*, 179 N.C. 63, 101 S.E. 533 (1919); *Harrill v. South Carolina & G. Ry.*, 132 N.C. 655, 44 S.E. 109 (1903). While the right of action for wrongful death is transitory, it can only be maintained by a representative qualified by a North Carolina court. *In re Scarborough*, 261 N.C. 565, 134 S.E.2d 529 (1964); *Cannon v. Cannon*, 228 N.C. 211, 45 S.E.2d 34 (1947); *Monfils v. Hazlewood*, 218 N.C. 215, 10 S.E.2d 673 (1940).

geographical jurisdiction in which it occurs gives rise to legal rights and duties. If a legal right arises at the locus, this right vests in the injured party and he may enforce it not only at the locus but in the courts of other states and nations as well. If no right exists at the locus, there is none to enforce anywhere. The North Carolina Supreme Court restated, reconsidered, and reaffirmed this general rule in 1963 in *Shaw v. Lee*.²⁰

The decision in *Shaw* came less than one hundred days before that of the New York Court of Appeals in *Babcock v. Jackson*,²¹ which rejected the *lex loci* conflicts rule and replaced it "by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."²² Recovery under New York law for an Ontario accident was allowed since it was a case "solely affecting New York residents and arising out of the operation of a New York based automobile."²³ Since *Babcock* the courts have been much concerned with this problem of the choice of the substantive law to govern tort actions. Hence it is appropriate to commence this examination of North Carolina choice of law rules with the decision in *Shaw*.

The rejected contention of the plaintiff in *Shaw* was that the law of her domicile, North Carolina, should apply to an automobile accident in Virginia in which she received injuries allegedly caused by the negligent driving of her deceased husband, also a North Carolina domiciliary. Regarding the problem as one of the existence of a cause of action rather than of capacity to sue,²⁴ the court applied the rule that it had earlier announced in *Howard v. Howard*.²⁵

Since the decision in *Shaw*, the court has consistently adhered to the *lex loci delicti* rule to determine the substantive law applicable to a suit on an out of state tort.²⁶ In *Farmer v. Ferris*,²⁷ an amusement device

²⁰ 258 N.C. 609, 129 S.E.2d 288 (1963).

²¹ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

²² *Id.* at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

²³ *Id.* at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

²⁴ 258 N.C. at 615, 129 S.E.2d at 292.

²⁵ 200 N.C. 574, 158 S.E. 101 (1931).

²⁶ The court invoked the rule in refusing to permit joinder of a husband as a joint tortfeasor in an action brought by the wife-passenger against the owner of the other vehicle because under the law of West Virginia, where the accident occurred, one spouse may not sue the other in tort. *Petrea v. Ryder Tank Lines, Inc.*, 264 N.C. 230, 141 S.E.2d 278 (1965).

Lex loci is applied to wrongful death actions as well as to other tort suits. *Broadfoot v. Everett*, 270 N.C. 429, 154 S.E.2d 522 (1967).

In one of the first decisions of the Court of Appeals of North Carolina present-

defectively manufactured in Michigan caused injury at Carolina Beach, North Carolina. The question presented was whether these facts constituted tortious conduct in this state so as to bring the suit within the in personam jurisdiction asserted by North Carolina General Statute § 55-145(4) (1965) in behalf of North Carolina residents against foreign non-domesticated corporations.²⁸ After finding due process requirements had been met, the court upheld jurisdiction saying: "[T]he place of a wrong is in the State where the last event takes place which is necessary to render the actor liable for an alleged tort."²⁹ When the negligence occurs in State A and its impact, producing injury, takes place in State B, this refinement becomes necessary to determine which state law is in fact the *lex loci delicti*. The rule stated by the court conforms to the great weight of authority.³⁰

In several tort cases the court has drawn the distinction between matters of "substance" and "procedure" and has applied *lex loci* to the former and *lex fori* to the latter. *Kirby v. Fulbright*³¹ involved a vehicle accident in Virginia. The court said: "Whether, under the substantive law of Virginia, the evidence was sufficient to require its submission to the

ing a conflicts question, the court applied the *lex loci* (in this case Virginia) in affirming an award made by the Industrial Commission under the Tort Claims Act. *Parsons v. Board of Educ.*, 4 N.C. App. 36, 39, 165 S.E.2d 776, 778 (1969).

²⁷ 260 N.C. 619, 133 S.E.2d 492 (1963), *cited in* Annot., 19 A.L.R.3d 91 (1968).

²⁸ *Id.* at 624, 133 S.E.2d at 497.

²⁹ *Id.* at 627, 133 S.E.2d at 498.

³⁰ In *Richards v. United States*, 369 U.S. 1, 16 n.35 (1962), the Supreme Court said: "[T]he two courts below . . . conclude[d] that Oklahoma would follow the general rule that the law of the place of injury would control even had the negligence that caused the injury taken place in Oklahoma." The opinion below in 285 F.2d 521, 523 (10th Cir. 1960), in part stated:

[I]n the absence of a controlling statute providing otherwise, the general rule is that where an act of omission or commission occurs at one place and resulting death, personal injury, or damage takes place at another, the situs of the actionable wrong is the place at which the death, personal injury or property damage takes place. . . . And that rule has been applied in cases in which the act of omission or commission in respect to a passenger airplane occurred at one place while the resulting accident and death took place at another. . . .

The Supreme Court then held this general conflicts rule was not applicable to a suit brought under the Federal Tort Claims Act because of the wording of that Act. *Cf. Brendle v. General Tire & Rubber Co.*, 408 F.2d 116 (4th Cir. 1969).

³¹ 262 N.C. 144, 136 S.E.2d 652 (1964). This distinction was also stated in *Thames v. Teer Co.*, 267 N.C. 565, 148 S.E.2d 527 (1966); *Young v. Baltimore & O.R.R.*, 266 N.C. 458, 146 S.E.2d 441 (1966); *Conrad v. Miller Motor Express, Inc.*, 265 N.C. 427, 144 S.E.2d 269 (1965); *Cobb v. Clark*, 265 N.C. 194, 143 S.E.2d 103 (1965); *Crow v. Ballard*, 263 N.C. 475, 139 S.E.2d 624 (1965).

jury is determinable in accordance with the procedural law of this jurisdiction."³²

Lex Loci and Its Alternatives

In the United States, the majority rule continues to be that whether conduct is actionable as a tort is determined by the substantive law of the place where the questioned conduct produced injury.³³ Within the last decade, however, this rule has been changed in whole or in part in at least fourteen jurisdictions: Arizona,³⁴ District of Columbia,³⁵ Iowa,³⁶ Kentucky,³⁷ Minnesota,³⁸ Mississippi,³⁹ Missouri,⁴⁰ New Hampshire,⁴¹ New

³² 262 N.C. at 150, 136 S.E.2d at 656.

³³ 16 AM. JUR. 2d *Conflict of Laws* § 71 nn. 4 & 7 (1964), and Annot., 92 A.L.R.2d 1129, 1186-89 (1963), contain extensive citations of authorities. See also Annot., 76 A.L.R.2d 130 (1961); Annot., 95 A.L.R.2d 12 (1964).

³⁴ *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968) (an interspousal suit).

³⁵ *Myers v. Gaither*, 232 A.2d 577 (D.C. Mun. Ct. App. 1967), *aff'd*, 404 F.2d 216 (D.C. Cir. 1968). A District of Columbia statute, imposing liability for accidents caused by the theft of a vehicle on an owner who left the keys in the vehicle, was applied to an accident in Maryland where the owner would not have been liable under Maryland law. See *Williams v. Rawlings Truck Line, Inc.*, 357 F.2d 581 (D.C. Cir. 1965). But see *Roscoe v. Roscoe*, 379 F.2d 94 (D.C. Cir. 1967), where upon the death of a husband, a wife was permitted to continue a suit, under a survival statute, based upon the negligent driving of the husband in North Carolina, although interspousal suits are prohibited by the law of the District of Columbia. The court said:

We deem it sufficient to note that this appellant wife had gained a right of action under the law of North Carolina; that right followed her here; the husband died, and upon his death the basis of the doctrine disappeared. No longer was there in jeopardy the domestic tranquility of the spouses. No longer was there in existence a predicate for the assertion of a policy which would bar continued maintenance of an action designed to vindicate the right which had so accrued to the wife. Balancing the respective interests in such circumstances, . . . we may apply the law of North Carolina.

Id. at 99. See also *Emmert v. United States*, 300 F. Supp. 45 (D.D.C. 1969).

³⁶ *Fabricus v. Horgen*, 257 Iowa 268, 132 N.W.2d 410 (1965), a wrongful death case in which the Iowa law as to measure of damages and real party in interest was applied to a Minnesota occurrence. However, the court said that the question of actionable negligence depended on the law of Minnesota. *Id.* at 276, 132 N.W.2d at 415. In *Fuerste v. Bemis*, — Iowa —, 156 N.W.2d 831 (1968), the court held that the Iowa guest statute was applicable to an action in Iowa between Iowa residents for an alleged wrongful death occurring in Wisconsin, which had no guest statute. The court found that all significant relationships were with the State of Iowa.

³⁷ *Wessling v. Paris*, 417 S.W.2d 259 (Ky. Ct. App. 1967), noted in 13 ST. LOUIS L.J. 146 (1968). The majority opinion states:

We recognize that an attempt to apply this rule in complex situations might involve an unstable exercise in legal gymnastics. Consequently, at this time we limit application of the rule to a very clear case, such as we have here.

All of the interests involved (other than the fortuitous place of accident [Indiana]) are Kentucky interests. The guest passenger's right of action against the driver will be determined by Kentucky law

Id. at 261.

³⁸ *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968). In this action by a Minnesota resident against a North Dakota resident for automobile accident injuries occurring while the parties were on a temporary pleasure trip in North Dakota, the Minnesota court refused to apply a North Dakota guest statute that would have precluded recovery. *See also Kopp v. Rechtzigel*, 273 Minn. 441, 141 N.W.2d 526 (1966).

³⁹ *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968). The court applied Mississippi's comparative negligence doctrine when occurrence was in Louisiana, but only Mississippi residents and estates were involved.

⁴⁰ *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969), *noted in* 13 ST. LOUIS L.J. 467 (1969). In a guest suit, the occurrence was in Indiana, but the parties were Missouri residents traveling in a Missouri car. Indiana had a guest statute, but Missouri did not. Missouri applied its own law. However, only three judges accepted the "most significant relationship" rule. The fourth judge concurred on the ground that to enforce the Indiana statute would be against Missouri public policy.

Previously in *Robinson v. Gaines*, 331 S.W.2d 653 (Mo. 1960), recovery between husband and wife domiciled in Missouri was denied for an accident occurring in New Mexico. New Mexico and not Missouri law was applied. *Gaines* was cited with approval in *Toomes v. Continental Oil Co.*, 402 S.W.2d 321 (Mo. 1966). In *Girth v. Beaty Grocery Co.*, 407 S.W.2d 881 (Mo. 1966), where plaintiff in seeking to avoid the application of the borrowing provision of the Missouri statute of limitations urged discarding the *lex loci* rule and the adoption of the contrary New York and Pennsylvania rule, the Supreme Court of Missouri refused, saying no conflict of law problem was presented. The Kansas City, Missouri, Court of Appeals in *Neihardt v. Knipmeyer*, 420 S.W.2d 27 (Kansas City, Mo. Ct. App. 1967) held:

The South Dakota guest statute is controlling in this case and we will be governed by the decisions of the South Dakota Supreme Court in applying it. We have been cited to no Missouri decision indicating that tort actions tried in Missouri are not governed by the law of the state where the tort occurred.

Id. at 29.

Note, *Choice of Law Rules in Tort Cases—A Coming Conflict in Missouri*, 33 Mo. L. REV. 81 (1968), in which a student recommended that Missouri depart from the *lex loci* rule and adopt the approach of the *Restatement (Second)*, was cited with approval by the three judges voting against *lex loci* in *Kennedy v. Dixon*, 439 S.W.2d 173, 181 (Mo. 1969).

⁴¹ *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966). This was a tort suit between New Hampshire spouses. The accident occurred in Vermont, which has a guest statute limiting host liability to gross and wilful negligence only. New Hampshire has no guest statute. The majority opinion in allowing recovery declared:

We prefer to apply the better rule of law in conflict cases. . . . If the law of some other state is outmoded, an unrepealed remnant of a bygone age, 'a drag on the coattails of civilization,' . . . we will try to see our way clear to apply our law instead. If it is our own law that is obsolete or senseless (and it could be) we will try to apply the other state's law.

Id. at 355, 222 A.2d at 209.

Jersey,⁴² New York,⁴³ Oregon,⁴⁴ Pennsylvania,⁴⁵ Rhode Island,⁴⁶ and Wisconsin.⁴⁷ To these should be added California,⁴⁸ which had deviated

⁴² *Mellk v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967). In an action between New Jersey residents for injuries to an automobile guest in an accident in Ohio the court held that "while the substantive law of Ohio governs the conduct of the parties insofar as this relates to the rules of the road, the New Jersey rule allowing a guest to sue his host for ordinary negligence applies to the present case." *Id.* at 235, 229 A.2d at 630.

⁴³ *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), in which the court held in a suit between residents of New York arising out of a weekend Ontario auto accident that Ontario guest statute was inapplicable and did not bar recovery. *See also Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

⁴⁴ *Casey v. Manson Constr. & Eng'r Co.*, 247 Ore. 274, 428 P.2d 898 (1967) (court applied *lex loci* since Washington had the *most* significant relationship).

⁴⁵ *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964). The court applied Pennsylvania law where decedent, a resident of Pennsylvania, was killed in Colorado aircraft crash. *See also Scott v. Eastern Air Lines, Inc.*, 399 F.2d 14 (3d Cir.) *cert. denied*, 393 U.S. 979 (1968).

⁴⁶ *Woodward v. Stewart*, — R.I. —, 243 A.2d 917 (1968), *petition for cert. dismissed*, 393 U.S. 957 (1969). In a wrongful death action where all participants were residents of Rhode Island and the defendant driver's car was traveling to and from points in Rhode Island when accident in Massachusetts occurred, the court said:

The objections to the application of this significant contacts or center of gravity approach to litigation is that the merits of the *lex loci* doctrine—uniformity, predictability, and certainty of result—will be lost.

Id. at —, 243 A.2d at 920. The court continued:

The interest-weighting approach to conflict of law cases is indeed the better rule, and justice will be more equitably administered if the Rhode Island courts apply the rule to tort conflict cases coming before them. All prior cases that are inconsistent with this view are hereby overruled . . .

Id. at —, 243 A.2d at 923.

In *Thayer v. Perini Corp.*, 303 F. Supp. 683 (D.R.I. 1969), a diversity wrongful death action, the court applied the Rhode Island "more significant interest" conflicts rule and found that since Massachusetts had the more significant interest its wrongful death statute should control. However, since Rhode Island refuses to enforce the Massachusetts' statute as being penal in nature and since the court held that the Rhode Island wrongful death statute was inapplicable, the case was dismissed. Here the decedent and his next of kin were citizens and residents of Rhode Island. The court said: "[T]he defendant is a Massachusetts corporation. The defendant's alleged tortious conduct causing the injuries to and death of the decedent occurred in Massachusetts during the construction . . . of [a] coffer dam upon which the decedent was working. . . . The relationship between the decedent and the defendant was centered in Massachusetts." *Id.* at 688. Thus, "more significant interest" analysis selected the *lex loci* statute as controlling, then forum public policy struck down that statute with the spectacular result that Rhode Island residents were denied a cause of action that could have been pursued in either the state or federal court in Massachusetts. The more liberal provisions of the Rhode Island wrongful death statute that plaintiff asserted to be applicable probably induced this infortuitous forum-shopping.

⁴⁷ *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965), *noted in* 1966

from *lex loci* perhaps as early as 1953. It may be noted that these cases, while departing from prior *lex loci* doctrine, did not suggest application of any rules of the road other than those of the locus.

On the other hand, courts in at least ten states recently have joined the North Carolina Supreme Court⁴⁹ in re-examining and reaffirming the *lex loci* rule: Connecticut,⁵⁰ Delaware,⁵¹ Florida,⁵² Kansas,⁵³ Louisiana,⁵⁴

Wis. L. REV. 913. Where driver and passenger, husband and wife, were Wisconsin residents and an accident occurred in Nebraska, the Wisconsin court refused to apply a Nebraska guest statute that would have denied recovery. The opinion indicated that Nebraska rules of the road would apply. *Id.* at 634, 133 N.W.2d at 417. See also *Satchwill v. Vollrath Co.*, 293 F. Supp. 533 (E.D. Wis. 1968); *Heath v. Zellimer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967). Actually, Wisconsin took the first step away from *lex loci* in *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959). See p. 257 and note 70 *infra*.

⁴⁸ *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). The actions were to recover for wrongful deaths of Ohio residents killed in a Missouri collision with a car owned and operated by a California resident. It was held that Ohio law permitting unlimited recovery applied and not Missouri's 25,000 dollar limitation. See also *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953), where the prospective defendant in a personal injury suit resulting from an accident in Arizona died before the action was filed. California had a survival statute, Arizona did not. The court held that since all of the parties were residents of California and the estate was being administered there, the right to sue was governed by the California laws relating to administration of estates.

⁴⁹ *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963). See p. 248 *supra*.

⁵⁰ *Landers v. Landers*, 153 Conn. 303, 216 A.2d 183 (1966).

⁵¹ *Friday v. Smoot*, — Del. —, 211 A.2d 594 (1965). Two Delaware residents on a brief auto ride were involved in an accident in New Jersey. The court held the Delaware guest statute not applicable and allowed the guest to recover under New Jersey law. "[W]e think the adoption of a more significant relationship theory would be a major change with respect to the rights of the litigants. As such, therefore, it falls within the peculiar province of the General Assembly." *Id.* at —, 211 A.2d at 596-97.

⁵² *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743 (Fla. 1967). Here a Florida resident sought recovery in federal court for the death of her Florida husband in an Illinois crash of a commercial aircraft. The Fifth Circuit certified to the Supreme Court of Florida the question of whether Florida would apply the Illinois limitation of 30,000 dollars on damages. The Supreme Court of Florida ruled the Illinois limitation applied and was not overridden by public policy considerations. "While the place at which an event occurs may indeed be fortuitous, that circumstance nevertheless seems to be of primary importance in determining the legal effect to be accorded any occurrence upon which a cause of action depends." *Id.* at 751-52. This rule was then applied by the federal court in 394 F.2d 656 (5th Cir. 1968). The rule has since been followed in subsequent cases. *Messinger v. Tom*, 203 So. 2d 357 (Fla. 1967); *Lescard v. Keel*, 211 So. 2d 868 (Fla. Dist. Ct. App. 1968).

⁵³ *McDaniel v. Sinn*, 194 Kan. 625, 400 P.2d 1018 (1965) (court applied Missouri limitation on damages in a personal injury and wrongful death action).

⁵⁴ *Nicholson v. Atlas Assurance Corp.*, 156 So. 2d 245 (La. Ct. App.), *aff'd*, 245 La. 461, 158 So. 2d 612 (1963). In the Louisiana wife's suit for her husband's injuries in Mississippi, the court held that the substantive law of Mississippi con-

Maryland,⁵⁵ Michigan,⁵⁶ Oklahoma,⁵⁷ South Carolina,⁵⁸ and Texas.⁵⁹ In addition, federal courts applying the conflicts rules of Arkansas,⁶⁰ Illinois,⁶¹ Massachusetts,⁶² and Ohio⁶³ have invoked *lex loci*. The rule in

trolled and defeated the action. However, a subsequent case, *Johnson v. St. Paul Mercury Ins. Co.*, 218 So. 2d 375 (La. Ct. App. 1969), holding that the trial court was in error in applying *lex loci*, has been granted a writ of review by the Supreme Court of Louisiana. 253 La. 872, 220 So. 2d 457 (1969).

⁵⁵ *Hartford Mut. Ins. Co. v. Bruchey*, 248 Md. 669, 238 A.2d 115 (Ct. App. 1968). This action was brought by the husband for loss of his wife's consortium due to an accident in Virginia. Even though Maryland law would have allowed such a recovery, the Maryland Court of Appeals followed Virginia law, which did not allow recovery. See also *White v. King*, 244 Md. 348, 223 A.2d 763 (1966).

⁵⁶ *Abendschein v. Farrell*, 11 Mich. App. 662, 162 N.W.2d 165 (1968), *aff'd*, 382 Mich. 510, 170 N.W.2d 137 (1969) (recovery denied under Ontario guest statute where guests in auto accident were New York residents traveling to Michigan and the defendant driver a Michigan resident). In affirming the intermediate appellate court the Michigan Supreme Court expressly refused to follow *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). The court quoted with approval from Judge Van Voorhis' dissenting opinion in *Babcock*. 382 Mich. at —, 170 N.W.2d at 142-43.

See also *Owen v. Illinois Baking Corp.*, 260 F. Supp. 820 (W.D. Mich. 1966).

⁵⁷ *Cherokee Lab., Inc. v. Rogers*, 398 P.2d 520 (Okla. 1965). "[W]e decline to hold with the view that the public policy of this state pursuant to the theory of Section 7 of Article XXIII of our Constitution is such or so strong as to require a determination that the Missouri statutory limit of \$25,000 . . . does not apply." *Id.* at 525.

⁵⁸ *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964). A husband and wife, residents of South Carolina, were in an automobile accident in Georgia. In South Carolina a wife may sue her husband, and in Georgia she cannot. In holding this suit could not be maintained, the court pointed out that the North Carolina Supreme Court had recently refused to abandon *lex loci*.

⁵⁹ *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968). The petitioner vigorously and ably argues that the State of Colorado actually has little concern with this unfortunate accident which took the lives of four Texans and one Illinois resident while they were returning to Texas on a business trip in behalf of a Texas based commercial activity, and points out that the defendant is a Texas corporation and that the negligent pilot was also a Texas resident. From these circumstances, it is contended that essentially this is a Texas controversy which should be controlled by Texas law. *Id.* at 184. Nevertheless, the court applied the law of Colorado in the case. *Id.* at 182. See also *Gaston v. B. F. Walker, Inc.*, 400 F.2d 671 (5th Cir. 1968); *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841 (5th Cir. 1967).

⁶⁰ *Glick v. Ballentine Produce, Inc.*, 343 F.2d 839 (8th Cir. 1965).

⁶¹ *Karczewski v. Baltimore & O.R.R.*, 274 F. Supp. 169 (N.D. Ill. 1967).

⁶² *Doody v. John Sexton & Co.*, 411 F.2d 1119 (1st Cir. 1969).

⁶³ *Goranson v. Capital Airlines, Inc.*, 345 F.2d 750 (6th Cir. 1965). This case was a wrongful death diversity action in which the decedent had been a resident of Ohio and had been killed in an aircraft crash in Virginia. After finding that Ohio had followed the *lex loci* rule continuously since 1891, the federal court in applying the Virginia wrongful death damage limitation made this observation:

There is considerable discussion in recent cases on whether the extent of damages recoverable is to be treated as part of the substantive or procedural

Alaska,⁶⁴ Indiana,⁶⁵ North Dakota,⁶⁶ and South Dakota⁶⁷ is not clear.

law of the state. The reasoning in these cases is persuasive but we are not at liberty to adopt a new rule of conflict of laws in Ohio
Id. at 752.

⁶⁴ In Alaska, as to tort cases in general, the issue has been expressly reserved. *Armstrong v. Armstrong*, 441 P.2d 699 (Alas. 1968). The court did decide that domiciliary law, not *lex loci*, applies to interspousal immunities and liabilities in multistate tort actions when the litigants are domiciliaries of Alaska and their only contacts with the situs of the tort are transitory in nature.

⁶⁵ In a diversity case the Court of Appeals for the Seventh Circuit surmised that Indiana would discard the *lex loci* rule. *Watts v. Pioneer Corn Co.*, 342 F.2d 617 (7th Cir. 1965). Thereafter, in another case the Indiana Court of Appeals, after pointing out that the decisions of the circuit court are not binding on the state, decided that when an injury covered by workmen's compensation occurred in Kentucky, Indiana had the greater interest in having its law applied. On appeal the Supreme Court of Indiana reversed on another ground and limited its decision to the holding that the defendant was covered by the compensation act and was not subject to a common law suit. *Witherspoon v. Salm*, — Ind. App. —, 237 N.E.2d 116 (1968), *rev'd*, — Ind. —, 243 N.E.2d 876 (1969). This result seems to leave Indiana in its original position as a *lex loci* jurisdiction. On the point of compensation act coverage, the supreme court decision relied on *Warner v. Leder*, 234 N.C. 727, 69 S.E.2d 6 (1952).

⁶⁶ Another borderline situation exists regarding the torts choice of law rule in North Dakota and South Dakota. A North Dakota federal district court judge has stated that the choice of law rule in a multistate tort situation has not been determined in either North or South Dakota. *Merchants Nat'l Bank & Trust Co. v. United States*, 272 F. Supp. 409 (D.N.D. 1967). The action was brought against the United States under the Federal Torts Claims Act for the wrongful death of a working wife and mother, a resident of North Dakota, who was slain in Minnesota by her mentally disturbed husband, also a resident of North Dakota, after his release, without proper supervision, from a federal mental institution in South Dakota. The judge awarded the plaintiff administrator a 200,000 dollar judgment under the unlimited North Dakota wrongful death statute although the wrongful death statute of South Dakota limited recovery to 30,000 dollars and that of Minnesota to 35,000 dollars. The decision recognized the obligation of the court to apply the conflicts rule of the state in which the negligence occurred, here South Dakota, in a Federal Tort Claims Act suit. The judge decided that when the Supreme Court of South Dakota had occasion to announce a multistate tort choice of law rule, it would adopt the "most significant interest" rule and not *lex loci*.

This decision is persuasive as to what the conflicts rule of South Dakota may become, and possibly, by way of dictum only, persuasive as to what the North Dakota conflicts rule may be when decided. However, in view of the rule that in diversity cases such prophecies by federal courts are not binding on state courts and that state courts may reach, and in fact have reached, opposite conclusions, it seems premature to score the Dakotas as "most significant interest" jurisdictions. It might be argued that the usual conflicts rule in diversity suits would not be applicable to a Federal Tort Claims Act case. However, *Richards v. United States*, 369 U.S. 1 (1962) held that the federal courts in such cases have an obligation to follow the conflicts rule of the state where the act of negligence occurred. This requirement is comparable to the obligation in diversity cases to follow the conflicts rules of the state in which the federal district court sits. See note 30 *supra*.

⁶⁷ *Merchants Nat'l Bank & Trust Co. v. United States*, 272 F. Supp. 409 (D.N.D. 1967). The court said:

In any event, it is believed that excluding at present these four states from a count of *lex loci* and anti-*lex loci* jurisdictions, as declared since 1963, is appropriate and introduces no distortion.

Applying a baseball approach to this judicial ferment of the last seven years, the score stands tied at 15 to 15 on the question of abandoning *lex loci* except as applied to rules of the road. This count, while comprehensive, is not necessarily exhaustive, nor is it likely to remain static. Again resorting to baseball, a tie score in what may be likened to the sixth inning yields no grounds for one to predict which side will ultimately prevail. Further, this approach has the weakness of being quantitative rather than qualitative. It does seem to follow from this substantial difference in judicial opinion that neither side is annointed with infallibility.

From judicial opinions, academic writings, and *Restatement* drafts that reject *lex loci* as an across-the-board rule for selecting substantive tort law, there emerge, in varying combinations, various alternative precepts. Some of these alternatives are as follows:

1. Emphasize some aspect of the situation that may be said not to be controlled by "tort" law. For example, in an automobile injury case where the defendant dies prior to the suit being filed, "administration of estates" is emphasized so as a matter of "procedure" to bring it within the survival statute of the forum state instead of the *lex loci delicti* of the state in which the tort occurred, which has no survival statute.⁶⁸ The "procedure" approach has received judicial criticism.⁶⁹

This court is of the opinion that the South Dakota Supreme Court would follow its sister states, Minnesota and Wisconsin, in adopting "the most significant relationship" or the "most significant contacts" rule, and upon that basis and for the further reason that the "contacts" rule is a modern and enlightened one, the law of the State of North Dakota will be applied to the facts in this case.

. . . .

Newgard's having been a patient at Meade in South Dakota was simply happenstance so far as that state was concerned. Similarly, Eloise Newgard's having been physically in Minnesota when she was murdered was mere circumstance. She was there visiting relatives. Neither South Dakota nor Minnesota had or have the slightest interest in Eloise A. Newgard or her three children. The significant and very real relationships with all here involved were and are with the State of North Dakota, which very obviously has a vital interest in this litigation.

Id. at 419, 420. See note 66 *supra*.

⁶⁸ *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953). Once the "procedure" label is affixed, *lex fori* is applicable under traditional principles. For an example of such labeling of wrongful death damages, see *Kilberg v. Northeastern Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

⁶⁹ *Rungee v. Allied Van Lines, Inc.*, 92 Idaho 718, 449 P.2d 378 (1962).

Courts often apply the terms "procedural" and "substantive" to laws as a

- Another example is to emphasize that an interspousal tort suit involves "family law" or "status" in order to bring it under the substantive law of the state of the marital domicile.⁷⁰
2. Use the substantive law of the state having the most significant contacts with the matter litigated.⁷¹
 3. Analyze policy to determine which *litigant* has the greater policy interest.⁷²
 4. Analyze policy to determine which *state* involved has the greatest policy interest.⁷³

matter of conclusory labeling without disclosing the basis for the conclusion. Moreover, matters relating to the measure of damages are said to be substantive rather than procedural. . . . To characterize these statutes as procedural would be to invite forum shopping. Therefore we view the question as one of deciding whose law, as to the particular issue involved, has the more significant relationship to the transaction and the parties.

Id. at 722, 449 P.2d at 382. See also *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

⁷⁰ *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959). *Haumschild* was modified by *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

⁷¹ *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

Comparison of the relative "contacts" and "interests" of New York and Ontario in this litigation, vis-à-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal. The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile garaged, licensed, and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.

Id. at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

Judge Van Voorhis, in dissent, said:

The present case makes substantial changes in the law of torts. The expressions "center of gravity," "grouping of contacts," and "significant contacts" are catchwords which were not employed to define and are inadequate to define a principle of law, and were neither applied to nor are they applicable in the realm of torts.

Id. at 486, 191 N.E.2d at 286, 240 N.Y.S.2d at 753. See *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953). See also Cheatham, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1229, 1230 (1963). "Most significant contacts" is criticized by Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1233 (1963).

⁷² See Ehrenzweig, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1243, 1246 (1963). Chief Justice Traynor in *Reich v. Purcell*, 67 Cal. 2d 551, 553, 432 P.2d 727, 729, 63 Cal. Rptr. 31, 33 (1967), wrote: "The forum must search to find the proper law to apply based on the interests of the litigants and the involved states."

⁷³ See *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Mellk v. Sarahson*,

5. Construe the situation, if possible, so as to conclude that there is no real conflict of law involved.⁷⁴
6. Apply the law having any connection with the transaction that will permit the plaintiff to recover or to obtain a maximum recovery. This proposal might be termed the "judgment for plaintiff" approach.⁷⁵ Courts have been slow to state baldly this principle as a motivating factor, but the interests of states in seeing that their doctors and hospitals do not go unpaid and that plaintiffs do not become relief recipients are stated as legitimate factors to be considered.⁷⁶ This principle has, however, been the conflicts rule consistently applied in permitting lenders to recover in the face of usury statutes. Full recovery of the principal and interest stipulated is allowed if permitted under the law of any state substantially related to the transaction.⁷⁷ Furthermore, if the rate is illegal in all such states, the penalty imposed on the lender is that prescribed by the most lenient state.⁷⁸ In con-

49 N.J. 226, 229 A.2d 625 (1967); *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); *Currie*, *supra* note 71.

⁷⁴ *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); *Traynor, Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959). *Currie*, *supra* note 71, at 1242 says: "If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict."

⁷⁵ *Ehrenzweig, Enterprise Liability in the Conflict of Laws*, 69 YALE L.J. 595, 794, 978 (1960); *Lorenzen, Tort Liability and the Conflict of Laws*, 47 L.Q. REV. 483, 492 (1931).

⁷⁶ E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, *CONFLICT OF LAWS, CASES AND MATERIALS* 487 (1964); *Cavers, Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1219, 1225 (1963). See *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

⁷⁷ *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927). This rather Draconian rule has been only slightly ameliorated in North Carolina by N.C. GEN. STAT. § 53-190 (Supp. 1969) which provides:

No loan contract made outside this state in the amount or of the value of nine hundred dollars (\$900.00) or less for which a greater consideration or charges than are authorized by § 53-173 of this article have been charged, contracted for, or received shall be enforced in this State and every person in anywise participating therein in this State shall be subject to the provisions of this article; provided, that *the foregoing shall not apply to loans legally made in another state*. No lender licensed to do business under this article may collect, or cause to be collected, any loan made by a lender in another state to a borrower who was a legal resident of North Carolina at the time the loan was made. The purchase of a loan account shall not alter this provision. (Emphasis added.)

⁷⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203, comment *d* at 298 (Proposed Official Draft, May 1, 1968) (pt. II) states: "If a contract would be usurious under the general usury statutes of all states to which it has a substantial

tract conflicts cases this technique is referred to as the principle of validation and is based on the concept that the parties intended their consensual transaction to have legal validity. There is no precisely comparable consensual feature in the tort field, but some of the tort cases rejecting *lex loci* discuss the relationship of the parties in at least neo-consensual terms.⁷⁹

7. Apply the substantive law of the forum.⁸⁰ For wholly different reasons, this rule was the common law approach when neither party pleaded and proved foreign law differing from that of the forum.⁸¹
8. Refuse to entertain jurisdiction of the case if it presents a conflict between the law of two jurisdictions neither of which is the forum, and the forum is itself disinterested.⁸²

relationship, the forum will apply the usury statute of that state which imposes the lightest penalty."

⁷⁹ *E.g.*, *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966).

Predictability of legal results in advance of the event is largely irrelevant, since automobile accidents are not planned. The expectations of the present parties, if they had any, as to legal liabilities and insurance coverage for accidents, would be with reference to their own state, and they would think in terms of lawsuits brought in New Hampshire courts under New Hampshire law, if they thought about the matter at all.

Id. at 355, 222 A.2d at 209. See also *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968); *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 33 N.W.2d 408 (1965).

⁸⁰ *Currie, supra* note 71, at 1242 says: "For the real problems, in which the forum's interests are at stake, there can be no judicial solution except application of the law of the forum."

⁸¹ See *Leary v. Gledhill*, 8 N.J. 260, 84 A.2d 725 (1951). Since 1931 in North Carolina, N.C. GEN. STAT. § 8-4 (1969) has provided for judicial notice of the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country. The effect of this statute is to require North Carolina courts on their own motion to raise conflict of laws questions and to consider foreign law when the facts in issue make such action appropriate. *Arnold v. Ray Charles Enterprises*, 264 N.C. 92, 96, 141 S.E.2d 14, 17 (1965).

⁸² The danger of forum shopping, possibly advanced by a primary application of forum law, will have to be reduced by the substitution for the obsolete "transient rule" of personal jurisdiction, of a new, now growing, common law of "forum conveniens." That law will limit jurisdiction to courts whose contacts with the case or the parties are sufficient to justify primary application of the municipal rule or of such foreign rules as are called for by forum policy.

Statement of Ehrenzweig, contained in *CONFLICT OF LAWS, CASES AND MATERIALS, supra* note 76, at 479. Compare *Currie, supra* note 71, at 478:

If the forum is disinterested, but an unavoidable conflict exists between the interests of two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum, at least if that law corresponds with the law of one of the other states. Alternatively, the court might decide the case by a candid exercise of legislative discretion, resolving

9. Apply in each case the "better" rule of law that has any relevancy.⁸³ Such a rule would naturally bring into play in each case the subjective judgment of the adjudicators. Who may, on either side of the bench, with infallibility determine the "better" rule? Does it mean that on facts identical except for locus the court of forum State A will apply *lex fori* when the locus is State B, but *lex loci* if State C? Related to the "better rule," yet distinguishable, is Professor Caver's insistence on reaching a "just" result "fair to the parties affected," while studiously avoiding "jurisdiction-selecting" rules or "result selective" rules. He proposes to effectuate this rule by establishing seven principles of preference, five of which pertain particularly to tort actions.⁸⁴
10. Make eclectic application to each separate issue presented the law of the jurisdiction that has the most significant relationship to that particular issue.⁸⁵ "Flexibility" is promoted in a geometric ratio if different tests of "significant relationship" are used in determining which law is to prevail in each different area of conflict in a single case.

Obviously these alternatives are not necessarily mutually exclusive, and in some cases several might be (and indeed have been) used to support a given result. In other instances, various alternatives may be in conflict, thus necessitating a choice. At this point predictability of outcome becomes most difficult and there is real danger of "slipping into a chaos of essentially meaningless ad hoc decisions."⁸⁶ One school of thought feels that predictability should not be a controlling factor.⁸⁷

the conflict as it believes it would be resolved by a supreme legislative body having power to determine which interest should be required to yield. This last idea is borrowed from the civil law world, where often the law requires judges to determine a question not otherwise decided as they believe the legislative body would determine it.

⁸³ *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966), quoted in note 41 *supra*.

⁸⁴ D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 122, 139-180 (1965) [hereinafter cited as *CAVERS*]. To grasp fully this proposal, reading of this scholarly book is necessary. It has been subjected to a critical review, the thrust of which is that Cavers does not deviate very far from the Currie doctrine, and that where he does deviate, he is wrong. See Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers' The Choice-of-Law Process*, 46 *TEXAS L. REV.* 141 (1967).

⁸⁵ *E.g.*, *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Woodward v. Stewart*, — R.I. —, 243 A.2d 917 (1968), *petition for cert. dismissed* 393 U.S. 957 (1969).

⁸⁶ CAVERS, *supra* note 84, at 121.

⁸⁷ It is argued by some writers that adoption of a more flexible rule does

One thing clearly emerges. Those who disagree with the *lex loci* rule are not in agreement among themselves.⁸⁸ There has been a torrent of academic writing on the subject, involving much high-level bickering, that is almost entirely adverse to *lex loci*.⁸⁹

There remains for consideration the rule adopted by *Restatement (Second) of Conflict of Laws*, which, for torts, contemplates selective departure from the *lex loci* rule laid down in *Restatement (First)*.⁹⁰ The new rule embodies an orderly listing of factors, some vague and some specific, to be considered in choosing applicable law, but leaves priorities to judicial discretion.⁹¹ The general availability of the *Restatement*

away with certainty. . . . Also, the argument adds, the old rule is much easier to apply and facilitates the task of the attorney in advising his client. . . .

The reply is simply stated. Ease of application and predictability are insufficient reasons to retain an unsound rule. . . .

Griffin v. United Air Lines, Inc., 416 Pa. 1, 16, 203 A.2d 796, 803 (1964).

⁸⁸ This disagreement has been commented on even by a court that has seen fit to depart from *lex loci*. "Although the overwhelming majority of writers are opposed to retention of the place of the injury rule, there is disagreement as to the successor to that rule." Griffin v. United Air Lines, Inc., 416 Pa. 1, 13, 203 A.2d 796, 802 (1964).

⁸⁹ See CAVERS, *supra* note 84; B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); Cavers, Currie, & Leflar, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212 (1963); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1; Ehrenzweig, *The 'Most Significant Relationship' in the Conflicts Law of Torts*, 28 LAW & CONTEMP. PROB. 700 (1963); Harper, *Policy Basis of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155 (1947); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966); Leflar, *Conflict of Laws*, 36 N.Y.U.L. REV. 36 (1961); Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959); Weintraub, *A Method for Solving Conflict Problems-Torts*, 48 CORNELL L.Q. 215 (1963); Note, *Conflict of Laws: Pennsylvania Repudiates Place of Injury Rule, Adopts Governmental Interest Analysis*, 1965 DUKE L.J. 623; Note, *Conflict of Laws: An Analysis of New Restatement Rule as Applied by Fourth Circuit*, 1964 DUKE L.J. 377; Note, *Conflict of Laws: Forum Applies Foreign Law, Rejecting Foreign Statutes of Limitation—An Unjustifiable Result under the Governmental Interest Analysis*, 1963 DUKE L.J. 762; Note, *Conflict of Laws—Choice-of-Laws: The Greatest Interest Rule*, 47 N.C.L. REV. 407 (1968); Note, *Conflict of Laws—Departure from Lex Loci*, 45 N.C.L. REV. 505 (1967); Note, *Conflicts—Most Significant Relation Rule*, 43 N.C.L. REV. 586 (1965); Note, *Conflict of Laws—Most Significant Relationship Rule*, 42 N.C.L. REV. 419 (1964); Note, *Conflict of Laws—Capacity to Sue—Which Law Should Govern?*, 41 N.C.L. REV. 843 (1964).

⁹⁰ Section 378 of the original *Restatement* stated: "The law of the place of wrong determines whether a person has sustained a legal injury."

⁹¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (Proposed Official Draft, May 2, 1967) (Choice of Law Principles):

(*Second*) and its relationship to the respectable *Restatement* family will probably cause it to be cited judicially with some frequency, at least in those jurisdictions departing from *lex loci*. In fact, it has been cited with approval in at least twelve jurisdictions⁹² that have abandoned *lex loci*.⁹³

-
- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
 - (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determining and application of the law to be applied.

Professor Willis Reese, Reporter for *Restatement (Second)* has enunciated policies to guide courts in deciding choice of law questions. In general, these policies are reflected in the provisions of section 6. Reese, *Conflict of Laws and The Restatement (Second)*, 28 LAW & CONTEMP. PROB. 679, 682-90 (1964).

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (Proposed Official Draft, May 1, 1968) (The General Principle) provides:

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
- (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
 - (a) the place where the injury occurred,
 - (b) the place where the conduct causing the injury occurred,
 - (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
 - (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

In the May 1, 1968 Draft, §§ 146, 147 and 175, dealing respectively with personal injuries, injuries to land and other tangible things, and wrongful death, all prescribe *lex loci* unless some other state has "a more significant relationship" to the occurrence, the parties, or (under § 147) the thing.

The new approach of the *Restatement (Second)* has engendered some protest. See *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 15, 203 A.2d 796, 803 (1964).

⁹² Arizona, District of Columbia, Iowa, Kentucky, Mississippi, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island and Wisconsin. The respective citations are those given in notes 34-37, 39, 41-47 *supra*.

⁹³ The abandonment does not signify a unanimity of judicial opinion as to the process to be followed in determining choice of tort law where *lex loci* has been rejected. At least three jurisdictions seem to prefer the summarization made by Professor Leflar in *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966). In *Woodward v. Stewart*, — R.I. —, 243 A.2d 917, 923 (1968), the court said:

Restatement (Second) makes explicit that *lex loci* and the most significant relationship rule may, on occasion, coincide, but that, depending on the facts, one or the other may be chosen without doing violence to reason.⁹⁴ There are those who will find virtue in the very thing to which some have objected, namely, the general guidelines afforded by the formulation of *Restatement (Second)* to aid counsel in constructing a theory of their case and courts in their process of decision.

Some proponents of the theory of most significant relationship would apply their method not only in tort cases but in all choice of law cases, with the possible exception of those purporting to affect title to real property located in another state. Some would limit it to tort and contract cases.⁹⁵ The possibility at the other end of the scale is that the

The Supreme Court of at least two of our sister jurisdictions, namely Wisconsin and New Hampshire, have considered this problem and on cogent reasoning and analysis have found merit in the guidelines first enunciated by Dean Leflar. These are:

- (1) Predictability of results.
- (2) Maintenance of interstate and international order.
- (3) Simplification of the judicial task.
- (4) Advancement of the forum's governmental interests.
- (5) Application of the better rule of law.

Like the Supreme Court of Wisconsin, we are persuaded that those guidelines combine a "workable brevity" with a reasoned analysis leading this court to their application. . . .

See also *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

⁹⁴ See Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679, 699 (1963).

⁹⁵ Fairly precise rules have in general been stated in the case of status, corporations, and property, since, on the basis of present knowledge, it is deemed possible to identify and to give effect to the most important policies in these areas. Present experience, on the other hand, with respect to contracts and torts does not permit the formulation of definite rules with any reasonable assurance that these rules would give appropriate effect to what are here the most significant policies. Hence the more general and more flexible formulation of 'state of most significant relationship' has been resorted to. Presumably more definite and precise rules can be stated after more experience has accumulated. That will be the task of future *Restatements*. *Id.* 699.

Across-the-board application of governmental-interests analysis may have been voiced by Judge Keating in *In re Estate of Crichton*, 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967). This decision upheld the New York will of a New York decedent that excluded a second wife from whom he had been separated for thirty years. The decision disallowed the wife's claim under Louisiana community property law to half of the personal property situated in Louisiana. The opinion reads, "The choice of law decision we must make in this case should be guided by the same considerations that have guided our decisions in other choice of law cases." *Id.* at 133, 228 N.E.2d at 805, 281 N.Y.S.2d at 819. "New York, as the domicile of Martha and Powell Crichton, has not only the dominant interest in the application

significant relationship approach may be limited to certain classifications of torts⁹⁶ and that an ultimate reapplication of stare decisis would restore a reasonable degree of stability.

Interspousal Tort Liability

Some states, including North Carolina,⁹⁷ have, either by statute or case law or both, removed all impediment to tort liability between spouses. In other states, however, the common law rule that there is no such liability continues to prevail.⁹⁸ This disparity gives rise to frequent conflicts between the law of the marital domicile and *lex loci*. *Shaw v. Lee*⁹⁹ involved such a conflict. After classifying the problem as "tort" rather than emphasizing "status," "marital domicile," or "family law," the court applied the traditional *lex loci* rule. In doing so it adhered to its earlier rule in multistate interspousal tort cases.¹⁰⁰

The application of *lex loci* to interspousal tort cases was the almost unanimous rule in the United States up to 1955.¹⁰¹ Since then, upon invocation of one or more of the alternatives discussed above, courts in at least eight states have departed from it.¹⁰²

of its law and policy but the only interest." *Id.* at 134, 228 N.E.2d at 806, 281 N.Y.S.2d at 820. The effect of this language is obscured by the fact that in saying "New York, as the domicile . . . , has . . . the only interest," the court declared and applied the traditional rule that matrimonial domicile law determines questions of personal property. *See also In re Estate of Clark*, 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968).

⁹⁶ What we do know now with fair certainty is that choice of law is too vast and complicated an area to be governed by a relatively small number of simple rules of general application. What is needed instead is a large number of relatively narrow rules that will be applicable only in precisely defined situations.

Reese, *supra* note 94, at 681.

⁹⁷ N.C. GEN. STAT. § 52-5 (1966) provides: "A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried." Regarding this statute (then § 52-10.1), the court in *Shaw v. Lee*, 258 N.C. 609, 616, 129 S.E.2d 288, 293 (1963), said: "The Legislature did not intend to extend its enactments beyond our borders and create in a spouse a right of action against the other for acts done beyond the borders of North Carolina."

⁹⁸ Annot., 43 A.L.R.2d 632 (1955). "The courts in a majority of jurisdictions have adhered to the common law rule that one spouse has no right of action against the other to recover damages for personal injuries caused by the other." *Id.* 636. *See Scholtens v. Scholtens*, 230 N.C. 149, 52 S.E.2d 350 (1949).

⁹⁹ 258 N.C. 609, 129 S.E.2d 288 (1963).

¹⁰⁰ *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931).

¹⁰¹ Annot., 96 A.L.R.2d 973, 976 (1964).

¹⁰² *Armstrong v. Armstrong*, 441 P.2d 699 (Alas. 1968); *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968); *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d

During the same period, courts in at least four states other than North Carolina have reaffirmed that *lex loci* is determinative in interspousal tort cases.¹⁰³

In 1967 the North Carolina General Assembly enacted this statute:

A husband and wife shall have a cause of action against each other to recover damages for personal injury, property damage or wrongful death arising out of acts occurring outside of North Carolina, and such action may be brought in this State when both were domiciled in North Carolina at the time of such acts.¹⁰⁴

It is within the prerogative of a legislature to enact conflict of laws rules so long as no constitutional limitation is exceeded. It is improbable that

218 (1955); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966) (suit between parent and child); *Thompson v. Thompson*, 105 N.H. 86, 193 A.2d 439 (1963); *Koplick v. C. P. Trucking Corp.*, 27 N.J. 1, 141 A.2d 34 (1958); *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966) (by applying the Pennsylvania law, that of the marital domicile, recovery between the spouses was denied); *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959). Some of these cases have been interestingly discussed in the later case of *Woodward v. Stewart*, — R.I. —, 243 A.2d 917 (1968). See also *Wartell v. Formusa*, 34 Ill. 2d 57, 213 N.E.2d 544 (1966).

¹⁰³ *Landers v. Landers*, 153 Conn. 303, 216 A.2d 183 (1966); *Nicholson v. Atlas Assurance Corp.*, 156 So. 2d 245 (La. App. 1963), *aff'd*, 245 La. 461, 158 So. 2d 612 (1963); *Robinson v. Gaines*, 331 S.W.2d 653 (Mo. 1960); *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964). See also *LaChance v. Service Trucking Co.*, 215 F. Supp. 162 (D. Md. 1963).

¹⁰⁴ N.C. GEN. STAT. § 52-5.1 (Supp. 1969). A member of the General Assembly who sponsored this legislation indicated, as to an early draft, that his primary purpose was to permit suit between husband and wife:

In our mobile society it is quite normal for North Carolinians to be temporarily out of the state and become involved in any number of situations which bring about personal injury or death. It is also my understanding that the law of the *situs* controls, even though the person may have lived in North Carolina all of his life and would be allowed a recovery under the laws of this state. I have particular reference to husbands and wives motor-ing through various states and becoming involved in an automobile accident in a state not allowing one spouse to sue the other. In fact, my proposed Legislation is aimed primarily at that particular situation. . . .

Letter from George T. Clark to J. Dickson Phillips, Jr., January 24, 1967.

A suggestion by the author of this article that the legislation might be broadened to allow tort suits between parent and child was not included in the adopted legislation. That suggestion read as follows:

In personal injury, property damage and wrongful death actions brought in North Carolina, arising out of acts occurring outside of North Carolina between husband and wife, or parent and minor child or children, who were domiciled in North Carolina at the time of such acts, the substantive tort law of North Carolina shall determine the right to interfamilial action and the standard of care due to such passengers by such motor vehicle drivers.

For a discussion of the statute, see *Whitman, Conflict of Spousal Immunity Laws: The Legislature Takes a Hand*, 46 N.C.L. Rev. 506 (1968).

this disparity of treatment accorded to spouses domiciled in North Carolina, as distinguished from nonresident spouses, is unconstitutional.¹⁰⁶

This legislative conflicts rule has not yet been construed in a reported decision of a North Carolina court. It appears to make clear a legislative intent to give extra-territorial effect to local law permitting tort suits between husband and wife, but only if both were domiciled in North Carolina at the time. This intent seems to preclude the applicability of the statute to any other situation no matter how closely related.

Since the statute applies only when North Carolina is the domicile of both spouses, a wife domiciled in North Carolina who is injured by the negligence of her husband in Virginia, which does not recognize interspousal tort liability, could not recover from him if he is domiciled in South Carolina, even though the local law of each domicile permits such suit. The same result would follow if both were residents of South Carolina, or any other state permitting interspousal recovery, if *lex loci*, applicable under *Shaw*, denied such recovery. On the other hand, *lex loci* would not prevent a Virginia wife from recovering in North Carolina courts for injuries caused by her Virginia husband in North Carolina or in any other state permitting interspousal suit. In all of these cases, the statute presumably preserves the existing judge-made conflicts law that is not inconsistent with it.¹⁰⁶

A difficult question is presented when North Carolina spouses are driver and passenger and the driver's simple negligence causes injury in a state that prohibits recovery by guests except for gross negligence or willful misconduct. If *lex loci* bars interspousal suits, the North Carolina statute clearly prevails as to that feature. But does the statute intend that a spouse may recover when, under *lex loci*, a non-spouse guest could not? The statutory language provides no assistance. It does not specify what shall constitute a cause of action. On its face, it simply puts spouses on the same basis as other litigants. If the legislature had intended in such cases that the substantive tort law of North Carolina should determine the standard of care due a spouse-passenger by a spouse-driver, it could

¹⁰⁶ See *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963), *rev'g* 307 F.2d 131 (2d Cir. 1962).

¹⁰⁶ *E.g.*, *Bogen v. Bogen*, 219 N.C. 51, 54-55, 12 S.E.2d 649, 651-52 (1941). In this four-to-three decision an Ohio-domiciled wife was permitted to recover for injuries negligently inflicted upon her in North Carolina by the driving of her Ohio-domiciled husband, though under the law of Ohio interspousal tort suits were not permitted. The court did not discuss *lex loci*. The majority appear to have treated the question as procedural.

have so stated. The court could reach this result if it wished,¹⁰⁷ but it is under no clear legislative direction to do so. It is well to remember that the opinion in *Shaw* was a general reaffirmance of *lex loci* and was not limited to the issue of whether one spouse could sue the other.

A similar problem arises in suits predicated upon torts committed in a state that limits the dollar amount of recovery, denies damages for deceased's pain and suffering, or diminishes some other element of damages recognized in North Carolina if the action is brought in North Carolina by one spouse domiciled in the forum state against the other who is similarly domiciled. Do the North Carolina rules placing no limit on recovery and specifying elements of damages recoverable¹⁰⁸ apply? Without the interspousal statute North Carolina would certainly follow *lex loci*.¹⁰⁹ Moreover, that statute does not specify the measure of damages and clearly does not purport to give general extra-territorial effect to North Carolina tort damage rules. If read as inferentially carving out domiciled spouses for preferred treatment over other North Carolina domiciliaries, the statute is constitutionally suspect under the equal protection clause.

The only reported North Carolina case since *Shaw* involving the interspousal issue was a 1965 case¹¹⁰ in which the plaintiff, a North Carolina wife, was injured in West Virginia. Alleging negligence on the part of the North Carolina husband, defendant by cross action sought contribution from him. The court, dismissing the cross action, said:

A defendant who has been sued for tort may bring into the action for the purpose of enforcing contribution . . . only a joint tort-feasor whom plaintiff could have sued originally in the same action. . . . The law of West Virginia does not permit one spouse to sue the other in tort. . . . North Carolina applies the *lex loci delicti*. . . .¹¹¹

¹⁰⁷ See *Guest Statute Cases* discussed pp. 268-69 *infra*.

¹⁰⁸ N.C. GEN. STAT. § 28-174 (Supp. 1969).

¹⁰⁹ See *Caldwell v. Abernethy*, 231 N.C. 692, 58 S.E.2d 762 (1950).

¹¹⁰ *Petrea v. Ryder Tank Lines, Inc.*, 264 N.C. 230, 141 S.E.2d 278 (1965).

¹¹¹ The court also declared:

Original defendant . . . argues . . . that we should overrule *Shaw v. Lee* . . . and thus abandon our well-established conflicts rule, in order to apply the law of the state which has had "the most significant relationship or contacts with the matter in dispute"—in this case, appellant contends, North Carolina. Such an approach is referred to as the "center of gravity" or "grouping of contacts" theory Notwithstanding that appellant's counsel in his brief and in his oral argument presented his case to this court in the best possible light, the same reasons which dictated our decision in *Shaw v. Lee* . . . constrain us to adhere to it. . . .

Id. at 231, 141 S.E.2d at 279. Compare *Emmert v. United States*, 300 F. Supp. 45

Had this case arisen after the 1967 statute, presumably the cross action would have been allowed.

Guest Statute Cases

In *Crow v. Ballard*¹¹² the North Carolina Supreme Court made it clear that its general *lex loci* rule applied to actions involving a guest statute.¹¹³ This result is in accord with the vast weight of authority in the United States.¹¹⁴

Probably the earliest departure from strict application of *lex loci* to guest statute cases was *Babcock v. Jackson*.¹¹⁵ The court found that the dominant contact was with New York, the state of domicile of both the guest and host, and applied the ordinary negligence rule of New York rather than the guest statute of Ontario, the state in which the accident occurred. At least six other jurisdictions have followed *Babcock* in permitting recovery in the face of impeding guest statutes of the place of the tort.¹¹⁶

The considerations involved in fashioning a conflicts rule in this area are essentially the same as for tort cases in general. Those who advocate the "most significant contacts" approach might well assert that if the domicile of both guest and host is in a single state other than that of the tort, this fact alone goes a long way toward establishing "most significant contact." Others, however, would reject such an approach on the ground that any mechanical rule for selecting controlling law should not be tolerated. *Lex loci* proponents are likely to say that

(D.D.C. 1969), in which it was held that the law of the defendant father's domicile, not *lex loci*, controls the right to contribution.

¹¹² 263 N.C. 475, 139 S.E.2d 624 (1964).

¹¹³ See *Frisbee v. West*, 260 N.C. 269, 132 S.E.2d 609 (1963); *Doss v. Sewell*, 257 N.C. 404, 125 S.E.2d 899 (1962); *Kizer v. Bowman*, 256 N.C. 565, 124 S.E.2d 543 (1962); *Nix v. English*, 254 N.C. 414, 119 S.E.2d 220 (1961); *Hale v. Hale*, 219 N.C. 191, 13 S.E.2d 221 (1941); *Brumsey v. Mathias*, 216 N.C. 743, 6 S.E.2d 496 (1940). See also *Desch v. Reeves*, 163 F. Supp. 213 (M.D.N.C. 1958).

¹¹⁴ Annot., 95 A.L.R.2d 12 (1964).

¹¹⁵ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). The court said: "Although the rightness or wrongness of defendant's conduct may depend upon the law of the particular jurisdiction through which the automobile passes, the rights and liabilities of the parties which stem from their guest-host relationship should remain constant and not vary and shift as the automobile proceeds from place to place." *Id.* at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 751.

¹¹⁶ *Fuerste v. Bemis*, — Iowa —, 156 N.W.2d 831 (1968); *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967); *Kopp v. Rechtzigel*, 273 Minn. 441, 141 N.W.2d 526 (1966); *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969); *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Wilcox v. Wilcox*, 26 Wis. 2d 61, 133 N.W.2d 408 (1965). But see *Friday v. Smoot*, — Del. —, 211 A.2d 594 (1965), in which Delaware reaffirmed the application of *lex loci* to guest statute cases.

the guest statute situation is like any other tort situation and should not be singled out for separate attention.

Wrongful Death Cases

Wrongful death litigation presents another area that may be treated separately although basically it is just one facet of the whole tort matrix. As in other tort situations, there has been some trend away from the *lex loci* rule, which traditionally was given almost unanimous application to determine wrongful death liability, including the measure of and limitations on damages.¹¹⁷ Standing almost alone, Iowa as early as 1905 held that damages for foreign torts were to be assessed in accordance with the law of the Iowa forum.¹¹⁸

In *Kilberg v. Northeast Airlines, Inc.*,¹¹⁹ a 1961 New York suit for the death of a New Yorker in a plane crash in Massachusetts, the court, by way of dicta, announced that though the cause of action was based on the Massachusetts death statute, that statute's limitation of damages was inapplicable because damages lie within the area of procedure. Consequently, the court indicated that the New York rule, under which no limitation is imposed, should be applied.¹²⁰ To the extent that *Kilberg* relied on classifying damages as "procedural," it was rejected by the same court in a 1962 decision that reached the same result on the basis of the interest of the State of New York in its residents.¹²¹ Other states that have refused to impose *lex loci* damage limitations in wrongful death cases in which the decedent was not domiciled in the state in which the tort was committed are California,¹²² Mississippi,¹²³ Pennsylvania¹²⁴ and Rhode Island.¹²⁵

¹¹⁷ Annot., 92 A.L.R.2d 1180, 1185-89 (1963).

¹¹⁸ See *Fabricius v. Horgen*, 257 Iowa 268, 132 N.W.2d 410 (1965). In this multiple wrongful death case that occurred in Minnesota, all the parties were residents of Iowa. The court, applying Iowa law, relied upon *Dorr Cattle Co. v. Des Moines Nat'l Bank*, 127 Iowa 153, 98 N.W. 918 (1905).

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

¹²⁰ "It is open to us, . . . particularly in view of our strong public policy as to death action damages, to treat the measure of damages in this case as being a procedural or remedial question controlled by our own State policies." *Id.* at 41, 172 N.E.2d at 529, 211 N.Y.S.2d at 137.

¹²¹ *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962). *Accord*, *Pearson v. Northeast Air Lines, Inc.*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

¹²² *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

¹²³ *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968).

¹²⁴ *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

¹²⁵ *Woodward v. Stewart*, — R.I. —, 243 A.2d 917 (1968).

At least five states have recently refused to deviate from a strict adherence to *lex loci* in wrongful death cases.¹²⁶ North Carolina has long applied *lex loci* to wrongful death actions,¹²⁷ and this rule was reaffirmed by the supreme court in 1964¹²⁸ and again in 1967.¹²⁹ In 1969 in *Brendle v. General Tire & Rubber Co.*,¹³⁰ the Court of Appeals for the Fourth Circuit reluctantly recognized that North Carolina applies the *lex loci* rule in wrongful death actions and has declined to adopt the "most significant relationship" test. In this case, decedent Brendle, a North Carolina resident, suffered fatal injuries in Missouri as the result of a tire blowout while he was driving a truck for his employer, a North Carolina corporation. The defendant tire manufacturer was incorporated and engaged in manufacturing in Ohio and sold the allegedly defective tire to decedent's employer in North Carolina through a North Carolina subsidiary. Plaintiff, administratrix of the decedent, alleging negligent manufacture and breach of implied warranty of fitness for use, sued for pre-

¹²⁶ *Messinger v. Tom*, 203 So. 2d 357 (Fla. 1967); *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 473 (Fla. 1967); *McDaniel v. Sinn*, 194 Kan. 625, 400 P.2d 1018 (1965); *Abendschein v. Farrell*, 11 Mich. App. 662, 162 N.W.2d 165 (1968); *Cherokee Laboratories, Inc. v. Rogers*, 398 P.2d 500 (Okla. 1965); *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968). See also *Glick v. Ballentine Produce, Inc.*, 343 F.2d 839 (8th Cir. 1965); *Satchwill v. Vollroth Co.*, 293 F. Supp. 533 (E.D. Wis. 1968).

¹²⁷ *Caldwell v. Abernethy*, 231 N.C. 692, 58 S.E.2d 763 (1950); *Wise v. Hollowell*, 205 N.C. 286, 171 S.E. 82 (1933).

¹²⁸ "Liability for negligence resulting in personal injury or death is determined by the law of the state where the tort is committed." *In re Scarborough*, 261 N.C. 565, 567, 135 S.E.2d 529, 530 (1964).

¹²⁹ *Broadfoot v. Everett*, 270 N.C. 429, 154 S.E.2d 522 (1967). Plaintiff, administrator of a Maryland decedent, brought a wrongful death action against the executrix of a North Carolina decedent. The deaths resulted from the crash in Pennsylvania of an aircraft owned and operated by the North Carolina decedent. Plaintiff did not qualify as ancillary administrator, nor was the wrongful death action brought, until seventeen months after the crash. The Pennsylvania statute of limitations was one year, and a statute permitted personal service to be made on nonresident automobile and aircraft operators by service on the Pennsylvania Secretary of State. The North Carolina statute of limitations is two years. Defendant pleaded the Pennsylvania statute in bar, and a trial court judgment of dismissal was affirmed on appeal. The court applying the "borrowing" portion of the North Carolina statute of limitations, said:

The ancillary administrator, appointed in North Carolina for a foreign decedent killed in Pennsylvania, is not a resident of this State within the meaning of the proviso to G.S. 1-21; the real parties in interest have never been residents of North Carolina. . . . At the time this action was instituted here, it was barred in Pennsylvania where it arose; it is, therefore, also barred in North Carolina.

Id. at 433, 154 S.E.2d at 526.

¹³⁰ 408 F.2d 116 (4th Cir. 1969).

death pain and suffering and medical expenses and for wrongful death. Under Missouri law there is no survival of a cause of action for medical expenses or pain and suffering if death results from the injury; further, the proper parties-plaintiff in a wrongful death action are the decedent's minor children. Consequently, both causes of action in tort were defective under Missouri law. Holding that the North Carolina Supreme Court would apply Missouri law, the district court granted summary judgment as to both tort actions. In affirming, the court of appeals held that it was bound to apply the North Carolina conflicts rule in a diversity case.¹³¹

Two additional cases, though technically dealing with local North Carolina law, merit mention because of their multistate aspects. In a 1964 decision, *In re Scarborough*,¹³² the state supreme court upheld the jurisdiction of North Carolina courts to entertain a suit for wrongful death where a nonresident decedent was killed in another state and left no assets in North Carolina other than the cause of action for wrongful death. A resident of Michigan had died at a motel in Laurens, South Carolina, as the result of a defective heater. He had never resided in and had no heirs or next of kin in North Carolina. A domiciliary administrator was appointed in Michigan. An ancillary administrator brought

¹³¹ The opinion evidences some judicial regret regarding this obligation. Clearly the present litigation is not an appealing one in which to apply the *lex loci* rule. Missouri has no real connection with either the alleged tortious conduct or the various parties involved in the litigation. It is the "place of the wrong" only in the special sense that "the last event necessary to make an actor liable" occurred in that state. The fact that the accident happened there was completely fortuitous. No Missouri traffic law was violated, and no Missouri resident was involved. The alleged negligence occurred in Ohio, and any damages awarded in the suit would be paid by an Ohio corporation. The decedent's estate is being administered in North Carolina, where his surviving dependents reside. Therefore, whether the purpose of tort law in this situation is to admonish the tortfeasor or to compensate the tort victims, Missouri has no interest in having its law govern the case, and North Carolina has no reason to apply Missouri law rather than its own, the law of the forum

Missouri's more restrictive law thus clearly conflicts with the forum state's interest in assuring its residents, the decedent's dependents, adequate compensation for injury or death, and yet the result of applying Missouri law furthers no interest of that jurisdiction.

Id. at 117-18.

Use of forum law, as the appellant urges, seems by far the more reasonable course. Unfortunately for plaintiff's contention, however, we are not free to fashion our own choice of law rule, for we are bound by the decisions of the North Carolina Supreme Court.

Id. at 120.

¹³² 261 N.C. 565, 135 S.E.2d 529 (1964).

a wrongful death action, which was settled, in South Carolina against three defendants. Thereafter petitioner applied in North Carolina for letters of ancillary administration for the purpose of filing a wrongful death action against a different defendant, an Alabama corporation having a resident agent in Charlotte. It was held that ancillary letters should issue and that the right of action for wrongful death is an asset with situs in the county in which personal service can be had on the tortfeasor. The court further held that if meritorious defenses to the suit existed, these could not prevent the appointment of an administrator.

In *In re Edmundson*,¹³³ a Maryland driver, injured in the same North Carolina accident in which an Ohio driver was killed, had an ancillary administrator appointed for the latter in order to bring a personal injury action. It was held that the potential right of exoneration under a policy of automobile liability insurance covering the Ohio driver was a sufficient asset to permit the letters to be issued in North Carolina, provided that the insurer was subject to service of process in the state.

Loss of Consortium

Choice of substantive law to control a suit for loss of consortium does not seem to have been presented for decision in North Carolina. This void in North Carolina case law is not surprising since, except as a newly recognized element of damage in a wrongful death suit,¹³⁴ local law gives no cause of action for loss of consortium.¹³⁵ Two recent cases in other jurisdictions have held that if the injury to a spouse occurs in a state other than that of the marital domicile, the applicable law is that of the place of injury. In Maryland the court reached this result by applying the traditional *lex loci* rule.¹³⁶ In reaching the same result, the court in Oregon found that the state of the injury had more significant contacts than the state of the marital domicile.¹³⁷ In each case recovery was denied on the ground that no cause of action existed.

When the injury depriving a spouse of consortium occurs in another state, North Carolina courts would probably apply *lex loci* and permit

¹³³ 273 N.C. 92, 159 S.E.2d 509 (1968).

¹³⁴ N.C. GEN. STAT. § 28-174 (Supp. 1969). As enacted, the statute does not use the word "consortium," but it seems to be covered by the words that are used.

¹³⁵ *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945).

¹³⁶ *Hartford Mut. Ins. Co. v. Bruchey*, 248 Md. 669, 238 A.2d 115 (1968). See note 55 *supra*.

¹³⁷ *Casey v. Manson Constr. and Eng'r Co.*, 247 Ore. 274, 428 P.2d 898 (1967). See note 44 *supra*.

recovery if the other state's law does, even if the injured spouse is not deceased and hence the recent provision in the North Carolina wrongful death statute would not be operative. This new provision probably establishes that North Carolina has no strong public policy against permitting recovery for loss of consortium. It is conceivable, but unlikely, that a North Carolina court would hold loss of consortium to occur not at the place of injury, but at the marital domicile, and would apply North Carolina law to deny recovery if the injured spouse survives. Caution might dictate bringing the suit for loss of consortium in the state of physical injury if its law permits such an action.

CHOICE OF CONTRACTS LAW

In general the weight of choice of law authority in the United States in multistate contracts cases has paralleled the formulations contained in the *Restatement (First) of Conflict of Laws*. These rules provided that (1) the validity of a contract is governed by the local law of the place of contracting; (2) the parties do not have power to choose the governing law; (3) matters of performance and damages for non-performance are governed by the local law of the place of performance; and (4) the rules apply to the entire field of contracts.¹³⁸ In *Restatement (Second)*, these rules have been changed so that (1) both validity and performance are determined by the local law of the state of most significant relationship, with the exception of details of performance, which are governed by the local law of the place of performance; (2) the contracting parties may choose the governing law so long as it has substantial relationship to the transaction; and (3) certain types of contracts are carved out for special treatment.¹³⁹

¹³⁸ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, part II, comment at 180 (Proposed Official Draft May 1, 1968).

¹³⁹ Provisions here relevant are:

Section 186. Applicable Law. Issues in contract are determined by the law chosen by the parties in accordance with the rule of § 187 and otherwise by the law selected in accordance with the rule of § 188.

Section 187. Law of the State Chosen by the Parties.

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties

The "most significant contacts" approach to choice of law was first developed not in tort, but in contract cases.¹⁴⁰ It is safe to say that those states that have unqualifiedly adopted "significant contacts" or "policy analysis" in multistate tort cases will also apply these concepts to the resolution of multistate contract litigation.¹⁴¹ These states possibly

or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention the reference is to the local law of the state of the chosen law.

Section 188. Law Governing in Absence of Effective Choice by the Parties.

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, as to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied . . .

Section 206. Details of Performance. Issues relating to details of performance of a contract are determined by the local law of the place of performance.

Section 189. Contracts for the Transfer of Interests in Land. The validity of a contract for the transfer of an interest in land and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the land is situated unless, with respect to the particular issue, some other state has a more significant relationship to the transaction and the parties, in which event the local law of the other state will be applied.

For significant academic discussions of contracts aspects of RESTATEMENT (SECOND), see CAVERS, RE-RESTATING THE CONFLICT OF LAWS: THE CHAPTER ON CONTRACTS in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW, LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 349 (1961); Reese, *Contracts and the Restatement of Conflicts of Laws, Second*, 9 INT'L & COMP. L. REV. 53 (1960); Weintraub, *The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique*, 46 IOWA L. REV. 713 (1961).

¹⁴⁰ See *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954).

¹⁴¹ See *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266

would not give finality to a law chosen by the parties, but would consider it as a factor in determining "significant contacts" or aiding in "policy analysis."

North Carolina contract conflicts law has not been much swayed by *Restatement (First)* or *(Second)*, and not at all by the "most significant relationship" rule. Essentially the North Carolina rule has been, and is, that the *lex loci celebrationis* (also referred to as the *lex loci contractus*)—the substantive law of the state where the the last act to make a binding contract takes place—controls all aspects of the contract.

The North Carolina authorities are collected in *Fast v. Gulley*,¹⁴² a 1967 case holding that a contract regarding ownership of corporate stock, entered into between a father and adult daughter in New Jersey, created a joint tenancy with right of survivorship since this result was required by New Jersey law.¹⁴³ This case also clearly enunciates the test for determining the place of the contract.

The issue of whether questions of performance are governed by the law of the place of contracting or of the place of performance has not been conclusively decided in North Carolina. The court raised the issue, *sua sponte*, in *Arnold v. Ray Charles Enterprises*¹⁴⁴ but did not resolve it.¹⁴⁵

(1961); *Lilienthal v. Kaufman*, 239 Ore. 1, 395 P.2d 543 (1964). *See also* *Perrin v. Pearlstein*, 314 F.2d 863 (2d Cir. 1963), which held that, when points of contact are equal, resort must be had to the law of the state in which the last act necessary to make a binding contract occurs.

¹⁴² 271 N.C. 208, 155 S.E.2d 507 (1967).

¹⁴³ "In interpreting a contract made outside of this State our courts long ago established the principle that the law of the country where the contract is made is the rule by which the validity of it, its exposition, and consequences are to be determined." *Id.* at 211, 155 S.E.2d at 509. *See also* *Davis v. Davis*, 269 N.C. 120, 152 S.E.2d 306 (1967); *Cannaday v. Atlantic Coast Line R.R.*, 143 N.C. 439, 55 S.E. 836 (1906) (frequently cited for the proposition that the law of the place where the contract was made governs matters of execution, interpretation, and validity); *Ford Motor Credit Co. v. Jordan*, 5 N.C. App. 249, 168 S.E.2d 229 (1969).

¹⁴⁴ 264 N.C. 92, 141 S.E.2d 14 (1965).

¹⁴⁵ The contract in this case was made in New York, it was to be performed in Virginia The only question of substantive law . . . involves the proper measure of damages Throughout, neither party has made any reference to the law of New York or that of Virginia, yet we are required to take judicial notice of foreign law. . . . It appears that the law of New York, *lex loci celebrationis*, and that of Virginia, *lex loci solutionis*, are no different with reference to the substantive question here involved. There would be no profit, then, for us to exercise ourselves here to determine which law is to be applied, for to do so would take us into a "highly complex and confused part of the conflict of laws."

Id. at 96-97, 141 S.E.2d at 17.

In *Connor v. State Farm Mutual Automobile Insurance Co.*,¹⁴⁶ a liability policy issued in Virginia was at issue, and the opinion is clear that the validity of its provisions was governed by Virginia law. However, the critical issue was whether the insurer had waived, or was estopped from invoking, the provision requiring the insured to cooperate in defending a North Carolina suit. The court *seems* to deal with this issue as a matter of North Carolina law, but there is neither a classification of the issue as one of performance nor any discussion of choice of the law of performance.

Another case in which the court is inconclusive on the issue of what law governs questions of performance is *Davis v. Davis*.¹⁴⁷ The plaintiff wife, a North Carolina resident, instituted an action for alimony without divorce. The defendant husband, a resident of Florida, asserted a defense based on a separation agreement executed in Florida and in a cross action prayed for absolute divorce. The separation agreement, valid in Florida, did not comply with the North Carolina statutory requirement that there be a privy examination of the wife and a certificate of the examining officer that the contract is not "unreasonable or injurious" to her. The court, in remanding for determination whether the separation agreement was in fact unreasonable or injurious to the wife, said:

We are advertent to the decisions holding that, with reference to contracts providing for performance in another state, the law of the place of performance governs generally or as to matters relating to performance. . . . Suffice to say, our research has disclosed no decision in which the 'place of performance' rule has been applied to a separation agreement. The separation agreement under consideration implies the wife intended to leave Florida with the children and take up residence in North Carolina. However, she was not required to do so; and defendant's obligation to make the stipulated payments for her support was general and unconditional, whether she resided in Florida, North Carolina or elsewhere.

The conclusion reached is that the validity and construction of the separation agreement are to be determined by the law of Florida.¹⁴⁸

In an action for breach of warranty brought by a resident of California against a North Carolina corporate manufacturer of gyrogliders, the

¹⁴⁶ 265 N.C. 188, 143 S.E.2d 98 (1965). Compare *Goulding v. Sands*, 237 F. Supp. 577 (W.D. Pa. 1965).

¹⁴⁷ 269 N.C. 120, 152 S.E.2d 306 (1967).

¹⁴⁸ *Id.* at 124, 152 S.E.2d at 310.

North Carolina Supreme Court held that whether the allegation was actionable was to be determined on demurrer by the law of North Carolina since the plaintiff had not pleaded any facts invoking foreign law.¹⁴⁹ This holding implies that California law would determine the adequacy of performance if there in fact was a contract of sale between the parties consummated in California.

Perhaps the court's broad language in a colorful breach of promise suit¹⁵⁰ can be applied to matters of performance and breach. Reasoning by analogy to its conflicts rule in interspousal tort suits, the court said:

It follows that a party to a contract made in a State which denied recovery for its breach should not be allowed to recover in another State, although the breach occurred in the forum State, and that a contract unenforceable in the State where it is made should not be enforceable in the courts of this State. Thus if the alleged marriage contract were made in the State of California, the defendant would not have been liable.¹⁵¹

The interesting question whether the North Carolina Supreme Court will apply choice of law clauses in contracts was raised in a suit seeking to modify certain provisions of a trust instrument.¹⁵² In 1924, James B. Duke, a resident of New Jersey, executed in that state a trust instrument transferring securities to twelve trustees for "the Duke Endowment." The trust indenture, subscribed by Duke and the twelve designated trustees, stated that it was

¹⁴⁹ *Murray v. Bensen Aircraft Corp.*, 259 N.C. 638, 131 S.E.2d 367 (1963).

¹⁵⁰ *Hutchins v. Day*, 269 N.C. 607, 135 S.E.2d 132 (1967).

¹⁵¹ *Id.* at 612, 153 S.E.2d at 136.

The United States Court of Appeals for the Fourth Circuit has held that "the North Carolina rule is that the consequences of contractual obligations entered into and to be performed in the same state must be determined by the law of that state." *Hardy-Latham v. Wellons*, 415 F.2d 674, 677 (4th Cir. 1968).

Although the matter has not been briefed by counsel, independent study satisfies us that the North Carolina rule is that the consequences of contractual obligations entered into and to be performed in the same state must be determined by the law of that state. See *Fast v. Gulley*, 271 N.C. 208, 155 S.E.2d 507 (1967); *Davis v. Davis*, 269 N.C. 120, 152 S.E.2d 306 (1967); *Roomy v. Allstate Insurance Co.*, 256 N.C. 318, 123 S.E.2d 817 (1962). In the instant case, Hunt and Barnes, both New York residents, contacted Mrs. Hardy-Latham, another New Yorker, in that state and correctly anticipated that her performance as well as their own would be exclusively in the Empire State. Thus, there can be no question that it is New York's law which governs the proper division of the \$15,000 commission.

Id.

¹⁵² *Cocke v. Duke Univ.*, 260 N.C. 1, 131 S.E.2d 909 (1963).

executed by a resident of the State of New Jersey in said State, is intended to be made, administered and given effect under and in accordance with the present existing laws and statutes of said State, notwithstanding it may be administered and the beneficiaries hereof may be located in whole or in part in other states, and the validity and construction thereof shall be determined and governed in all respects by such laws and statutes.¹⁵³

The court held that it had jurisdiction to construe and modify the trust instrument, but that in doing so it would apply the substantive law of New Jersey. "A court called upon to supervise the administration should have no doubt as to what law the donor intended the trustees to obey."¹⁵⁴

Apparently the court has not in express terms accepted and applied the law selected by the parties to govern their agreement, nor has it refused to do so. In *Dulke* the court certainly carefully considered the choice of law direction in the trust instrument, drew heavily upon it in determining the intent of the donor, and proceeded to apply the designated New Jersey law in deciding the litigation. However, that law was also the *lex loci celebrationis*. Whether the North Carolina courts will approve the *Restatement (Second)*'s broad permission to parties to choose the law to govern a multistate contract¹⁵⁵ remains to be seen. There is some precedent for adopting the *Restatement* rule by virtue of the assertions in North Carolina cases that *lex loci celebrationis* applies "in the absence of circumstances indicating a different intention."¹⁵⁶

The enforcement of choice of law clauses specifying which law shall govern has long been the rule in most civil law countries, and there has been some movement in the United States in that direction.¹⁵⁷ The principal objection is the possibility of individuals being forced into choice of law clauses in contracts of adhesion. A distinction could be drawn between commercial and non-commercial contracts, but such a distinction

¹⁵³ *Id.* at 8, 131 S.E.2d at 913.

¹⁵⁴ *Id.* at 9, 131 S.E.2d at 914.

¹⁵⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (Proposed Official Draft, May 1, 1968).

¹⁵⁶ Quoted from an English case in *Canaday v. Atlantic Coast Line R.R.*, 143 N.C. 439, 442, 55 S.E. 836, 837 (1906). This has in turn been quoted by later North Carolina cases. *See, e.g., Fast v. Gulley*, 271 N.C. 208, 211, 155 S.E.2d 507, 510 (1967).

¹⁵⁷ Cases approving and applying choice of law clauses are collected in RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Reporter's Note at 194-200 (Proposed Official Draft, May 1, 1968).

would introduce its own complications.¹⁵⁸ Choice of law by the parties is an area of North Carolina conflicts law apparently still open to influence by effective advocacy of counsel, except to the extent that it is now determined by the Uniform Commercial Code, which will hereafter be discussed.

The question of choice of law must be distinguished from the related question of choice of forum. On this latter point the North Carolina rule, except as to labor contracts, continues to follow the common law—courts of the state may not be divested of jurisdiction by advance contractual agreement of the parties. Arbitration clauses will not be enforced to preclude direct resort to the courts,¹⁵⁹ unless the clauses are contained in labor contracts¹⁶⁰ or unless an express agreement to arbitrate has been made regarding a specific disagreement that has already arisen.¹⁶¹

Choice of forum agreements purporting to select a given court to the exclusion of all others usually are not enforced by American courts. In the case involving the Duke Endowment, *Cocke v. Duke University*, the North Carolina Supreme Court rejected a contention that the trust instrument required that it be administered only in the courts of New Jersey and proceeded to exercise jurisdiction over the controversy.

UNIFORM COMMERCIAL CODE CONFLICTS PROVISIONS

Because it contains certain built-in conflict of laws rules, the Uniform Commercial Code merits separate examination. The North Carolina Supreme Court has not yet had occasion to construe any of these conflicts provisions, but this void is not surprising since the Code is effective in North Carolina only as to transactions entered into and events occurring on and after July 1, 1967.¹⁶² When the court is confronted with the application of the statutory conflicts rules to sales, commercial paper, bank deposits and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading and other documents of title, investment securities, secured

¹⁵⁸ See Note, *Commercial Security and Uniformity Through Express Stipulations in Contracts as to Governing Law*, 62 HARV. L. REV. 647 (1949).

¹⁵⁹ *Skinner v. Gaither*, 234 N.C. 385, 67 S.E.2d 267 (1951); *McDonough Constr. Co. v. Hanner*, 232 F. Supp. 887 (M.D.N.C. 1964).

¹⁶⁰ N.C. GEN. STAT. § 95-36.8 (1965).

¹⁶¹ *Poe v. University of N.C.*, 248 N.C. 617, 104 S.E.2d 189 (1958).

¹⁶² N.C. GEN. STAT. § 25-10-101 (1965); *Yates v. Brown*, 275 N.C. 634, 642, 170 S.E.2d 477, 483 (1969); *Bailie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969); *Southern Nat'l Bank v. Universal Acceptance Corp.*, 2 N.C. App. 319, 321, 163 S.E.2d 10, 12 (1968). See generally *Symposium—The Uniform Commercial Code in North Carolina*, 44 N.C.L. REV. 525 (1966) for a comprehensive presentation of the substantive provisions of the Code.

transactions, and the consensual relationships controlled by the Code, decisions may be somewhat different than would be the case without this statutory direction.

A primary objective of the Code is to achieve uniformity of decision in all American jurisdictions as to matters covered by it.¹⁶³ If this goal were fully accomplished, there would be little need for court-made conflicts rules in commercial cases covered by the Code, at least so far as domestic transactions are concerned. Conflicts problems would still arise as to transnational commercial transactions in situations in which international practice is not uniform. As a practical matter there will continue to be a divergence of results even among the states of the United States because an identical text of the Code has not been adopted in all states. At any rate, inevitably there will be disagreement among courts even in applying identical language.¹⁶⁴ The Comments, both "Official" and "North Carolina," accompanying the Code and its integral conflicts provisions, are intended to minimize the area and number of conflicting decisions. So far as official attitudes may be assessed, the relationship between the *Restatement (Second) of Conflict of Laws* and the Code is harmonious; each strives to complement the other. Consistently, *Restatement* Comments either refer favorably, or completely defer, to Code requirements.¹⁶⁵ In turn, application of *Restatement* principles

¹⁶³ The Publisher's Note at the beginning of Chapter 25 of the General Statutes of North Carolina states in part:

The Comments headed "Official Comment" are the Comments of the National Conference of Commissioners of Uniform State Laws and the American Law Institute which appear in the "1962 Official Text with Comments" of the UCC. The Comment under the title of the Act states in part:

Uniformity throughout American jurisdictions is one of the main objectives of this Code; and that objective cannot be obtained without substantial uniformity of construction. To aid in uniform construction these Comments set forth the purpose of various provisions of this Act to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction.

N.C. Gen. Stat. § 25-1-101(2)(c) provides, "This chapter shall be liberally construed and applied . . . to make uniform the law among the various jurisdictions.

See Reese, *The Uniform Commercial Code and Its Application in Noncode States*, 15 BAYLOR L. REV. 291 (1963).

¹⁶⁴ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Comment c § 191 at 225, and Introductory Note to Topic 4, Negotiable Instruments, preceding § 214, at 357 (Proposed Official Draft, May 1, 1968).

¹⁶⁵ *Id.*, Reporter's Note § 187(2), at 199; Reporter's Note § 188, at 214; Comment c § 191, at 225; Comment d § 191, at 226; Comment d § 205, at 311; Introductory Note § 208, at 328; Comment g § 210, at 342; Comment b § 211, at 345; Comment f § 211, at 348; Introductory Note § 214, at 357; Comment f § 214, at 363; Comment g § 215 at 371.

is left open to the courts by the Code provision that "[u]nless displaced by the particular provisions of this chapter, the principles of law and equity . . . shall supplement its provisions."¹⁶⁶ As Code problems arise in North Carolina, conflicts decisions from other Code jurisdictions may be very persuasive because of the aspiration for uniformity, but they are not binding on the North Carolina courts.

The basic conflicts section of the North Carolina version of the Code¹⁶⁷ does three things. First, it permits the parties to a transaction,

¹⁶⁶ N.C. GEN. STAT. § 25-1-103 (1965) reads:

Unless displaced by the particular provisions of this chapter, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

¹⁶⁷ N.C. GEN. STAT. § 25-1-105 (1965) provides:

(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 chapter applies to transactions bearing an appropriate relation to this State.

(2) Where one of the following provisions of this chapter 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, § 25-2-402.

Applicability of the article on bank deposits and collections, § 24-4-102.

Bulk transfers subject to the article on bulk transfers, § 25-6-102.

Applicability of the article on investment securities, § 25-8-106.

Policy and scope of the article on secured transactions, §§ 25-9-102 and 25-9-103.

For a pessimistic view of both the wisdom and efficacy of the effort to promote conflicts uniformity, see Weintraub, *Choice of Law For Products Liability: The Impact of the Uniform Commercial Code And Recent Developments In Conflicts Analysis*, 44 TEXAS L. REV. 1429 (1966). Professor Weintraub believes it is inappropriate to permit buyers to accede, on a take-it-or-leave-it basis, to a choice of law provision selecting a substantive law denying products liability recovery against manufacturers. He urges that a court should be free to engage in state-interest analysis in making its choice of law. Using three hypotheticals, he develops the thesis that if the law of any state having any reasonable relationship to the transaction permits implied warranty or strict tort liability recovery, that law should be applied to give judgment for plaintiff in products liability litigation.

See generally Nordstrom & Ramerman, *The Uniform Commercial Code and the Choice of Law*, 1969 DUKE L.J. 623. This article starts with this synopsis:

The choice of laws provisions of the Uniform Commercial Code often have been criticized on the basis that they are forum oriented, so forum oriented that their constitutionality may be questionable. The authors of this article analyze the basic Code choice of law section (UCC § 1-105) and conclude that this section need not be read with the heavy emphasis on the forum's version of the Code as suggested by some other writers. Instead, the argument is made that the Code's choice of law principles permit development in accordance with the forum's general notion of choice of law. Addi-

which has a "reasonable relation" to North Carolina and also to another state or nation, to agree that the law of either shall govern. Second, if no such choice of law is agreed upon in a transaction that has an "appropriate relation" to North Carolina, the substantive provisions of the North Carolina Code apply. Third, certain transactions are governed by specific sections, and in some of these a rigid conflicts rule is prescribed.

The first provision is a statutory recognition that parties to transactions may, within limits, expressly choose the substantive law to govern

tionally, the Code can provide impetus for complete acceptance of party autonomy in selecting the system of law which will govern the rights and duties of the parties to a contract.

Id. at 623. The authors conclude:

The Code, with one of the most comprehensive choice of law statutes yet enacted, seeks to retain certainty for the parties by allowing agreement as to the law which will govern the transaction, subject only to the requirement that the transaction have a "reasonable relation" to the state whose laws are chosen—often a requirement of little impact because businessmen simply do not choose to have their transactions governed by laws that are strange to them. Undoubtedly, the portion of the statutory grant of party autonomy which will have the greatest impact on policing choice of law clauses is the requirement that the parties "agree" on the clause. Here, common law contract notions of subjective and objective mutual assent will continue to play their role.

Id. at 645.

One writer has flatly stated that "the Uniform Commercial Code as presently operative fails to achieve the goals of uniformity its authors originally hoped it would." Hintze, *Disparate Construction of the Uniform Commercial Code—The Need for Federal Legislation*, 1969 *UTAH L. REV.* 722, 742.

Federal commercial paper is not subject to the dictates of the Uniform Commercial Code. In *United States v. Philadelphia Nat'l Bank*, 304 F. Supp. 955 (E.D. Pa. 1969), allowing the government recovery from the bank on a forged treasury check, the court said:

[U]nder the Uniform Commercial Code . . . this is a "padded payroll case" and the loss, if the plaintiff were not the Government, would fall on the employer whose agent presented the padded payroll. UCC § 3-405(1) (c) However, the Supreme Court held in *Clearfield Trust Co. v. United States*, 318 U.S. 363 . . . (1943) that pursuant to the federal currency powers, legal questions involved in controversies over federal commercial paper are to be resolved by the application of federal common law rather than state law. . . . Subsequent decisions of the Supreme Court . . . have held in situations very close to the instant one that the loss must fall on the bank rather than the Government [D]efendant contends, . . . since the Uniform Commercial Code has been revised to include the padded payroll cases, and since nearly all the states have adopted the Code, we should in the interest of uniformity adopt that rule for federal paper as well

[T]he rationale of *Clearfield* was not uniformity but "preservation of the federal right"

Id. at 956. See also *United States v. Bank of America Nat'l Trust & Sav. Ass'n*, 288 F. Supp. 343 (N.D. Cal. 1968).

their agreement. The statute does not expressly spell out what the word "transactions" means. Conceivably, it could be read to extend to all consensual transactions even if they are not within the scope of the Code. At least this question seems to have been left open for adjudication. However, in view of the further Code statement that "[f]ailing such agreement this chapter applies to transactions bearing an appropriate relation to this State,"¹⁶⁸ it seems clear that the intent of the Code's drafters is to prescribe the conflicts rule only for transactions substantively governed by the Code itself. Thus, it is possible that, depending upon whether the agreement is or is not governed by the Code, North Carolina could develop two different rules as to choice of law in contracts. Nevertheless, uniformity as to basic rules seems desirable.

The Code does not permit unlimited choice of law. If all parties and all elements of the transaction are North Carolina-contained, there seems to be no warrant in the statute for enforcing a contract term that the law of Utah, or Argentina, shall govern. The same result would seem to be true if the transaction had reasonable relationship to North Carolina, Virginia, and Tennessee, but not to Utah or Argentina. However, the Official Comment following North Carolina General Statutes section 25-1-105 states:

Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or the performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.¹⁶⁹

Does this mean that when a contract has reasonable relations only with North Carolina and California, the court should enforce a term to the effect that all disputes shall be resolved by arbitration in the same manner as if the New York arbitration statute applied? Probably so, if meaning is given to the language of the Official Comment, even though section 25-1-105 itself does not provide for this result. The example is complicated by the fact that North Carolina has adhered to the common law rule refusing to enforce agreements to arbitrate in futuro.¹⁷⁰ What about an agreement to submit to arbitration under the procedures made avail-

¹⁶⁸ N.C. GEN. STAT. § 25-1-105(1) (1965).

¹⁶⁹ N.C. GEN. STAT. § 25-1-105, Official Comment (1965).

¹⁷⁰ See notes 159-61 *supra*.

able by the World Bank, a private trade association, or any other organization not a state or country? Whether such provisions are enforceable in North Carolina under the Code remains to be seen.

Since all states except Louisiana have adopted the Code, presumably an agreement to apply the law of North Carolina or California to a contract with reasonable relations to each state would lead to the application of the same substantive law regardless of the forum. Such uniformity would promote the purpose of the Code. Even here, however, there may be conflict due to differences in wording or to divergence of judicial interpretation.

A definite possibility of difference in result when parties select the substantive law arises where the transaction has a reasonable relationship to North Carolina and any foreign country. The law of the foreign country may differ substantially from the Code provisions, yet it would be applicable if the parties agree to accept it. A North Carolina party is, of course, not obliged to agree to such a choice of law. Furthermore, the Code has drawn heavily on commercial practice as it has developed in all countries engaging in transnational business, and there is some trend toward world uniformity in commercial law.

Another general problem is the definition and application of the words "reasonable relation." Is the "reasonable relation" test under the Code the same as the "substantial relationship" and "reasonable basis" test prescribed by section 187 of the *Restatement (Second) of Conflict of Laws*?¹⁷¹ The language is similar enough for courts to give each test the same meaning.

By its precise language the Code limits choice of law to "this State" or to "another state or nation." Strictly applied, this language would prevent parties from designating the law of different states to control different aspects of the transaction. While this limitation would perhaps promote simplicity and uniformity, there does not seem to be any particular reason why the parties should not be permitted to select the law of four different states to govern respectively four different aspects of the transaction so long as each state had a reasonable relation to the aspect that its law was selected to control.

Another situation not expressly covered by Code language is that of the truly national contract. Suppose a New York corporate manufacturer and a California corporate wholesaler, each qualified for and doing business in all fifty states, enter into a single master sales contract for the

¹⁷¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, *supra* note 139.

manufacture and delivery in each state of a specified line of commodities. Assume that they select the law of Nevada to govern all aspects of the transaction. In a suit in North Carolina arising out of a sale consummated under the master contract by delivery in North Carolina of commodities manufactured in North Carolina, will the law of Nevada be applied? Does it make any difference whether the master contract was executed in New York, Nevada, North Carolina or elsewhere? Arguably, this transaction bears a reasonable relation to both North Carolina and Nevada, even if the contract was executed in some other state. There seems to be no reason why Nevada would not qualify as a state whose law parties might select to govern the transaction. This result would not be inconsistent with judicial conflicts doctrine applied to multi-state contracts antecedent to the Uniform Commercial Code.¹⁷²

The second major conflicts provision of the Code is contained in the last sentence of section 25-1-105: "Failing such agreement this chapter applies to transactions bearing an appropriate relation to this State."¹⁷³ Is an "appropriate" relation a greater or lesser one than a "reasonable" relation, or in this context do the two adjectives have the same meaning? Presumably the legislature intended to draw a distinction, but its precise nature is not readily apparent.¹⁷⁴ The Official Comment clearly says that if the forum state's relation to the transaction is no more than that of a disinterested forum in which a transitory cause of action has been brought, it would not be appropriate to apply the substantive law of the forum, particularly if the contract was made and was to be performed in places whose law is contrary to the provisions of the Code.¹⁷⁵ Thus the Code would seem to leave open to North Carolina courts the application of the present rule of *lex loci contractus* (or, for that matter, the *Restatement's* "most significant relationship" rule).

Would the fact that one of the parties was a resident of North Carolina, without more, constitute an "appropriate relation" sufficient to bring the state's substantive Code law into effect? The Official Comment further provides: "Where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is 'appropriate' is left to judicial decision. In deciding that question the court is not strictly bound by precedents established

¹⁷² See *Hal Roach Studios, Inc. v. Film Classics*, 156 F.2d 596 (2d Cir. 1946).

¹⁷³ N.C. GEN. STAT. § 25-1-105(1) (1965).

¹⁷⁴ There is a difference between the Code and *Restatement (Second)*. The *Restatement* applies the law of the state having "the most significant" relation.

¹⁷⁵ N.C. GEN. STAT. § 25-1-105 Official Comment (1965).

in other contexts."¹⁷⁶ The North Carolina Comment indicates that this language may serve to modify prior North Carolina law.¹⁷⁷ The clear purport of the Official Comment is an expression of hope that the courts will promote uniformity by making a wide application of the substantive Code provisions in any case in which such application is a matter of discretion.¹⁷⁸

One federal district court went so far as to cite the adoption of section 1-105 of the Uniform Commercial Code by the Alabama Legislature as a valid reason for inferring that the Supreme Court of Alabama would change its general rule from *lex loci contractus* to the most significant relationship rule.¹⁷⁹ The Court of Appeals for the Fifth Circuit reversed, holding that this inference was unwarranted.¹⁸⁰ The reasoning

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* North Carolina Comment. In this connection, the Comment refers to *Roomy v. Allstate Ins. Co.*, 256 N.C. 318, 123 S.E.2d 817 (1961) and *Davis v. Coleman*, 33 N.C. 303 (1850). *Roomy* involved a suit on a liability insurance policy, a transaction not governed by the Code. *Davis* involved whether a note bearing eight per cent interest, which was legal in Georgia where the loan was made and the note given, but usurious in North Carolina, was legal. The defense of usury is not covered by the Code. Accordingly, the observation of the commentators does not necessarily follow from the two cited cases. But there are many situations where the application of the "appropriate relation" clause could result in a change in North Carolina conflicts of law.

¹⁷⁸ Application of the Code . . . may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries. Compare *Global Commerce Corp. v. Clark-Babbitt Industries, Inc.*, 239 F.2d 716, 719 (2d Cir. 1956). In particular, where a transaction is governed in large part by the Code, application of another law to some detail of performance because of an accident of geography may violate the commercial understanding of the parties.

Id., Official Comment.

¹⁷⁹ After considering the trend of decisions abandoning the "place of contracting" rule, the present approach of the Restatement, and the adoption of the significant relationship canon in the area of personal property by the Alabama Legislature, this court concludes that the courts of Alabama would apply the law of Alabama to the issues presented in this case This includes not only the general law of Alabama, but also the Alabama statute of frauds.

Ideal Structures Corp. v. Levine Huntsville Dev. Corp., 251 F. Supp. 3, 7 (N.D. Ala. 1966).

¹⁸⁰ If we had this question before us as a matter of first impression, we might follow under the district court's banner. However, the rule in Alabama boasts a long and proud vintage Our Erie antenna is not so sensitive that we can gauge every variant breeze of change. Forecasting the repudiation of a fixed legal principle is not simplistic The choice-of-law reference in the Uniform Commercial Code may eventually draw the

of the appellate court is preferable. It would seem to be a strained result to depart from *lex loci contractus* and to adopt "significant contacts" on the basis of Code section 1-105 alone,¹⁸¹ particularly since the word "significant" nowhere appears in that section.¹⁸²

Subsection (2) of section 1-105¹⁸³ expressly limits the right of the parties to choose the applicable law as to certain substantive issues.¹⁸⁴ For example, in cases involving sales agreements creditors of the seller are subject to the buyer's rights to recover the goods as provided by sections 2-402 and 2-716 of the Code unless the retention of possession by the seller is, as against the creditor, fraudulent under any law of the state in which the goods are situated. This exception does not apply if the retention of possession is in good faith by a merchant-seller in the current course of trade for a commercially reasonable time.¹⁸⁵ Expressly preserved are the rights of secured creditors of sellers provided for in Article 9 of the Code. Also expressly preserved are creditors' rights to recover when retention is not in the current course of trade and is a

Alabama courts into a general application of the "most significant relationship" test, but this prediction cannot approach inevitability. *Ideal Structures Corp. v. Levine Huntsville Dev. Corp.*, 396 F.2d 917, 921 (5th Cir. 1968).

¹⁸¹ However, the Supreme Court of Wisconsin has stated:

Our recently adopted Uniform Commercial Code . . . recognizes an "appropriate relations" test for determining applicable law, and the official Uniform Commercial Code comments refers to a transaction's "significant contacts" as being factors in the choice of law. This in itself indicates legislative approval of the Restatement rule of "most significant relationship."

Wilcox v. Wilcox, 26 Wis. 2d 617, 630, 133 N.W.2d 408, 415 (1965). A similar view is expressed in *Nordstrom & Ramerman, The Uniform Commercial Code and the Choice of Law*, 1969 DUKE L.J. 623, 646, which states:

[C]ases . . . in which parties have not agreed on applicable law, will present the hardest problems of statutory interpretation The "appropriate relation" test frees the court from the narrow tests of prior Code versions such as place of making or performance and allows it to adopt choice of law rules resting on rational foundations. Furthermore, the Code may someday form the base from which choice of law principles can be enunciated in non-commercial areas.

¹⁸² Relevant here is RESTATEMENT (SECOND) OF CONFLICT OF LAWS, comment c § 203, at 295 (Proposed Official Draft, Part II, May 1, 1968), which reads: "As here used, the term, 'substantial relationship' bears a different meaning than that attributed to 'most significant relationship' in § 188. As to a particular issue, a contract may have a 'substantial relationship' to two or more states; it can have its 'most significant relationship' to only one." Although section 203 deals with usury, the comment appears to have general validity.

¹⁸³ N.C. GEN. STAT. § 25-1-105(2) (1965).

¹⁸⁴ See note 167 *supra*.

¹⁸⁵ N.C. GEN. STAT. §§ 25-2-402(1), (2) (1965).

fraudulent transfer or preference under the law of the state in which the goods are situated.¹⁸⁶

Article 4 of the Code deals with bank deposits and collections. It expressly states that its provisions prevail over article 3, which governs commercial paper, but that article 8, which controls investment securities, prevails over article 4.¹⁸⁷ Thus the Code establishes some fixed internal conflicts rules.

Article 4 also provides that a bank's liability for action or non-action on any item handled for purposes of presentment, payment, or collection is governed by the law of the situs of the bank or its branch or separate office.¹⁸⁸ This provision applies to each step of the collection process. If action or non-action of sub-agents is involved, vicarious liability of the bank is determined by the law of the state of the location of the principal bank.¹⁸⁹ The Official Comment states that it is imperative that one law govern the activities of one office of a bank, that the basic duty of a collecting bank is one of good faith and ordinary care, and that parties to an ambulatory instrument must know that action will be taken with respect to it in other jurisdictions.

The Code rules regarding bank deposits and collections may be varied by agreement, except that a bank may not disclaim or limit its liability for lack of good faith or failure to exercise ordinary care. The parties may be agreement, however, determine the standards by which the bank's responsibility is to be measured if such standards are not manifestly unreasonable.¹⁹⁰ Federal Reserve regulations, clearing house rules, and the like compose a part of such agreements whether or not specifically assented to by all parties interested.¹⁹¹ Banks have security interests in collection items to the extent to which credit given for them has been withdrawn. Subject to the provisions of article 9 of the Code,¹⁹² no security agreement is necessary to enforce such security interests.

"Bulk transfers," as distinguished from other transfers specified in section 6-103, are subject to the provisions of article 6, and the parties may not by agreement deviate therefrom.¹⁹³

With respect to securities transactions, the Code provides that "[t]he

¹⁸⁶ *Id.* § 25-2-402(3).

¹⁸⁷ *Id.* § 25-4-102(1).

¹⁸⁸ *Id.* § 25-4-102(2).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* § 25-4-103(1).

¹⁹¹ *Id.* § 25-4-103(2).

¹⁹² *Id.* § 25-4-208.

¹⁹³ *Id.* § 25-6-102(4).

section 9-103.¹⁹⁸ This latter section in subparagraph (1) states that the validity and perfection of a security interest in an account or contract is governed by the law (including conflict of laws rules) of the jurisdiction in which the assignor maintains the office in which he keeps records concerning the account or contract. Subparagraph (2) specifies that the validity and perfection of a security interest in intangibles or equipment normally used in more than one jurisdiction are governed by the law (including the conflict of laws rules) of the chief place of business of the debtor. Subparagraph (3) covers in detail the problem of other incoming goods already subject to a security interest in another jurisdiction. It

¹⁹⁸ *Id.* § 25-9-103.

(1) If the office where the assignor of accounts or contract rights keeps his records concerning them is in this State, the validity and perfection of a security interest therein and the possibility and effect of proper filing is governed by this article; otherwise by the law (including the conflict of laws rules) of the jurisdiction where such office is located.

(2) If the chief place of business of a debtor is in this State, this article governs the validity and perfection of a security interest and the possibility and effect of proper filing with regard to general intangibles or with regard to goods of a type which are normally used in more than one jurisdiction (such as automotive equipment, rolling stock, airplanes, road building equipment, commercial harvesting equipment, construction machinery and the like) if such goods are classified as equipment, or classified as inventory by reason of their being leased by the debtor to others. Otherwise, the law (including the conflict of laws rules) of the jurisdiction where such chief place of business is located shall govern

(3) If personal property other than that governed by subsections (1) and (2) is already subject to a security interest when it is brought into this State, the validity of the security interest in this State is to be determined by the law (including the conflict of laws rules) of the jurisdiction where the property was when the security interest attached. However, if the parties to the transaction understood at the time that the security interest attached that the property would be kept in this State and it was brought into this State within 30 days after the security interest attached for purposes other than transportation through this State, then the validity of the security interest in this State is to be determined by the law of this State

(4) Notwithstanding subsections (2) and (3), if personal property is covered by a certificate of title issued under a statute of this State or any other jurisdiction which requires indication on a certificate of title of any security interest in the property as a condition of perfection, then the perfection is governed by the law of the jurisdiction which issued the certificate.

(5) Notwithstanding subsection (1) and § 25-9-302, if the office where the assignor of accounts or contract rights keeps his records concerning them is not located in a jurisdiction which is a part of the United States, its territories or possessions, and the accounts or contract rights are within the jurisdiction of this State or the transaction which creates the security interest otherwise bears an appropriate relation to this State, this article governs the validity and perfection of the security interest and the security interest may only be perfected by notification to the account debtor.

See also *Id.* § 25-9-401 dealing with place of filing.

validity of a security and the rights and duties of the issuer with respect to registration or transfer are governed by the law (including the conflict of laws rules) of the jurisdiction of organization of the issuer."¹⁹⁴ The Official Comment states that the purpose of this language is to prescribe a specific conflicts rule that is in accordance with the prevailing case law. The parties are prohibited from designating by agreement that the law of another jurisdiction may govern.¹⁹⁵ The specific reference to conflicts rules requires the use of partial *renvoi*; that is, a court is to look to the conflicts rule rather than exclusively to the substantive law of the jurisdiction whose law is controlling.

Also apparently invoking partial *renvoi* is section 1-105(2), which provides that if the Act in certain sections "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. . . ."¹⁹⁶

These provisions seem to run counter to the generally accepted view that *renvoi* has no application to contracts matters and to the feeling that conflicts reference should be directly to the substantive contract law of the other jurisdiction. The parenthetical language "(including the conflict of laws rules)" does not confine its sweep to conflicts rules prescribed by Code sections and is broad enough to embrace the general conflicts law of a jurisdiction. Hence it is conceivable that a matter might again be subjected to the general conflicts test that the parties may choose their own substantive law if it has any reasonable relationship to the transaction. This result could to some extent curtail the objective of uniformity of result. In any event, the parenthetical reference to conflicts rules makes final identification of applicable substantive law a more complex problem than it would otherwise be.

The final area in which the Code prescribes specific conflicts rules is that of secured transactions. The provisions of article 9 apply to all security interests created by contract in any personal property and fixtures within the jurisdiction of the Code state, including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, title retention contract and lease, or consignment intended as security.¹⁹⁷ Excepted from this general provision are multiple state transactions to the extent that they are otherwise provided for in

¹⁹⁴ *Id.* § 25-8-106.

¹⁹⁵ *Id.* § 25-1-105(2).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* § 25-9-102.

seems that in these particulars the parties may not agree upon choice of law, no matter how reasonable the relation of that law may be, unless such choice is permitted by the conflicts law of the non-forum jurisdiction designated by the Code.

The resolution of conflicts problems under the Code's "solutions" is by no means easy. Since all but one state has adopted the Code, however, if judges strive to obtain uniformity of result by applying the substantive rules of the Code whenever possible, the end product may be salutary. Whether those who oppose uniformity of result in the resolution of conflicts questions will train their sights against the Code's objective remains to be seen. The tentative conclusion emerges that even the skillful drafting of the conflicts provisions of the Code has not eliminated conflict of laws questions and may raise new ones for resolution by the courts.

FEDERAL TAX MATTERS

In *Bank v. Wells*,¹⁹⁹ a case of first impression in North Carolina, the North Carolina Supreme Court enunciated a new conflicts rule. The decedent died domiciled in Nevada and, pursuant to a general power of appointment, devised to North Carolina residents certain real property situated in North Carolina and administered under a North Carolina trust. The will contained no express direction regarding apportionment of estate taxes, and the Nevada executor and two ancillary administrators from North Carolina sued one of the appointees to have him pay a pro-rata share of the federal estate tax. The court first upheld the constitutionality of section 2207 of the Internal Revenue Code, which entitled the plaintiffs to recover the tax. While the court could have based its decision on this holding alone, it proceeded to state a conflicts rule allowing the plaintiffs to prevail under the Nevada apportionment statute:

When questions of apportionment of estate taxes arise in courts of a state of the *situs* of a trust whose assets are includible in decedent's gross estate for tax purposes, the law of the *situs* refers to the law of decedent's domicile to resolve the questions.²⁰⁰

In reaching this result the court adopted the New York conflicts rule.²⁰¹

¹⁹⁹ 267 N.C. 276, 148 S.E.2d 119 (1966).

²⁰⁰ *Id.* at 287, 148 S.E.2d at 126, quoting from *Doetsch v. Doetsch*, 312 F.2d 323 (7th Cir. 1963).

²⁰¹ *In re Gato's Estate*, 276 App. Div. 651, 97 N.Y.S.2d 171, *aff'd*, 301 N.Y. 653, 93 N.E.2d 924 (1950).

CRIMINAL LAW

The usual rule is that, apart from granting extradition in a proper case or providing cooperative procedures under reciprocal statutes, one state will not enforce the penal laws of another state. In the 1963 case of *In re Donnelly*,²⁰² the petitioner, a North Carolina resident, was arrested in South Carolina for drunk driving and posted a fifty-dollar bond that was forfeited. No warrant was issued. Under North Carolina law a resident's license may be suspended upon notice of his conviction in another state of an offense that, if committed in North Carolina, would be grounds for suspension.²⁰³ Forfeiture of bail, not vacated, is equivalent to a conviction.²⁰⁴ Under North Carolina law, however, there can be no valid forfeiture of bail unless a warrant has been issued.²⁰⁵ South Carolina law holds that no warrant is necessary.²⁰⁶ In restoring petitioner's license the court held that a North Carolina driver's license can be suspended only in accordance with the law of North Carolina, both statutory and decisional, and that in this case there was no judicially cognizable forfeiture of bail.

The Department of Motor Vehicles contended that the finding of the North Carolina Superior Court that petitioner had committed an offense in South Carolina was sufficient to sustain the license suspension. The court rejected this argument:

The statutes do not contemplate a suspension or revocation of license by reason of a conviction in North Carolina of an alleged offense committed beyond its borders. In criminal matters the courts of North Carolina have no original extraterritorial jurisdiction.²⁰⁷

WORKMEN'S COMPENSATION CASES

In *Rice v. Uwharrie Council Boy Scouts of America*,²⁰⁸ an injury to a Boy Scout executive while he was officially engaged in deep sea fishing on the high seas off Jekyll Island, Georgia, was held compensable under the North Carolina Workmen's Compensation Act. The court based its

²⁰² 260 N.C. 375, 132 S.E.2d 904 (1963), noted in 42 N.C.L. REV. 623 (1964).

²⁰³ N.C. GEN. STAT. § 20-23 (1965).

²⁰⁴ *Id.* § 20-24(c).

²⁰⁵ *In re Wright*, 228 N.C. 301, 45 S.E.2d 370 (1947), *aff'd on rehearing*, 228 N.C. 584, 46 S.E.2d 696 (1948).

²⁰⁶ *State v. Langford*, 223 S.C. 20, 73 S.E.2d 854 (1952).

²⁰⁷ 260 N.C. at 382, 132 S.E.2d at 908. *But cf.* *Parks v. Howland*, 4 N.C. App. 197, 166 S.E.2d 701 (1969).

²⁰⁸ 263 N.C. 204, 139 S.E.2d 223 (1964), followed in *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 167 S.E.2d 790 (1969).

decision on these facts: the contract of employment was made in North Carolina, the plaintiff was a North Carolina resident, the defendant Boy Scout Council maintained a place of business in North Carolina, and the employment contract was not expressly for services to be performed exclusively outside of North Carolina.²⁰⁹ The defendant contended that the exclusive remedy of the plaintiff was under the Longshoremen's and Harbor Workers' Act.²¹⁰ The court rejected this contention and pointed out that the Act is applicable only if recovery under workmen's compensation may not be had under state law.²¹¹ The court held that the proper forum is the North Carolina Industrial Commission. "The claim does not arise under Maritime Law, but under an employment contract made in North Carolina by residents of that State."²¹² This characterization of the cause of action as one of "employment contract" is consistent with the previous practice of the court in Workmen's Compensation Act cases.²¹³

FAMILY LAW

Remaining for consideration in the vast choice of law arena is the important cluster of family law problems with multistate aspects.

Divorce Jurisdiction

North Carolina adheres to the rule, supported by the great weight of authority, that jurisdiction to grant a divorce is predicated upon the minimum requirement that one of the parties be a domiciliary of the state. The North Carolina Supreme Court has held that military personnel must meet this requirement²¹⁴ despite a 1959 statute providing that in a divorce action "allegation and proof that the plaintiff or the defendant has resided . . . pursuant to military duty within this State

²⁰⁹ 263 N.C. at 206, 132 S.E.2d at 226, *applying* N.C. GEN. STAT. §97-36 (1965).

²¹⁰ 33 U.S.C. §§901-50 (1964).

²¹¹ 263 N.C. at 206, 139 S.E.2d at 225.

²¹² *Id.* at 206, 139 S.E.2d at 225-26.

²¹³ *E.g.*, *Warren v. Dixon & Christopher Co.*, 252 N.C. 534, 114 S.E.2d 250 (1960).

²¹⁴ *Martin v. Martin*, 253 N.C. 704, 118 S.E.2d 29 (1961). The court said:

The court should have instructed the jury upon the issue of residence that the burden is on plaintiff to satisfy the jury: (1) that plaintiff was stationed on the Fort Bragg military reservation for six months next preceding the institution of the action, and (2) that during said period plaintiff had the intention to make North Carolina his permanent home or to live there indefinitely.

Id. at 711, 118 S.E.2d at 34.

for a period of six months . . . shall constitute compliance with the residence requirements set forth in this chapter. . . ."²¹⁵

In at least three states the conclusion has been reached that similar statutes do dispense with domicile of military personnel as a jurisdictional requirement for granting divorces.²¹⁶ These holdings have not been subjected to scrutiny by the United States Supreme Court, which has not departed from its ruling in the celebrated *Williams v. North Carolina*²¹⁷ cases that domicile is a requisite fact for the exercise of divorce jurisdiction.

Interesting facets of divorce jurisdiction over military personnel were raised in *Rector v. Rector*.²¹⁸ Plaintiff, a serviceman, was married to defendant, a German national, in Germany in 1964. Plaintiff was transferred to Fort Bragg, North Carolina, and, before November 4, 1967, he and his wife purchased a home in nearby Fayetteville. On that date they separated, and defendant continued to live in the house. In March 1968, plaintiff transferred his interest in the house to defendant. Plaintiff sued defendant for divorce on grounds of adultery. The jury found that plaintiff had not been a resident of North Carolina for six months but that defendant had been, and the divorce was granted. Plaintiff had testified that defendant intended her residence to be in Fayetteville and that she had never expressed any desire or intent to return to Germany to live. Defendant appealed, contending that she could not be domiciled in North Carolina since it had been found that her husband was not domiciled there. The divorce was affirmed, the court of appeals holding that a wife may acquire a domicile apart from that of her husband, and that the non-domiciled husband, as a plaintiff, may assert the North Carolina domicile of the wife to establish divorce jurisdiction.

Recognition of Foreign Divorces

The *Williams* rule that a divorce decree granted by another state may be collaterally attacked by proving that neither party was in fact domiciled in the granting state has been greatly restricted. Later Supreme Court cases have held that if both parties appeared in the original proceeding,

²¹⁵ N.C. GEN. STAT. § 50-18 (1966).

²¹⁶ *Wheat v. Wheat*, 229 Ark. 842, 318 S.W.2d 793 (1958); *Wallace v. Wallace*, 63 N.M. 414, 320 P.2d 1020 (1958); *Wood v. Wood*, 159 Tex. 350, 320 S.W.2d 807 (1959).

²¹⁷ *Williams v. State*, 220 N.C. 445, 17 S.E.2d 769 (1941), *rev'd*, 317 U.S. 287 (1942); *Williams v. State*, 224 N.C. 183, 29 S.E.2d 744 (1944), *aff'd*, 325 U.S. 226 (1945). See *Recognition of Foreign Divorces*, pp. 294-97 *infra*.

²¹⁸ 4 N.C. App. 240, 166 S.E.2d 492 (1969).

the finding of domicile becomes *res judicata* and may not be collaterally attacked even if the issue of domicile was not in fact contested.²¹⁹ Difficult questions can arise as to what constitutes an appearance and whether the moving party is estopped from denying the validity of the decree that his representations induced.

In *Donnell v. Howell*,²²⁰ the plaintiff wife, a domiciliary of North Carolina, obtained a one-day divorce in Alabama by falsely alleging and testifying that she was a resident of Alabama. The defendant husband, also a North Carolina domiciliary, in *propria persona* filed an answer waiving all notice and admitting that plaintiff was domiciled in Alabama, but did not appear at the trial or otherwise participate in the proceeding. In a subsequent action in North Carolina for a partition sale of real estate owned by the spouses, both stipulated that they had perpetrated a fraud on the Alabama court. The North Carolina Supreme Court held that this stipulation of fact rendered the Alabama divorce void under the local law of Alabama and that in holding the decree void the court was giving it the same faith and credit it would receive in Alabama. No petition for *certiorari* to the United States Supreme Court was filed.

In *Thrasher v. Thrasher*,²²¹ the North Carolina Court of Appeals upheld a Massachusetts divorce decree and held that the Massachusetts court's finding of domicile of the plaintiff was *res judicata*. The court of appeals said that if, as the plaintiff testified in the North Carolina action, her Massachusetts testimony was perjured, it constituted intrinsic fraud and could not be asserted to destroy the Massachusetts court's finding of jurisdictional fact. The husband and wife and three children had been domiciled in England. The wife went to Massachusetts and obtained a divorce. At the divorce hearing she testified that she was domiciled in Massachusetts. The defendant husband did not personally appear, but was served with process and was represented at the trial by counsel. The Massachusetts decree ordered the husband to pay six hundred dollars a month to the wife for her support and for that of the children. Later the wife and children moved to Asheville, North Carolina, and the wife brought an action for permanent alimony, custody of the children, counsel fees, and alimony *pendente lite*.

²¹⁹ *Cook v. Cook*, 342 U.S. 126 (1951); *Johnson v. Muelberger*, 340 U.S. 581 (1951); *Coe v. Coe*, 334 U.S. 378 (1948); *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

²²⁰ 257 N.C. 175, 125 S.E.2d 448 (1962). *Accord*, *Day v. Day*, 237 Md. 229, 205 A.2d 798 (1965).

²²¹ 4 N.C. App. 534, 167 S.E.2d 549 (1969).

Personal service was obtained on the husband in North Carolina. The trial court awarded the plaintiff one thousand dollars a month support pendente lite and one thousand dollars attorney fees. Asserting that the court was without jurisdiction because of the Massachusetts divorce, the husband moved to vacate the judgment. In resisting this motion the wife testified that she had obtained the Massachusetts divorce under coercion by the husband, that the attorney she had used had really represented the husband, that she and her husband were both residents of England at the time, and that her testimony that she was domiciled in Massachusetts was false.

The trial court held that the Massachusetts decree was void and reaffirmed its pendente lite order. The court of appeals reversed. It held that unless the plaintiff was presently married to the defendant she was not entitled to support pendente lite. The court distinguished *Donnell* and held that under the controlling federal cases the Massachusetts divorce was entitled to full faith and credit. The opinion in *Thrasher* provides a valuable discussion of the requirements of full faith and credit, not only as to sister state divorce decrees, but also as to foreign judgments.

The court in *Thrasher*, without expressly using the label, in fact relied in part upon the doctrine of estoppel—that the moving party to a divorce action may not later impeach the decree so obtained.²²² In both *Thrasher* and *Donnell* the defendant husband did participate to some extent in the questioned divorce proceeding. However, in *Donnell* the court said:

Although the parties . . . are *in pari delicto* the court will grant relief . . . if its forbearance will be productive of an offense against public morals. . . . If a court should forbear to grant relief . . . in the face of their stipulation . . . that the final divorce decree . . . was secured by the perpetration of a fraud upon the Alabama court, it would be an offense against public morals. . . .²²³

It is, apparently, the stipulation of fraud by both parties, as distinguished from its unilateral assertion, that eliminates estoppel to deny the validity of the decree. But does this distinction dispose of full faith and credit?

²²² *Sears v. Sears*, 293 F.2d 884 (D.C. Cir. 1961); *Krause v. Krause*, 282 N.Y. 355, 26 N.E.2d 290 (1940); *McIntyre v. McIntyre*, 211 N.C. 698, 191 S.E. 507 (1937). See Weiss, *A Flight on the Fantasy of Estoppel in Foreign Divorce*, 50 COLUM. L. REV. 409 (1950); Note, *Enforcement by Estoppel of Divorce Without Domicile: Toward a Uniform Divorce Recognition Act*, 61 HARV. L. REV. 326 (1948).

²²³ 257 N.C. at 185, 125 S.E.2d at 455.

Perhaps a better factual distinction is that in *Thrasher* the defendant appeared by counsel, thus causing the jurisdictional fact of domicile to become *res judicata*, whereas in *Donnell* the defendant's only participation in the proceeding was to file an answer in *propria persona*. The question remains, however, whether this latter factual situation removes a decree from the full faith and credit mandate of the federal cases. Filing an answer would seem to constitute an appearance. How much in *propria persona* activity may a party engage in before *res judicata* attaches? It appears that under *Donnell* some room is left for effective advocacy but that *Thrasher* is probably more typical of jurisprudence in this area.

Support and Alimony

It is difficult to separate problems of support and alimony from those of custody, but there are jurisdictional differences that make the effort to do so desirable. The basic rule is that an *ex parte* proceeding upon substituted service of process is sufficient to confer jurisdiction to grant a divorce to a domiciled plaintiff, but that, unless the defendant enters a general appearance, substituted service will not sustain an *in personam* judgment awarding alimony or support or adjudicating rights in property not within the territorial jurisdiction.²²⁴ This so-called doctrine of "divisible divorce" is recognized in North Carolina.

In *Fleek v. Fleek*,²²⁵ the wife, a domiciliary of North Carolina, instituted a divorce action by publication and by mailing copies of the summons and complaint to the defendant at his last known addresses in both Switzerland and Italy. Defendant did not respond. A judgment was entered granting plaintiff an *ex parte* divorce and custody of the two children of the marriage. Plaintiff then moved that defendant be ordered to pay one thousand dollars a month support for the children and published notice of the motion and mailed copies of it to the defendant. Through counsel the defendant then entered a special appearance and moved to quash service and to dismiss plaintiff's motion upon the ground that the court was without jurisdiction to enter an *in personam* judgment. The trial court granted the motion to dismiss, and the supreme court affirmed.

²²⁴ *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Armstrong v. Armstrong*, 350 U.S. 568 (1955); *Kreiger v. Kreiger*, 334 U.S. 555 (1948); *Estin v. Estin*, 334 U.S. 541 (1948).

²²⁵ 270 N.C. 736, 155 S.E.2d 290 (1967), *noted critically in* 47 N.C.L. REV. 437, 441 (1969), in which the writer asserts that "the expansion of the concept of personal jurisdiction to the limits of fairness and reason" would include this situation.

The plaintiff contended that service by publication would support the requested order under North Carolina General Statutes section 1-98.2(3) (1953), which provides: "Service of process by publication or service of process outside the State may be had . . . for any other relief involving the domestic status of the person to be served. . . ." In rejecting this assertion the court said:

The plaintiff was a resident of North Carolina. The parties were married in this State and had lived here as husband and wife. Undoubtedly the Court had jurisdiction of the plaintiff and of the marriage status, and authority to grant the divorce. The children were before the Court in the actual custody of the plaintiff and the Court unquestionably had authority to award custody to her. The defendant's domestic status as a party to the marriage (a proceeding *quasi in rem*) was before the Court for adjudication. In a proper case, the Court may acquire jurisdiction of a non-resident defendant's rights to property in this State by attachment or by garnishment, but the Court is without power to enter a judgment *in personam* unless and until the defendant is before the Court in person, that is, by personal service of process, or by a general appearance before the Court. The terms of the statute relating to the "domestic status of the person to be served" do not give the Court authority to render a personal judgment. A judgment *in personam* on such service would violate due process which requires actual notice and an opportunity to be heard.²²⁶

Until 1967 the North Carolina rule was that if in any jurisdiction a decree of absolute divorce was entered without provision for alimony, no subsequent alimony proceeding could be maintained. This rule put a premium on a race to judgment in another state. In *Anderson v. Anderson*,²²⁷ for example, the wife commenced an action for alimony without divorce in North Carolina. Thereafter, the husband obtained an *ex parte* divorce in Florida with no provision for alimony and asserted this judgment as a defense in the wife's pending suit. The wife moved for alimony pendente lite and counsel fees. This motion was denied on the ground that the Florida absolute divorce decree was valid and entitled to full faith and credit. For litigation commenced after October 1, 1967,

²²⁶ 270 N.C. at 738, 155 S.E.2d at 291.

²²⁷ 247 N.C. 269, 100 S.E.2d 504 (1957). See also *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E.2d 71 (1967). Compare *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1956); *Rymanowski v. Rymanowski*, — R.I. —, 249 A.2d 407 (1969), noted in 48 N.C.L. REV. 100 (1969); Annot., 28 A.L.R.2d 1378 (1953).

this unhappy situation has been rectified as to foreign divorce decrees by the following provision:

- (a) After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine except . . .
 (d) A divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained shall not impair or destroy the right of the dependent spouse to alimony as provided by the laws of this State.²²⁸

Custody

Since 1967 the North Carolina rule has been that if there is a pending divorce action, any custody proceeding must be joined with it.²²⁹ Furthermore, jurisdiction of the court granting a divorce to award the custody of unemancipated children continues after the divorce,²³⁰ and a previous custody decree rendered in a habeas corpus proceeding does not deprive the court in which a subsequent divorce proceeding is brought of jurisdiction to hear and determine child custody.²³¹ Even prior to the 1967 statutory amendments, the North Carolina Supreme Court had held that "the institution of a divorce action in this State ousts the custody jurisdiction previously obtained by a writ of habeas corpus."²³² If there is no North Carolina divorce action pending, child custody may be awarded in a habeas corpus proceeding.²³³

²²⁸ N.C. GEN. STAT. § 50-11 (Supp. 1969).

²²⁹ N.C. GEN. STAT. § 50-13.5(f) (1966) provides in part:

If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action.

See *In re King*, 3 N.C. App. 466, 165 S.E.2d 60 (1969), in which this statute was applied.

²³⁰ *Stanback v. Stanback*, 266 N.C. 72, 145 S.E.2d 332 (1965).

²³¹ *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E.2d 324 (1967).

²³² *In re Sauls*, 270 N.C. 180, 154 S.E.2d 327 (1967).

²³³ *Id.* at 186, 154 S.E.2d at 332. The court said:

We are constrained to believe that the legislature did not intend habeas corpus under G.S. 17-39.1 to be used to determine custody disputes between parents divorced in North Carolina or between whom a divorce action is pending, but that this section provides an alternative remedy (to be used in the judge's discretion) in other cases.

Id. Among the court's examples of "other cases" were:

In re Craigo, 266 N.C. 92, 145 S.E.2d 376 (custody of the children of contending parents divorced outside of North Carolina awarded to the maternal grandparents); *In re Skipper*, 261 N.C. 592, 135 S.E.2d 671 (dispute over children in North Carolina between parents with divorce

The basic rule of jurisdiction in custody proceedings has been that if the child is physically present in the state, the court has jurisdiction to determine and award custody.²³⁴ This power is carried forward into the 1967 statute by the provision that "[t]he courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child when: (a) the minor child . . . is physically present in this state. . . ."²³⁵ Moreover, the pendency in another state of a suit by one of the parents for divorce, custody, and support does not deprive North Carolina courts of habeas corpus jurisdiction to determine the right to custody if the child is within the state.²³⁶

The exercise of jurisdiction to award custody based on the physical presence of the child alone is not binding as an in personam judgment against a nonresident parent who did not appear. The United States Supreme Court has denied that there is in personam jurisdiction in these circumstances, and North Carolina has expressly followed this rule.²³⁷

Not infrequently there has been a previous custody decree in another

action pending in South Carolina); *Lennon v. Lennon*, 252 N.C. 659, 114 S.E.2d 571 (dispute between parents, one a resident of North Carolina, the other a nonresident divorced in Nevada).

Id. at 185, 154 S.E.2d at 332. See also *In re Herring*, 268 N.C. 434, 150 S.E.2d 775 (1966).

²³⁴ N.C. GEN. STAT. § 17-39.1 (1965) in pertinent part provides:

[A]ny superior court judge . . . may, in his discretion, issue a writ of habeas corpus requiring that the body of any minor child whose custody is in dispute be brought before him. . . . [T]he judge may award the . . . custody of the child to such person . . . as will . . . best promote the interest and welfare of said child.

It is not necessary that the child be domiciled in North Carolina. Presence alone is enough. *Holmes v. Sanders*, 246 N.C. 200, 97 S.E.2d 683 (1957). *In re Biggers*, 228 N.C. 743, 47 S.E.2d 32 (1948), indicates that if the children are not within the state the court is without jurisdiction to award custody.

²³⁵ N.C. GEN. STAT. § 50-13.5(c)(2)(a) (Supp. 1969).

²³⁶ *In re Skipper*, 261 N.C. 592, 135 S.E.2d 671 (1964).

²³⁷ *May v. Anderson*, 345 U.S. 528, 533-34 (1953). In *Lennon v. Lennon*, 252 N.C. 659, 667, 114 S.E.2d 571, 576 (1960), the children then being present in North Carolina, the court held:

In view of the fact that the plaintiff herein was not personally served with summons in the State of Nevada and did not appear in said court in person or by attorney, based on the decision of the Supreme Court of the United States in *May v. Anderson* . . . we hold that the courts of North Carolina are not bound by the custody decree entered in the Nevada court and that the court below had jurisdiction to determine the custody of the children involved in the controversy.

However, service of notice of a custody motion on an attorney of record in a divorce proceeding where a personal appearance was made "is as valid as if served on the party himself." *Weddington v. Weddington*, 243 N.C. 702, 704, 92 S.E.2d 71, 73 (1958).

state, the children are in North Carolina, and its courts are petitioned to change the custody prescribed by the foreign decree. A landmark case of this type was *Kovacs v. Brewer*,²³⁸ in which it was originally held that a New York decree awarding custody of a child residing in North Carolina to her mother, who was domiciled in New York, was not entitled to full faith and credit even though the North Carolina father had appeared at the custody hearing in New York. The United States Supreme Court granted certiorari and held that "a custody decree is not *res judicata* in New York if changed circumstances call for a different arrangement to protect the child's health and welfare." The judgment was vacated and remanded "to the North Carolina courts for clarification, and, if they have not already so decided, so they may have an opportunity to determine the issue of changed circumstances."²³⁹ Death of the father before further proceedings in North Carolina mooted both the litigation and the controversy, and the child was voluntarily surrendered to the mother.²⁴⁰

In *Kovacs*, the United States Supreme Court clearly required a finding of change of circumstance before it would sanction the altering of a custody decree of another state. Later North Carolina Supreme Court cases have recognized the necessity for findings of change of circumstance before the provisions of an earlier custody decree in another state may be set aside.²⁴¹ The same rule is applicable in a wholly domestic setting²⁴² and applies regardless of whether the previous custody decree was entered by consent of the parties.²⁴³ One North Carolina Court of Appeals case has held that, in a motion to modify a custody order, it is not necessary to allege change of circumstances although a finding of such change would be required before the motion could be granted.²⁴⁴ Query whether in view of *Kovacs* proof without pleading, or amending the pleading to include appropriate allegations, would be permitted in a proceeding seeking modification of a custody order issued in another state.

A word should be said regarding the situation in which the child is

²³⁸ 245 N.C. 630, 97 S.E.2d 96 (1957).

²³⁹ *Kovacs v. Brewer*, 356 U.S. 604, 608 (1958). See also *Halvey v. Halvey*, 330 U.S. 610 (1947).

²⁴⁰ *Kovacs v. Brewer*, 248 N.C. 742, 104 S.E.2d 882 (1958).

²⁴¹ *In re Marloe*, 268 N.C. 458, 146 S.E.2d 441 (1966), noted in 45 N.C.L. Rev. 848 (1967); *In re Craigo*, 266 N.C. 92, 145 S.E.2d 376 (1965), noted in 44 N.C.L. Rev. 930 (1966).

²⁴² The authorities are collected in *Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E.2d 506 (1969). See also *Gustafson v. Gustafson*, 272 N.C. 452, 158 S.E.2d 619 (1968); *In re Herring*, 268 N.C. 434, 150 S.E.2d 775 (1966).

²⁴³ *Zande v. Zande*, 3 N.C. App. 149, 164 S.E.2d 523 (1968).

²⁴⁴ *Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E.2d 506 (1969).

either present in this state or absent from it by reason of forceful seizure by a parent or a third person. The rule is still the same. The court may exercise jurisdiction if the child is present. This rule was strikingly illustrated by *In re Craigo*.²⁴⁵ A mother and father with two small children separated in late 1963. The mother and a man whom she later married took the children to Reno, Nevada. The father and the maternal grandparents went to Reno and brought the children to North Carolina where they lived with the grandparents until July, 1964. The father then took the children to his residence in Georgia, commenced a divorce action, asked for custody of the children, and was awarded temporary custody by a Georgia superior court order expressly indicating that it was not an adjudication on the merits. Shortly thereafter the father learned that the mother had obtained an absolute divorce in Florida and that the decree contained no custody provision. The father took no further action in his pending divorce action, married again, and settled on a farm near Ellijay, Georgia. Nine days later the mother and her new husband went to the home of the father and in his absence forcibly took the children and brought them to North Carolina. Soon the maternal grandparents petitioned for habeas corpus to have custody awarded to them. The father intervened, contending that the Georgia custody decree was binding on the North Carolina courts.

After holding that under the circumstances North Carolina courts had jurisdiction over the children and the parents, the court rejected the father's contention:

The constitutional provision, Article IV, Section 1, requiring full faith and credit to be given to judicial proceedings in sister States does not require North Carolina to treat as final and conclusive an order of a sister State awarding custody of a minor when the Courts of the State making the award can subsequently modify the order or decree.²⁴⁶

The court cited authority to the effect that under Georgia law the prior order was interlocutory. (It would seem that no custody decree ever becomes final in the sense that it may not subsequently be altered upon proof of change of material circumstances.) In *Craigo*, the court approved the trial court's findings that the grandparents were proper custodians because neither parent was suitable. It did not say whether there was

²⁴⁵ 266 N.C. 92, 145 S.E.2d 376 (1965).

²⁴⁶ *Id.* at 95, 145 S.E.2d at 378.

evidence of change of circumstance occurring subsequent to the Georgia decree, nor whether findings to this effect were necessary to comply with the full faith and credit clause.

If the child is absent from the state, even though bodily carried away, and there is no in personam jurisdiction of the actual custodian, it has been held that the court is without jurisdiction to award custody.²⁴⁷ It has also been held that if both parents are before the court, it has jurisdiction even if the child is outside the state because the court may rely on its in personam power.²⁴⁸ The true principle would seem to be that only if the court has in personam jurisdiction over the actual custodian, whether he be a parent or someone else, may it award custody of a child who is outside the state.

The kidnapping of a child by a parent is not a criminal offense under federal law²⁴⁹ and until 1969 was not a crime in North Carolina.²⁵⁰ These circumstances and the exercise of jurisdiction by the courts when the child is present put a premium on self-help and, in the words of Justice Jackson, seems "to reduce the law of custody to a rule of seize-and-run."²⁵¹ The countervailing factor is that if unfortunate children of broken homes are present, courts from a sense of compassion seek to do whatever seems to offer promise of improving the children's lot. As a North Carolina court has said, "The polar star for determining the custody of children is what serves the best interests of the children."²⁵² This attitude even extends to the appellate court's disregarding the failure of counsel either to docket the appeal on time or to file a brief and proceeding to review the stenographic transcript of the custody hearing on the merits, "because the duty is constant upon the courts to give to children subject to their jurisdiction such oversight and control as will be conducive to the welfare of the child and to the best interests of the State."²⁵³

In 1969 the North Carolina General Assembly made it a felony, punishable by up to three years imprisonment, "for any person with the intent to violate [the custody order of a North Carolina court] to take or trans-

²⁴⁷ *Weddington v. Weddington*, 243 N.C. 702, 92 S.E.2d 71 (1956).

²⁴⁸ *Romano v. Romano*, 266 N.C. 551, 146 S.E.2d 821 (1966); *Weddington v. Weddington*, 243 N.C. 702, 92 S.E.2d 71 (1956); *Speck v. Speck*, 5 N.C. App. 296, 168 S.E.2d 672 (1969).

²⁴⁹ 18 U.S.C. 1201 (1964).

²⁵⁰ Compare N.C. GEN. STAT. § 14-39 (1969) with N.C. GEN. STAT. § 14-320.1 (1969).

²⁵¹ *May v. Anderson*, 345 U.S. 528, 542 (1953) (dissenting opinion).

²⁵² *In re Owenby*, 3 N.C. App. 53, 54, 164 S.E.2d 55, 56 (1968).

²⁵³ *In re Burchette*, 3 N.C. App. 575, 578, 165 S.E.2d 564, 566 (1969).

port, or cause to be taken or transported, any such child from any point within this State to any point outside the limits of this State or to keep any such child outside the limits of this State."²⁵⁴ This Act does not apply to the forcible removal of a child from any other state in violation of a custody order of a court of North Carolina or of any other state. Thus, without violating the statute, a parent or his agent may still forcibly bring a child into North Carolina in disobedience of an existing custody award and then seek a North Carolina custody order. Moreover, a parent may violate with penal impunity a North Carolina custody decree by abducting a child from any point in the state and taking him to any other point in North Carolina. The removal of a child from North Carolina before any domestic custody award has been made is not prohibited even though a petition for custody is then pending. The penal statute may have some deterrent effect, but it falls far short of prohibiting the "rule of seize-and-run" in custody disputes.

A recent case from the court of appeals, *Rothman v. Rothman*,²⁵⁵ concisely collects much of the learning applicable to interstate custody disputes. Plaintiff wife and defendant husband were residents of Virginia in April 1969, when the husband obtained a valid Virginia divorce from bed and board and temporary custody of an infant son. Both parties had appeared personally. In March 1969, the wife obtained court permission to leave Virginia temporarily and to take the infant with her to her parents' home in North Carolina on condition that they return for a scheduled hearing. The wife failed to return and was found in contempt, and the Virginia court entered the divorce and custody decree. In early May the husband came to North Carolina to claim the child and was then served with the wife's North Carolina custody petition. The husband countered with a North Carolina habeas corpus petition, and these proceedings were consolidated. The district court after a hearing awarded custody to the wife. The appellate court found that the evidence did not support the finding of change of circumstances sufficient to warrant modifying the Virginia decree, reversed, and upheld the father's custody in accordance with the Virginia decree. The court held that (1) the physical presence of the child gave the North Carolina court jurisdiction to modify the Virginia decree; (2) the Virginia decree, though subject to modification in Virginia, was entitled to full faith and credit in North Carolina courts absent proof of subsequent change of circumstances with

²⁵⁴ N.C. GEN. STAT. § 14-320.1 (1969).

²⁵⁵ 6 N.C. App. 401, 170 S.E.2d 140 (1969).

respect to custody; and (3) the doctrine of *res judicata* barred relitigation of custody issues as they existed on the date of the Virginia decree.

A flexible approach to custody jurisdiction is certainly the order of the day.²⁵⁶ A co-operative and child-welfare-centered exercise of custody jurisdiction in multistate situations is reflected in the 1967 North Carolina statutory provisions.²⁵⁷

²⁵⁶ See *Sampsel v. Superior Ct.*, 32 Cal. 2d 763, 197 P.2d 739 (1948). Former Chief Justice Traynor wrote:

There is, of course, no question that the courts of a particular state have jurisdiction to determine the child's custody if the court has jurisdiction in personam over both parents, and the child is both physically present and domiciled within the state All the basic elements in each of the foregoing theories are present. Difficulties have been encountered, however, when one or more of these elements are lacking.

. . . It would, however, be no solution of the problem to require all these elements to be present before a court could acquire jurisdiction. Unfortunately cases will arise where one or two elements are lacking, and some court must have jurisdiction in the interest of the child to make proper provision for its custody. . . . The principal cases and most of the secondary authorities have been concerned less with the question whether a court has jurisdiction than with the question whether the courts of other states are bound by the particular decision, when that jurisdiction has been exercised. The respective theories are based on the assumption that in order to achieve finality in this matter one court at one given time must have an exclusive right to determine the issue. "From a standpoint of expediency and of achieving socially desirable ends, there seems to be only one argument in favor of confining jurisdiction to a single state; that it will produce stability and discourage the crossing of state lines to avoid the effect of unpalatable custody decrees." . . . It is doubtful, however, whether the best interest of the child, the paramount consideration in custody proceedings, is served thereby.

. . . In the interest of the child, there is no reason why the state where the child is actually living may not have jurisdiction to act to protect the child's welfare, and there is likewise no reason why other states should not also have jurisdiction

Thus, if the child is living in one state but is domiciled in another, the courts of both states may have jurisdiction over the question of its custody. It does not follow, however, that the courts of both states will exercise that jurisdiction and reach conflicting results. The courts of one state may determine that the other state has a more substantial interest in the child and leave the matter to be settled there. On the other hand, if the jurisdiction of one state has been exercised over the child, there is no reason why, if the welfare of the particular child is a matter of real concern to the courts of another state, those courts may not also have jurisdiction, which might be exercised in the interest of the child "with respectful consideration to the prior determination of other courts similarly situated"

Id. at 777-80, 197 P.2d at 749-50.

²⁵⁷ The pertinent portions of N.C. GEN. STAT. § 50-13.5(c) (Supp. 1969) read:

(5) If at any time a court of this State having jurisdiction of an action

Separation Agreements

Under North Carolina statutory law²⁵⁸ a separation agreement is void if it does not contain a certificate by the certifying officer that he has made a private examination of the wife. Even the wife may not assert the validity of a separation agreement defective in this respect.²⁵⁹ The extraterritorial effect of this statute was raised in *Davis v. Davis*,²⁶⁰ which presented the question of whether a separation agreement executed in Florida prior to the wife's return to North Carolina to live is enforceable in this state in the wife's action for alimony without divorce when the contract, though valid under Florida law, did not comply with the North Carolina requirements. The trial court answered this question in the affirmative. The

or proceeding for the custody of a minor child finds as a fact that a court in another state has assumed jurisdiction to determine the matter, and that the best interests of the child and the parties would be served by having the matter disposed of in that jurisdiction, the court of this State may, in its discretion, refuse to exercise jurisdiction, and dismiss the action or proceeding or may retain jurisdiction and enter such orders from time to time as the interest of the child may require.

(6) If at any time a court of this State having jurisdiction of an action or proceeding for the custody of a minor child finds as a fact that it would not be in the best interests of the child, or that it would work substantial injustice, for the action or proceeding to be tried in a court of this State, and that jurisdiction to determine the matter has not been assumed by a court in another state, the judge, on motion of any party, may enter an order to stay further proceedings in the action in this State. A moving party under this subdivision must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial. The court may retain jurisdiction of the matter for such time and upon such terms as it provides in its order.

N.C. GEN. STAT. § 50-13.7(b) (Supp. 1969) provides:

When an order for custody or support, or both, of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support or custody which modifies or supersedes such order for custody or support.

²⁵⁸ N.C. GEN. STAT. § 52-6 (1966).

²⁵⁹ *Trammell v. Trammell*, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

Defendant insists that the purported deed of separation is void for the reason that the certifying officer did not provide in her certificate that the plaintiff was privately examined; and being void, the trial court erred in permitting it to be introduced in evidence.

...

... The purported deed of separation, without a certificate meeting the requirements of G.S. 52-6 and G.S. 47-39, is void and, over defendant's objection, should not have been allowed in evidence.

Id. at 168-69, 162 S.E.2d at 606-07.

²⁶⁰ 269 N.C. 120, 152 S.E.2d 306 (1967).

supreme court reversed and remanded with a number of interesting observations.

The court noted at the outset that since the agreement was signed in Florida when plaintiff wife and defendant husband were both residents there, its validity and construction were to be determined by the law of Florida. The court applied the general rule that a contract is to be construed according to the law of the place in which it is made. It then recognized decisions dealing with contracts to be performed in another state and holding that the law of the place of performance governs generally as to matters relating to performance. The court declined to follow these cases, however, because it found no authority to apply the doctrine to a separation agreement. Pointing out that while the agreement in question implied that the wife intended to leave Florida, the court observed that she was not required to do so.

It would seem that since the agreement was binding on plaintiff under Florida law, her request for an increase in child support would have to be denied. The court went on, however, to consider plaintiff's contention that the agreement could not be enforced in this state, despite its validity under the applicable law of Florida, because it violated North Carolina's public policy. The court said that while an agreement like the one at issue would not be rejected as void solely because of failure to comply with the privity examination provision, it would be set aside if it was factually established that it was unreasonable or injurious to the wife. After noting that the burden of proof is on the party attacking the validity of such agreement, the court remanded the case with the following instructions:

If it be found as a fact upon competent evidence that the agreement when executed was unreasonable or injurious to the wife, then it will not be recognized as valid and enforceable in this state. If it be found as a fact that it was not unreasonable or injurious to the wife, it will be recognized as valid and enforceable as if in full compliance with the North Carolina statute. The settled public policy of North Carolina is concerned with substance rather than form.²⁶¹

The court pointed out, as "worthy of exploration by counsel prior to the next hearing," that Florida law permits modification of the amount of payment for the support of the wife provided in a separation agree-

²⁶¹ *Id.* at 126, 152 S.E.2d at 310.

ment. It also noted that in North Carolina separation agreements are not final as to the amount to be provided for the support and education of minor children.

CONCLUSION

Many basic choice of law problems have arisen in North Carolina practice, have been adjudicated, and appear to be well-settled. Others, particularly those evolving from recent statutory enactments in the conflicts sphere, will necessitate the development of new jurisprudence. In some of these areas the courts will have broad options of decision, and imaginative advocacy may be rewarding. Considering the intricate phantasmagoria that comprises the choice of law complex, it would be naive to forecast dogmatically what the future action of either the courts or the legislature may be. These problems lend themselves not so much to immutable solutions as to pragmatic adjustments of clashing interests in a constantly changing society.