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CONTEMPORARY PROBLEMS IN CONFLICT OF LAWS

JURISDICTION BY STATUTE

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PART I

INTRODUCTION

The circumstances under which a court may exercise its "personal jurisdiction" are dealt with so commonly in the procedural codes that courts quite generally consider that power to be strictly limited by statute. Unfortunately, however, both for the simplicity of the problem and for a fully developed rationale providing a pattern or framework of rules assuring the "most efficient and just" administration of justice possible, piece-meal and fragmentary legislation¹ broadening the judicial power to exercise such jurisdiction has been the rule rather than the exception.² And closely related rules vitally bearing on effective judicial administration often do not appear in the codes at all.³

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¹ Such legislation often contains a dual restriction on its scope, limited both by subject matter and by the status of the plaintiff. See, e.g., *Conn. Gen. Stat. Rev.* § 33-411(c) (1958), limiting substitute service to a foreign corporation, in favor of a local resident, on the enumerated causes.

² Traditional professional conservatism has contributed at least substantially to this slowness in broadening substituted service as is illustrated by Montana's experience. See Syverud, "Substituted Service on Domiciliary by Notice Outside the State," 2 *Mont. L. Rev.* 112 (1941). Twenty-two years ago, it was pointed out that the wording of Montana's Code of Civil Procedure providing for substituted service (borrowed from California shortly after Montana's statehood) was such that it could very reasonably be interpreted as authorizing substituted service in every case where it was constitutionally permissible. But if any practitioner in Montana ever argued for that construction in a court, the issue was never taken to the supreme court. Recently, some courts have adopted such a flexible rule for corporations. See, e.g., *Henry R. Jahn & Son, Inc. v. Superior Court*, 49 Cal. 2d 855, 323 P.2d 437 (1958).

³ Examples of these are dismissal on the ground of fraudulent or coercive service, and dismissal for *forum non conveniens*.

Recently, however, a number of "comprehensive codes" have been enacted, attempting to deal generally and broadly with the subject, and at the same time giving effect to *International Shoe Co. v. Washington*⁴ and *McGee v. International Life Insurance Co.*,⁵ the modern United States Supreme Court decisions greatly enlarging the constitutionally permissible grounds for exercising such jurisdiction. This paper will consider what should be included in an "adequate" process statute and how the current "comprehensive statutes" compare with such an "ideal" statute. The study is divided into two parts: 1. An examination of the present constitutional limitations on the exercise of judicial jurisdiction; 2. A consideration of cognate matters which are so closely related to the general question of when a court *can* or *should* exercise jurisdiction that either they should be dealt with directly in a single act, or at least should be carefully examined in the context of such act. Part I, an analysis of the factors which appear to determine the present limits of constitutionally permissible "judicial jurisdiction" appears in this Symposium, and is devoted largely to an interpretation of some of the less obvious criteria which the United States Supreme Court has currently provided for measuring constitutional limits. Part II critically examines related matters, raising the question of whether they should or should not be included in a completely articulated statute covering these procedures. It will be published in another Review.⁶

Interest in effective legislation in this area has developed sufficiently that, in 1962, the Commissioners on Uniform State Laws approved a Uniform Act which includes our present subject.⁷ Its provisions regulating the vesting of judicial jurisdiction in a particular court over a suit will be used as a model, and will be compared with three very recent "comprehensive" codes enacted by Illinois,⁸ Wisconsin⁹ and Montana¹⁰ respectively.

⁴ 326 U.S. 310 (1945).

⁵ 355 U.S. 220 (1957).

⁶ It will appear in 24 Mont. L. Rev. — (1963).

⁷ "Uniform Interstate and International Procedure Act," approved at the Annual Conference, July 30-August 4, 1962, and approved by the American Bar Association, February 4, 1963.

⁸ Ill. Ann. Stat. ch. 110, § 17 (Smith-Hurd 1956).

⁹ Wis. Stat. Ann. § 262.05 (Supp. 1963).

¹⁰ Mont. Rev. Codes Ann. § 93-2702-2(B) (Rule 4) (Supp. 1961). Laws of 1961, Ch. 208, repealed much of Montana's existing Civil Procedure Code, enacting in its stead, sections modelled on the Federal Rules of Civil Procedure (with some modifications, of course). The expanded grounds for exercising personal jurisdiction were incorporated from Federal Rule 4.

UNIFORM ACT

The Uniform Act includes several other topics in addition to "substituted service."¹¹ But our interest lies in Articles I and II, dealing with that subject. Article I enumerates the various grounds on which substituted service may be made, under the title "Bases of Personal Jurisdiction Authorizing Service Outside the State."¹² Article II deals with the manner of such service and those qualifying to serve process.

The Uniform Act authorizes substituted service both generally and specially. It subjects to personal jurisdiction generally any defendant domiciled in or maintaining a principal business within the forum,¹³ as do the Wisconsin¹⁴ and the Illinois¹⁵ Codes. However, Montana's new Code fails to authorize substituted service on the basis simply of domiciliation, and there does not appear to be any other Code section so authorizing. The Uniform Act, however, does not expressly authorize compulsive personal service within the forum state. Very possibly this was omitted because the expressed scope of this Act is "interstate and international." But it does contain a section expressly providing that "a court may exercise jurisdiction on any other basis provided by law."¹⁶ All three states, Wisconsin,¹⁷ Illinois¹⁸ and Montana,¹⁹ include an express provision for compulsive local personal service.

¹¹ Uniform Interstate and International Procedure Act, approved by National Conference, Summer, 1962; by American Bar Association, February, 1963. In addition to dealing extensively with several alternative methods for serving abroad, Arts. II, III, IV, and V enlarge the variety of methods for securing testimony and other evidence abroad; assures the fullest assistance possible to foreign tribunals and litigants; and implements fully methods for the determination of foreign law, and the proving of official foreign records. In popular current language, it maximizes "options" for "getting the job done"—a remarkable advance over traditional restrictive approaches. In short, it takes an "engineering" approach of authorizing and utilizing every *means* possible to achieve the given "ends" sought in these areas. In so doing, it is drafted to supplant the Uniform Foreign Depositions Act, the Uniform Judicial Notice of Foreign Law Act, and the Uniform Proof of Statutes Act. See Commissioners' Prefatory Note 3.

¹² Art. I was added, almost as an afterthought, late in May 1962 after the remainder of the Act had received official approvals. It replaces the Uniform Extra-Territorial Process Act, then in its third draft, which had been discussed in the 1961 meeting of the Commissioners on Uniform State Laws. In its section 3, that act had dealt very narrowly and restrictively with "service of process" under the Act.

¹³ Uniform Interstate and International Procedure Act, § 1.02.

¹⁴ Wis. Stat. Ann. § 262.05(1) (Supp. 1963).

¹⁵ Ill. Ann. Stat. ch. 110, § 16(1) (Smith-Hurd 1956).

¹⁶ Uniform Interstate and International Procedure Act, §§ 1.06, 6.01.

¹⁷ Wis. Stat. Ann. § 262.05(1) (Supp. 1963).

¹⁸ Ill. Ann. Stat. ch. 110, § 13.1(2) (Smith-Hurd 1956).

¹⁹ Mont. Rev. Codes Ann. § 93-2702-2 B(1) (Supp. 1961).

Although some of the various bases supporting "personal jurisdiction" by substituted service are stated more narrowly than in some similar state statutes recently enacted, Section 1.03(a) of the Uniform Interstate and International Procedure Act may be cited as representative of the current statutes broadening "personal jurisdiction based upon conduct," departing from the strict rule of *Pennoyer v. Neff*. It provides that:

A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a (cause of action) (claim for relief) arising from the person's:

- (1) transacting any business in this state;
- (2) contracting to supply services or things in this state;
- (3) causing tortious injury by an act or omission in this state;
- (4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct or derives substantial revenues from goods consumed or services rendered in this state;
- (5) having an interest in, using, or possessing real property in this state; or
- (6) contracting to insure any person, property or risk located within this state at the time of contracting.

Understandably, a "Uniform" act, drafted for maximum state acceptance, refrains from adopting the more extreme statements of rules authorizing the exercise of personal jurisdiction. Nevertheless, each subheading is taken from or is framed upon an existing piece of state legislation. An editorial note states that Illinois provided the model for clause "1"; Michigan for "2"; Maine, Minnesota, Vermont, and Illinois for "3";²⁰ and Wisconsin for "4." Clauses "5" and "6" are found in several existing statutes. Clause "6" now also is frequently found in substance in insurance regulatory codes. Though drafted earlier, Montana's very recent Civil Procedure Revision adopts clauses "1" and "2" in almost exactly the same form, though not in the same order.

One provision found in at least two of the new "comprehensive" process statutes, and included in the "Extra Territorial Process Act" (merged in the present "interstate . . . Procedure Act")²¹ is not

²⁰ Actually, the Uniform Act often is stated much more broadly than the statutory model cited. *E.g.*, Minnesota's statute relied on, actually limits suits thereunder to Minnesota resident plaintiffs against a foreign corporate defendant. Minn. Stat. Ann. § 303.13 (1958).

²¹ Wis. Stat. Ann. § 262.05(8) (Supp. 1963); Mont. Rev. Codes Ann. § 93-27202 B(1)(f) (Supp. 1961); Uniform Interstate and International Procedure Act, § 2(6).

included in the Uniform Act. It would subject any officer of a locally incorporated corporation to substituted service in a local personal action. The reason given for its omission in the Interstate Act is that it so vitally affects the substantial rights of the stockholders that it "is more appropriate to consider it in the context of the state's policy on this issue as reflected in other statutes directly relating to corporations."²² This hardly is sufficient reason for excluding a provision on it in the Uniform Act. But more on this later.

SCOPE OF PROVISIONS

It now is reasonably clear that "transacting *any* business in this state" is framed deliberately so as no longer to require the "doing of business" in a continuous sense. The Uniform Act itself urges this provision "be given the same expansive interpretation that was intended by the draftsmen of the Illinois Act and has been given by the courts of that state."²³ Indeed a single business transaction authorizes a local court to exercise personal jurisdiction by substituted service. Thus, *International Shoe*, buttressed by *McGee*, is interpreted as stating constitutional limits for all kinds of business transactions—not just for insurance—or for collection of social security taxes.²⁴

It must not be assumed that "contracting to supply services or things" in clause "2" is simply a duplication of clause "1's" "transacting any business" phrase. As worded, it authorizes substituted service in an action brought on a wholly executory foreign contract. Moreover, it clearly so authorizes in an action against a foreign supplier for poor services or defective "things" delivered in the state in many situations which clearly might not involve a "transaction" within the state, as interpreted by some courts. In part, it serves as a hedge against a possibly narrow construction of "transaction."²⁵ So these two sections taken together intend to give the widest practicable scope to substituted service on actions arising out of commercial activity having any substantial connection with the forum.

Clauses "3" and "4" both involve claims based on tortious conduct. In "3," only the causative act *must* occur in the forum, though ordinarily the injury also will occur there. Though clause "4" reaches

²² Uniform Interstate and International Procedure Act, § 1.03, Comment 8.

²³ Uniform Interstate and International Procedure Act, & Commissioners' Prefatory Note 6.

²⁴ Ill. Stat. Ann. ch. 110, § 17 (Smith-Hurd 1962).

²⁵ Clauses (1) and (2) combined should do much to make even less plausible such restrictive decisions as *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956), denying jurisdiction because contact and shipment originated outside of forum.

outside the state to cover a foreign act causing injury in F similarly to clause "2" in the commercial field, it authorizes substituted service *only* provided the foreign defendant already has submitted to the local jurisdiction by independent commercial activity. Though clause "3" originally was drafted more conservatively to require that both the tortious act and the injury occur in the forum, similar to a single "business transaction" under clause "1," as approved, both clauses "3" and "4" are almost identical in coverage with Wisconsin's corresponding sections.²⁶ Montana's single clause dealing with tort injuries limits substituted service to local tort injuries, but regardless of where the act occurred and of whether the defendant has ever submitted himself otherwise to Montana regulation.²⁷

Clause "5" appears in practically all of the "comprehensive" statutes in substance, though Wisconsin's act extends its coverage to include "tangible property" or "any asset" within the state.²⁸ Of course it is not merely jurisdiction over the property asserted here, but rather over personal actions arising out of such ownership, supporting the exercise of *personal* jurisdiction by substituted service.

As mentioned, several states had ventured to subject foreign insurers to substituted service on local claims before *McGee*, but all of the broad acts drafted since that case apparently include a provision such as is contained in the Uniform Act in clause "6."

RELATION TO "CHOICE OF LAW" QUESTION

It has been frequently asserted that the "law of personal jurisdiction" is closely related to the "choice of law problem."²⁹ In a

²⁶ Wis. Stat. Ann., § 262.05(3)(4) (Supp. 1963).

²⁷ Mont. Rev. Codes Ann., § 93-2702-2 B(1)(b) (Supp. 1961). The fact that several of the stated grounds for substituted service may be overlapping, applied to certain facts, is intentional. See Commissioners' Prefatory Note, *supra* note 11, at 6. All this emphasizes an intention to exercise all the personal jurisdiction constitutionally allowed concerning business activities of all kinds, particularly those in which the forum has a substantial interest. Interestingly, this section in the Montana Code formally asserts personal jurisdiction on the basis of *any act*, regardless of where committed, if a tort action therefrom "accrues" *within Montana*.

²⁸ Wis. Stat. Ann., § 262.05(6) (Supp. 1963). The jurisdiction asserted here includes tangible personal property as well as land, and extends to such property in the state *either* when the benefit first arose, *or* when the action is brought; hence, this jurisdiction is very much broader than that found in other statutes under the corresponding section.

²⁹ Black, dissenting in *Hanson v. Denckla*, 357 U.S. 235, 258 (1958): "True, the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations." *Cf.* Warren, *id.* at 253. Ehrenzweig, "The Transient Rule of Personal

recent article, Professor Leflar suggests that, for constitutional purposes at least, the United States Supreme Court may be in the process of "merging" the two. He asks: "Are the limits which the federal due process clause sets on state exercise of judicial jurisdiction gradually coming to be identical with the limits which the same clause sets on state exercise of so-called 'legislative jurisdiction' . . . ?"³⁰ He accepts the phrase "fair play and substantial justice" used in *International Shoe* as providing the "key" to when substituted service is permitted, and submits that it will be satisfied when: 1. The claim involves local elements making it reasonable for plaintiff to prefer local suit; 2. The defendant is the volitional cause of local presence sufficiently to subject him reasonably to local suit; 3. No relevant public interest is disserved by allowing the local suit.³¹

This is a meaningful question, and Leflar's interpretation of "fair play and substantial justice" may seem equally meaningful. But both contain latent ambiguities which must be clarified and resolved before they can bear fruitful solutions.

Part of the ambiguity is resolved in a footnote³² explaining that the suggested "merger" deals exclusively "with jurisdiction based on the fact that the cause of action sued on is itself somehow connected with the state where the suit is brought." But there remains the question of whether Leflar intends to suggest that "judicial jurisdiction" is being expanded constitutionally to become identical with the existing constitutional limitations on "legislative jurisdiction" exemplified in the *Dick*³³ case generally, or, on the other hand intends to say that the broadening of constitutional power limiting "personal jurisdiction" should be equally available to broaden "legislative jurisdiction." The language of the principal quotation, above, strongly suggests the former, but Leflar uses illustrations strongly suggesting the latter. For example, he urges³⁴ that the "place of contracting" rule constitutionally imposed in *Delta & Pine Land Company*,³⁵ should

Jurisdiction: The 'Power' Myth and Forum Conveniens," 65 Yale L.J. 289, 291 (1956): ". . . [A]n example may serve here to illustrate the close though often neglected connection between the laws of jurisdiction and of choice-of-law."

³⁰ Leflar, "The Converging Limits of State Jurisdictional Powers," 9 J. Pub. L. 282 (1960).

³¹ *Id.* at 285-6. Note that, in stating "governmental interest" negatively in number 3, Leflar stresses, or at least encourages the stressing of, the *trial* aspects of the case—the adjudicative institutional interests of the forum rather than *any* legislative interest.

³² *Id.* at 282-3, n.2.

³³ *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

³⁴ Leflar, *supra* note 30, at 284.

³⁵ *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934).

now give way to a more flexible rule. This would broaden very considerably traditional "legislative jurisdiction" rather than using the latter to measure "judicial jurisdiction." On the other hand, his suggestion that any person owing a debt, but not being sure to which of several persons it was due, should be permitted to interplead non-residents at the *debtor's domicile* (apparently even though the opposing parties have no contact with that domicile)³⁶ seems to go beyond current constitutional limitations on *both* legislative and judicial jurisdiction.

But this is not all. Leflar uses additional illustrations contributing further to this ambiguity. He cites divorce, criminal jurisdiction, and workmen's compensation,³⁷ traditionally strictly localized actions, as being highly relevant to his thesis. Apparently, he finds strong evidence in these strictly localized actions of the same "merger" of judicial-legislative jurisdictional limits as he sees in the broadening of the constitutional limits on the exercise of personal jurisdiction. Having described these localized actions, he queries further: "Are the outer boundary lines which the Constitution sets for these two kinds of jurisdiction tending to converge in other case areas also?"³⁸ The noted illustrations, with the above query, poses the question of whether Leflar intends to say merely that, in any case in which a court exercises its personal jurisdiction under *McGee*, it will be permissible for it to apply its own law as a matter of course.³⁹ Or is he saying that he sees a *localizing* process going on generally throughout the conflicts field?⁴⁰

Possibly, what Leflar's suggestion comes to simply is that, in the future, the United States Supreme Court may be expected to apply

³⁶ Leflar, *supra* note 30, at 286-7.

³⁷ *Id.* at 282.

³⁸ *Ibid.*

³⁹ Credibility is given this interpretation of Leflar by the fact that he cites Currie, "Notes on Methods and Objectives in the Conflict of Laws," 8 Duke L.J. 171, 178 (1959), and Ehrenzweig, "The Lex Fori—Basic Rule in the Conflict of Laws," 58 Mich. L. Rev. 637 (1960), both apparently influenced much by Nussbaum, *Principles of Private International Law* 37-9, 94 (1943), wherein he champions what he calls the "homeward trend," raising a strong presumption in favor of "choosing" the forum's own law. Such view is valid—*applied to these particular bases* for substituted service, precisely because the forum exercises jurisdiction to vindicate its substantive interest, therein. For that very reason, they offer no *general* support for the "homeward trend" in conflicts. Cf. Briggs, "The Need for the 'Legislative Jurisdictional Principle' in a Policy Centered Conflict of Laws," 39 Minn. L. Rev. 517, 541-5 (1955).

⁴⁰ The validity of such interpretation of current developments is doubtful. However, an analysis based upon the principle of "institutional affiliation," implemented through a genuinely policy-oriented law, may require more "localizing" of actions than exists in current practice. See Briggs, *supra* note 39.

a single standard of "fair play and substantial justice" to limit both "legislative jurisdiction" and "personal jurisdiction"—*i.e.*, wherever there is one, there is the other. So stated, however, it is very reminiscent of standards suggested forty years ago by Lorenzen,⁴¹ Cavers,⁴² and to an extent, Cook,⁴³ and currently vigorously espoused by Dean Graveson⁴⁴ of the University of London. But such proposition gets not one step beyond the bare statement of an ideal requiring creative legal administration. It was barren of results forty years ago,⁴⁵ and there is no more reason to expect it to bear fruit today, extended to "judicial jurisdiction."

This much is certain, however. The very fact that this enlarged personal jurisdiction is limited strictly to litigation arising out of a "purposeful contact" by the defendant with the forum, respecting which the forum must have at least some "governmental interest," requires the conclusion that the exercise of personal jurisdiction in these special cases is regarded as reasonable precisely because of a substantial "governmental interest," inhering in the forum which it wants to implement and vindicate. Hence, as others have said,⁴⁶ "The 'law of personal jurisdiction' is closely related to the 'choice of law problem'," particularly in this area. From this, it is clear that the "governmental interest" that is significant and that is served by determining what "choice of law" should be made refers to the subject matter of the litigation rather than merely, or in addition to, its procedural interest in a "fair trial" or in relative "trial convenience."⁴⁷ Hence, thus clarified and limited, substance may be given to Leflar's question when it is used to ask the following two additional questions about legislation enlarging personal jurisdictions:

⁴¹ Lorenzen, "Territoriality, Public Policy and the Conflict of Laws," 33 Yale L.J. 736, 748 (1924).

⁴² Cavers, "A Critique of the Choice-of-Law Problems," 47 Harv. L. Rev. 173, 179, 193 (1933).

⁴³ To Cook, the real "touchstone" was not "justice" as such formally, but rather "social convenience," though the former is an element in the latter. See, *e.g.*, Cook, *The Logical and Legal Bases of the Conflict of Laws* 253 (1942). Similarly, "justice" will be a significant ingredient in an "institutionalized" approach, though generally only one of many factors, and generally "derived" from the particular "subject matter" involved in its institutionalized setting.

⁴⁴ Graveson, *The Conflict of Laws* 6-7 (1952).

⁴⁵ A summary supporting this assertion is found in Briggs, *supra* note 39, at 526-9.

⁴⁶ See authorities cited note 29 *supra*.

⁴⁷ In his analysis of the many cases involving the point, Towe finds that "governmental interest" as a requirement for substituted service, beyond its strictly *procedural* interest, has become so attenuated as to be almost nonexistent in several cases. Towe, "Personal Jurisdiction Over Non-Residents and Montana's New Rule 4B," 24 Mont. L. Rev. 1, 15 nn.89, 90 (1962).

1. How generally has this legislation utilized the full limits of constitutional powers recognized by the United States Supreme Court today for purposes of "legislative jurisdiction" to measure the scope of "personal jurisdiction by substituted service"?
2. How much, if any, of this legislation authorizing substituted service has been framed so as to require the conclusion that F intends not only to enlarge its court's "personal jurisdiction," but also intends to create *new* "substantive rights" by applying its own law in situations where traditionally no such right would exist—*i.e.*, in the past, its courts have applied a foreign law?

As to the first question, so long as one's attention is focused on the extent to which these acts enlarge the grounds for substituted service, thus modifying *Pennoyer v. Neff*,⁴⁸ the development in this law seems to be "radical," even extreme. Just as soon, however, as one accepts the premise that substituted service may be permissible, either generally because of some enduring legal relationship or "affiliation" of the defendant with the forum, or specially, because in the particular action he is found reasonably to have submitted to that law and to have expected its protection, it becomes clear that all of these acts to date are most conservative in their handling of the subject. Indeed, a careful reading of each of these varying grounds for substituted service quickly makes clear that they are carefully framed so as to limit substituted service not only to acts of transactions in which the forum has a very substantial governmental interest sufficient fully to warrant it to apply its own law as controlling, but that in most of the situations traditional conflicts doctrine would *require* that its law be applied.

This is true generally of clauses "1," "3," "4" and "5" in the Uniform Act above.⁴⁹ Although clause "3" makes jurisdiction turn on a *local negligent act* rather than local injury, in most cases the injury also will occur in the forum. Moreover, the common law, as defined by the Restatement, recognizes such an "act" as a permissible basis on which to exercise "legislative jurisdiction" by awarding "damages" for any injury, local or foreign,⁵⁰ and there is some developed current

⁴⁸ 95 U.S. 714 (1878).

⁴⁹ See text accompanying notes 11-28 *supra*.

⁵⁰ Restatement, Conflict of Laws §§ 64-65 (1934). The latter section states: "If consequences of an act done in one state occur in another state, each state . . . may exercise legislative jurisdiction. . . ." Restatement (Second), Conflict of Laws § 43f(1)(e), comment *h* (1958), generally confirm. See also Briggs, "Utility of the Jurisdictional Principle in a Policy Centered Conflict of Laws," 6 Vand. L. Rev. 667, 686-7 (1953), and comment thereon in Falconbridge, Conflict of Laws 821-2 (2d ed. 1954).

practice selecting that law as governing.⁵¹ It is particularly interesting to note that under clause "4," although the tort would be governed by the forum's law under the orthodox "place of the tort," the defendant is subjected to substituted service only in those cases in which he is already subject on the basis of "doing some⁵² business" there generally, *i.e.*, where he has identified himself and is "affiliated" with the forum's economic institutions on independent grounds.

That clauses "2" and "6" also deal with situations which are governed by the local "substantive" law is supported by the very considerable volume of common-law authority adopting the rule that the "place of performance" governs both the validity of the contract and the performance thereof.⁵³ Further, the fact that the domicile of the person or the situs of the thing insured has made repeated efforts to assert its controlling interest in these insurance contracts is highly significant. That "insurance contracts" came to be subject to a more restricted choice of law rule, requiring that the law of the "place of contracting" govern the essential validity of such contracts regardless of the "subject matter's" location, resulted from an unduly narrow construction of the United States Constitution by the United States Supreme Court.⁵⁴ But both of these sections contain a common prin-

⁵¹ The choice of law provision in the Federal Tort Claims Act, as construed by a very recent unanimous decision by the United States Supreme Court, dramatically illustrates this practice. In *Richards v. United States*, 369 U.S. 1 (1962), the Court construed the phrase "in accordance with the law of the place where the act or omission occurred" (28 U.S.C. § 1346(b)), to mean that the *whole* law where the *negligent act* occurred, regardless of the location of the injury, should be "chosen." Of course this includes that state's "choice of law rule," traditionally supposed to pose the terrible "renvoi" problem. But the Court stated this analysis will provide a desirable "flexibility," taking into account recent modifying developments in tort choice of law. *Id.* at 11-13. It also supported completely the thesis that the "whole" law of a state with *exclusive* legislative jurisdiction should be included in a reference to it; that there is no difficulty, logical or otherwise, in such practice; and that it is not only desirable, but absolutely necessary, in a policy-centered law. *Briggs, supra* note 50, at 667-673, 697-700; *Briggs, supra* note 39, at 517-21.

⁵² Courts upholding this jurisdiction are likely to recite the fact that the defendant maintains some business connections with the forum, having no connection with the suit, though it need not amount to "doing business." *Green v. Robertshaw-Fulton Controls Co.*, 204 F. Supp. 117 (S.D. Ind. 1962); *Gordon Armstrong Co. v. Superior Court*, 160 Cal. App. 2d 211, 325 P.2d 21 (1958). Uniform Interstate and International Procedure Act, Editorial Comment 7.

⁵³ Classical support for the "place of performance" rule are found in *Hall v. Cordell*, 142 U.S. 116 (1891), and *Pritchard v. Norton*, 106 U.S. 124 (1882), basing it on "presumed intention of the parties." Story gave credence to the rule in *Story, Conflict of Laws* § 280 (1834). See 2 *Beale, Conflict of Laws* 1077-9 (1935). *Cf. Comment*, 2 *Mont. L. Rev.* 74 (1941).

⁵⁴ *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918).

ciple of great importance. They both recognize that the "subject matter" of the contract, whether it be to supply services or "things" or insurance coverage, is the vital element which should be utilized for allocating and measuring governmental interest, rather than the formal contract in these highly important types of transactions. Though technically, in these statutes, this is only for the purpose of authorizing the exercise of "personal jurisdiction" on substituted service, the underlying principle involved here goes a long way in supporting a view advanced by the writer some years ago, that, to determine what law should govern the substantive rights of the parties:

Should not the "subject matter" of the contract determine the "choice of law," rather than the highly formalized and conceptualized doctrines of contract law as such? Are not those doctrines, involving highly conceptualized abstractions altogether too insubstantial to support the highly developed conflicts doctrine expounded by the Restatement—or by the "local law school" for that matter? . . . [T]he "de facto" subject matter, and the fact that it is almost as varied as life itself—at least economic life—has seemed to give no one concern. Few were inclined even to ask the question whether the essential nature of the policy considerations involved might not be greatly affected and might not vary greatly for conflicts purposes according to the variety of that subject matter—for the purpose of determining that some one society and law has a controlling legislative interest in the contract. Of course, it may be insisted that every transaction becoming a contract includes certain "distinctive" de facto elements, occurring so regularly in all contracts as to provide an independent, substantial generalized subject matter for all contracts. These are the series of acts expressing the "will," and implying a "meeting of the minds." But these are precisely the "subject matters" and this is the field most dramatically demonstrating the unsatisfactory character of the "mechanical application" of conflict doctrine. The series of acts involved may occur in "n" number of states, having no "social" significance or relevancy whatever to the states in which they occur, their locus being purely accidental. So, there is especially good reason to ask why the "realists" did not seize upon this field to demonstrate the need for a "sociological" analysis of conflicts. . . . Cook particularly . . . might have been expected to point out the need for a reappraisal of conflicts doctrine, applied particularly to contracts, to give full effect to the interests of that society most substantially affected by the transaction. . . . Yet, when he examines the contracts field as a basis for criticizing the Restatement's formulation of governing law, he simply advances the "intent of the parties" rule as one preferable to the "place of contract" or to the "performance" rules.⁵⁵

⁵⁵ Quoted from an as yet unpublished "Project Outline," entitled "General Theory for 'Conflicts' Based in a Genuine 'Sociology of Law'," Ch. XX, Contracts 48-51 (1958).

On the above analysis⁵⁶ it seems reasonable to conclude that, although Leflar's suggestion (that "due process" controls over judicial jurisdiction and over substantive jurisdiction are "moving toward each other, tending toward identity in their dividing lines between the permissible and the not-permissible") is supported at least superficially by recent developments, it has little present practical value in evaluating the actual current law. Moreover, though it seems likely that *Hartford Accident & Indemnity Corporation v. Delta & Pine Land Company*⁵⁷ would be reversed if it were decided today by the United States Supreme Court as he suggests, his further conclusion that "fair play and substantial justice" will support a demand by a debtor that his foreign claimants be subjected to the personal jurisdiction of the debtor's forum by interpleading them there to determine the rightful claimant,⁵⁸ not only does not meet Leflar's own second criterion for measuring "fair play and substantial justice";⁵⁹ it is not supported by any Supreme Court decision to date. Those claimants ordinarily would have done absolutely nothing to "submit" themselves to the jurisdiction, legislative or judicial, of that state, unless he intends to limit it to a forum having contacts with both claimants. The debtor chooses his own domicil and forum which is assumed to have no interest whatever in the substantive claim itself.

Leflar's conclusion on this interpleader action may result from the giving of too much weight to an emerging factor which he feels is the key in the recent enlargement of substituted service—that plaintiffs have as much justifiable interest in having their claims adjudicated at convenient places as do defendants. (Of course, courts generally always have found a *duty* to entertain suit by a resident. Most of these cases involve resident plaintiffs.) So long as the Supreme Court continues

⁵⁶ If "substituted service" and "choice of law" controlling actions on insurance policies should be determined by the interests protected (*i.e.*, the subject matter), measured by "institutional affiliation," the above statement should help us recognize a serious question arising under the most common form of the statute permitting substituted service on insurance contracts. The Wisconsin statute bases its jurisdiction either on the domiciliation of the insured *when the action arises*, or alternately, when the event insured against occurs in Wisconsin. In the other three, including the Uniform Act (as well as in California's Insurance Code, the forum's interest supporting substitute service is determined as "of the time of the contracting." Without detailing the reasons here, obviously, Wisconsin's statute more realistically protects the "institutional" interests of a state than does the provision found in the other statutes, though all three bases for exercising "personal jurisdiction," stated alternately, *may* be supportable.

⁵⁷ 292 U.S. 143 (1934).

⁵⁸ Leflar, *supra* note 30, at 237.

⁵⁹ *Id.* at 285-6.

to require the forum to have a substantial governmental interest in the transaction involved submitted to it by the defendant's own "purposeful act," this factor will be secondary. Moreover, on the second question in particular, with the possible exception of the insurance field, there is little evidence that the enlarging of substituted service is related in any way to any attempts to "enlarge" or vary traditional substantive rights.

Another current intensive study of the law's development under these substitute service statutes suggests the following criteria for determining whether a defendant can be so subjected to personal jurisdiction: 1. Some local governmental interest (high, manifest, slight); 2. Trial convenience; 3. Purposeful act of the defendant establishing significant contacts with the forum and expecting benefits and protection from its laws with respect thereto.⁶⁰

Without doubt the Supreme Court repeatedly stresses these three factors in its recent leading decisions expanding personal jurisdiction.⁶¹ Though there may be room for a difference of opinion as

⁶⁰ Towe, *supra* note 47, at 13-21. Towe notes the similarity between his "criteria" and those given by the Restatement (Second), Conflict of Laws § 84 and comments (1956). *Id.* at 21-2 n.140. The latter, however, are stated much more generally than are Towe's. *Cf.* Note, "Jurisdiction Over Nonresident Corporations. Based on a Single Act: A New Sole for *International Shoe*," 47 *Geo. L.J.* 342 (1958). Its criteria, (1) a cause of action, based on (2) a single act by a foreign corporation (3) in a "fair" forum, have very limited usefulness in determining the criteria which must be implemented in a *comprehensive* "personal jurisdiction" statute. It greatly overstates "act"; it merely paraphrases the statutes' strict limiting to a *special* jurisdiction; and it buries all the specific concrete problems in the phrases "fair play" and "substantial justice."

⁶¹ Towe's three-fold test succinctly summarizes the specific bases justifying such jurisdiction stated in *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223-4 (1957): 1. *Purposeful act*: "The contract was delivered in California. . . ." 2. *Governmental interest*: "It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. . . ." 3. *Trial convenience*: "These residents would be at a severe disadvantage if they were forced to follow the insurance company. . . . When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof. . . ." On the third criterion, its principal difference from *forum non conveniens* is that it has become part of constitutional doctrine—a characteristic of due process. Towe notes that this was "deemphasized" in *Denckla* but maintains, correctly it seems, that "it is difficult to exclude trial convenience from the minimum contacts test." Towe, *supra* note 47, at 16. In effect Justice Warren said that "trial convenience" standing practically alone is not enough. See particularly, "Developments in the Law—State-Court Jurisdiction," 73 *Harv. L. Rev.* 909, 1011-12 (1960). It suggests that "public interest factors" in *forum non conveniens* are not important in due process. But public interest may be served and implemented through "due process"—especially where that interest relates to "personal rights"; also, greater "inconvenience" may be constitutionally permissible

to whether one of these "factors" is of primary importance with the other two subordinate, whether all three are equally important, or whether the relative importance varies from case to case,⁶² that the Supreme Court considers each of these three relevant seems unquestionable. In any case Mr. Towe's analysis is a very helpful one in understanding the actual decisions to date. *However, any analysis emphasizing "single act or transaction" as the central factor, out of context and without regard to the "institutional affiliation"*⁶³ *of the subject matter of that act or of its possible relation to strong governmental interests located in other states, omits certain vital factors which, though not present in some cases, actually are decisive in others—our thesis for "Part I."*

Perhaps the thesis stated here can best be illustrated by considering the real issues which separate the dissents from the majority opinion in *Hanson v. Denckla*.⁶⁴ It is believed this will establish that major error by competent judges results from assuming that, because the defendant performs "similar acts" in the forum in both, *McGee* should govern *Denckla*—this, in spite of the fact that in *McGee*⁶⁵ the cause of action supposedly involved simply the enforcement of

than a *forum non conveniens* standard; and, relative convenience to the plaintiff is of greater importance than under traditional *forum non conveniens* doctrine.

⁶² Towe, *supra* note 47, at 21.

⁶³ In the phrase "institutional affiliation," the word *affiliation* intends to suggest a close, intimate contact and relationship between a state and the "subject matter" of (i.e., the exact issues in) a cause of action, of a more or less enduring character. *Institutional* stresses the dynamic character of that subject matter—the social, economic and political interests that are tied up in and served by that "subject matter." It also intends to stress the profound importance of dealing with the "subject matter" as an integrated unit. The phrase describes the "key concept" for analyzing conflicts problems generally in terms of a "genuine sociology of law." It includes all that congeries of "intangibles," including rules and regulation and "norms" for its inner order which often go to make up institutional frameworks and processes.

Incidentally, Sunderland used the phrase "affiliating circumstances" to describe the relation of a defendant to a court necessary to support "personal jurisdiction"; Justice Warren used it to describe that relation supporting all forms of judicial jurisdiction, personal and in rem. As used here, "institutional affiliation" supports the exercise of every possible form of jurisdiction, legislative and judicial. A better example could hardly be imagined than the "trust business" and the specific trusts involved in *Denckla*. Compare Sunderland, *The Problem of Jurisdiction, Selected Essays on Constitutional Law 1270, 1272 with* Chief Justice Warren in *Hanson v. Denckla, supra* note 29, at 246.

⁶⁴ *Hanson v. Denckla, supra* note 29, at 257-263.

⁶⁵ *McGee v. Int'l Life Ins. Co., supra* note 61. Of course the forum's interest actually was far more substantial than merely as locus of the "transaction," because the "subject matter" of that contract was "situated" there, making California comparable to Delaware, rather than to Florida, in *Denckla*.

contract rights "*arising*" in *California, the forum*, while in *Denckla*, admittedly the prime "subject matter" of the litigation was "situated" elsewhere. The following analysis is based on a thesis which, when applied to trusts, requires the conclusion that in any case in which a trust is as closely connected to a particular state as was this one to Delaware, that state must be recognized to have as exclusive a jurisdiction thereover as over Delaware land. So, in the following analysis, in an effort to suggest the real grounds for that position and to avoid past unfortunate criticism of the use of the concept of "situs"⁶⁶ applied to this subject matter, the phrase "institutional affiliation" as defined above in note 63 generally will be substituted for "situs."

INSTITUTIONAL LIMITATIONS ON SUBSTITUTED SERVICE

Historical Background

On this analysis, obviously, the "dominant factor" in this case is the fact that all of its issues relate to a "trust," both the corpus of which, and its administration, are "affiliated" exclusively with Delaware and subject exclusively to its laws. All parties assumed that all trust assets were "situated"⁶⁷ in Delaware. The trustees, both in their corporate capacity generally and as the administrators of these particular trusts, were subjected exclusively to Delaware law with respect to the discharge of their trust duties. How, then, can there be any question as to what law should determine the legal consequence of the exercise of the power of appointment by Mrs. Donner? A brief historical summary of the problem will suggest that question's answer.

⁶⁶ Various writers have been caustic in recent years in their criticism of the common judicial practice of describing an "intangible" as if it had a "situs"—treating it as a tangible for this purpose. But the time spent in such criticism could have been devoted much more profitably to an inquiry as to what are the factors in such cases, psychologic and institutional, which influence courts to treat such intangibles in this way. It is believed that the conceptual tool, "institutional affiliation," can help to make that kind of inquiry fruitful.

⁶⁷ *Hanson v. Denckla*, *supra* note 29, at 247. The trust "res" was composed of corporate securities, equally susceptible of being characterized either as "tangible" or "intangible." Justice Warren says that "such assets are intangibles that have no 'physical' location. But their embodiment in documents . . . makes them partake of the nature of tangibles." *Id.* at 247, n.16. These terms explain exactly nothing as to why they are considered located in Delaware. On other issues, they equally readily may be deemed "situated" at the corporate domicil of each issuer. The real reason is that they form the "nexus" of the trust institution affiliated exclusively with the state of Delaware, out of which all the present legal issues arise. So, as in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), whether deemed "tangibles" or "intangibles"—it matters not one jot nor one tittle.

One of the first and most pressing problems facing the new federation of states following the Revolution came from determined efforts by some states to intrude into the territories of other states for the purpose of nullifying or limiting the sovereign interests of those states over residents or subject matters found there. Sometimes state *F*⁶⁸ would assert a power to subject a citizen of state *S* to the personal jurisdiction of *F*'s courts with the object of subjecting him to a strict personal liability for the full amount sued on simply on the strength of his ownership of some kind of property in *F*—often on suits entirely foreign to that ownership.⁶⁹ At other times we have found, and *still find*, courts attempting to expand their “jurisdiction over the *subject matter*” greatly, simply by virtue of an admitted *personal jurisdiction* over some or all of the parties involved, at times buttressed by a determined attempt to *extend* an admitted jurisdiction—such as Florida’s “probate” jurisdiction in *Denckla*—thus proposing to intrude into the exclusive jurisdiction over subject matters of all kinds located exclusively in another state, which, on the basis of reasonable, workable and practical principles of “institutional affiliation” governing the proper allocation and distribution of powers among the states should readily be recognized as subject exclusively to the laws of that state.⁷⁰

⁶⁸ The symbol “F” describes the state first asserting judicial jurisdiction. “S” refers here to the state “impinged” upon. It will become “F-2” when “F-1’s” judgment is put in issue there.

⁶⁹ *Kibbe v. Kibbe*, 1 Kirby 119 (Conn. 1796), seems to be a prime example of this outrageous tendency. In a Massachusetts action, the return recited that the deputy has “attached a handkerchief” of the defendant, and caused to be left a summons at his residence in Connecticut—this to support a personal judgment for a large sum. In a subsequent action thereon in Connecticut, the defendant felt obliged to deny any attachment of any of his property. Though very much aware of its full faith and credit obligations, the Connecticut court declared that this judgment was entitled to no credit whatever. The outrageous situation resulting from this kind of practice is demonstrated in the current judicial practice in Germany. See deVries and Lowenfeld, “Jurisdiction in Personal Actions—A Comparison of Civil Law Views,” 44 Iowa L. Rev. 306, 332-44 (1959).

⁷⁰ In *Briggs*, *supra* note 50, at 679-80, and in *Selected Readings on Conflict of Laws* 198 (1956), the author recognizes and discusses the critical importance that the forum not assert a subject matter jurisdiction it does not have, in the name of an admitted jurisdiction. Hence, the following by Leflar, *supra* note 30, at 286, is very disturbing:

So-called in rem jurisdiction over intangibles such as choses in action, statuses, and heirships in probate has always been more difficult to understand [than intangibles], but it becomes easier to understand once we break away from the false notion that the intangible somehow acquires a physical situs, as a tangible thing does, which supports the exercise of jurisdiction over it, and instead

That the first practice, asserting an unlimited personal jurisdiction over a defendant simply by seizing something allegedly belonging to him, attempts to extend raw power to an area where it does not exist at all and is so arbitrary that it cannot be tolerated by other states, has had to be reasserted at regular intervals ever since the Revolution.⁷¹ The other half of this insidious practice received a degree of respectability by the English decision of *Penn v. Lord Baltimore*.⁷² There may have been a special justification for that court's determination of legal interests in foreign land in that case. Certainly the English court thought so, relying on the assumption that the land lay where there was little developed government or civilization. Further, the issues were between British subjects, both of whom were equally subject to the jurisdiction of the Crown and its instrumentalities, and the territories involved generally were governed by the same laws. Though none of those very sensible considerations have existed in subsequent cases, the decision has been cited time and again as justifying a court of equity, in the exercise of its admitted personal jurisdiction over the parties, to adjudicate interests in foreign land. The gross error of this has been recognized only recently, though in critical decisions the instincts of the United States Supreme Court always have been sound, rejecting the argument that a nonsitus court has any power to adjudicate interests in foreign land, either directly or indirectly.

Nevertheless, the ambiguous character of the "subject matter" over which the court has jurisdiction in an equity suit has continued to beguile and mislead—for some intriguing reason—students of the subject more often than the courts.⁷³ Further, the error involved in the

say that the standard of fair play and substantial justice must be satisfied. . . .

This recognizes that a defendant's interests in intangibles are personal interests not appreciably different in kind, but only in their factual aspects, from personal interests enforced in proceedings classified as in personam, and properly identifies the true question in both types of proceedings as one of whether it is fair and just . . . for the defendant's interests to be adjudicated by a court of the forum which the plaintiff has chosen.

Not only does this statement close the door to understanding either Warren's opinion or the justification for it; to judge the validity of an analysis based on "institutional affiliation," he takes the "key" and throws it away.

⁷¹ Careful examination of our history establishes that *Pennoy v. Neff*, 95 U.S. 714 (1878), was simply a flowering culmination of that struggle, producing rules congenial to stable interstate relationships.

⁷² 1 Ves. Sen. 444, 27 Eng. Rep. 1132 (Ch. 1750).

⁷³ Those writers generally, who rely on "justice" as the touchstone for selecting the applicable law, naturally find a very broad-ranging jurisdiction in equity to render binding decrees. Briggs, *supra* note 39, at 526-29, summarizes these views,

assertion of such power by a foreign court, in actions raising directly and immediately questions of ownership in foreign land, shows up all too often in probate proceedings—the claim to competency here being asserted in the name of the domicil's admitted competence to receive for filing and probate a will of its domiciliaries, as the locus of the "primary administration of the estate." Substantially the same question arose in *Clarke v. Clarke*⁷⁴ as is involved in the *Denckla* case. There, the South Carolina court was faced with the question of whether a certain provision in a will being probated there as the testator's domicil effected an equitable conversion of land in Connecticut. The answer to this question would, in turn, also answer the question of who should take the property. The South Carolina court ruled that the real estate was equitably converted into personalty and directed that it should pass under the will as personal estate rather than as realty.⁷⁵ In categorical language, the United States Supreme Court upheld Connecticut's refusal to give any effect to South Carolina's ruling and order, stressing the complete lack of jurisdiction of the "subject matter," *i.e.*, who should inherit foreign land under the will.⁷⁶

In a modern English case the basic issue was even closer to *Denckla*. In *In re Duke of Wellington*,⁷⁷ the English probate court was faced with the problem of construing and administering two wills executed by the Sixth Duke of Wellington: one covered his large estate in Spain, including much personal property; the other devised his English estate, concluding with a residuary clause. The Spanish will failed completely for want of an heir qualifying under its terms. So the question the English court had to decide was whether the Spanish estate should pass intestate or by devise under the English will's residuary clause.⁷⁸ Immediately it recognized that it must look to Spanish law to determine how Spanish land would devolve under these circumstances⁷⁹ (though it erroneously assumed that it could apply English law to determine who should take the Spanish personal property).⁸⁰

noting their shortcomings. *Cf.* Currie, "Full Faith and Credit to Foreign Land Decrees," 21 U. Chi. L. Rev. 620 (1954).

⁷⁴ 178 U.S. 186 (1900).

⁷⁵ *Clarke v. Clarke*, 46 S.C. 230, 24 S.E. 202 (1896).

⁷⁶ *Clarke v. Clarke*, *supra* note 74, at 191-192.

⁷⁷ *In re Duke of Wellington*, [1947] 1 Ch. 506, *aff'd*, [1948] 1 Ch. 118 (1947).

⁷⁸ *Ibid.*

⁷⁹ *Id.* at 514.

⁸⁰ *Id.* at 513. *Cf.* Falconbridge, *op. cit. supra* note 50, at 192, pointing out that the only court with jurisdiction to adjudicate an estate is the *situs*.

Analysis of Denckla

Justice Warren recognizes and reaffirms, in principle, the doctrine both of *Clarke v. Clarke* and *Duke of Wellington*, recognizing the exclusive jurisdiction of the situs of land. Indeed, he extends their doctrine so as clearly to impose the same limitations on tangible assets of all kinds, when he says that

Authority over the probate and construction of its domiciliary's will, under which the assets might pass, was thought [by Florida] sufficient to confer the requisite jurisdiction. But jurisdiction cannot be predicated upon the contingent role of this Florida will. Whatever the efficacy of a so-called "*in rem*" jurisdiction over assets admittedly passing under a local will, a State acquires no *in rem* jurisdiction to adjudicate the validity of *inter vivos* dispositions simply because its decision might augment an estate passing under a will probated in its courts. *If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the State nor the decedent could claim any affiliation. . . .* For the purpose of jurisdiction *in rem* the maxim that personalty has its situs at the domicile of its owner is a fiction of limited utility. . . . [It] is not a sufficient affiliation with the property upon which to base jurisdiction *in rem*. (Emphasis added.)⁸¹

This goes "double" for property bound up and institutionalized in a foreign trust. This forthright recognition of the limits on the competence of nonsitus courts over tangible property of all kinds is highly significant, though it is quite in line with current developments. It relies on basic propositions that the writer has advocated for many years,⁸² which propositions are implemented in great detail in the current tentative drafts of the *Restatement (Second), Conflict of Laws*.⁸³ For these reasons, the long-range importance of *Denckla*

⁸¹ *Hanson v. Denckla*, 357 U.S. 235, 247-9 (1958).

⁸² See the following studies: Excerpts From "Utility for Solving the 'Renvoi'," Selected Readings on Conflict of Laws 189 (1956); Briggs, *supra* note 39; Briggs, "Renvoi" in the Succession to Tangibles: A False Issue Based on Faulty Analysis," 64 Yale L.J. 195 (1954); Briggs, *supra* note 50; Briggs, "The Jurisdictional-Choice-of-Law Relation in Conflicts Rules," 61 Harv. L. Rev. 1165 (1948); Briggs, "The Dual Relationship of the Rules of Conflict of Laws in the Succession Field," 15 Miss. L.J. 77 (1943).

⁸³ The analysis developed in the articles cited note 82 *supra*, based on a recognition of an exclusive legislative power in one state, requiring that any reference to that law include its "whole" law, is fully articulated in Restatement (Second), Conflict of Laws, Ch. 7, Property (Tent. Draft No. 5, 1959). This analysis extends to all interests, both legal and equitable, and to all forms of tangible property. The Introductory Notes, pages 12-14 and 78-82, detail this rationale. And §§ 293a through 299d apply the same rationale to trust interests—of the greatest significance in evaluating *Denckla*.

very well may be contained in the above quotation, rather than in the supposed limitations which it puts on *International Shoe* and *McGee*.

The fact is that the manner in which the question is raised of whether Florida could render a judgment entitled to full faith and credit in Delaware, or one even valid in Florida, simply by subjecting the Delaware trustees to foreign notice, actually raises a spurious issue. If it be established that Florida had no *in rem* jurisdiction of any kind, what can any form of service on the trustees add to its competence—even compulsive service? Neither the parties nor the court can vest it with a jurisdiction it basically lacks. The Florida rule on “whether the trustee is an indispensable party” cannot even become relevant until it is first vested with a subject matter making that rule relevant; its rule thereon, regulating *Florida* trusts, just has no bearing on this case. If that rule provided that personal notice or mailed notice to the trustee wherever he might be found was sufficient notice, it would be perfectly valid for a local trust and very probably was so framed. Perhaps the Florida court itself recognized this fact; that, by its own conflicts rule, in some way it has to make Florida the state of the trust’s creation. That may well have been its primary reason for torturing the import of the exercise of the power of appointment by calling it a “republication of the original trust instrument in Florida.”⁸⁴ But the institutional affiliation of the trust assets and its administration cannot be so relocated by any such simple twist of the wrist, any more than could land be moved. *Whatever instruments, written agreements, contracts, wills or other documents relating to the trust may be executed, and wherever executed, they must be subordinated to Delaware’s law, not that of any other law—not even that of the settlor’s domicil—in the same way that the validity of contracts to convey land must be controlled by its situs.*⁸⁵

Undoubtedly, Florida has a “substantial interest” by virtue of its being the court of primary jurisdiction and administration. And the

⁸⁴ *Hanson v. Denckla*, 100 So. 2d 378, 382 (Fla. 1956).

⁸⁵ These conclusions are implicit in §§ 293a through 299d, of the Restatement (Second). The Restatement (Second) also makes exactly the same distinction between that law governing the effect of the contract on interests in the land itself, and that governing rights measured by “purely contractual matters,” as was made in, Briggs, “The Jurisdictional-Choice-of-Law Relation in Conflicts Rules,” 61 Harv. L. Rev. 1165, 1183-4 (1948). See Restatement (Second), Introductory Notes, 14: “Suppose that a contract to convey land in state X is entered into in state Y. Here X law, as that of the situs, governs the effect . . . of the contract upon actual interests in the land. . . . On the other hand, the law governing the contract determines what might be called purely contractual matters. . . .” The same generalization may be made concerning instruments relating to interests in a trust, such as in *Denckla*.

subject matter over which it has "jurisdiction" as such court is substantial. Nevertheless, as is often the case, the critical issue in this case is precisely that of what is the scope of the Florida court's "jurisdiction" to apply its own substantive rules in disregard of all other laws, in the name of its probate jurisdiction. Florida assumes that its "laws" govern all issues arising, *e.g.*, "is the trustee an indispensable party?"⁸⁶ Scott apparently is willing to grant that its probate jurisdiction vests it with a competence to bind "personally" all persons subject to its "personal jurisdiction" on all such issues.⁸⁷ Similarly, Warren grants that this probate jurisdiction *might* justify it to "apply its own law" so as to bind the persons made parties to the suit, but insists that it cannot bind the whole world—even though he is fully aware of the *barrenness* of the concept of "unitary administration of the estate."⁸⁸

If these conclusions are sound, Justice Warren might have made the real issues in the case clearer had he pointed out that a Florida decision on whether the trustee was an indispensable party was irrelevant to the case—that it did not lie within Florida's legislative jurisdiction even to frame a rule on that for this particular case; hence its judgment is void for lack of jurisdiction over the issue of ownership in the trust estates.⁸⁹ Instead, the majority formally grants for purposes of argument that Florida's rule on whether the trustee is an indispensable party may control the entire case; that, since Florida law clearly treats the trustee as an indispensable party in *all* adjudications of trust rights by it, and since this trustee has not

⁸⁶ Actually, Justices Warren and Black differed in *Denckla*, as to whether the Florida rule had been clearly established on this point. Compare Warren, *supra* note 81, at 255-6, with Black, *id.* at 261-2.

⁸⁷ Scott, "Comment: Hanson v. Denckla," 72 Harv. L. Rev. 695, 708 (1959).

⁸⁸ Hanson v. Denckla, *supra* note 81, at 254. Even attempts to erase the distinction between "rights in rem" and "rights in personam," by calling all interests in this case "intangibles," as does Douglas, or "personal rights," as does Leflar, ignores completely the basic institutional realities of the case. An English decision, *In re Lorillard*, [1922] 2 Ch. 638, starkly reveals the fatuousness of the idea that the domiciliary court has any kind of "jurisdiction" over the estate as a whole, where found in several countries. It ruled that the ancillary court in England properly exercised its discretion in refusing to remit a considerable balance after local debts to the principal administrator in New York for payment of creditors there who were barred by the English statute of limitations, and paying the balance instead to the English heirs. See also, Dicey, Conflict of Laws 936-38 (Keith 4th ed. 1927), discussing the importance of this case.

⁸⁹ This is the real answer to Black's insistence that the case be remanded to the Florida court for its determination on the issue of "indispensability." Hanson v. Denckla, *supra* note 81, at 261-2.

"submitted" to Florida law by any "purposeful act," Florida cannot acquire personal jurisdiction over him; hence its decree is void.⁹⁰ As suggested above, it is believed that this rationale unnecessarily introduces a specious issue, providing a spurious basis for placing *Denckla* in the line of decisions articulating and limiting *International Shoe* and *McGee*.⁹¹

This is not to say that *Denckla* does not state an important limitation on the "doing of an act" basis for asserting and exercising "personal jurisdiction." Quite to the contrary! Its conclusion that it must be a "purposeful act by the defendant himself" to so subject, and that therefore, *T*, a third person (Mrs. Donner) could not, by moving around from state to state, subject a defendant in a passive relation to *T* to the power of each state to exercise personal jurisdiction over him, is a desirable limitation on the acquiring of jurisdiction by the doing of an act, as a general proposition. It expresses a reasonable limitation, generally consistent with our ideas of what is "fair and reasonable," and probably is institutionally desirable.⁹² However, its real relevance, even for this case, is open to question. Possibly, the Chief Justice chose to find lack of "personal jurisdiction" in order to avoid a decision on whether Florida could choose to apply its own law to the "trust instrument" on the "republication" gambit.⁹³

However, some language in the case also suggests that the Florida judgment may work as an estoppel against those subject to personal jurisdiction. Again, it is very doubtful that the case is an appropriate one for imposing an "estoppel," even on broadened grounds of "res judicata." Such a rule, practically, would vest the Florida court with a jurisdiction to transfer title to foreign tangible⁹⁴ assets in violation and in derogation of the law of their "situs." The want of jurisdiction appears on the face of the record, and no one

⁹⁰ *Id.* at 251-2, 255.

⁹¹ More accurately stated—it places *Denckla* in line with *McGee* correctly, but on

289 U.S. 253 (1933), as interpreted by *rs Corp.*, 68 F.2d 942 (2d Cir. 1934), bits of recognized legislative jurisdiction "act" requirement of "purposeful act" to uch the same standard of reasonableness ion, legislative and judicial, of a foreign

be permitted for "choice-of-law" purposes, jurisdiction. *Hanson v. Denckla*, *supra*

characterization of "tangible" or "intangible"

should be estopped to challenge it in Delaware.⁹⁵ If there is a complete lack of jurisdiction in the Florida court over the trust res and its administration in Delaware as an incident of its probating, construing and administering this will, that fact should be obvious on the face of any resulting judgment; certainly, no parties subjected to the proceedings against their will should be estopped to rely on that voidness in Delaware.⁹⁶

A modern leading Supreme Court decision, cited by Justice Warren, and dealing with this general question, declares that a probate decree of the domiciliary court does not have binding effect on outside personalty "of nonresidents over whom there was no personal jurisdiction."⁹⁷ And, though it may be interpreted as standing for the rule that persons subject to the personal jurisdiction of the court are so bound, it does not say that, (only ruling that those not subject are *not* bound) and no such rule was called for by the case. Indeed, the logic of that case, in which the primary question in issue was "where was the deceased's domicile," would require the conclusion that the only state which can make a binding rule on that issue to govern administration of and succession to chattels is the situs of the chattels—and that inconsistent findings thereon by all other courts are void on their face and may be collaterally attacked at the situs by *any* interested person.⁹⁸

Practical Justification for Exclusive Jurisdiction

But the above conclusions are based on the premise that the "situs" of the property has such a controlling interest in its disposition that it always should have a competence to make its own independent findings—and to refuse, on petition of any interested party, to give any effect to the judgment of foreign courts thereon, as it sees fit to. Is such premise justified?

⁹⁵ Florida made no pretense even, of trying to apply Delaware law; it assumed it was the governing law by the republication. *Hanson v. Denckla*, *supra* note 84, at 382.

⁹⁶ The conclusiveness of a judgment by "estoppel," because subject to the court's personal jurisdiction, generally is based on a *voluntary* submission. Hence, any proposal to extent it to these cases of pure "statutory submission," or even voluntary submission, concerning the court's probate jurisdiction, should be questioned.

⁹⁷ *Riley v. New York Trust Co.*, 315 U.S. 343 (1941); *Hanson v. Denckla*, *supra* note 81, at 249.

⁹⁸ In *Riley*, the estate in issue was Coca-Cola stock. Opposing counsel stipulated that the stock should be deemed "situated" in Delaware, the state of incorporation of the issuer. Delaware was the last state to rule on the location of the testator's domicile. Had it ruled first, surely all other states would be bound thereby. See, *Briggs*, *supra* note 85, at 1169, n.11.

It may be recalled that the first several areas in which the Supreme Court approved the "statutory subjection of nonresidents to substituted service" quite generally were explained as being exceptional situations calling for the exercise of the special police powers of the state. (Of course, some courts try to so limit *McGee* even today.) But it is now generally agreed that this newly developed constitutional power exists "generally" on quite a broad basis—no "special" police power is necessary. But does this accurately describe what has occurred? Does it not more realistically describe the actual factors influencing this development by recognizing the fact that new legislation enlarging substituted service is based on the proposition that the state has a very substantial governmental interest which it is likely to want to assert with respect to practically every socio-economic institution centered in that state? If this is so, should not that state's paramount interest where it is clear, and particularly with respect to those institutional affiliations over which it has an exclusive concern, always be available on behalf of any interested person, even though this limits principles of *res judicata*—subject only to an adjudication in which that state itself has so participated as to bind it? This state interest may thus be given effect by allowing individuals to assert it on due process grounds. This is not new. It always has been recognized that it is a lack of due process for any court to assert power over a subject matter over which it has no jurisdiction. It may be time to reassess recent tendencies to enlarge uncritically *res judicata* so as to bar further inquiry into jurisdiction.⁹⁹

The above assessments of the present law indicate that current trends generally are giving increasing recognition of and effect to the governmental interests of each state; that, as to acts and/or consequences which occur within a state, personal jurisdiction by sub-

⁹⁹ Although the principle of *res judicata* has been extended so as to bar a second adjudication of jurisdiction over some subject matters, it has never been enlarged so as to bar all such adjudications. A finding of jurisdiction to determine interests in foreign land never becomes conclusive. It was expressly excepted in *Stoll v. Gotlieb*, 305 U.S. 165 (1938). Moreover, it appears that any gross or obvious assumption of subject matter jurisdiction does not raise a collateral estoppel. *Kalb v. Feuerstein*, 308 U.S. 433 (1940), appears to maintain that rule. *Duke v. Durfee*, 308 F.2d 209 (8th Cir. 1962), most trenchantly affirms this principle. *Accord*, Restatement, Judgments § 10 (1942); Restatement, Conflict of Laws § 451(2) (1948). Moreover, *Duke* very strongly supports the thesis that the state's interest in such issues properly may be protected by allowing the private parties to continue litigating the issues in a second court, as we suggest. *Id.* at 220. See Boskey and Braucher, "Jurisdiction and Collateral Attack: October Term, 1939," 40 Colum. L. Rev. 1006 (1940), naming numerous "subject matter" jurisdictions, an adjudication on which does not become *res judicata*.

stituted service may be based thereon so long as they are not incidental and subordinate to institutional affiliations of superior importance, subject exclusively to other state(s); but that various important socio-economic-political institutions characteristically are so affiliated exclusively with some one state that acts, transactions and/or conduct of various kinds, though occurring abroad, must be drawn to that legal system generally governing those institutions—to be governed, of course, exclusively by that law. These conclusions raise a serious question whether such “act” properly supports a personal jurisdiction by substitute service. The very least required here is that the forum do the best job it can in applying the “affiliated” law—or alternately, that it dismiss the suit on the issues governed by the foreign law.

This is not to say that the fact that the institution has some casual, incidental or subordinate connection with another state should never be given any effect. But whether it should must be determined by that controlling law.¹⁰⁰ To use the *Denckla* case for illustration, Delaware has exclusive jurisdiction over the regulation and administration and proprietary interests in such trusts as are involved in that case. However, if there is a substantial argument for the view that the law of the settlor's and testator's domicile at death should be taken into account, it should be left to the situs of the trust to make a decision on that issue.

Conflict Avoidance

Moreover, the broad ranging concept of “conflict avoidance” by planning cumulatively supports these conclusions. Thus, the practical argument that the law should be so stated that a settlor could plan his trust estate with certainty as to what law will govern, points unerringly to Delaware in this case, *i.e.*, the state where it was established and left permanently to be administered. The facts strongly suggest that Donner may have left the trust in Delaware because she knew that her exercise of the appointment would be given effect there. Her wishes, on the other hand, would be completely defeated if Florida were allowed to render a binding adjudication thereon. Of course, a trust situs might very reasonably apply *either* its *own* law *or* that of the *domicil* at death, whichever would best give effect to the wishes of

¹⁰⁰ See Briggs, “Utility of the Jurisdictional Principle in a Policy Centered Conflict of Laws,” 6 Vand. L. Rev. 667, 668-674, 697-700. (1953); Briggs, “Renvoi in the Succession to Tangibles: A False Issue Based on Faulty Analysis,” 64 Yale L.J. 195, 214-218 (1954).

the testator—if the situs has a strong policy favoring such a rule—but again, the domicile itself is in no position to so determine.¹⁰¹

Trusts—Testate or Inter Vivos

The above discussion of the principle that the state with which a trust estate is most closely affiliated institutionally must be held to have the sole jurisdiction to determine rights therein, makes no distinction between trusts created by will and those created inter vivos because it is submitted that that principle must govern both types. However, the reasons for such a rule regulating an inter vivos trust are even more compelling. So far as appears from the record, not only was the original trust created inter vivos and administered many years as such, but the power of appointment also should be found to have taken effect immediately, if any effect is given to the obvious wishes and intentions of the settlor. She exercised the appointment by a written instrument in the form of a “deed,” carefully and consciously executed separately from the will she executed the same day. Presumably, that part of the trust res affected by the appointment also was formally transferred immediately to the *two* trustees originally selected by the daughter (mother of the new beneficiaries). If she continued to receive all income for life, the inter vivos appointment and transfer are no less effective.¹⁰²

Critique of Dissents

If this is correct, then Justice Douglas' assertion that Florida has competence here because the “appointment was integrated with the will” just is not correct, and his concession that “one not a party or privy to the Florida proceedings” can separately litigate the right to assets in other states draws the line between the correlative powers of the various states at the wrong place—as does Justice Black. In any case, full recognition of the plenary power of the state of

¹⁰¹ Ironically, in this particular case, the domicile is determined to defeat the effort of the testator, contrary to strongly expressed modern doctrine that that law giving effect to the testator's wishes should be chosen—at least so long as it has any substantial connection with the issues. Cf. Restatement (Second), Conflict of Laws § 295 (1958); Recent Decision, 26 Mich. L. Rev. 694 (1927), noting *Miller v. Douglas*, 192 Wis. 436, 213 N.W. 320 (1927), which selects the law of the situs directly to govern trusts of personal property generally, including testamentary disposition. It observes that the domicile generally governs, but grants that this is at the direction of the situs.

¹⁰² It is most helpful if the legal effect of these transfers be determined at the time they occur; so the law governing at that time must also be clear. The only acceptable law for that purpose is the state of affiliation. The settlor's domicile may change many times before her death.

paramount institutional affiliation, under a rule that all subordinate, collateral acts and transactions, whether local or foreign, are drawn to that same state, tremendously simplifies the entire "choice of law" problem, making it clear that the legislative power of differing states will not vary according to incidental, casual or minor variations in those transactions. Certainly, it is of the utmost importance to be able to determine at once, at the moment of the exercise of the power in many such cases, what law governs; the same law should govern for all purposes as a matter of course. The contact of these subordinate transactions and acts with other states often is accidental, without legal significance, and never with supervening significance.

In interpreting other cases to determine which one should be deemed to control the present decisions and which ones not, serious error results from a failure to give effect to the above analysis. This is dramatically demonstrated by the positions taken by both Justices Douglas and Black in *Denckla*. For example, Justice Black takes the position that "the decision most nearly in point [with *Denckla*] is *Mullane*¹⁰³" Apparently, he concludes that because New York, the situs of a "common trust fund" subject to extensive state regulations and controlling exclusively the scope of the trustees' powers and duties, was allowed to adjudicate the liability of the trustees simply by giving notice to all persons known to have any interest therein by that means most likely to give them notice in fact, Florida must likewise be allowed to exercise the jurisdiction asserted here. From another perspective, it seems almost incredible that any such comparison should be made. In *Mullane*, New York was the state with exclusive power (*i.e.*, the "situs" on the basis of sole institutional affiliation) over the trust and everything drawn to it. Here, it is clear that Jackson intended to say that New York had exclusive jurisdiction to render a final adjudication on the issue of the trustee's liability, without any "personal jurisdiction" over the beneficiaries at all.¹⁰⁴ In this respect,

¹⁰³ Black, dissenting in *Hanson v. Denckla*, *supra* note 81, at 260. *Mullane v. Central Hanover Bank & Trust Co.* *supra* note 67.

¹⁰⁴ Actually, the proceeding was a statutory accounting by the trustees. *Mullane v. Central Hanover Bank & Trust Co.*, *supra* note 67, at 309. The fact that the "common trust fund" is both strictly a creature of statute, subject to the most rigid and detailed administrative regulations, and a resourceful institutional device or tool for the most economical and expeditious administration of small trust accounts, is quickly revealed by a perusal of New York's law authorizing them, N.Y. Banking Law §§ 4, 100c, which includes sixteen detailed regulatory paragraphs, which, for the common trust fund, must be added to many other more general regulations. Sections 8-16 deal with proceedings for determining the fidelity of the trustee and the safety of such investments. They include the requirement that the trustee

New York was exercising the traditional "in rem" or "quasi-in-rem"¹⁰⁵ jurisdiction—though even here, due process imposes an enlarged duty to give notice in fact if possible.¹⁰⁶ In *Denckla*, in contrast, Florida had no such power at all. Delaware's jurisdiction, *not Florida's*, parallels or is analogous to New York's in *Mullane*.¹⁰⁷

Similarly, Douglas cites *Atkinson v. Superior Court*¹⁰⁸ as a controlling precedent for *Denckla*.¹⁰⁹ Apparently, he, too, fails completely to recognize the parallelism in institutional affiliation between California in that case and Delaware in *Denckla*, not between California and Florida as he supposes. Instead, he concludes that simply because the California court found that it had such jurisdiction over the subject matter involved that it could render a binding decision on the issues raised without "personal service" on the named New York trustee, Florida had equal "jurisdiction" without "personal service" on the Delaware trustees. Such conclusion flies squarely in the face of the fundamentally different character in the governmental interests that

periodically file an accounting of its common trust funds and petition for a "settlement of its accounts." This was the proceeding involved in *Mullane*.

The case is pregnant with meaning in that it dramatizes the fact that the process of institutionalizing more and more of our activities rushes on apace; that such institutions are a compound of non-legal "norms for the inner order," of strictly legal norms, and of human elements—all coordinated and integrated so as to achieve determinate ends; that the dynamics of such institutions spring from the motivations, will, desires and resourcefulness of the members manipulating such institution within its established framework of norms—legal and non-legal; and that, as society consciously and deliberately institutionalizes such activities, very commonly such institutionalizing will be identified with some particular socio-political unit supplying the legal norms and determining what pattern of norms will best serve the purposes for which the institution is created. Jackson sensed that what is considered "reasonable" should be determined in considerable part by the needs and capabilities of the institution—he measured the notice requirements accordingly.

¹⁰⁵ Black is not correct in saying, as he does in *Denckla*, *supra* note 81, at 260, that in *Mullane* the court rendered a "personal judgment" in favor of the trustees against the nonresident beneficiaries without local service. *Converse v. Hamilton*, 224 U.S. 243 (1912), in which the Supreme Court recognized a power in the Minnesota court to impose a statutory assessment on foreign stockholders in a local corporation, enforceable at their domicils without "personal jurisdiction," is analogous. The court called it in the nature of a quasi-in-rem proceeding.

¹⁰⁶ *Griffin v. Griffin*, 327 U.S. 220 (1946), rules that though a court has personal jurisdiction of the defendant, it must continue to use that form of notice most likely to inform him in fact, of any further proceedings in the case. *Accord*, *McDonald v. Mabee*, 243 U.S. 90 (1917); *Milliken v. Meyer*, 311 U.S. 457 (1940).

¹⁰⁷ Black just assumes that the Florida court in *Denckla* stands in exactly the same relationship to the primary subject matter as does the New York court in *Mullane*.

¹⁰⁸ 49 Cal. 2d 338, 316 P.2d 960 (1957).

¹⁰⁹ Douglas, dissenting in *Hanson v. Denckla*, *supra* note 81, at 263-4.

California and Florida had in each case. In *Atkinson*, the suits arose out of collective bargaining agreements entered into between California employers and California unions, vitally affecting permanent employment relationships "situated" in California, and involving economic interests (source of the wealth involved) just as permanently situated there. Every "institutional" element was "affiliated" with California.¹¹⁰ So far as appears from the case, California made no attempt to exercise any control whatever over any kind of foreign property; neither does it appear that any rights, powers or duties had as yet "accrued" or matured in the foreign trustee. This suit seeks simply to forestall that, by asking for effective forms of relief available wholly to plaintiffs in California. Here, the "trustee" is indeed a "nominal party"¹¹¹ in the most literal sense, in contrast to the very active trustees, vested with all trust powers and duties, in *Denckla*. So, with personal jurisdiction over all the other parties involved (including particularly the Federation), California was in the best possible position to decide whether the plaintiff employees were being unlawfully deprived of a part of their wages by their union, in violation of fiduciary duties in their favor,¹¹² also, whether the agreement that "royalty payments" should be made to the foreign trustee was illegal and void; and whether the Federation should be liable in damages for such breach of duty.¹¹³

¹¹⁰ The plaintiffs complained that, in violation of its duty as their collective bargaining agent, and in fraud of their rights, the Federation (union) contracted with the employers that certain royalty payments and payments for reuse of motion pictures on television should be paid to a trustee for specified trust purposes instead of to the employees. The court had to decide whether the defendant New York trustee was subject to substituted service under a state statute so providing where the action "relates to . . . personal property in this State, in which . . . defendant . . . claims . . . an interest . . . [and] the relief demanded consists in excluding such person from any interest therein." The case is complicated unnecessarily by much argument based on the supposed strictly "floating" character of the trustee's chose-in-action. But, though the court shows a prejudice against the term "situs," for intangibles, it accurately describes the principle of "institutional affiliation" in ruling that "the multiple contacts with this state fully sustain the jurisdiction of the superior court to exercise quasi-in-rem jurisdiction over the intangibles in question." *Atkinson v. Superior Court*, *supra* note 108, at 966.

¹¹¹ Contrasted with Florida in *Denckla*, here California has a plenary power to decide whether the trustee should be deemed an "indispensable party."

¹¹² This fact may be stressed again. The supposed distinctions either between "in rem—in personam" or "tangible—intangible" are completely irrelevant in this kind of fact situation. See authority cited note 110 *supra*.

¹¹³ One hardly could ask for a fact situation more dramatically demonstrating the error of Professor Leflar's conclusion that "a defendant's interests in tangibles 'wherever located' are *personal interests* not appreciably different . . . from personal interests

Circuit Court Error

Still another very recent case dramatizing the error that results from a failure to recognize the importance of the distinguishing factors we have been discussing is a 1959 court of appeals decision¹¹⁴ in which the court interprets *Denckla* as clearly limiting *McGee* "to the insurance field." Apparently, the Seventh Circuit felt sure that, except for the fact that *Denckla* involved interests in trust estates, while *McGee* involved rights arising out of an insurance contract, these two cases were on "all-fours" with each other; that means that so far as the acts performed in the forum in each case were concerned, they were nearly enough identical to require the same governing rule regulating the exercise of personal jurisdiction in each case, and that the difference in results must be because *Denckla* states the "general rule," and *McGee* permits substituted service as an exception only because the insurance field is subject to "special police power regulation."¹¹⁵ But this is erroneous. As is said elsewhere, "The *McGee* opinion is based upon the minimum contacts theory of jurisdiction and not upon the special nature of the business."¹¹⁶ But further, this construction of *McGee* indicates a failure to realize how much more substantial was California's interest in the subject matter of that contract than was Florida's in the trust interests considered in *Denckla*. In *McGee*, not only did certain affirmative acts relating to the "transaction" occur in California, but the subject matter of the insurance, with all the interests implied therein, also was exclusively "affiliated"

enforced in proceedings classified as 'in personam' . . ." and that, therefore, any court should have equal competence to adjudicate suits involving such interests, based simply on the personal jurisdiction over the defendant. Leflar, "The Converging Limits of State Jurisdictional Powers," 9 J. Pub. L. 282 (1960). And Douglas goes even further in *Denckla* when he attempts to justify Florida's exercise of jurisdiction over the Delaware trust by maintaining that "Florida has such a plain and compelling relation to these out-of-state intangibles . . . as to give Florida the right to make the controlling determination, *even without personal service over the trustee*. . . . It is merely a suit to determine interests in those intangibles." (Emphasis added.) Douglas, dissenting in *Hanson v. Denckla*, *supra* note 81, at 263. Agreed that it matters not whether the interests are classified as "in rem" or "in personam," both Leflar and Douglas ignore completely the fact that so-called "intangibles" or "personal rights" may be as closely affiliated with a single state, institutionally and functionally, as is land.

¹¹⁴ *Trippe Mfg. Co. v. Spencer Gifts, Inc.*, 270 F.2d 821 (7th Cir. 1959).

¹¹⁵ On this analysis, the special police power recognized in *Hess v. Pawloski*, 274 U.S. 352 (1927), and similar cases, simply is extended to include the insurance field; hence, no change in traditional doctrine.

¹¹⁶ In Ill. Ann. Stat. Ch. 110, §§ 17 (Smith-Hurd 1962 Supp. 16), Jenner and Tone differ with *Tripp*, declaring that, "The *McGee* opinion is based upon the minimum contacts theory of jurisdiction and not upon the special nature of the insurance business.

with California. In contrast, the essential "subject matter" of the litigation in *Denckla* was affiliated exclusively with Delaware.¹¹⁷

Validity of Institutional Treatment

Thus far, our discussion simply has asserted the reasonableness of giving the trust estate an exclusive "situs" in Delaware, and of requiring that all matters involving and affecting the "substance" of that trust be drawn to and assimilated by that law—*i.e.*, that the "norms governing the inner order"¹¹⁸ of a trust, operating as an economic-legal institution, must constitute a single body of regulating and governing rules internally consistent and harmonious. Whatever may be the practical limits of such a proposition applied to trust institutions which have been so divided and spread over several states as to make it difficult to establish a single "base" or locus for it, to repeat, it is submitted that, institutionally, there is quite as much reason for giving the trusts here involved as single and exclusive a "situs" in Delaware as has Delaware land.

Contrary to various critics of the idea of ascribing "situs" to an intangible, again, institutionally, that term sometimes is the most apt *traditional* concept to describe the *results* of the institutional considerations involved on issues requiring an adjudication of legal interests therein.¹¹⁹ With no other established terminology to describe fixed relationships justifying the choice of a particular law exclusively, the courts have had to utilize what appears to them to be the most suggestive terminology available. If the critics¹²⁰ had searched realistically for the "practical and operational" reasons supporting the use of that

¹¹⁷ This does not intend to ignore or negate the difference in the purposefulness of the contacts by the defendants with the forums in the two cases.

¹¹⁸ Institutionally, this phrase is useful to describe that body or pattern of rules, regulations and procedures that make the institution "tick," assuring both its self-contained integrity and the appropriateness of its functions and activities in relation to its purposes in society. The phrase, "norms for the inner order," is suggested by Ehrlich, *Fundamental Principles of the Sociology of Law* 121-36 (Moll's translation, Russell & Russell 1962). The institutional analysis found herein, and used to resolve conflicts questions, builds on a rationale elaborated by Ehrlich, being consistent with this writer's conception of the law's relation to its society. This phrase is a relative concept. "Norms" constituting the "inner order of society" as a unit will be external to those regulating particular, individual institutions.

¹¹⁹ So, surely there could be no objection to using the term to describe the "result" both in *Denckla* and in *Atkinson*.

¹²⁰ It long has been the vogue to speak disparagingly of "situs" applied to intangibles. We find ample evidence of this criticism in Leflar's comments, *supra* note 70, as well as in the remarks of some of the court in *Denckla* and in *Atkinson*, though it led to no harmful results in the latter.

term, their researches would have been far more fruitful than have been the criticisms of this use of "situs." So, in expropriation cases, in applying a rule that the "situs" of property "expropriated by government decree" determines the validity of that decree, English courts have consistently treated institutional debtors, domiciled in England, as "sitused" there. The "institutional affiliation" with England of the Bank of England, with headquarters in London, or of a London trading firm engaged extensively in international trade, at least for many issues, is quite as obvious as if it were land that was involved. So the former King of Spain's bank deposits in London,¹²¹ and an Austrian merchant's credit balances with a London trading company,¹²² were not subject to the expropriation decrees of the domiciliary states. It is hoped that the phrase "institutional affiliation" will make clear the baselessness of the charge that the use of "situs" to describe the controlling "contact" in these cases is a misleading fiction.¹²³

The extent to which trust supervision and administration has become a major economic institution is exemplified in *Mullane* and *Denckla*. In *Mullane* the very legality of the "common trust fund" principle depended on New York Law; both the legal status of the trusts involved and whether the trustee has properly discharged his legal responsibilities obviously must be governed exclusively by New York law. It is only slightly less obvious that similarly, Delaware must control the legal status of the trusts in *Denckla*. In both, such businesses have become subject both to extensive supervisory codes and to major regulatory commissions. By any criterion that can be suggested, measured by institutional standards, that law and it alone must govern the substantive rights represented in the trusts where, as here, all the component elements involved in these trusts and their administration have a single location. There is no conceivably adequate reason for placing any kind of legal power, legislative or judicial, over these economic interests in a foreign state. The underlying policy considerations supporting the admitted general competence of the domiciliary

¹²¹ *Banco de Vizcaya v. Don Alfonso de Borbon y Austria*, [1935] 1 K.B. 140 (1934).

¹²² *Frankfurter v. W. L. Exner, Ltd.*, [1947] 1 Ch. 629.

¹²³ The significant question is "Where is the seat" of the economic-socio-political interests involved. Of course, this metaphorical use of the term "situs" at times may result in its misuse, and in suggesting "wrong answers" to some. But this is true in all cases of the "as if" use of established legal terminology—even though the experience of centuries has demonstrated over and over that, because of language limitations, this often is the only way that the law can grow, adapt and be kept adequate, and effect transitions from a lower to a higher order.

court, Florida, to serve as the "primary probate and administration court," supplies no reasons whatever for such overreaching of that forum. Justice Warren recognizes this fact clearly in his statement quoted at note 81 *supra*.

Contrary to the vigorous assertions of influential writers in the recent past,¹²⁵ these conclusions are not merely extensions of outworn, anachronistic ideas based on false premises derived from the concept of sovereignty. Though the elaboration of the thesis must be left for another paper now in preparation as stated above, an overriding critical issue facing the young nation in its formative years sprang from the readiness of nearly every state to impinge outrageously on the paramount governmental interests of every other state. And a pressing question was how to avoid bitterness, strife, vindictiveness and retaliatory action as a result thereof. The limitations imposed in *Pennoyer v. Neff*¹²⁶ were rooted in the pragmatic experience of nearly a century in dealing with the problem and generally expressed the limitations that experience had demonstrated was the minimum needed at that time, to ameliorate the conditions encouraging disunity.¹²⁷ Those limitations contributed very considerably to provide a viable, dynamic political-legal environment for the harmonious development of this federated nation.¹²⁸

¹²⁵ W. W. Cook pioneered the attack on the very conception of "legislative jurisdiction," though some of his followers pursued it even more determinedly for a time. Cook, *The Logical and Legal Bases of the Conflict of Laws* 70 (1942). Perhaps his attempt to extirpate the phrase from conflicts doctrine was part of his larger attack on "vested rights." But "legislative jurisdiction" is a conceptual tool that is absolutely essential in any analysis of conflicts problems based on a "genuine sociology of law" with an institutional treatment. So, happily, the principle not only has withstood the attacks of its detractors; it is in a firmer position and its value as an analytical tool is better appreciated today than ever. Witness the extended development and refinement of the concept in the Restatement (Second), *Conflict of Laws* Ch. 3, *Jurisdiction in General* (1956) and Ch. 7, *Property* (1959).

¹²⁶ 95 U.S. 714 (1878).

¹²⁷ The legal history of that time, rightly read, supports some of Llewellyn's acute observations in Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960). It is believed that the development of the legal doctrine culminating in *Pennoyer v. Neff* takes place almost entirely in the "grand style" of judicial craftsmanship, as he describes it at 36, epitomizing the quotation which he translates from German author Goldschmidt, at 122: "Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place. . . . The highest task of law-giving consists in uncovering and implementing this immanent law." Institutionally, these are the "norms for the inner order." These judges were creative, not formalists.

¹²⁸ In Story, *Conflict of Laws* (1834), the author simply provided a theoretical

Logic of Institutional Treatment

Once the Supreme Court comes to realize more fully the futility of elevating "uniformity of rule" on a national basis, either by means of full faith and credit or otherwise, the more quickly will it become clear that it can serve best in this area by being alert to those areas in which there is a clearly paramount interest in some one state, and framing relevant constitutional law doctrine so as to give full effect to those paramount interests. It is submitted that it is only on that approach that "genuine uniformity of treatment" can be achieved, with its increase in interstate harmony. Professor Scott has almost precisely this thesis in mind when he declares that:

It might be thought, and perhaps was thought by the Florida court, that the Supreme Court . . . was unduly interfering with the affairs of that state. This, indeed, seems to have been the opinion of the dissenting Justices. On the other hand, if the Supreme Court had required the Delaware court to give full faith and credit to the Florida judgment, it might well be thought, and undoubtedly would be thought by the Delaware court, that this would be an undue interference with the affairs of that state. The Supreme Court cannot escape this dilemma. In policing the distribution of power among the states, it must take a position one way or the other. *I think that it is fortunate that the Supreme Court held that it was Delaware and not Florida which had control over the disposition of the property, and held that, except so far as the jurisdiction of the Florida court might be based upon personal jurisdiction over some of the beneficiaries, it had no power to determine who should ultimately receive the property.* (Emphasis added.)¹²⁹

But even here, Professor Scott concedes too much to Florida. I would deny Florida any competence to bind even the parties before it on the issue of the legal status of the trusts. The "institutional affiliation" here involved compels that conclusion. And a very recent opinion by the Eighth Circuit¹³⁰ goes far in reaffirming our thesis. That case stresses for all it is worth the importance of limiting the doctrine of res judicata so as not to preclude F-2 from making an entirely independent finding on the question of whether a certain tract of land was located in Nebraska or in Missouri.¹³¹ Institutionally there is

rationale for experience. He merely stated those premises already formulated by the courts—which he himself had participated in—to provide the necessary institutional environment for a healthy political relationship between the states, assuring us of a viable economic growth in which all the potential tensions which otherwise would result, are eliminated.

¹²⁹ Scott, "Comment: *Hanson v. Denckla*," 72 Harv. L. Rev. 695, 708 (1959).

¹³⁰ *Duke v. Durfee*, *supra* note 99. First suit not res judicata.

¹³¹ *Id.* at 220-1. Parties receive benefit of states' immunity to res judicata in subsequent suit.

quite as much reason for saying the same thing about the trust estates in Delaware.

This is not to say that Delaware law must govern any and every issue which may arise concerning the legal status of those trusts. On other issues the institutional affiliations in other states may become paramount. For example, though in *Denckla* it was reasonable for the parties to grant that the "situs" of the trust res was in Delaware, based specifically and particularly on the presence there of the stock certificates forming the "corpus" of that trust,¹³² Delaware law would not be the appropriate one to determine conflicting rights in the corporate investments represented by those shares. The institutional affiliation of those corporations in the state of their incorporation becomes the controlling one to determine ownership in the stock itself, if that were put in issue. All of the parties involved are chargeable with knowledge of the supremacy of "governmental interest" in the state of incorporation strictly on the basis of institutional affiliation, for exactly the same reasons which dictate that Delaware law control the administration of the trust itself.

CONFLICT AVOIDANCE AGAIN

To this point, the law of Delaware has been chosen over that of Florida to determine the legal status of the Donner trusts, largely on the basis of the completeness with which it is affiliated with Delaware, in recognition of the extent to which it is integrated into the economic-legal system represented in that state. If there were other countervailing considerations pointing to the selection of another law as a basis for developing the most satisfactory "norm" for business purposes (institutionally), they should not be ignored. There appear to be none. However, such other considerations as the "reasonable expectations of the parties" and/or "the intent and wishes of the settlor" all combine to reinforce greatly the conclusions that Delaware law should govern.

Considerable thought has been given in recent years to the general problem of "conflict avoidance" (mentioned briefly above), *i.e.*, of tailoring and framing of transactions so as to avoid as much as possible and to reduce to the minimum, potential choice of law problems. Surely this should be encouraged by all legal systems generally. And for the setting up of trusts in particular, a procedure whereby all the elements of the trust are located in one state, and that a state most

¹³² Of course, the mere fact that the *certificates* were located in Delaware is not the best reason for considering them "situated" there. The real reason is that they formed the corpus of a trust which was affiliated exclusively with Delaware.

certainly hospitable to the trust and to the purposes which the settlor wishes to be realized, offers the most promising procedure for such "avoidance." At least in all those cases where the settlor's conduct is generally consistent with that result, all reasonable efforts should be made to effectuate that purpose. Everything in *Denckla* strongly suggests that it was Mrs. Donner's intention, hope and understanding that the trust was permanently affiliated with Delaware and its laws—everything she did was consistent with such an understanding.¹³³ The development of rules giving full effect to such purpose is the only way to provide maximum "predictability" in a trust operation. If this is so, the subsequent moving about of the settlor, whatever may be his apparent intentions as to where he wants to live out his last years (a strictly personal preference, often based on fickle and capricious motivations), should be recognized as being so completely collateral to and independent of the establishing and maintaining of large trust estates of this kind as to have no connection with or effect upon the institutional affiliation of that trust. Any other rule raises unnecessary and arbitrary limitations on the freedom of movement of the testator in relation to his trust purposes—they should be recognized as involving two entirely different (institutional) worlds.

It would be hard to imagine a fact situation more dramatically illustrating the validity of these observations. There is no doubt that Donner wanted and expected her appointment to be valid and to take effect inter vivos, and very probably she relied on Delaware law for assurance.¹³⁴ A salutary principle of modern trust law, generally recognized, at least formally, is that "The intention of the settlor should be given effect so long as such intention is at all reasonable." Yet, by making the "domicil at death" rule govern in this case, the settlor's intention is completely defeated, and the appointment fails with fairly obvious injustice as between the intended beneficiaries.

Restatement (Second) Support

As I read the relevant sections of the *Restatement (Second), Conflict of Laws*,¹³⁵ they support completely the analysis just described. Sections 294 through 299d stress the power of the settlor to select any

¹³³ From the factual recital in *Denckla*, every act Mrs. Donner performed connected with the trust, from its inception to her death, indicates strongly that she expected it to continue to be treated strictly as a Delaware trust. *Hanson v. Denckla*, 357 U.S. 235, 238-40 (1958).

¹³⁴ Had Donner wanted her appointment to have a testamentary effect, it would have been so simple to have dealt with it in her will, instead of using the much more cumbersome device of executing a separate instrument.

¹³⁵ *Restatement (Second), Conflict of Laws* §§ 293a-299d (1959).

law "with a substantial connection with the trust" to govern both its "validity" and its "administration"; subject, however, to an expressed recognition of the ultimate paramount power of the "situs" of a "chattel or document" as part of the res to dictate that choice. Inter vivos powers of appointment receive the same treatment.¹³⁶ Under these sections, it should be possible to establish the "intention" and wishes of the settlor by her conduct where it is clear, quite as readily as by express statement in the trust instrument.

The Reese Analysis

On this analysis it is not at all easy to divine the reasons for Professor Reese's expression of doubt, in a recent detailed analysis of the case, that *Denckla* reached the "correct result" in refusing to give conclusive effect to the Florida decision. He expresses that doubt thus:

Yet, it is by no means clear that the majority in the *Denckla* case arrived at the correct result. Personal jurisdiction could be obtained in Florida over the great majority of the interested parties, and this state would have afforded, in all probability, the most convenient forum for the trial of the suit. Should not the rules for obtaining judicial jurisdiction over an absent party be liberalized somewhat in such a situation if, by this means, the forum could determine the entire controversy and thus obviate the need for multiple litigation?¹³⁷

These statements pose several questions. Professor Reese rests his preference on an alleged "trial convenience" alone (the existence of which is doubtful), without considering any of the countervailing arguments relied on herein. Surely the trustees are much more than mere nominal party stakeholders. At least arguably they have an affirmative duty to appear in any court with power to render a binding judgment on behalf of the settlor, to do everything they can to save the trust for the purposes and wishes of the settlor. Furthermore, Reese states the issues solely in the interests of the individual parties concerned. Justice Warren considers the interests of the states concerned in "trust administration," as does Scott.¹³⁸ Speaking as though the only issue here was whether it was reasonable for Florida to litigate without the presence of the trustees, who Reese apparently considers to be strictly only stakeholders, he adds:

¹³⁶ *Id.* at §§ 294 and 295.

¹³⁷ Reese & Galston, "Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction," 44 Iowa L. Rev. 249, 257 (1959).

¹³⁸ In the quotation just above, Reese and Galston seem to be giving effect exclusively to *procedural* considerations and conveniences—the approval of a rule to "avoid multiple litigation."

This argument seems particularly persuasive in a case, such as *Denckla*, where the absent party has no pecuniary or other tangible interest in the outcome of the suit. He would suffer no real harm if he did not appear at the trial at all. Hence considerations of reasonableness would seem to indicate that his interest in having the trial at a place convenient to him should be subordinated, at least to some extent, to the interests of those who have more at stake.¹³⁹

But what of the interests of those heirs who are relying on the rights given them by the law of Delaware? So far as appears from Reese's discussion, he is perfectly willing for Florida to ignore completely Delaware's law, to grossly violate the obvious wishes and intentions of the settlor, and to destroy completely the rights created by Delaware. "Why?" I would ask. The question is all the more pressing in view of the fact that the *Restatement (Second)* recognizes the paramount power in Delaware,¹⁴⁰ which Florida so completely ignores. Moreover, it is quite as convenient, for this trust at least, to let the Delaware court adjudicate *all* rights of everybody concerned in a single action as it is for Florida, notwithstanding Reese's contrary assertion. Indeed, it appears from the record that more nearly all the interested parties were represented in the Delaware action than in the Florida suit.¹⁴¹ The very least that might be required of Florida would be that it do the best job it could of recognizing and giving effect to Delaware's law as controlling—including *its whole law*.¹⁴² Reese concludes on this point, with the observation that:

In any event, the close division of the Court in *Hanson v. Denckla* reveals dramatically that uncertainties still abound in the area of judicial jurisdiction based upon the doing of acts, and the causing of consequences, in a state.¹⁴³

¹³⁹ Reese & Galston, *supra* note 137, at 257-8.

¹⁴⁰ Reese is the Reporter for the *Restatement (Second)*, *Conflict of Laws*, making it especially difficult to divine the basis on which he so easily chooses Florida. Not one of the criteria considered in the relevant sections of the *Restatement* suggest a basis on which Florida might be chosen.

¹⁴¹ In *Hanson v. Denckla*, *supra* note 133, at 241, the court states: "About a dozen other defendants were nonresidents. . . . With the exception of two individuals whose interests coincided with complainants Denckla and Stewart, none of the non-resident defendants made any appearance." This referred to the Florida suit. Contrast the following statement, referring to the Delaware suit, *id.* at 242: "Nonresident defendants were notified by registered mail. All of the trust companies, beneficiaries, and legatees except Katherine N. R. Denckla, appeared and participated in the litigation."

¹⁴² Mistakenly and confusingly described as "renvoi" in the past, this practice simply assumes that the forum has sufficient jurisdiction over the subject matter to adjudicate, but must decide as would the Delaware court. It is not clear that either Justice Warren or Scott would concede this much competence to the Florida court.

¹⁴³ Reese & Galston, *supra* note 137, at 258.

If we take his words at their face value, they strongly suggest that Professor Reese makes exactly the same error as did both Leflar and the judges discussed above, in assuming that "the doing of acts and the causing of consequences in a state" should be equated in exactly the same way in every case without regard to with what other interests, having possibly exclusive institutional affiliations with other states, they may be related to; *i.e.*, regardless of whether such acts and consequences should be deemed ancillary and subordinate to, and thus controllingly related to, foreign institutional affiliations. If so, this is a most unfortunate and harmful error.

CONTENTS OF ALL-INCLUSIVE SUBSTITUTED SERVICE STATUTE

The *Denckla* case convincingly demonstrates that the "doing of an act" as a basis for enlarging "personal jurisdiction" cannot be considered in a vacuum. The forum must consider its possible relationship to foreign institutional affiliations. But this poses still another question: Are the rules expanding the courts' power to exercise personal jurisdiction limited to "acts or consequences"? The drafting of some state codes indicates that the framers have thought that it might be.¹⁴⁴ But the fact is that the "comprehensive" codes we have been comparing, quite generally already have formally enlarged such jurisdiction on additional grounds. One need only recall that most of the "broad" statutes make mere "ownership" a basis for substituted service;¹⁴⁵ further, some acts also include the relationship of foreign corporate officers to a local corporation, by subjecting such officer to substituted service.¹⁴⁶ Obviously, therefore, the "enlarging" process marches on. And presumably, all of these provisions are constitutional. But this poses the still further question: Are there any limitations to these enlargements?

Limitations on Broadening of Jurisdiction

Although, on casual consideration, the domestic relations field may appear to be the least likely of all areas requiring limits on this

¹⁴⁴ Ill. Ann. Stat. ch. 110, § 17(1) (Smith-Hurd 1956), states: "Any person . . . who . . . does any of the acts hereinafter enumerated . . ." Such "act" thereunder includes ". . . ownership . . . or possession of . . . real estate . . ." Similarly drafted, Mont. Rev. Codes Ann. § 93-2702-2(B) (1961) enlarges "act" to include the positions, offices, or statuses of corporate officer, executor or administrator. Apparently, the drafters of these acts thought that "act" may have become a "magic word" for these statutes, much as was the word "consent" became under the nonresident motorist statutes.

¹⁴⁵ Of course, the fact that such broadened jurisdiction need not be tied to "act" is exemplified both in the Wisconsin legislation and in the Uniform Act.

¹⁴⁶ *Supra* note 144, citing the Montana statute.

broadening of "personal jurisdiction" since the courts often talk about the rights and duties arising therefrom and suits based thereon being quasi-in-rem in character, more careful examination of the various questions arising in domestic relations litigation suggests definite possible limitations on the power of a state to authorize its courts to exercise personal jurisdiction by substituted service; that such power is much narrower than its power to apply its own law; and that these limitations may well survive the foreseeable future.¹⁴⁷

Domestic Relations Issues

Suppose, for example, a state determines to authorize its courts to exercise personal jurisdiction by foreign process in all constitutionally permissible cases arising in the domestic relations field. Typically, these will include suits for divorce or annulment, for support, for alimony, and for child custody. Can it do so for any or all of these suits? For a court with jurisdiction otherwise to grant a divorce or an annulment, jurisdiction over the defendant poses no problem because such *personal* jurisdiction has never been required. For support or alimony proceedings, however, courts generally have doubted that they possessed the competence to exercise jurisdiction over these "subject matters" without personal jurisdiction over the defendant.¹⁴⁸ Legislators generally have also doubted that they could constitutionally empower their courts to exercise such jurisdiction by substituted service, as is dramatically demonstrated by the history of the very recent "Reciprocal Enforcement of Support Act." That Uniform Act, throughout its various revisions from 1950 to 1958, has assumed that a condition to any binding finding of duty of support against a defendant, generally, is that the forum acquire a strictly personal jurisdiction over him on compulsive personal service.¹⁴⁹ The Act is carefully drafted to that end, illustrated by resort to the "two court" proceeding under it, with the second court acquiring personal jurisdiction¹⁵⁰ which is required at least as much by the presumed

¹⁴⁷ Leflar's suggestion that "choice of law" and "judicial jurisdiction" may be merging very possibly is made in the limiting framework of "acts." Though causes of actions arising out of domestic relations traditionally are "localized," this generally does not appear to be an influencing factor in the Supreme Court's decisions *broadening* the constitutional restrictions on the exercise of that jurisdiction, rather than narrowing them as in other fields. Rather are they due process limitations related to and in the light of the particular *subject matter*.

¹⁴⁸ *Pawley v. Pawley*, 46 So. 2d 462 (Fla. 1950); *Spradling v. Spradling*, 74 Okla. 276, 181 Pac. 599 (1919). Cf. *Griffin v. Griffin*, 327 U.S. 220 (1946).

¹⁴⁹ *Tennessee v. Perry*, 198 Tenn. 389, 280 S.W.2d 919 (1955).

¹⁵⁰ Briggs, "The Reciprocal Enforcement of Support Act," 15 Mont. L. Rev. 40, 49-56 (1954); Briggs, "Need for Adoption of the 1958 Amendments to the Uniform Reciprocal Enforcement of Support Act," 20 Mont. L. Rev. 40, 49 (1958).

necessity of a "compulsive" type of service as by the practical requirement that the defendant be subjected to the "contempt powers" of a court to insure payment—indeed, "compulsive service" serves a double purpose which, in combination, greatly strengthens the Act's effectiveness.

Support and Custody

Furthermore, in *Armstrong v. Armstrong*,¹⁵¹ conclusively reinforced by *Vanderbilt v. Vanderbilt*,¹⁵² the United States Supreme Court recently has fully confirmed these common-law doubts, ruling that a state legislature cannot empower its courts either to decree alimony in favor of the wife or rule against her right to support, merely on substituted service.¹⁵³ In the latter case particularly, Justice Black states this constitutional prohibition broadly so as to prohibit the divorcing court from attempting either to cut off the right of an absent spouse to support, or to adjudicate the existence and quantum of an absent husband's duty to pay alimony, in the following language:

Here, the Nevada divorce court was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the divorce action and he had not been subject to the divorce court's jurisdiction. Therefore, the Nevada decree, to the extent it purported to affect the wife's right to support, was void and the Full Faith and Credit Clause did not obligate New York to give it recognition.¹⁵⁴

This principle clearly should control equally all forms of support litigation.¹⁵⁵ And note that the principal dissenters in *Denckla* are the strongest advocates for limiting "personal jurisdiction" in domestic relations.¹⁵⁶

¹⁵¹ 350 U.S. 568 (1956).

¹⁵² 354 U.S. 416 (1957).

¹⁵³ Of course, presence or absence of "purposeful act" is irrelevant.

¹⁵⁴ *Vanderbilt v. Vanderbilt*, *supra* note 152, at 418-9. Though Warren did not participate in this decision, he had concurred in *Armstrong v. Armstrong* on the ground relied on by the majority in this case; hence, practically, the *Vanderbilt* decision was supported by a seven-to-two majority.

¹⁵⁵ See *California v. Copus*, 138 Tex. 196, 309 S.W.2d 227 (1958), which ruled that California could subject the defendant to a continuing duty to support his mother in a California institution, only so long as he was a resident thereof. However, the limitation on liability imposed by this case may be legislative, rather than constitutional. The Uniform Reciprocal Enforcement of Support Act § 7 (1952) assumes that either of the two co-operating states may impose the duty wherever the obligee is found. But even that Act does not attempt to subject the defendant either to the legislative or the judicial jurisdiction of a state in which he has never been "present."

¹⁵⁶ Both Black and Douglas, dissenting in *Hanson v. Denckla*, *supra* note 133, strongly approved restricting judicial jurisdiction in *Armstrong* and *Vanderbilt*; they

Note that here the private interests of the spouse and the public interests of the foreign state in the welfare of that spouse, are equally protected by the instrumentality of "due process." Hence, we see here an increasing awareness of the need for extending continuous solid recognition of and protection for paramount governmental interests in certain socio-legal institutions affiliated in a particular nonforum state.¹⁵⁷

Of course, it may be objected that all of this is changed by the "demise" of *Pennoyer v. Neff*. That such is not the case, however, is conclusively established both by *Armstrong v. Armstrong*,¹⁵⁸ trenchantly confirmed in *Vanderbilt*,¹⁵⁹ and by Justice Warren's explicit extension of the limitations of these cases to the administration of a trust in *Denckla*, when he declares:

Those restrictions [on substituted service] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.¹⁶⁰

But more significantly yet, as recently as 1953, the United States Supreme Court introduced and stressed an opposite, narrowing trend, exemplified in custody cases, denying for the first time the power of state courts to exercise jurisdiction to entertain an action for the custody of a child by substituted service on the defendant parent. In fact, *May v. Anderson*¹⁶¹ flatly denied any power in even the court of the *matrimonial* domicile, where the children were still domiciled

also concurred in *May v. Anderson*, 345 U.S. 528 (1953), requiring personal service on the contesting parent in a custody case for the first time.

¹⁵⁷ Such development supports the thesis advanced that an exclusive legislative jurisdiction should be recognized in numerous fields; further, where recognized, references to that law should be to its whole law—but that this should never be confused with the supposed "renvoi problem." See Briggs, "The Need for the 'Legislative Jurisdictional Principle' in a Policy Centered Conflict of Laws," 39 Minn. L. Rev. 517 (1955), and related articles. Note further that these "domestic relations" cases suggest the antithesis of Leflar's "merger trend."

¹⁵⁸ *Supra* note 151.

¹⁵⁹ *Supra* note 152.

¹⁶⁰ *Hanson v. Denckla*, *supra* note 133, at 251. Obviously, "convenient forum" alone, particularly for the plaintiff, is not enough. And, though taken literally, this quotation might suggest that the only thing lacking in *Denckla*, is the necessary "minimum contact." Such is not the case.

¹⁶¹ *Supra* note 156. In such a case, the wife had had the most extensive and intensive "contacts" with the forum, the matrimonial domicile, and the continuing domicile of the husband and children.

with their father, to make an award in favor of the father, in Wisconsin, even though the mother was personally served in Ohio,¹⁶² where she then resided. It held such decree not entitled to full faith and credit in Ohio, and arguably, that it was void even in the forum for lack of due process.¹⁶³

Arguably,¹⁶⁴ at least, there is a less substantial institutional basis for denying this power than for denying it in support and alimony actions, and one might expect the Supreme Court to modify this new restriction in the light of *McGee's* very liberal rule, four years later, for "single acts"; but this reasoning ignores the insights provided by the present analysis revealing that *McGee* just regulates different "institutions." In any case, though Frankfurter dissented in the seven-to-two decision in *Vanderbilt*, also decided in 1957, he was careful to reaffirm his approval of *May v. Anderson's* requirement of actual compulsive service on the defendant parent in a custody case, going out of his way to distinguish it in a footnote, in the following language:

Custody over children presents an entirely different problem. See *May v. Anderson*. . . . The interests of independent human beings, the children, are involved. Also, insofar as the spouses' interests are concerned, the divorce may terminate their relations with each other as husband and wife, but it cannot terminate their relation to their children.¹⁶⁵

At the same time, there is no doubt in all of these cases that the forum properly *applies its own substantive law* in adjudicating the issues involved. That conclusion is of the utmost importance in evaluating Professor Leflar's suggestion that "choice of law" and "judicial jurisdiction" are merging. This considerable body of decisions arguably supports the opposite hypothesis. So, in the light of the very substantial and even "expanding" *restrictions* imposed by the Supreme Court on all of these domestic relations issues, at least for the moment, there seems to be little prospect of that Court "completing the merger

¹⁶² *Id.* at 530. Justice Burton states: "The only service of process upon appellant consisted of the delivery to her personally, in Ohio, of a copy of the Wisconsin summons and petition."

¹⁶³ Justice Jackson, dissenting, seemed to think that the majority was based on a lack of due process, but Justice Frankfurter maintained that the decision went only to the full faith and credit issue. Justice Burton's opinion was not clear on the point.

¹⁶⁴ Such argument would insist that the most that should be required would be actual notice, assuring opportunity to contest. Modification of *Anderson* to accept this rule in the next few years is quite conceivable. But even that would support a restrictive trend rather than an expanding one.

¹⁶⁵ *May v. Anderson*, *supra* note 156, at 423 n.1.

of the constitutional limitations of choice of law generally, with the rules limiting substituted service," as envisioned by Leflar.¹⁶⁶

BROADENING OF NOTICE REQUIREMENTS

But this is not the whole story yet! The extent and direction of the Supreme Court's actions in modifying traditional doctrine regulating judicial jurisdiction cannot be correctly perceived until its various decisions imposing a much greater duty to give actual notice in all kinds of litigation is taken into account, and correlated with the so-called "liberalizing" rules of *International Shoe* and *McGee*. In actions in rem in nature, we find a broad-gauged "tightening up" of the requirements of due process, restricting very considerably the plenary power which states have had therein historically—thus further continuing a trend opposite to the "single act" cases. Both opposing tendencies involve a realistic tailoring and fashioning of a framework of "norms for the *judicial* process" (inner institutional order),¹⁶⁷ restricting arbitrary judicial power on the one hand, and liberalizing "judicial power" on the other, where it is now thought reasonable, on balance.

As late as 1870, in *Cooper v. Reynolds*,¹⁶⁸ the Supreme Court upheld the Tennessee court in cutting off all rights in local land on a record leaving it very unclear whether any kind of "notice"—even by publication—actually was ever given. This tolerates plenary power run rampant, going entirely beyond any legitimate institutional interest in Tennessee. In a series of more modern cases, however, the Supreme Court has progressively subjected in rem actions, as well as personal actions, to the requirement of actual notice. So the instances in which "publication" is constitutionally permissible are now much fewer than formerly.¹⁶⁹ Also, it now requires a reasonable time for

¹⁶⁶ Leflar may not have had "domestic relations" cases in mind in stating his "merging trend." However, he does cite a number of such fields as a basis for his discussion, and he does not formally distinguish "localized actions" in his thesis.

¹⁶⁷ The entire body of "true" procedural rules reasonably may be characterized as the "norms for the inner order" of the "judicial [adjudicative] process," considered institutionally. They are formulated with one purpose in mind, *i.e.*, the most efficient functioning of that process to guarantee the achieving of its ends, as a distinctive self-contained governmental institution.

¹⁶⁸ 77 U.S. 308 (1870).

¹⁶⁹ *Schroeder v. City of New York*, —U.S.—, 9 L. Ed. 2d 255 (1962). Here a notice by publication statute, in a condemnation proceeding, providing for posting of notice conspicuously in several places in the area of the proposed condemnation, almost certainly constitutional historically, was held violative of due process.

the defendant to respond, even when publication is allowed;¹⁷⁰ and in *Mullane*,¹⁷¹ it laid down the broad dictum that, in every judicial proceeding in rem or in personam, both due process and full faith and credit require that that form of available notice be given which is most likely to inform in fact. And in a slight variation in the application of the same principle, it has gone even further in requiring that, even when the court has personal jurisdiction over the defendant, it must act on the same standards for assuring notice in fact regarding any *further* proceedings in the suit.¹⁷²

All of these developments contribute greatly to a creative system of rules having as their purpose the achieving of the most fundamental purposes of a viable judicial process operating institutionally, *i.e.*, the determination of all those facts on which the most "just decision" becomes possible.

BASES FOR "UNIFORMITY"

On this "whole view" perspective, the following thesis is fully supportable: We see here that, in the last several decades, in framing constitutional limits on the exercise of judicial (and we might add, "legislative") jurisdiction, the Supreme Court has consistently given effect—sometimes gropingly, sometimes consciously and partly articulated, at other times instinctively—to the principle that under that constitution, an overriding purpose in conflicts cases generally is the "allocating and distributing of sovereign power"¹⁷³ among the states—and between the states collectively, and the federal sovereign—as was so neatly stated by Scott in justifying his preference of Delaware law over Florida's in *Denckla*,¹⁷⁴ by Justice Warren,¹⁷⁵ and even by Jackson, in his dissent in *May v. Anderson*:

I am quite aware that in recent times this Court has been chipping away at the concept of domicile as a connecting factor between the state and the individual to determine rights and obligations. . . . But if our federal system is to maintain separate legal communities, as the Full Faith and Credit Clause evidently contemplates, there must be some test for determining to which of these a person belongs [*i.e.*, for the purpose of allocating and

¹⁷⁰ *Roller v. Holly*, 176 U.S. 398 (1900).

¹⁷¹ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-320 (1950). The court did not require actual personal notice in every case—a large common class was involved.

¹⁷² *Griffin v. Griffin*, 327 U.S. 220 (1946).

¹⁷³ It should not be necessary to stress the fact that "sovereign power" represents the total institutional power of each society.

¹⁷⁴ See note 129 *supra*.

¹⁷⁵ *Hanson v. Denckla*, *supra*, at note 133, at 247-9.

distributing power]. If, for this purpose, there is a better concept than domicile, we have not yet hit upon it.¹⁷⁶

Further, the Court seems to be becoming more and more aware of the fact that the only realizable ideal of "uniformity" of any kind lies in the direction of developing criteria for making such allocation and distribution so far as possible, rather than in a mechanical application of full faith and credit, or in the application of any other over-simplified cliché. Moreover, a basic canon of this thesis is recognition of the fact that the judicial process cannot be treated institutionally as operating separately and independently from the political-legal system of which it is a part.¹⁷⁷

Though it has been typical of recent analyses of conflicts cases to assume that, generally the interests of several different states are substantial enough and are sufficiently in "balance" to equally justify the selection of its own law by any one of them, it is submitted that a general "institutional analysis" will make clear that such assumption is not correct nearly so commonly as is assumed. Just how serious this error is can be established only by further analysis of the same kind.¹⁷⁸

¹⁷⁶ *May v. Anderson*, *supra* note 156, at 538-9.

¹⁷⁷ Of course, courts have very important "legislative" functions, but these must be made subordinate and a supplementary part of legal administration; however, those powers are broadest on conflicts issues, generally. The tortured view that courts are free floating agents with independent competence to create rights has been given plausibility in the past only by an overstressing of the proposition that there is no right without a remedy and of the transitory character in modern law of the remedy most commonly involved in litigation.

¹⁷⁸ *Cf.* Currie, "Notes on Methods and Objectives in the Conflict of Laws," 8 *Duke L.J.* 171 (1959); Ehrenzweig, "The Lex Fori—Basic Rule in the Conflict of Laws," 58 *Mich. L. Rev.* 637 (1960).