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Conflict of Laws

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PART TWO

PRIVATE LAW

CONFLICT OF LAWS*

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INTRODUCTION

Three novel forces have placed conflict law[1] in the forefront of legal subjects and scholarly preoccupation. While these forces have been at work changing the broad outlines of this field for a long time, recognition has been greatest in the recent period under survey. The first of these forces grows out of the new position of the United States. It is the rising interest in the need for differentiation of norms between the international conflict[2] and the interstate.

The second major force is the apparent reluctance on the part of federal authorities, mainly the legislature and judiciary, to assert national control of conflict conduct and norms. This withdrawal, already noted earlier, seems to have reached a danger point. Perhaps as a corollary to the second and perhaps responding to independent impulses is the third force which might be stated to be the continued expansion of state authority.

All of these forces have been at work in Florida although possibly not with the same intensity as in other places.

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*This is the third in the Survey of Florida Law series and covers the cases contained in Volumes 81 So.2d 697 through 96 So.2d 536 (August 29, 1957); 7 Fla. Supp. (1955) through 9 Fla. Supp. (1957). Federal cases in the fifth circuit are included through 152 F. Supp. and 246 F.2d as well as the changes in the Florida Statutes made in the regular session of the 1957 Florida Legislature. Wherever possible points discussed and left unchanged by subsequent cases are merely crossreferred to the prior surveys which are designated simply as 8 and 10 MIAMI L.Q. 1954 and 1956 respectively.

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1. See BAYITCH, CONFLICT LAW IN UNITED STATES TREATIES, (1955) and comment thereon in Mueller, Book Review, 45 CALIF. L. REV. 394, note 13 at 397 (1957).

2. A new designation has been suggested by JESSUP, TRANSNATIONAL LAW (1956). See Ehrenzweig, *Interstate and International Conflicts Laws: A plea for Segregation*, 41 MINN. L. REV. 717 (1957). Another important contribution to clarification of the areas that ought to be allotted these two branches of the conflict field is the series of Bilateral Studies in Private International Law being published for the Parker School of Foreign and Comparative Law by Oceana Publications. Number 8 on Australian-American Private Int'l Law by Cowen has just appeared. For a review of No. 4-7 see Mueller, Book Review, 45 CALIF. L. REV. (1957) and especially note 2, for a list of prior reviews. His suggestion that these volumes be maintained by annual supplementation in the AM. J. COMP. L. is excellent. This has already been done with Szladits, 5 AM. J. COMP. L. 341 (1956). See also review by Thomas, of Eder, Colombian-American Private Int'l Law, 11 SW, L.J. 391 (1957).

THE EXERCISE OF CONFLICT JURISDICTION

Legislative Jurisdiction

Viewed generally, the legislature at is 1957 session did not push out the frontiers of state[3] authority to the same extent as in the prior session.[4]

Most of the activity was in the form of perfecting and consolidating control previously asserted. In the matter of jurisdiction for divorce matters there was even an important withdrawal.[5]

One major piece of legislation must be noted, The Florida Arbitration Code,[6] because of the importance and novelty of the conflict provisions contained therein.[7] These provisions are designed to aid in the solution of one of the gravest problems that has held back arbitration as a satisfactory solution to legal questions especially in the transnational area; namely that of the characterization of the agreement as procedural in the conflict sense and hence often governable by the law of the forum.[8] Other provisions should help to remove any doubt as to the enforceability of arbitrations or judgments entered in consequence thereon.[9]

The rule of the *Parmalee* cases[10] was followed in *Baker v. Commercial Travelers' Mutual Acc. Ass'n.*[11] Some doubt has been cast on the validity

3. An interesting case construing states rights in the sea frontier, is State v. Massachusetts Co., 95 So.2d 902 (Fla. 1957).

4. See 10 MIAMI L.Q. 257 (1957).

5. This consisted in the change of the residence requirements from ninety days to six months, see Laws of Fla. c. 57-44 amending FLA. STAT. § 65.02(1957). Further tightening in this field is evidenced by Laws of Fla. c. 57-258 adding FLA. STAT. § 65.20 (1957) providing a thirty day "cooling off" period. For the major discussion of this problem see Murray, *Domestic Relations*, 12 U. MIAMI L. REV. (1958).

6. Laws of Fla. c. 57-402; FLA. STAT. §§ 57.10-57.31(1957). The legislative history makes clear that both labor and commercial arbitration is included.

7. The author of this survey was happy to serve the Florida Bar as draftsman, of this statute, together with Wesley A. Sturges. On the overall need and importance of such an act for Florida, see Albritton, *The Florida Arbitration Law*, 31 FLA. BAR J. 121 (1957); Arbuse, *The General Case for Arbitration*, *id.* at 129; and for the historical background of this remedy under the former FLA. STAT. c. 57(1955) see Yonge, *The Arbitration of an Ordinary Civil Claim in Florida*, 6 U. FLA. L. REV. 157 (1953) which appears in a slightly revised version in 1 FLA. LAW & PRACTICE 627 (1955). See also comment in 8 MIAMI L.Q. 220 (1954). That the new remedy has broader uses see Laws of Fla. c. 57-199 adding a new section FLA. STAT. 578.27 (1957) providing an arbitration committee to assist in determining claims arising out of failure of seeds to perform as indicated by label.

8. That this is no mere academic speculation see Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956) and see Sigfreid v. Pan American World Airways, 230 F.2d 13 (5th Cir. 1956).

9. Especially the new FLA. STAT. §§ 57.27 (2), 57.31 (1957).

10. Parmalee v. Commercial Travelers Mut. Acc. Ass'n, 206 F.2d 523 (5th Cir. 1953); Parmalee v. Iowa State Traveling Men's Ass'n, 206 F.2d 518 (5th Cir. 1953). "These cases involve the construction of a statutory extension of an earlier doctrine which recognized that the insurance industry has always been peculiarly sensitive to state regulation." For further discussion see 8 MIAMI L. Q. 209, 211 (1954). Analagous to this problem is that of the Direct Action Statutes. See Leflar, *Conflict of Laws*, 1956 ANN. SURVEY AM. L. 33 and notes; see also McDonald, *Direct Action Against Insurance Companies*, 1957 WIS. L. REV. 614, especially note 8 at 615.

11. 150 F. Supp. 725 (S.D. Fla. 1955). It was also relied on and applied in Shutt v. Commercial Travelers' Mutual Acc. Ass'n, 229 F.2d 158 (2nd Cir. 1956) to distinguish the Tennessee statute therein construed.

of the temporal distinction by the recent *McGee* case extending full faith and credit to a California judgment rendered to enforce a policy entered into before the statute. While it now seems clear that the power exists to assert jurisdiction on the basis of an isolated transaction, the courts appear reluctant to do so unless the legislative mandate is clear.[12]

There were several other interesting statutory enactments in the 1957 legislative session. In a general statute providing for registration of felons, the language is found in section two:[13]

> Any person who has been convicted of a crime . . . in any court . . . of any foreign state or country, which crime if committed in the state of Florida would be a felony, shall forthwith . . . register with the sheriff. . . .

There can be no question of legislative authority but an interesting problem in classification of crimes under the laws of other jurisdictions is left without specific indication as to the standards to be applied.[14]

In the matter of service on foreign corporations, the legislature repealed section 47.17 and provided that, on failure to comply with the designation provision,[15] process may be served "on any agent of such foreign corporation transacting business for it" in the state.

In view of the extension of jurisdiction[16] in other states this is a conservative measure, particularly if "transacting business" is deemed to evidence a more intimate connection than that involved in the *Weber*[17] case.

Another important statute left without specific territorial or substantive limits is that requiring a writing to evidence an agreement to make a will, legacy or devise.[18] In view of the legislative intent to include prior agree-

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12. The Court in McGee *supra* apparently found such a mandate but query whether some of its language indicates an intent to go beyond the insurance field allowing such legislative policy to overflow into the more normal areas of commercial activity permitting extraterritoriality there as well. See Ehrenzweig & Mills, *Personal Service Outside the State: Pennoyer v. Neff in California*, 41 CALIF. L. REV. 383 (1953). See also Leflar, *supra* note 10; McDonald, *supra* note 10; see also Risijord, *Conflict of Laws Applicable to the Standard Automobile Liability Policy*, 1957 WIS. L. REV. 586.

13. Laws of Fla., c. 57-19 § 2. See Lambert v. California, 26 U.S.L. WEEK, 4059 (U.S. Dec. 17, 1957) where a similar municipal ordinance was held violative of due process.

14. Similarly Laws of Fla. c. 57-52 amending FLA. STAT. § 205.432 (1955) imposes a Florida common law definition of "common ownership or management and control" on insurance companies "incorporated" in any foreign country.

15. FLA. STAT. §§ 47.34-36 (1955).

16. See Leflar, note 10 *supra*.

17. State *ex rel.* Weber v. Register, 67 So.2d 619 (1953) and comment thereon in 8 MIAMI L.Q. 214-215 (1954). *But cf.* language in McGee v. International Life Lns. Co.,—U.S.—, 78 S.Ct. 119 (1957), ". . . a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."

18. Laws of Fla. c. 57-148 (1957).

ments, some reference to the law of the place where made should have been included.[19]

JUDICIAL JURISDICTION

In general

Most of the actions of the Florida Supreme Court in the period under survey can be said to continue the trends in the general exercise of jurisdiction previously noted.[20]

Continuity

Two cases created an important extension of the doctrine of continuity of jurisdiction. The first was *Grant v. Corbitt*.[21] Here the court stated that the original jurisdiction for determination of custody based on divorce was sufficient to effect a change therein even though the mother was domiciled in another state and the child's domicile would be presumed to be hers. It was also held that custody could be awarded to a person not an original party to the divorce proceeding. The rule that the child must be present was affirmed.

In an earlier case, *Watson v. Watson*,[22] the court set forth the rule that modification of a support order based on personal jurisdiction over *H* and *W* in 1947 could be made without new service of process on *H*, even though he was no longer within the jurisdiction. This was based on the holding that, with a specific reservation in the 1947 decree of jurisdiction to modify, a proceeding to modify was not a new action. While there was actual notice in the *Watson* case, as well as appearance, the court enunciated the rule that a change in persón, status or property would be supported by service by mail without the state.[23]

The court also considered the question of jurisdiction for adoption and determined that presence of the adoptee plus consent of one natural parent and adequate notice to the other was sufficient.[24]

Jurisdiction to Tax

In *State ex rel Peninsular Tel. Co. v. Gay*[25] important determinations as to both legislative and judicial jurisdiction to tax were made.[26] The

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19. As was done by Laws of Fla. c. 57-158 (1957) which in amending FLA. STAT. § 72.22 (1955) provided that nothing in the amendment would prevent the adopted child from inheriting from the " . . . natural parents under the laws of this state or any state."

20. For general background see 8 MIAMI L.Q. 216 (1954), also 10 MIAMI L.Q. 264 (1956).

21. 95 So.2d 25 (Fla. 1957).

22. 88 So.2d 133 (Fla. 1956).

23. Relying on the rule of Moore v. Lee, 72 So.2d 280 (Fla. 1954).

24. *In re* Brown's Adoption, 85 So.2d 617, 619 (Fla. 1956).

25. 90 So.2d 132 (Fla. 1956).

26. As to source of information that might be used to limit the power to impose taxes on mortgages and deeds, a party asserted, in State *ex rel.* Port Sewall Realty Co. v. Green, 91 So2d 306 (Fla. 1957), the existence of a treaty between Canada and the

court assumed the latter jurisdiction and then proceeded to limit the former. It found that here all the steps in the issuance of bonds of a Florida corporation took place outside the territory of the state, the mere fact that they were secured by a pledge of Florida assets would not subject them to a documentary stamp tax. There was a dissent in which Milledge, J. said:

> I cannot bring myself to the conclusion that a Florida corporation can evade the documentary tax by the expedient of holding a director's meeting and signing and delivering the bonds outside the state. . . . I think that the corporation has done nothing but put its metaphorical hat on backward.[27]

In strong contrast to this possibly radical self-denying interpretation was the assertion of authority to tax the purchase and use of airplane parts even though there might be a marginal effect on interstate and foreign commerce.[28]

Conflict of Jurisdiction — State and Federal

In *Bert Lane Company v. International Industries,*[29] the court found that there was a sufficient basis for the claim for equitable relief of unfair competition to create state jurisdiction even though the right asserted arose out of a patented process. The reasoning used to defeat the exclusive federal jurisdiction over patent cases is analogous to that used to assert the more limited interpretation of the federal question in normal federal jurisdiction.[30]

The narrowness of result is shown by this language:

> Whether the plaintiffs could have sued in a federal court for infringement of their patent is not necessary to be decided. The fact remains that they elected not to do so. . . . A determination of their claim does not require a construction of the patent laws nor a finding that there has been an infringement by the defendants of their patent.[31]

Another aspect of potential conflict between the two jurisdictions was considered in *Jacksonville Blow Pipe Co. v. Reconstruction Finance Corp.*[32]

United States. The court approved the reliance of the circuit judge on a letter from the United States Department of State that no such treaty was in force between the countries in question that would affect the state's power to levy this form of taxation.

27. State *ex rel.* Peninsular Tel. Co. v. Gay, 90 So.2d 132, 136 (Fla. 1956).

28. L. B. Smith Aircraft Corp. v. Green, 94 So.2d 832, 836 (Fla. 1957) relying in part on fixing by interpretation the term "common carrier" to the exemption language of FLA. STAT. § 212.08 (3) (1957) and in part on the implied authority given to the states by the Supreme Court in Braniff Airways v. Nebraska State Board, 347 U.S. 590 (1954).

29. 84 So.2d 5 (Fla. 1955).

30. See 10 MIAMI L.Q. 286 (1956) and regarding the discussion of Cox v. Roth see note 8 ALA. L. REV. 347 (1956).

31. See note 29 *supra* at 8.

32. 244 F.2d 394 (5th Cir. 1957).

Here the court had to pass on the scope of judicial exceptions to the 179 prohibition against enjoining state court proceedings. It was held that a injunction was proper to prevent a replevin of goods sold to a purchase at a bankruptcy sale. It is fortunate that the situations in which actua conflicts arise in our dual system of courts are relatively infrequent.[33]

Judicial jurisdiction — herein more on the semantics of domicile, permanent resident and residence

A leading case, *Bloomfield v. St. Petersburg Beach*[34] and the change i the language of the all-important jurisdiction for divorce statute make i important to note the continuity into this period of this basic problem The court takes the classic position that once the intent is clearly established mere temporary withdrawal from the state will not work a loss of domicile I should be noted that here domicile was being asserted for the purpose o establishing voting rights. The court distinguished *Campbell v. Campbell*.[3]

In the light of the legislative change of the language in Florida Statut section 65.02, this distinction may have to be reconsidered. It is indeed unfortunate that such a vital power-assertion principle should not be clari fied by concerted action on the part of both court and legislature.[36] The employment of the term "bona fide" could be taken to indicate an intention to convert residence to domicile.[37] For the legislature to add to the con fusion by the adoption of such new language as "bona fide resident" to an already crowded terminological field and for the court to continue a vague objective standard for measurement of subjective intent will only make inevitable a broad and complete restudy of the entire field.[37a]

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33. For resolution of some other conflicts occurring in the period see *In re* Beach Resort Hotel Corp., 141 F.Supp. 537, 543 (S.D. Fla. 1956); Maule Industries v. Gerstel 232 F.2d 294 at 298 note 4 (5th Cir. 1956); " . . .[T]he referee . . . will . . . certainly take the steps necessary to 'avoid unseemly conflicts between courts' " . . . . ; and Coasta Petroleum Co. v. Collins, 234 F.2d 319,320 (5th Cir. 1956) "It seems to us best to set aside any holding that the trustees are immune from suit, so that any future litiga tion in the Florida State Courts will not be embarrassed by a claim of res judicata . . . . "

34. 82 So.2d 364 (Fla. 1955). See comment on this case in Stern, Domicile, title to appear in FLA. LAW AND PRACTICE.

35. 57 So.2d 34 (Fla. 1952) and comment in 8 MIAMI L.Q. 210, note 2 (1954) and 10 MIAMI L.Q. 267 (1956).

36. That the same confusion exists in higher places see Fourco Glass Co. v Transmirra Products Corp., 353 U.S. 222 (1957) especially at 226.

37. Laws of Fla. c. 57-58 (1957) amending FLA. STAT. § 636-26(1) (1955) and Laws of Fla. (1957) c. 57-244 amending FLA. STAT. § 475.17-18 (1957) employ the language "bona fide resident" in determining qualifications for insurance adjusters and real estate brokers respectively, and see Laws of Fla. c. 57-240 (1957) amending FLA STAT. § 409.16(c) (1955) and FLA. STAT. § 409.40(8) (1955) with the language "citi zen of the U.S. or has been a resident of the U.S. for at least twenty years . . . . "

37(a) Similar lack of realism has already brought pressure to bear on reform o the statute of limitations field. See proceedings Fla. Bar. Comm. Continuing Law Reform

Herein more on res-judicata and collateral estoppel

Another area of confusion noted has continued, reaching a high point in a per curiam opinion of the court in *Lawlor v. Lawlor*.[38] The entire opinion is as follows:

> Although the final decree in this case uses the term 'res judicata' when it should have been 'estoppel by judgment,' the result reached by the chancellor was proper. Affirmed.

Notwithstanding this, the rule of the *Gordon*[39] case was applied with interesting and opposite results in two cases. *Horn v. Horn*,[40] reached the conclusion that a prior New York decree granting *H* a limited divorce *mensa et thoro* on the ground of abandonment was no bar to *W's* divorce action based on habitual intemperance. The bland statement that such a prior judgment would not act as a total or partial bar was reiterated. It was said to be so because the "causes of action" are different. Yet in *Field v. Field*[41] it was held that full faith and credit demanded at least estoppel effect for a New Jersey separate maintenance decree in which *H* participated. The Gordon[42] rule was now limited to matters of strict res judicata in the narrow sense as previously "defined" by the court.

In *Carducci v. Carducci*[43] the court approved, per curiam, the dismissal with prejudice of *H's* complaint for divorce on the grounds of desertion and habitual indulgence in violent and ungovernable temper. *W* had pleaded two Massachusetts proceedings as both res judicata and estoppel by judgment, one granting her separate maintenance and the other dismissing *H's* action for divorce based on the latter of the two grounds mentioned above. The implication from this holding is that the full court has not yet made up its mind how far it will follow the identity of causes of action concept and thus leaves open the door to an avoidance of the full faith and credit effect of prior proceedings by manipulation of this standard. The case can be understood only on the assumption that as a policy question the court chooses to leave this matter open for settlement at a future date.[44]

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38. 84 So.2d 913 (Fla. 1955).
39. 59 So.2d 40 (Fla. 1952) and comment in 8 MIAMI L.Q. 209, 226 (1954).
40. 85 So.2d 860 (Fla. 1956).
41. 91 So.2d 640 (Fla. 1956); 68 So.2d 376 (Fla. 1953).
42. See note 39 *supra*.
43. 82 So.2d 360 (Fla. 1955).
44. Parks, A. J., dissented from the per curiam on the ground that the proceedings pleaded did not contain sufficient proof of the defense and that the same rule should apply therein as would in an action for divorce, the state having the same interest. *Id.* at 362. For other cases considering this distinction see Shearn v. Orlando Funeral Home, 88 So.2d 591 (Fla. 1956); Woodson v. Woodson, 89 So.2d 665 (Fla. 1956); Youngblood v. Taylor, 89 So.2d 503 (Fla. 1956).

The change of statutory situation limitation on the rule of *Wagner v. Baron*[45] was followed and relied on in *Thompson v. Thompson*.[46]

FULL FAITH AND CREDIT

General

In one of the most important decisions in the period under survey, *Pacific Mills v. Hillman Garment*,[46a] the court had to consider and pass on the validity of a New York judgment based on consent to the jurisdiction of the courts of that state through an arbitration agreement. The lower courts had granted and affirmed the granting of Hillman's motion to dismiss and the supreme court reversed. They found that voluntary participation in the arbitration in New York was consent to the entry of judgment and would support the judgment against an initial due process attack. While the statutory change in arbitration had not at this time taken place, it was found that Florida public policy was not so inimical to the quasi-judicial type procedure in that arbitration awards would, once made, be enforced even under the old statute. The consent aspect provided for sufficient notice, certainly as much, the court pointed out, as that provided for in the statute[47] held constitutional in *Weber v. Register*.[48]

In addition the court continued the construction of the Uniform Judicial Notice Act[49] which required the pleading of the foreign law relied on so as to make a clear record on this point but found the general allegation that the judgment was entered in accordance with a procedure set forth in article 84 of the arbitration statute[50] of the New York Civil Practice Act to be sufficient. As thus construed the restrictive interpretation is much more liberal than had earlier appeared.

The decision in this case is also important for the future construction of the new Florida Arbitration Code[51] in that the language used shows an intent to change the attitude underlying the decision in *Fenster v.*

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45. 64 So.2d 267 (Fla. 1953). The court stated:
> The cases are legion which hold that res judicata is not a defense in a subsequent action where the law under which the first judgment was obtained is different than that applicable to the second action, or there has been an intervening decision, or a change in the law between the first and second judgment, creating an altered situation.

See comment thereon in 8 MIAMI L. Q. 209, 230 (1954) and in 10 MIAMI L. Q. 269 (1956).

46. 93 So.2d 90 (Fla. 1957).

46a. 87 So.2d 599 (Fla. 1956).

47. FLA. STAT. § 47.16 (1957).

48. State *ex rel.* Weber v. Register, 67 So.2d 619 (Fla. 1953) and comment thereon in 8 MIAMI L. Q. 214-216 (1954).

49. Pacific Mills v. Hillman Garment, 87 So.2d 599, 601 (1956), where the court relies on Kingston v. Quimby, see 80 So.2d 455 (Fla. 1955), 10 MIAMI L.Q. 261 (1956).

50. N.Y. CIV. PRAC. ACT § 1450.

51. FLA. STAT. §§ 57.10-57.31 (1957).

Makovsky[52] which had stated the classic "ouster of jurisdiction" rule. This language of the court[53]

> . . . when an arbitration procedure is employed in a particular state then the law of the forum controls the disposition of the ultimate rights of the parties . . .

also indicates an intention to take a liberal attitude by adopting in advance of the new statute the classification now established. The passage must be understood, by the holding in the principal case, to mean the law of *that* forum. To give such a broad effect to a substantive classification is most important.[54]

In granting full faith and credit to a New Jersey judgment, the court considered a collateral attack raising lack of jurisdiction over the subject matter in the prior proceeding.[55] *Vonella* recovered in a Workmen's Compensation proceeding which recovery was reduced to judgment under the New Jersey procedure. The decisive question before the Florida Supreme Court when enforcement was sought was the matter of the statute of limitations. Following the strict rule on judicial notice,[56] appellants failure to put appellee on notice in the lower court of the provisions relied on led to the proper assumption that the New Jersey statute was the same as the Florida statute, e.g., that failure to plead it acted as a waiver. Notwithstanding this correct decision, the court considered the law and found it to be the same in fact.[57]

A different result was reached in cutting off the obligation arising under a foreign decree by use of a local statute. *W* had entered into a separation agreement with *H* in Pennsylvania and *H* had established a trust fund and agreed to pay the deficiency between income from the trust and the amount stipulated in the separation agreement. This had been required by decree of the Pennsylvania court.[58] *H* had duly performed until his death and the executor of his estate paid the amount due *W* for the last year of his life. *W* failed to file a claim against the estate within the period of eight months.[59]

The court held[60] that even if it were assumed that this obligation survived, there was nothing to take it out of the scope of the short statute

52. 67 So.2d 427 (Fla. 1953).
53. Pacific Mills v. Hillman Garment, 87 So.2d 599, 602 (Fla. 1956).
54. At the judgment level it is curious that the court should have added, *id.*, "we have not been referred to any decision passing upon the enforceability in a sister state of a judgment entered in the New York courts pursuant to [this] arbitration procedure."
55. Aboandandolo v. Vonella, 88 So.2d 282 (Fla. 1956).
56. Kingston v. Quimby, 80 So.2d 455 (Fla. 1955) and comment in 10 MIAMI L. Q. 261 (1956).
57. *But cf.* the statement of the court in Walter Denson & Son v. Nelson, 88 So.2d 120, 122 (Fla. 1956): "Ordinarily statutes of limitation are construed as being applicable to the remedy and not to the substantive right."
58. Van Sciver v. Van Sciver, 337 Pa. 390, 12 A.2d 108 (1940).
59. As required by FLA. STAT. § 733.16 (1957).
60. Van Sciver v. Miami Beach First National Bank, 88 So.2d 912 (Fla. 1956).

of limitation. In spite of its embodiment in a valid foreign decree the obligation was found to be merely contractual.

On the survival question the court said:

> . . . [T]he obligation remains a purely contractual one arising out of the promise voluntarily made by the decedent during his life with the intention of binding his executor after his death. Without such a contractual obligation, the plaintiff (W) would have had no claim at all, since any right to support arising out of the pre-existing marital status would have been extinguished upon the death of the husband.[61]

Important cases in the general field of faith and credit to divorce decrees were also decided in this period. In *Sorrells v. Sorrels*[62] the court had to consider the effect of *H's ex parte* Alabama divorce on a prior Florida separate maintenance decree.[63] The court reiterated its reliance on the previously announced rule of *Pawley v. Pawley*[64] and stated that it would grant validity to the Alabama decree to the extent of terminating the status but would not consider it to have dealt with the duty of support. This same problem arose in *Armstrong v. Armstrong*,[65] where the Florida court had left rather ambiguous the question of whether it intended to cut off W's right to alimony in an ex parte proceeding by *H*. The language, quoted by both the Ohio Supreme Court and the United States Supreme Court, was ". . . specifically decreed that no award of alimony be made to the defendant. . . ."[66]

In the opinion of the court, Florida had not adjudicated the alimony question and Ohio could therefore do so without raising a full faith and credit question.[67]

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61. *Id.* at 914. The same general result is reached as to support money for children awarded by a divorce decree; Guinta v. Lo Re, 159 Fla. 448, 31 So.2d 704 (1947). *But cf.* the result in the recent case of Flagler v. Flagler, 94 So.2d 592 (Fla. 1957), where support payments ordered in a paternity suit were held not to survive. The place of principal administration was Illinois. A contrary result was reached in Johnson v. Every, 93 So.2d 390 (Fla. 1957), which found language in a decree ordering alimony payments until death or remarriage of wife sufficient expression of intention to make the obligation survive. There was a strong dissent on the question of intention but the rule of the principal case as to conforming to the eight-month claim statute was reiterated, *Id.* at 393 (majority) and 397 (dissent). The amount due was held to be incapable of increase either retrospectively or prospectively after H's death.

62. 82 So.2d 684 (Fla. 1955).

63. Sorrells v. Sorrells, 53 So.2d 645 (Fla. 1951).

64. See discussion in 8 MIAMI L.Q. 225 and note 82. In an otherwise superb survey article by Leflar there is a small factual error. He has it that the divorce was a Florida one when in fact it was Cuban. 1956 ANN. SURVEY AM. L. 33 note 90.

65. 350 U.S. 568 (1955).

66. *Id.* at 569.

67. On this state of the record, Justice Frankfurter would have dismissed the writ as improvidently granted. Perhaps the most important aspect of the case, as subsequent events bore out, was the concurrence of Black, J., *id.* at 575. This opinion found that Florida adjudicated the alimony question and fell back on the rule of *Estin* to find that such a determination was not entitled to full faith and credit as a matter of constitutional policy.

An apparently sound result reached in *In re Bourne's Estate*[68] which considered the scope of collateral attack permitted in a New York court under the prevailing Florida law and applying the rule of *Johnson v. Muelberger*[69] found that the daughter of a former marriage was foreclosed from making such an attack since she had no vested rights but only an expectancy in the estate being administered,[70] was reversed[70a] by the appellate division finding that the jurisdictional question was still open. This result clearly limits the broad rule of the *Johnson* case which was not based solely on the appearance of *H* but on the overall scope of Florida law as to collateral attack. Further consideration by the New York Court of Appeals may well result in the restoration of the broader effect which seems more in accord with the spirit of the Supreme Court holding in *Johnson*.

The final case of importance is that of *Berkman v. Ann Lewis Shops*.[71] Plaintiff was assignor of judgments obtained in Florida against a subsidiary of defendant. Jurisdiction in Florida had been based on the substituted service statute held constitutional in *Weber v. Register*.[72] They were found undoubtedly valid against the subsidiary but the crucial question was whether, in enacting Florida Statute section 47.16 (1957) the Florida Legislature had intended to overthrow the rule that ownership of a subsidiary did not bring the parent within the jurisdiction without more. The court made two important declarations. First that it could inquire into

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This Black concurrence assumes great importance because in the subsequent case of *Vanderbilt v. Vanderbilt*,—U.S.—, 77 S. Ct. 1360 (1957), it became the rule of the court. See his comments on *Thompson v. Thompson*, 350 U.S. at 581 (1955). For an excellent review of the problem see Frankfurter, J., dissenting in *Vanderbilt*, 77 S. Ct. 1363-65 and a fine general discussion of the problem in Leflar, *Conflict of Laws*, 1956 ANN. SURVEY AM. L. 38 and especially his comment on Kessler v. Farquier Nat'l Bank, *id.* at note 83 which should be compared with prior comments in 8 MIAMI L.Q. 216 (1954) and 10 MIAMI L.Q. 262 (1956).

68. 142 N.Y.S.2d 777 (Surr. Suffolk 1955). For a prior hearing of this case see 206 Misc. 378, 133 N.Y.S.2d 192 (1954).

69. 340 U.S. 581 (1951).

70. The surrogate court relied on De Marigny v. De Marigny, 43 So.2d 442 (Fla. 1949). For other cases in New York granting full faith and credit to Florida proceedings see Astor v. Astor, 162 N. Y. S.2d 87 (S.Ct. 1957) (no adjudication in Florida as to status of either W1 or W2 as lawful wife) for prior proceedings see 161 N.Y.S. 2d 443 (S.Ct. 1957) and 160 N.Y.S.2d 103 (S. Ct. 1957); Vallianos v. Vallianos, 161 N.Y.S.2d 918 (S.Ct. 1957) (routine credit); Steinhauser v. Steinhauser, 158 N.Y.S.2d 854 (App. Dis. 2d Dept. 1956) (no modification alimony except in Florida granting court). And see the interesting involvement of a divorce decree in Vermont-New York faith and credit situation in Chapman v. Chapman, 158 N.Y.S.2d 674 (S.Ct. 1956). No faith and credit was given in Aspromonte v. Aspromonte, 164 N.Y.S.2d 299 (S.Ct. 1957) and in Schwartz v. Schwartz, 164 N.Y.S.2d 943 (S.Ct. 1956) inquiry into lack of domicile for divorce in Florida was barred by plea of constitutional privilege against self-incrimination.

70a. 2 A.2d 896, 157 N.Y.S.2d 777 (S. Ct. 1956).

71. 246 F.2d 44 (2d Cir. 1957).

72. Cf. discussion *supra* note 17 and 8 MIAMI L.Q. 214-216 (1954) and comments on similar problem in Leflar, 1956 ANN. SURVEY AM. L. 25 especially that the trend seems to be in favor of expanded state jurisdiction both by service personally outside the state and substituted service within and his discussion of the new section 17 of the Illinois Civil Practice Act. See also the valuable note, *Due Process of Law and Notice by Publication*, 32 IND. L.J. 469 (1957).

the jurisdictional basis because it had not been clearly litigated in Florida and that this would not not violate the full faith and credit clause and second, that the Legislature did not intend such a result. Whether they could have done so had they been found to have intended the result is a question left open by the court.

Both majority[73] and dissent[74] cite comments made on the *Weber* case[75] for their own purposes. It seems to me, that, while the result in *Weber* ought to be opposed,[75a] the case would have indicated an intent to subject such activities to Florida control. Distinguishable on its facts it may be from the present case, but those facts are such as to make the present case really an *a fortiori* one. Nor does it seem reasonable to continue the *Cannon*[76] rule in face of clear legislative intent to subject corporate activity to greater control.[77]

Impairment of contract

Slate v. Berkshire Life Insurance Company[78] has been set apart because it involves not only full faith and credit and the *Erie* doctrine but mainly the matter of a state impairment of the obligations of contract. Beneficiary brought action to recover the proceeds of a life insurance policy and for attorney's fees.[79] It was admitted that this was an Ohio contract and that Ohio had no such provision for recovery of attorney's fees. The court felt that faith and credit was not technically involved and distinguished the *Dunken* case[80] on the ground that the Florida statute does not attempt to interfere with foreign contracts or business activity. Since it is limited to "rendition of judgment" this presupposes jurisdiction over the defendant company as well as such contact with the state as to allow it to assert such a public policy in the regulation of that industry. Since this is a diversity jurisdiction case, the federal court is but another court of the state and Florida law is binding on it, unless it conflict with other constitutional

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73. Berkman v. Ann Lewis Shops, 246 F.2d 44, 50 (2d Cir. 1957).
74. *Id.* at 52.
75. 67 So.2d 427 (Fla. 1953); 8 MIAMI L.Q. 209, 214-216 (1954).
75a. *Cf.* McGee v. International Life Ins. Co. —U.S.—, 78 S.Ct. 119 (1957).
76. "In the leading case of Cannon Mfg. Co. v. Cudahy Packing, 267 U.S. 333 (1925) . . . , the Supreme Court held that a foreign corporation that solicited customers and sold and distributed its products in North Carolina through a wholly-owned subsidiary was not amenable to suit in a forum of that state since the identity of the two corporations was maintained and the activities within the state were actually carried on by the subsidary." See note 73 *supra* at 48.
77. Further support for this construction of the legislative intent will be found in Laws of Fla. c. 57-747 amending FLA. STAT. § 47.16 (1955) by adding (2) which includes within the basic service provisions foreign manufacturers doing business in Florida through brokers, jobbers, wholesalers or distributors. It makes any such act give rise to a conclusive presumption that the person or corporation is engaging in a business or business venture within the meaning of (1).
78. 142 F. Supp. 691 (S.D. Fla. 1956).
79. As provided by FLA. STAT. § 625.08 (1957).
80. Aetna Life Insurance Co. v. Dunken, 266 U.S. 389 (1925).

principles.[81] No such federal constitutional objections were found. Why the court did not find Ohio public policy embodied in its statutes read into the policy thus presenting the faith and credit issue is left without a more satisfactory answer than the statement that the clause containing that declaration of statutory policy ". . . technically is not involved."[82]

State Law in the Federal Courts

The Erie Doctrine

In a general statute[83] intended to streamline the operations of the highest court of this state, the 1957 legislature took cognizance of an important and perplexing problem in this field, namely that of filling the gap in state jurisprudence when it becomes material in the several federal courts. It perfected a provision originally enacted in 1945 giving the court power to answer "questions or propositions of the laws of this state, what are determinative of the said cause (therein pending), and (when) there are no clear controlling precedents in the decisions. . . ."[84]

The cases arising in the federal courts in the period surveyed range from absolute respect for "state law" to wild hunting for "the state law" when none exists, and include all of the subtle shades in between. One of the finest examples of direct control occurred in *Hunter v. United States Fidelity and Guaranty Co.*[85] The entire opinion is as follows:

> Per Curiam. Upon the authority of a decision filed . . . by the Supreme Court of Florida in a companion case involving the same law and facts . . . the judgment of the court below is Affirmed.[86]

In complicated litigation involving relationships between a general carrier and an excess insurance carrier the basic liability arose out of a Florida litigation.[87] The excess carrier had refused liability on the grounds of unreasonable delay in the transmission of notice.[88] Here the court

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81. The court also disposed of Holderness v. Hamilton Fire Ins. Co., 54 F. Supp. 145 (S.D. Fla. 1944), which applied the *Dunken* limitation construing the statutory attorney's fees as part of every contract by mention of the later Florida case, Feller v. Equitable Life Assurance Soc., 57 So.2d 581 (Fla. 1952), which changed the interpretation and which is now the law.

82. See note 78 *supra* at 692. The meaning of "technically" is also left unanswered!

83. Laws of Fla. c. 57-274 revising and amending Fla. Stat. c. 25 (1955) relating to the organization of the supreme court.

84. Fla. Stat. § 25.031 (1957). It is unfortunate that this provision is not more widely used.

85. 231 F.2d 446 (5th Cir. 1956).

86. The companion case is to be found in 86 So.2d 421 (Fla. 1956).

87. Florida Greyhound Lines v. Jones, 60 So.2d 396 (Fla. 1952).

88. Greyhound Corp. v. Excess Insurance Co. of America, 233 F.2d 630 (5th Cir. 1956); see also parallel case, American Fidelity & Casualty Co. v. Greyhound Corp., 232 F.2d 89 (5th Cir. 1956) which was followed in Springer v. Citizens Casualty of New York, 246 F.2d 123 (5th Cir. 1957).

had to look a bit further afield to find authority but discovered it in a prior case in the same circuit that arose out of other Florida litigation.[89] It was considered proper controlling authority in that it not only arose in Florida but involved the construction of a Florida contract. In *Chaachou v. American Central Insurance Company*[90] this delightful statement concerning the doctrine is found.

> Taking our *Erie* lights, as best we can, . . . Florida, whose policy controls here, recognizes this, we think, as a valid area for contract. . . .[91]

In *MacCurdy v. United States*[92] the court had to determine the meaning of Florida law applicable under the provisions of the Federal Tort Claims Act. It was found that the dangerous instrumentality rule made contributory negligence of the driver imputable to the owner, barring recovery by the owner for the death of his wife and for the damage to his automobile. After enunciating a general rule in these terms the court then went on to say:

> The Supreme Court of Florida has never had a case exactly like this, but the general rule is that in actions for wrongful death compensation may not be recovered for the benefit of persons who concurred in the injury and death. . . . This rule is based upon public policy and the principal (sic!) that no one should be permitted to profit by his own wrong.[93]

Moritt v. Fine[94] involved the standard *Erie* reference to Florida law on the question of the meaning of that state's Statute of Frauds. It was held that a broker's signature on a "deposit receipt" merely to acknowledge payment without intention to sign for sellers with respect to terms of purchase did not satisfy the statute. Brown, J., dissenting, had this to add:

> Reminiscent to me of the nice, intriguing dialectic inquiries of common law pleading, a point of view which Florida Judges, steeped in the lore and traditions of their local practice, seem reluctant to discard. . . , the nub of the Court's decision is that the pleaded contract violated the statute of frauds because the

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89. This case, Phoenix Indemnity Co. v. Anderson's Groves, was relied on by both majority and dissent. Greyhound Corp. v. Excess Insurance Co. of America, note 88 *supra* at 636 and 640 respectively.

90. 241 F.2d 889 (5th Cir. 1957).

91. *Id.* at 892. Reference is made to Meredith v. Winter Haven, 320 U.S. 228 (1943), see discussion in 10 MIAMI L.Q. 284 note 173 (1956). The substantive question involved in the case, avoidability of standard extended coverage policy for false statements, is not novel or important and the court apparently heeded its "erie lights". For another routine *Erie case*, see American Insurance Co. v. Burson, 213 F.2d 487 (5th Cir. 1954); broad interpretation of "theft" under Florida law properly applicable.

92. 143 F. Supp. 60 (N.D. Fla. 1956).

93. *Id.* at 65. The result was affirmed on appeal, 246 F.2d 67 (5th Cir. 1957), relying on a late Florida case and converting the doctrine into one of general respondeat superior.

94. 242 F.2d 128 (5th Cir. 1957).

> Seller did not sign on the right line. . . . But neither the statute of frauds nor the elements of a contract requires such ritualism.[95]

Two other problems were dealt with in the area of the *Erie* doctrine. The first is that of determining the scope of the state law to be applied, the special procedure-substance classification in the federal diversity jurisdiction. *Pogue v. Great Atlantic & Pacific Tea Company*[96] was an action by a customer against a storekeeper to recover for injuries in a "slip and fall" situation. The court found that under the applicable Florida law the question of control over the creation of the hazard was crucial but stated that the decision on whether this was such a triable issue of fact as to preclude summary judgment was a federal one not subject to state law control.

> We do not think that we should seek to discover how that apparently unique doctrine of Florida law should be applied to the evidence in this case, for we consider it purely procedural and without application to a case tried in the Federal Court. . . . The kind of jury trial to which the parties are entitled in federal courts . . . is that preserved by the seventh amendment of the Constitution, to which the doctrine of *Erie Railroad Co. v. Tompkins* . . . is of course subservient.[97]

The second of these problems is that of finding a solution in the case where state law is admittedly applicable but none can be found. Since the courts have not yet begun to use the statute set forth at the beginning of his section,[97a] they are forced to proceed by analogy or some other less than exact means of determining that body of doctrine.

Consider the case of *Howard v. Atlantic Coast Line Railroad Company*[98] where the court could find no specific instance involving the application of the Florida attractive nuisance doctrine to the facts. It said that the court

> . . . has not circumscribed itself to the application of any single principle, but rather has considered all factors which properly bear on the reasonableness of a property-owner's acts.[99]

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95. *Id.* at 132-133. Footnotes of the court omitted. For cases construing the Florida law in the insurance brokerage area and reaching a similar result, see Peddy v. Pacific Employers Insurance Company, 246 F.2d 306 (5th Cir. 1957); National Fire Ins. Co. v. Board of Public Instruction, 239 F.2d 370 (5th Cir. 1956) applying the Florida valued property clause, as well as FLA. STAT. § 625.08 (1957) providing for attorney's fees.

96. 242 F.2d 575 (5th Cir. 1957).

97. The court's careful review and summary of "the apparently unique" doctrine of Florida substantive law was applied and followed in a later case, Goldman v. Hollywood Beach Hotel Company, 244 F.2d 413 (5th Cir. 1957). The result in the principal case should be contrasted with State Mutual Life Assurance Co. v. Wittenberg, 239 F.2d 87 (8th Cir. 1956), applying state law with respect to determining when the burden of proof should be imposed. For a generally excellent discussion of substance-procedure see Drinan v. A. J. Lindemann & Hoverson Co., 238 F.2d 72 (7th Cir. 1956).

97a. FLA. STAT. § 25.031 (1957).

98. 231 F.2d 592 (5th Cir. 1956).

99. *Id.* at 594.

On the basis of this generalized rule the federal court then felt free to determine the particular case. In another case[100] involving the question of the necessity for payment of the excess judgment before the insured could recover damages for breach of the insurer's duty to settle the claim, a precise point which the Florida court had not determined, the federal court avoided the need for a prior determination of state law by exercising other parts of the broader federal jurisdiction than the question of damages.

Finally in a case[101] involving the construction of the innkeepers liability statutes[102] the district court used the reverse technique stating:

> There are no decisions by the Florida Supreme Court construing these statutes, but the Court of Appeals, Fifth Circuit, has considered the same in two cases. . . . These decisions . . . appear to be controlling these cases.[103]

Extended Erie doctrine

In the previous survey[104] mention was made of the emergence of this new area wherein state law is being applied in the non-diversity jurisdiction of the federal courts. This application occurs in two different types of setting. The first is where the Congress in the exercise of its power has made a particular choice or use of state law explicitly binding on the federal courts. The second is that in which the courts find such use by judicial interpretation. The first raises a question of improper or possibly unconstitutional abandonment of power by Congress; the second a willingness to create diversity where uniformity might well better be the goal.

A fine illustration of the split which exists in both settings is the recent Supreme Court decision in *De Sylva v. Baltimore*.[105] *Contrast* the language from the opinion of the court, Harlan, J.,[106]

> The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal, law. . . . This is especially true where

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100. Dotschay v. National Mutual Ins. Co., 246 F.2d 221 at 222 (5th Cir. 1957). The precise language of the court is worth quoting:

> We do not find it necessary to decide that question in advance of the State courts, for the jurisdiction of the federal district court was more elastic than simply to award damages.

101. Lazare Kaplan & Sons v. Pensacola Hotel Co., 153 F. Supp. 31 (N.D. Fla. 1957).

102. FLA. STAT. §§ 509.111 and 509.121 (1957).

103. See note 101 *supra* at 33. A variant of this is to be found in Meehan v. Grimaldi & Grimaldi, Inc., 240 F.2d 775, 777 (5th Cir. 1957), where the court stated: "No Florida cases are cited by the appellee that indicate that the Florida Supreme Court would not follow the principles mentioned in these cases." For another example of the willingness to predict with greater abandon see Citizens Fidelity Bank & Trust Co. v. Baese, 136 F. Supp. 683 (M.D. Tenn. 1956). And see discussion 10 MIAMI L.Q. 281-2 (1956) and authorities therein mentioned.

104. 10 MIAMI L.Q. 286 and note 186 (1956).

105. 351 U.S. 570 (1956).

106. *Id.* at 580.

> a statute deals with a familiar relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.

With that of the concurrence by Douglas, J.:[107]

> The meaning of the word "children" as used in section 24 of the Copyright Act is a federal question. Congress could of course give the word the meaning it has under the laws of the several states. . . . But I would think the statutory policy of protecting dependants would be better served by uniformity than by the diversity which would flow from incorporating into the Act the law of forty-eight States.

Pursuing the technique of remitting a decision on the content of the federally created right will eventually end with a determination of the scope at the same time. This line is too thin to maintain, epecially in the face of the apparent intent of this highest tribunal to enlarge the scope of state law within the diversity jurisdiction which must necessarily overflow into the area of determination of federally created rights. This becomes particularly true when one realizes that the federal judiciary at the district court level is filled with judges often more familiar with state than federal law.[108]

Several local cases were also decided in this period in this area. *Richter's Loan Co. v. United States*[109] intimated that state law might well be used to determine the effect of a slightly incorrect filing of a tax lien.[110]

In another most important case[111] the court refused to go along with cutting down the scope of federal jurisdiction by expanding the scope of the diversity jurisdiction. Admitting that, were this an ordinary diversity case, state law as to controlling periods of limitation would control, it reasserted the admiralty character of action on a charter party which incorporated by reference the one year limitation contained in the Carriage of Goods by

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107. *Id.* at 583.

108. Illustrations of fields in which the legislative direction was used are: social security—Robles v. Folsom, 239 F.2d 562 (2nd Cir. 1956); Warrenberger v. Folsom, 140 F. Supp. 610 (M.D. Penn. 1956); *but cf.* strong *contra* holding favoring the federal standard in construing meaning of remarriage in Sparks v. United States, 153 F. Supp. 909 (Vt. 1957); tort claims—Massachusetts Bonding and Ins. Co. v. United States, 352 U.S. 128 (1956) and comment 43 A.B.A.J. 255 (1957); naturalization—United States v. Milana, 148 F. Supp. 152 (E.D. Mich. 1957).

On the effect of the judicial extension of state law in diversity see especially, Bank of America v. Parnell, 352 U.S. 29 (1956) and comments thereon 10 MIAMI L.Q. 423 (1957) and 43 A.B.A.J. 156 (1957). An extremely interesting combination of legislative and judicial localization is Barnes v. Union Pacific RR., 139 F. Supp. 198 (S.D. Idaho, 1956).

109. 235 F.2d 753 (5th Cir. 1956).

110. A similar use of state law in a government contract case was made in Seaboard Machinery Corp. v. Hanover Fire Ins. Co., 149 F. Supp. 362 (N.D. Fla. 1957); *cf.* in general on this problem Miller v. Arkansas, 352 U.S. 187 (1956) noted in 43 A.B.A.J. 256 (1957).

111. J. B. Effenson Co. v. Three Bays Corp., 238 F.2d 611 (5th Cir. 1956).

Sea Act. This result was reached even in the absence of specific federal statutory authorization.[112]

And finally careful consideration must be given *Fahs v. Martin*.[113] This was an admittedly non-diversity action and yet the court felt that it should not decide the question whether federal or Florida law should make the choice of the applicable substantive law.[114]

It resolved the problem with this statement:

> . . . (*I*)*n deciding how the matter should be characterized for conflict of law purposes* (italics in original), it is clear that the law of the forum should control. Either as a federal court or in the role of a Florida court, we conceive of the matter as one of usury for the purpose of applying conflict of laws rules; for the applicable body of conflicts rules (either federal or Florida) is predicated on a framework of either federal or Florida legal concepts, not this peculiar differentiation existing only in some New York case.[115]

and then proceeded to decide the substantive part of the case on the basis of what might be called the general choice of law rules regarding usury.[116]

The problem of the conflict of laws in the non-diversity federal jurisdiction has not been resolved but rather postponed. Apparently it will not be resolved until the courts are faced with a case in which the rule of the forum, now defined as the state in which the non-diversity court sits rather than the court itself, and the rule of the Supreme Court differ. That lack of difference was the basis for postponement, a most unfortunate postponement in view of the rising tendency to fractionalize statutes and even constitutional principles once thought to embody policies favoring national rather than territorial uniformity.

CHOICE OF LAW

Creation and transfer of interests in tangible chattels

Once again the statutory law regarding that most important "tangible and mobile chattel"[117] has not been changed and the court has had

112. See especially discussion of Sheibel v. Agwilines, Inc., 156 F.2d 636 (2nd Cir. 1946) *id.* at 615-16. *But cf.* incorporation of state law on survival in general maritime tort in Meade v. Luksefjell, 148 F. Supp. 708 (S.D. N.Y. 1957).

113. 224 F.2d 387 (5th Cir. 1955). Not only for the point now under discussion but because it represents a fine example, perhaps almost unique, of careful consideration of characterization in the conflict of laws.

114. See especially the remarks of the court on the kind of uniformity that it felt was most important in the field of taxation, *id.* at 396.

115. *Id.* at 396-7; footnotes of the court omitted.

116. This particular solution to the problem of *whose* characterization, which is really not a solution at all, was cited and followed in Edward E. Morgan Co. v. United States, 230 F.2d 896, 902 (5th Cir. 1956): "We think it is unnecessary to decide whether a federal district court sitting in Texas in a case where jurisdiction *is not based* on diversity of citizenship should resolve a conflict of laws question by the law of the forum, i.e. Texas, or by a general rule or federal doctrine." (Emphasis supplied) Note that the specific question in *Fahs* was characterization and this has now been generalized to "conflict of laws."

117. See 10 MIAMI L.Q. 290 (1956).

occasion to reiterate[118] the *McQueen-Livingston* doctrine,[118a] as extended by the *Vincent* case.[119]

In *Lefcourt v. Streit*,[120] the court dealt with the interesting question of the construction of the statute which prohibits a person previously convicted of perjury from testifying in any court in this state.[121] The statute left open the question as to the territorial scope intended and, as stipulated on the appeal, the conviction had taken place in New York. Relying first on the general rule that the courts of one state will not enforce the penal laws of another[122] the court went on to consider the law chosen, the law of New York. Applying the whole law of New York, it found that the courts of that state would not bar a witness convicted in another state from testifying in New York. The court stated:[123]

> It is therefore clear that plaintiff's conviction would not have served to bar his testimony in the state of New York.

While the whole New York law speaks in terms of any felony, the court has in effect supplied the modification of the statute in question to conviction of perjury in a court of this state and has done so by an unconscious use of the *renvoi* doctrine in a most unusual setting.[124]

Validity and effects of foreign marriage

In two recent cases the court considered the validity and effects of a foreign marriage without any specific reference to the law of the place of celebration which would have been normal in the circumstances.

Mahan v. Mahan[125] involved an annulment action brought by W on the grounds of lack of capacity due to intoxication. The court took "judicial notice" that Folkston, Georgia, appears to be the "Gretna Green" of Florida couples, but reached the decision purely on the basis of general

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118. In Dicks v. Colonial Finance Corp., 85 So.2d 874, 876 (Fla. 1956), the original transfer took place in Georgia and Colonial was first to place its lien on record. The assigned conditional sales contract on the basis of which Colonial acted was held to bind on Dicks as it bound the party from whom he took his interest. See also significant comments on faith and credit in this field by Reese, reviewing Lalive, *The Transfer of Chattels in Conflict of Laws*, 42 A.B.A.J. 970 (1956) and in general as reported, his RESTATEMENT, CONFLICT OF LAWS (2d ed).

118(a) McQueen v. M. and J. Finance Corp., 59 So.2d 49 (Fla. 1952); Livingston v. National Shawmut Bank of Boston, 62 So.2d 13 (Fla. 1952). Quoted with approval in Clinger v. Reliable Discount Co., 80 So.2d 606, 607 (Fla. 1955). See the discussion in 8 MIAMI L.Q. 241-244 (1954).

119. Vincent v. General Motors Acceptance Corp., 75 So.2d 778 (Fla. 1954). See comment in 10 MIAMI L.Q. 290-291 (1956).

120. 91 So.2d 852 (Fla. 1956).

121. FLA. STAT. § 90.07 (1957).

122. See authorities cited in Lefcourt v. Street, note 120 *supra* at 854.

123. *Id.* at 855.

124. For previous discussion of construction of territorial scope of statutory language, see 8 MIAMI L.Q. 209, 219 and note 54 (1954).

125. 88 So.2d 545 (Fla. 1956).

and Florida law. It did not even make a statement that the law of the two states could be presumed the same.[126]

The second case, *Teel v. Nolan Brown Motors*,[127] paid greater heed to the law of the place of celebration, again Georgia. *H* had been killed in the course of employment and the deputy commissioner had exercised his discretion[128] to make the compensation payable to the minor children of *H* and W_1 who were actually dependent. Both W_1 and W_2 acquiesced in this order and sought review only of the determination of widowhood. *H* and W_1 were married in Georgia in 1938 and had lived together for ten years. *H* and W_2 were married in the same state in 1950. The court reversed the order below holding that W_1 had sustained the burden of proof in overcoming the presumption of validity of the second marriage. Florida law was used to determine the status question[129] and the only reference to the lex loci came in this statement:

> . . . (W)e judicially know that the State Bureau of Vital Statistics is the custodian of records that reflect the granting of divorces in every county in Florida. A similar agency exists in the State of Georgia . . . . In order to eliminate the doubt as to the presence or lack of a divorce, and *in order to discharge the burden placed upon her*,[130] we think the first wife should have exhausted a search of these public records.[131] (Emphasis added.)

Ademption of foreign realty

Eisenschenk v. Fowler,[132] led the court into the difficult area of determining what law should be applicable to resolve the question of ademption of foreign land. *T* executed a will[133] and codicil in February 1953 devising certain Illinois real property to appellants. Several months later *T* and appellants entered into a contract for sale of the land and four months thereafter *T* died. It is not clear whether the deed and mortgage were ever exchanged in accordance with the contract. Action is brought to determine whether appellants took under will or contract. The court stated a conversion from fee simple owner to vendor, or in event of the

126. The case was made to turn on the decisive question of the weight to be given the finding of a master and Florida law was used on that point. *Id.* at 547.

127. 93 So.2d 874 (Fla. 1957).

128. Under FLA. STAT. § 440.16(2)(c) (1957).

129. Particularly this language of the court, note 127 *supra* at 876, "A solution . . . merely requires the application of certain well-established rules heretofore announced by our prior decisions."

130. Note, the burden is placed upon her by Florida law.

131. *Ibid.*

132. 82 So.2d 876 (Fla. 1955).

133. Execution of the will is assumed in Florida although the abbreviated record as stated by the court does not pronounce on this point. Note 132 *supra* at 877.

exchange, mortgage, was sufficient to show the change of intention necessary to bring about the ademption.

While distinguishing the case on the facts of this will, the court cited with approval *In re Dublin's Estate*[135] which had properly referred the question to the situs of the land.[136] At least the approval of the *Dublin* rule is apparent, if not clear, since the court goes on to state:

> In Illinois, where the land in question was situated, the common law rule is evidently recognized and the conveyance of realty previously devised amounts to an ademption . . . , and so far as we are advised that rule has not been abrogated by statute in that State.[137]

Unfortunately the court then added that the rule seemed to be the same in Florida thereby clouding the holding. It would have been better to dismiss the appellant's arguments categorically by stating that no policy exists at the forum to set aside the normal reference to the situs of foreign land for the purpose of determining the intention of the testator. Perhaps in subsequent cases the court will be willing to make this clarification.

Law applicable to foreign will

The final important choice-of-law case decided in the period under survey was *Colclazier v. Colclazier*.[138] Under construction by the court was the effect of a will executed by T in 1950 in New Mexico. Plaintiffs in the action were the children of T and W_1. It was found that while T and W_2, the defendant here, were "married" in 1934, the defectiveness of T's Mexican divorce from W_1 prevented them from entering into a valid marriage until 1949, some years after the death of W_1. It was further found that the property in question had been acquired before this valid second marriage and hence was not impressed with community status under New Mexican law. On the sale of the property to T and W_2 without more a tenancy in common was created. One half went outright to W_2 and the other to the estate of T. The proceeds, however, went into bank accounts[139] governed by the law of the place of the contract and the New Mexican contracts provided for right of survivorship, taking them out of the estate

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135. 375 Pa. 599, 101 A.2d 731 (1954).

136. The Pennsylvania court relied on RESTATEMENT, CONFLICT OF LAW, 249, comment (c) (1934).

137. 82 So.2d at 876.

138. 89 So.2d 261 (Fla. 1956). The holding was an affirmance, in effect, of a most excellent master's report by the Hon. James A. Dixon, Sr. Its excellence is noteworthy in two regards: (1) the clear statement on the law governing rights in the bank deposits, quoted by the majority opinion, *id.* at 263, and (2) the very liberal attitude, approved by the court at 264, toward notice of foreign law under FLA. STAT. § 92.031 (1957).

139. For similar treatment of joint bank accounts see *In re* Kienle's Estate, 139 N.Y.S.2d 150 (Sur. N.Y. 1955).

proceeding. In so far as a tenancy by the entirety in the Florida deposits was created, that law was also given its proper effect. The court found that the question of election between community rights and taking under the will had been properly eliminated by the master.[140]

Even in the fact of doubtful domicile[141] which was found to preponderate in favor of a Florida domicile, the court very properly applied the law of the place of making the will to determine the overall intent of the testator as to the meaning of the community property to be conveyed as well as to the determination of the character of the property that should be classified within the scope of *T's* estate.[142]

Law applicable to foreign insurance policies

In *Neil v. Prudential Insurance Co.*[143] plaintiff had sued on disability policies which had been honored for more than twenty years and in reversing a directed verdict for defendant, Milledge J. stated this rule:

> The policies were executed in West Virginia. Whether construed by West Virginia or Florida law, the rule of construction is a liberal one.[144]

CONCLUSION

In concluding this survey mention will be made of only one additional contribution to the field, the excellent symposium on *Preventive Law of Conflicts*,[145] because of the importance of a new approach to the field. For the very fact that the field has once more moved to the forefront, as mentioned at the outset, has caused such a flood of superior writing that to select would be invidious. Let the student enrich himself to the fullest by submerging himself therein.

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140. There was a vigorous dissent by Roberts, J., see especially remarks in 89 So.2d at 267. A discussion of election in a non-conflict case, Lopez v. Lopez, 96 So.2d 463 (Fla. 1957).

141. 89 So.2d at 264.

142. The dissent took the position that the intent of the testator could not have been to let half the total property pass outside the estate and to give the children only one half of the remainder, to be divided three ways after payment of estate taxes. Support in the language of the will, *id.* at 267, is not found for the proposition that "he was attempting to dispose of both his and his wife's share of the community property." And even if that were his intention, the majority opinion makes it clear that this could not be done under the applicable New Mexican law.

143. 9 Fla. Supp. 36 (1956).

144. *Id.* at 37. For another construing the same area of Florida law but this time in the federal court see, Equitable Life Assurance Society v. Neill, 243 F.2d 193 (5th Cir. 1957).

145. 21 LAW & CONTEMP. PROB. 427 (1956).