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PART TWO

Private Law

CONFLICT OF LAWS*

DAVID S. STERN**

INTRODUCTION

Viewed from a sufficient distance¹ the last two years have worked few basic changes in the Conflict of Laws. It has become increasingly clear that the tendency of each local unit to assert greater power is intensifying, and the legislative activity in Florida is typical. The need for clarification of national and international aspects of the field has been stated and will undoubtedly receive greater recognition in the period before us. At the same time as they assert greater power, the states seem to have accepted the mandate of the Supreme Court of the United States with regard to full faith and credit, but the Court itself seems to hesitate before certain critical problems in the jurisdiction for divorce field and the erosion of the federal jurisdiction by the extended *Erie* rule.²

THE EXERCISE OF CONFLICT OF LAWS JURISDICTION

Legislative jurisdiction—recent legislation.—The 1955 Florida Legislature was very active in extending the authority of laws of this jurisdiction to, and possibly beyond, the constitutionally permissible limits. Fundamental

* This is the second in the Survey of Florida Law series and covers the cases contained in Volumes 69 So.2d 1 (1954) through 81 So.2d 696 (Aug. 25, 1955); 4 Fla. Supp. 1 (1953) through 6 Fla. Supp. 200 (1955) and the changes made in the Florida Statutes by the General Laws of 1955. It also reviews the federal cases in the Fifth Circuit and certain of the relevant cases from the Supreme Court of the United States and other jurisdictions. For a general background the reader should utilize the first article in this series, 8 *MIAMI L.Q.* 209 (1954), cited hereinafter simply as 1 *SURV. FLA. L.* 209. Where a new area has been touched by decision or statute, background material outside of the time limitation will be included; if the court has merely decided a case following a rule already commented on, reference will be made to the prior article.

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1. Sufficient in this case to lend detachment as well as enchantment. The final research for this article was done, and the text of this article was written while the author was on leave as lecturer in Comparative Law at the Law School of the University of Guadalajara, Mexico.

2. For example, see *Republic of Indonesia v. J. R. Simplot Co.*, 220 F.2d 321 (9th Cir. 1955) wherein the court avoided the destruction of diversity jurisdiction under *Woods v. Interstate Realty* doctrine (Idaho refused use of state courts to unqualified foreign corporations) by finding interstate commerce present, 337 U.S. 535 (1949).

to this subject is the exclusive applicability of laws within the territory of the sovereign and, taking advantage of Congressional enabling legislation, the State of Florida now has, in part, new boundaries.³ Within the territory, another statute⁴ permits the change in character of part of that territory by granting the Inter-American Cultural and Trade Center authority to make application to the proper federal authorities for the designation of a foreign-trade zone within the Center. The emergence of this center, especially with its avowed aims to increase trade between the hemispheres, will bring numerous conflict and foreign law problems to the jurisdiction.

A new Motor Vehicle Financial Responsibility Law was enacted.⁵ Jurisdiction over non-residents, as defined in the act, is presumed throughout the act.⁶ The commissioner is given authority to enter reciprocal agreements⁷ with other states whereby licenses of residents involved in an accident in such states may be revoked and the other penalties of the law invoked. In the second subsection the legislature assumes to exercise the same authority over non-residents as over residents, for accidents in the state. This language is included:

In the event such nonresident shall at the time have in effect an insurance policy or surety bond issued by an insurance company or surety company not authorized to do business in this state, the commissioner may reinstate such nonresident upon said company furnishing him with power of attorney to accept service of process.⁸

It is assumed that the "him" in the last clause refers to the commissioner and not the non-resident. When it is remembered that the stringent penalties of this new act operate to include every accident causing

3. Laws of Fla., c. 29744 (1955) under authority of Pub.L. No. 31, 83d Cong., 1st Sess. (May 22, 1953), which defines the new boundary as a line three geographical miles from the coast line along the Atlantic Ocean and Florida straits. "Coast line" is defined in the same chapter as the "line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."

4. Laws of Fla., c. 29828 (1955) adding a new section (554.28) to the chapter dealing with the Authority.

5. Laws of Fla., c. 29963 (1955) adding a new chapter FLA. STAT. § 324(1953). New section 324.01, sub § 5 defines a non-resident as "every person who is not a resident of the state" and does not bother to explain what it means, since the statute in general assumes jurisdiction over everyone; in its sub § 10, "judgment" includes any final judgment of any state or of the United States.

6. See as examples §§ 324.10-13.

7. By new section 324.06 the use of reciprocal agreements is becoming a favorite legislative device of which the Support of Dependents Act is a very well known example, former law Ch. 88, FLA. STAT. 1953, see comment I SURV. FLA. L. 211 and 223 note 74, now superseded by Laws of Fla., c. 29901 (1955), Uniform Reciprocal Enforcement of Support Act; see also Laws of Fla., c. 29768 (1955) amending FLA. STAT. § 443.18(1)(a) (1953) to limit coverage of reciprocal arrangements for unemployment compensation of multistate workers; and reciprocal aspects of admission to professions, Laws of Fla., c. 29727 (1955), pertaining to architects and c. 29846 requiring a non-resident optometrist to file earlier and pay a double fee; and cf. c. 29983 pertaining to brokers and amending FLA. STAT. § 475.14 (1953) to make non-active status available only to residents where formerly open to any broker.

8. FLA. STAT. § 324.06 (2) (1953).

property damage of over \$50, it will be seen how popular this jurisdiction, already rather unpopular for other reasons, will become with insurance companies abroad.⁹

The Adoption of An Adult Act was amended to remove the requirement that the adopter must have had custody of the adoptee for five years during the latter's infancy.¹⁰ The new Uniform Reciprocal Enforcement of Support Act¹¹ contains more liberal provisions with regard to similarity, and more stringent penalties for rendition of non-supporters. It continues essentially the same choice of law rule in Section 8 thereof, as was contained in the former act.¹²

Two new statutes¹³ fix time limitations on mortgages and judgment liens at twenty years. The balance of the legislative action will be considered in the next section and in the section on judicial jurisdiction when dealing with the meaning and use of the terms "residence," "permanent residence," and "domicile."¹⁴

Legislative jurisdiction—foreign and alien insurance companies.—In view of the already formidable special regulation of the insurance industry and admitted characteristics giving the states special interest in that regulation,¹⁵ the matters dealing with it have been set apart, as it no longer conforms to the traditional limitations on state legislative jurisdiction.¹⁶ Five statutes,¹⁷ in addition to the one already noted above, affect this industry exclusively—numerous other acts have an incidental effect.¹⁸

9. Mention of "abroad" calls to mind another new act. This is Laws of Fla., c. 29629 (1955) which by its Section 3 amends FLA. STAT. § 631.16(1) (1953) so as to exempt from licensing requirements any alien insurer "owned, controlled, or operated for a foreign government or any agency thereof."

10. Laws of Fla., c. 29704 (1955) by amending FLA. STAT. § 72.34 (1953). See comment on this act, 1 SURV. FLA. L. 211 note 8.

11. Laws of Fla., c. 29901 (1955). It is unfortunate that the drafters did not include in the definition of "state", in section 3, language mentioning The Commonwealth of Puerto Rico, which might be excluded by the phraseology used: "state, territory or possession." Such discrimination, the author is certain, was not intended.

12. The old Act, Ch. 88, FLA. STAT. (1953) was enforced by Pennsylvania in *Comm. ex rel. Shaffer v. Shaffer*, 175 Pa. Sup. 100, 103 A.2d 430 (1954).

13. As to judgment liens, see Laws of Fla., c. 29954 (1955); as to mortgages a somewhat more complex provision c. 29977 (1955), amending FLA. STAT. 95.28 (1953). In advance of both provisions, the court had reached a similar construction with regard to the duty of support in *Isaacs v. Deutsch*, 80 So.2d 657 (Fla. 1955). The rationale of new FLA. STAT. § 95.28 (1955) is based on the holding of *H.K.L. Realty Corp. v. Kirtley*, 74 So.2d 876 (Fla. 1954) and enacts much of its language.

14. Attention should be called to one provision extremely beneficial to the law schools, professors and students. This is Laws of Fla., c. 29736 (1955) adding to FLA. STAT. § 16.501 (1953) providing for free distribution of the Florida Statutes.

15. See especially discussion in 1 SURV. FLA. L. 210-213 and notes 5, 12, 18-21.

16. This is particularly true after the decision in the so-called Louisiana direct-action cases, *Lumberman's Mutual Casualty Company v. Elbert*, 348 U.S. 48 (1954) and *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 48 (1954).

17. They are Laws of Fla., cc. 29641, 29680, 29730, 29857 and 29859 (1955).

18. Such as Laws of Fla., c. 29855 (1955) (new form of notice of bankruptcy to policy-holders), c. 29640 (insurance adjusters) and the New Motorists Financial Responsibility Act, *supra* note 5, cc. 29731 and 29733 (group insurance), c. 29732 (establishing a new standard life policy). See also cc. 29854, 29856-29858.

The first¹⁹ presents no special problem. It provides a method for the domestication of an alien insurer in the state. It seems a reasonable exercise of the police power to protect domestic insurers from a possible plea of sovereign immunity. The second²⁰ is what might be termed a "special penal reciprocal insurance company type" statute. Its purpose is to require the same treatment of foreign and alien companies doing business in Florida as the foreign states would require of Florida companies admitted or being admitted to do business in those states. The most interesting part of this statute is contained in Section 2 which presumes the domicile of the company to be in "a state designated by it" wherein it has its principal office, largest amount of assets, or is admitted to do business—except to companies incorporated in Canada, which are deemed domiciled therein.²¹ The third²² is another reciprocal penal type act involving the prohibition on Florida companies from acting in states which by reciprocity prohibit their companies from acting in Florida without authorization to do business. An interesting provision is Section 6(a) which excerpts from the blanket prohibition contracts made where the insured is present in a state where the company in question is authorized to do business.²³ By the fourth,²⁴ all policies or certificates in the event of group coverage tied in with the sale of property (unspecified) in the state are made subject to Florida law.²⁵ The fifth is another reciprocity statute permitting the licensing of non-residents as life insurance agents provided the state wherein the person resides grants the same privileges "to a citizen" of Florida.²⁶ The curious shift in language will be discussed in the section on the semantics of localizing language in residence statutes.

Juridicial jurisdiction — in general.—Two cases construed the Uniform Judicial Notice of Foreign Law Act²⁷ and destroyed to a very large extent the progressive construction formerly given that statute. The first was *Lanigan v. Lanigan*.²⁸ Action was brought by W1 against H and W3. W1 was a resident of Rhode Island and sought to set aside a prior Nevada divorce obtained some 16 years earlier by H and to obtain satisfaction of a Rhode Island judgment for arrearages in support based on a Rhode Island separate maintenance decree prior in time to the Nevada divorce. W1 alleged that the third modification of the support decree was obtained

19. Laws of Fla., c. 29641 (1955).

20. Laws of Fla., c. 29680 (1955).

21. No detailed commentary is made on the effects of this act in view of the commentary thereon in the Insurance Article in this Survey.

22. Laws of Fla., c. 29730 (1955).

23. Section 6 contains three other saving clauses for insurance to be written in group, pension, or retirement plans and for renewal of existing business.

24. Laws of Fla., c. 29857 (1955).

25. This statute contains "Isle of Tobago," (see comment *infra*, note 141,) language when it states "which coverage is issued in this state or any other state or country." Verily the laws of Florida do now command the world!

26. Laws of Fla., c. 29859 (1955).

27. FLA. STAT. § 92.031 (1953) and see reference to liberal construction in 1 SURV. FLA. L. 211 note 7.

28. 78 So.2d 92 (Fla. 1955).

on the basis of personal service on H in Florida. The court affirmed a ruling that as to the first matter the Florida court had jurisdiction of the subject matter; as to the second matter, the court reaffirming the rule of *Sackler v. Sackler*,²⁹ held that Florida courts will aid with all equitable powers the enforcement of such support decrees. But on the merits, and anticipating a second appeal, the court stated that the mandate of the notice statute could not replace the need for pleading in the bill,³⁰ and that W1 was probably barred on the first point by laches.

Relying on this case as authority, the court next decided *Kingston v. Quimby*.³¹ Here W sued in reliance on a New York separation agreement, a Nevada divorce decree which incorporated same, and a New York judgment for arrearages. H moved to have the cause transferred to the law side of the court maintaining that the obligation to make payment was purely contractual. From an order denying the motion, H brought certiorari. The Supreme Court denied the writ and stated, insofar as material to the notice statute:

Arguments are advanced here based upon the laws of Nevada and New York but there is nothing in the pleadings or otherwise *in the record* of this cause to show reliance by any party upon any foreign law which could be controlling but which is at variance with the laws of Florida. The absence from the record of both pleading and proof of foreign law precludes our consideration of contentions in briefs based upon foreign law . . . ; nor under the circumstances does the Uniform Judicial Notice of Foreign Law Act require a different result.

. . . [a] party invoking the privileges of the Act is required to have the record reveal that fact and to have the record show *the authorities* which will be relied upon with reference to the foreign law. This procedure . . . results in a record which contains a clear presentation of the issues to assist the court in its decision. This procedure must be followed by any party desiring to assure himself of application of the benefits of the Act.³²

Let this be notice to all parties who wish, in the future, to rely on the act. Preparation should be made to plead and prove foreign law as a fact, as before, rather than risk a chance that the record does not sufficiently settle the issue for the court to be able to notice the foreign law. The part of the decision which deviates the farthest from the progressive construction formerly given in the *Peterson* case is the presumption—a variant revival of the old common-law rule—that in the absence

29. See 1 SURV. FLA. L. 225.

30. The precise language of the court was (78 So.2d 92, 95):

While this court and the lower court are required to take judicial notice of the 'common law and statutes of every state . . .', we do not think that such evidence, in the form of judicial notice, will supply the want of pleading in plaintiff's bill.

31. 80 So.2d 455 (Fla. 1955).

32. *Id.* at 456. The court then went on to state that this interpretation accords with *Lanigan, supra*, and the interpretation given in other states where adopted. The emphasis in the quotation is by the court.

of specific citation of authority showing a different result the foreign law is presumed not to vary from the Florida law.

Jurisdiction based on presence. Continuity and fraud.—In *Moore v. Lee* the court held that there was no presumption of continuity of jurisdiction over a parent in a custody proceeding through service of process on an attorney of record in a prior decree which had become final.³³

Two cases dealt with the matter of fraud in obtaining jurisdiction. In *Grammer v. Grammer*³⁴ W moved to set aside a divorce obtained by her deceased H on the basis that service had been fraudulent; the court found that she had not sustained the burden of showing faulty constructive service. In a lower court decision, *Nuzum v. Nuzum*,³⁵ it was held that, while insufficiency of constructive service is overcome by actual notice, fraud in procuring a default decree permits vacation thereof.

Jurisdiction to set aside prior decree.—In the 1953 Survey the matter of the limits on the power of the Florida courts to set aside prior decrees was considered in some detail in the discussion of *Kessler v. McGlone*.³⁶ The question was raised as to the result if H, now having set aside the decree to which Virginia had given full faith and credit, returned to Virginia and was met with the successful defense of res judicata in that forum. This has now happened and once again the Supreme Court has denied certiorari.³⁷ The denial of faith and credit in the second instance seems to be a greater violation of the rule of the *Treinies* case³⁸ than the failure of Florida to grant faith and credit to the first Virginia decree. Certainly the interest of the original forum in preventing fraud on the exercise of its jurisdiction, as well as the demand that the losing party exhaust his remedies in trying to correct a result which he feels violates the faith and credit policy, should demand greater respect to the later judgment in a series.

33. 72 So.2d 280 (Fla. 1954).

34. 80 So.2d 457 (Fla. 1955).

35. 5 Fla. Supp. 136 (1954), for an opposite result on the question of duress see *Kennedy v. Kennedy*, 5 Fla. Supp. 84 (1953). For a case reaching a somewhat different result from that under FLA. STAT. § 72.22 (1953) on adoption and inheritance rights, see *In re Calhoun's Estate*, 282 P.2d 880 (Cal. 1955) making natural child of adoptive parents sole heir of adopted child.

36. See 1 SURV. FLA. L. 216-218 and especially note 42 at 217.

37. *Kessler v. Farquier Nat'l Bank*, 195 Va. 1095, 81 S.E.2d 440, cert. denied, 348 U.S. 834 (1954), 68 HARV. L. REV. 719 (1955). The Virginia court affirmed the trial court's judgment based on defendant's demurrer to husband's suit again seeking widower's share.

38. Cf., the statement in the HARV. L. REV. at 720, *supra* note 37, that "[t]he Virginia court, in adhering to its own earlier decision, was refusing to follow the widely accepted rule that the later of two inconsistent determinations controls in a third suit." The author is in complete agreement with an eminent authority, consulted by him on this difficult question, namely that *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939), is determinative of the question. Cf., 1 SURV. FLA. L. 236, note 128 for reference to the rule of this case in an analogous situation.

Notwithstanding the somewhat sad demise of the *Kessler* case, the court has given another³⁹ and perhaps more satisfactory answer to the question of the limits of the bill of review. In *Reed v. Reed*⁴⁰ H was divorced from W in Nevada in 1948 and W from H in Dade County in 1949. In December 1949 the Attorney General filed a quo warranto proceeding attacking the charter of the Miami Retreat Foundation as not charitable within the meaning of Florida Statute, Chapter 617. Said foundation had been started by H & W in 1926. W was joined in this proceeding and cross-billed H and the corporate defendants, collaterally attacking the property settlement made in the course of the Florida divorce, in that the latter was based on fraud and concealment. The defenses of estoppel and res judicata were interposed and on appeal the Supreme Court held that W was estopped to contest the settlement and her cross-bill was dismissed.⁴¹

In October 1953 W filed her original bill in the nature of an *ex parte* bill of review making a direct attack on the property settlement. Certiorari was granted from the Chancellor's order permitting the filing of the bill, and petitioners contended before the Supreme Court that the court below was without jurisdiction to issue the bill of review. The court stated:

An original bill in the nature of a bill of review is addressed to the sound discretion of the court but we have held that leave of court for filing such a bill under some circumstances was not necessary

Petitioners contend that no decree affecting the rights of the Reeds was appealed to this Court, hence they say that there was no reason to secure the permission of the Court to file the bill. It is true that this Court did not have the divorce suit before it at any time but . . . the property settlement was before us and was adjudicated . . . This is *the gist of the question here*. We think it was set at rest in the quo warranto proceeding and that the respondent is estopped by judgment to again raise the question.

The chancellor therefore abused his discretion in entering the decree appealed from.⁴²

In speaking of "the gist of the question," rather than in terms of technical identity of causes of action,⁴³ the court has placed a vital limitation on the discretionary nature of the bill of review. If the court is willing to follow the same philosophy in the field of enforcement of foreign judgments, full faith and credit will also be given on a more liberal basis.

39. The first case establishing the existence of limits, but without defining them, was *Edwards v. Edwards*, 1 SURV. FLA. L. 217 note 42.

40. 70 So.2d 836 (Fla. 1954).

41. *Miami Retreat Foundation v. Ervin*, 62 So.2d 748 (Fla. 1952). On the main proceeding the same result as to the Att'y Gen'l was reached.

42. 70 So.2d 836, 837 (Fla. 1954). Quotation of authorities by the court is omitted and emphasis is supplied.

43. Cf., the previous discussion 1 SURV. FLA. L. 209-245.

Several other cases deciding questions of defects in jurisdiction over the person or subject matter must be mentioned in this connection. In *Montgomery v. Gipson*⁴⁴ the court held that where property is held by the entireties, the jurisdictional requirement of notice for a tax deed⁴⁵ is not satisfied by proof of service on one spouse. Strict conformity and not substantial compliance is required. In a similar proceeding involving foreclosure of a tax lien, it was held in *Sinclair v. Alford*⁴⁶ that service by publication on "Myrtle Danby" instead of "Myrtle Danley" was insufficient under the doctrine of *idem sonans* and that foreclosure based on such service must be set aside.⁴⁷

In *Attaway v. Attaway*⁴⁸ the court held that an order entered without notice to W or counsel permitting cancellation of future alimony payments on a past due promise to pay was void, and in *Hughes v. Bunker*⁴⁹ a similar result was reached in a guardianship proceeding in which the mother of the children in question was not given notice. Finally in *State v. Herin*⁵⁰ it was held that where the circuit court had jurisdiction of the subject matter of a tort action, prohibition would not lie to review the correctness of that court's judgment in overruling a challenge to jurisdiction over the person of the defendant.

Judicial jurisdiction. Herein of the semantics of "domicile-permanent resident-residence."—For most of the history of Florida law domicile has been used by the courts, and less frequently by the legislatures, in the traditional sense, *e.g.*, that permanent place to which our legal system looks to fix certain judicial matters amounting to the personal law. In the period under survey, both law-making bodies seem to have shifted from use of the term domicile, without losing sight of the concept, to the use of one of the residence terms noted above. It is well recognized that when the statutes speak in terms of "residence" alone, one of three possible meanings can attach: that the legislature meant domicile, domicile plus actual presence, or "mere" presence.⁵¹

As an example, the amendment to Florida Statute, Section 198.13⁵² requiring the filing of a copy of the federal estate tax return of "every decedent who at the time of his death was not a resident of the United States" changed the language in the old law from "not domiciled in." Here

44. 69 So.2d 305 (Fla. 1954).

45. FLA. STAT. § 194.18 (1954).

46. 72 So.2d 783 (Fla. 1954). See *id.* at 784 for previous decisions in the same litigation.

47. For a lower court case reaching the same result in small claims matter, see *Hart v. Maas Brothers, Inc.*, 5 Fla. Supp. 140 (1953).

48. 80 So.2d 352 (Fla. 1955).

49. 76 So.2d 474 (Fla. 1954).

50. 80 So.2d 331 (Fla. 1955).

51. For an excellent analysis of this whole problem see RESTATEMENT, CONFLICT OF LAWS § 9, comment *j* at 42.

52. By Laws of Fla., c. 29718 (1955).

the obvious intention is to bring the law into line with the federal concept, and the aspect of actual presence is made obvious.⁵³ On the other hand, such statutes as those dealing with non-resident motorists,⁵⁴ non-resident or resident architects, brokers,⁵⁵ life insurance agents⁵⁶ or the use of residence in multistate worker situations⁵⁷ must be presumed to deal with typical mobile denizen, or at least refer merely to a home without any element of intention permanently to remain. The amount of jurisdiction which ought to attach under these statutes should be considerably less.

At the opposite extreme are found, in line with the Restatement, such new statutes as that which allows each and every "permanent resident" a \$1,000 personal effects and household goods tax exemption,⁵⁸ or that which ameliorates the rule on support of dependent children by allowing state assistance where the parent or guardian has "resided" in the state for one year before application, and the child is under one year of age.⁵⁹

Of great difficulty is that of attaching the specific meaning best intended by the legislature to those statutes dealing with the administration of the estates of Florida "residents." This whole series⁶⁰ of statutes enacted by the 1955 legislature seem to pass the line of interstate and international comity, if not to approach, in certain instances, that of unconstitutionality. Since the more intimate and permanent the connection of the decedent with the jurisdiction, the greater the chance of survival of these enactments, it must be assumed that in using the word "resident" the legislature intended domicile plus actual presence. Otherwise the will of such a person must be admitted to probate in an *original* proceeding in Florida to be effective at all and proceedings in any other state or country shall be ineffectual.

53. The other basis of the requirement for filing is of sufficient interest to mention at this point:

. . . and whose gross estate shall include any real property situate and tangible personal property having an actual situs in the State and intangible personal property physically present within the State of Florida. *Ibid.*

Giving the legislature the benefit of the doubt, we must presume that the filing requirement attaches as if the "ands" were of the kind that mean "or". As to the use of the word "resident" in Section 10 of the chapter, amending FLA. STAT. § 198.33 (1953), the same presumption of actual physical presence at time of death plus domicile should be made.

54. Laws of Fla., c. 29963 (1955).

55. Laws of Fla., cc. 29727, 29983 (1955).

56. Laws of Fla., c. 29859 (1955).

57. Laws of Fla., c. 29768 (1955), providing that the state in which the worker has his "residence" may be one of those solely liable for unemployment compensation, thus amending FLA. STAT. § 443.18 (1)(a) (1953).

58. Laws of Fla., c. 29743 (1955). The statutory language removes any doubt as to its intention and is in this sentence, at least, a model of clarity. It reads "to very person residing and making his or her permanent home in this state. . . ." A nice constructional problem is presented in the second sentence which provides: "Title . . . may be held individually [which creates no problem], by the entireties, jointly or in common with others." Suppose that the bulk of the owners in common do not satisfy the other part of the exemption statute?

59. Laws of Fla., c. 29670 (1955) amending FLA. STAT. § 409.18 (1)(b) (1953).

60. Laws of Fla., cc. 29892, 29893 and 29894 (1955).

This particular section⁶¹ purports to affect all personal property regardless of situs and in this particular is, it is submitted, unconstitutional if by "any personal property" one understands property located any place in the world. That this was the intent may be seen from the command to the personal representative in the companion bill⁶² to "take possession of the personal property wheresoever situate of a person who hereafter dies a resident of the State . . ."⁶³

In *Slatcoff v. Dezen*⁶⁴ the court had the opportunity to construe an exemption statute⁶⁵ where it was aided by double language—"citizens or residents"—in determining that insurance policies issued before the defendant became a resident were exempt within the statute, since he was a resident at the time they were sought to be garnished and no fraud had been proved.

In *Frank v. Frank*⁶⁶ the court reviewed the general rules regarding domicile, especially for divorce purposes, stating that the statute requires an intent to become a permanent resident, this intent being an indispensable element in proof of bona fide residence. Note must be made of the qualifying adjectives which are always used to cloud the semantics in this field. Then the court went on to state:

It is true we have repeatedly held that a wife may not establish a residence (for the purpose of instituting a divorce action) separate from that of her husband so long as she continues to live with him The reason for such a ruling is that the law recognizes the husband as head of the family But if as in this case the former residence of the family as a unit was in Florida and the wife for just cause separated from her spouse, . . . she may 'tack on' to such newly established independent residence the period of time within which she was a resident of Florida by virtue of the establishment of the family domicile in Florida by the husband.⁶⁷

61. Laws of Fla., c. 29892 (1955) amended FLA. STAT. § 732.26 (1) (1953).

62. Laws of Fla., c. 29893 *supra*, which amended FLA. STAT. § 733.01 (1) (1953).

63. *Ibid.* The intent is made even clearer by the language used in the last . . . the three statutes referred to (Laws of Fla., c. 29894) wherein the inventory must include *all* personal property, if dealing with a Florida resident, and *all* property of all kinds within the state, if dealing with anybody else. The statute uses the polite language "a resident of some other state or country." Cf. the comment on the "Isle of Tobago", *supra*, relative to the fourth of the statutes (which is not discussed in this text because in the opinion of the author it is on the other side of the line of constitutionality). Under Laws of Fla., c. 29961 (1955) amending FLA. STAT. § 732.47 (1953) by inserting a new sub-paragraph (4), it is made a violation of the law of Florida for a person named in a will of a Florida decedent who is not qualified to act under domiciliary letters (Florida) to apply for letters in any other state or country, for the purpose of administering property of a Florida resident "located elsewhere than in the State of Florida."

64. 76 So.2d 792 (Fla. 1954).

65. FLA. STAT. § 222.14 (1953). See identical language in Rule III, Rules of Practice, Fla. R.R. & P.U.C., 4 Fla. Supp. 239 (1953); for a new statute using the same double language but with the "and" connective, see Laws of Fla., c. 29764 (1955), The Florida School Code, section 97 amending FLA. STAT. § 239.02 (1953).

66. 75 So.2d 282 (Fla. 1954).

67. *Id.* at 286.

In *Quentin v. Quentin*⁶⁸ the Circuit court relied on the decision in the *Campbell* case to determine that the jurisdictional requirements of the divorce statute require actual residence in the state and that this "amounts to something more than a requirement of bare domicile." The present court analogized the service of plaintiff to the company for which he worked, to the military service of the plaintiff in the *Campbell* case.⁶⁹ The fact that, on the occasion of a former visit, he might have declared an intention to reside in Florida when a transfer in his employment would be obtained was all that was within his power, and insufficient to found the jurisdiction of the court.

Florida now has reached the same conclusion as other jurisdictions on the effect of a Mexican mail-order divorce. In *Klose v. Klose*⁷⁰ H had failed, for lack of evidence, to obtain a Florida divorce.⁷¹ Thereafter, H and W1 entered into a property settlement agreement, obtained a foreign divorce and H remarried. In modifying the agreement and allowing maintenance, the court said:

The Mexican court had no jurisdiction whatsoever over this defendant [H]. At all times he was a resident of Florida and actually was domiciled here. At all times she . . . was a resident of Florida and domiciled here. At no time was any notice, personal or constructive, served on the plaintiff here of the pending Mexican divorce litigation. . . . This court therefore holds that the Mexican divorce was of no force or effect and that the plaintiff is still the wife of the defendant.⁷²

In the matter of jurisdiction to tax intangibles, *Sawtelle v. Tax Assessor*⁷³ held that where one co-trustee resided in Florida, and all other

68. 4 Fla. Supp. 28 (1953).

69. *Campbell v. Campbell*, 57 So.2d 34 (Fla. 1952), 1 SURV. FLA. L. 210, note 2. For a result contrary to the rule of this case, see *Wilson v. Wilson*, 58 N.M. 411, 272 P.2d 319 (1954) holding constitutional a New Mexico statute allowing jurisdiction for divorce on the basis of continuous presence for one year in military service. Regarding constitutional standards requiring domicile as the basis for divorce jurisdiction referred to in our discussion of *Alton v. Alton*, 347 U.S. 610 (1954), in 1 SURV. FLA. L. 225, note 82, note that that case was dismissed as moot by the Supreme Court. Therefore the rule of the Third Circuit remains in effect, reinforced now by the holding in *Granville-Smith v. Granville-Smith*, 348 U.S. 810 (1954); however, the Court avoided the troublesome question and entered into the even more dangerous problem of the powers of Congress over the Territory, in deciding that the Legislature of the Virgin Islands was without authority to adopt a non-domiciliary requirement. *Contra.*, *David-Ziesness v. David-Ziesness* 129 N.Y.S.2d 649 (Sup. Ct. 1954) (the state where the marriage was entered into has power to dissolve it.) The continued restatement still supports the classic rule, see RESTATEMENT, *Conflicts*, §§ 110,111,113, comment (a) at 34 (1953).

70. 6 Fla. Supp. 28 (1953); on the problem of Mexican divorces, see Comment, 9 MIAMI L.Q. 186 (1955).

71. See *Klose v. Klose*, 59 So.2d 877 (Fla. 1951).

72. 6 Fla. Supp. 28 (1953). This leaves open the interesting questions: 1) is the wife a wife for all purposes and 2) is the husband now guilty of bigamous cohabitation? Another interesting case on jurisdiction for divorce is one which established the requirement that both parties to a divorce must be alive at the time of the recording of the decree, per *Milledge, J. in Jacobs v. Jacobs*, 6 Fla. Supp. 88 (1954). See also, on evidence of domicile, the practical and valuable comments of *Giblin, J. in DuPont v. DuPont*, 5 Fla. Supp. 121 (1954).

73. 5 Fla. Supp. 13 (1953).

contacts were in other jurisdictions, assessment under chapter 199 of the Florida Statutes would be cancelled. *Greenough v. Tax Assessors*⁷⁴ was held to operate only where a statute expressly provided for such taxation, and under the rule of *Florida Nat'l Bank v. Simpson*⁷⁵ the statute had been held not to cover this situation. The court resolved the "nicely balanced doubts" in favor of the taxpayer.

In concluding this section, mention should be made of several miscellaneous problems dealt with by the court. These were matters such as venue, double jurisdiction within the state, and equitable enforcement of out-of-state decrees by injunction. In *Florida Nursery v. Pickard*⁷⁶ it was held that venue was at the plaintiff's place of business in an action on an open account. Two cases dealt with the coordinate jurisdiction of the Juvenile and Circuit courts. In the first, *State v. Hazlett*,⁷⁷ the court held that even illegitimacy (and certainly not mere absence of conventional marriage) would not deprive the father of his right to the custody of his children, they having been abandoned by the mother. The Juvenile Court then, on notice to the father, entered an order holding the children in a home for their placement or adoption. Thereafter, the father brought an uncontested divorce action in the circuit court and obtained their custody by order of that court. Later, in *State v. Hunt*, the Supreme Court held⁷⁸ that normally the tribunal first acting obtains exclusive jurisdiction, but that the Juvenile and Circuit Courts are coordinate in this respect, and the former might proceed with its jurisdiction where the mother, a party to the divorce action in the circuit court, failed to move for a stay.

An analogous situation was presented in *Harrison v. Harrison*⁷⁹ where W sought a divorce *a mensa et thoro* in Pennsylvania and H later sued W for absolute divorce there. Alimony, suit money and attorney's fees were allowed in Pennsylvania. H then brought suit for divorce in Florida and W moved for a stay; her motion was denied. The court below denied alimony and other relief. The Supreme Court felt that the ruling on alimony was correct but that W was entitled to full relief on the matter of suit money and attorney's fees.

The decision, in the posture of the litigation, seems eminently sound since ". . . the petitioner found herself a litigant in the chancery court in Florida over her protest."⁸⁰ The suggestion might be made that the original decision, affirming the denial of a stay, was incorrect in that the court might have applied the reasoning of *Gessler v. Gessler*⁸¹ or the policy behind the stay relief provided in the Soldiers' and Sailors' Civil Relief

74. 331 U.S. 486 (1947).

75. 59 So.2d 751 (Fla. 1951).

76. 4 Fla. Supp. 143 (1953).

77. 4 Fla. Supp. 50 (1950).

78. 70 So.2d 301 (Fla. 1954).

79. 71 So.2d 730 (Fla. 1954).

80. *Id.* at 731.

81. *Gessler v. Gessler*, 78 So.2d 722 (Fla. 1955).

Act. In view of the equitable enforcement of foreign support decrees, the time may be ripe for relief in the form of injunction against further proceedings, where such an injunction is entered by a foreign court having personal jurisdiction over the parties.⁸² The Florida doctrine of comity is sufficiently developed to provide for that type of cooperation, and logic compels the result, since the Florida courts would give full faith and credit to a judgment rendered in such a litigation.⁸³

Res Judicata.—The decision in *Wagner v. Baron*⁸⁴ has been subjected to two limitations by the court, both rendered by a division consisting of the dissenters in that case. The first of these limitations deals with the construction of the exception to the doctrine of *res judicata* therein created. The court held that a former adjudication was no defense “. . . where the law . . . is different, . . . or there has been an intervening decision”⁸⁵ In the case of *Plymouth Citrus Products v. Williamson*⁸⁶ the full Workmen’s Compensation Commission⁸⁷ had allowed what was, in effect, a second action relying on such an intervening decision as having changed the law.⁸⁸ In reversing, the court, Mathews (late C.J.), Roberts (then C.J.), Terrell and Sebring stated:

There must be an end to litigation sometime. As to the facts in this particular case, the doctrine of *res adjudicata* applies. (Citing cases, but no Florida authorities) The case of *Wagner v. Baron*, Fla., 64 So. 2d 267, was strongly relied upon . . . but is not applicable There was no question involved in that case of an intervening decision (emphasis of the court) which changed the rule of law or the responsibilities, duties and liabilities of the father of the bastard child. The change in that case was effected by a statute. (emphasis of the court) After a judgment, order or decree has become final and the time for appeal has expired, an intervening decision which may change the liability or rule of law applicable to the case is not sufficient ground to open the case up for the filing of a new claim under the same facts.⁸⁹

82. See, on this question, *Briggs*, *infra* note 228 at 343-44 and note 57 supporting this statement.

83. On such cooperative injunctive relief in aid of in personam marital litigation see *Usen v. Usen*, 136 Me. 480, 13 A.2d 738 (1940), and see *Edell v. Edell*, 134 N.Y.S.2d 758 (Sup.Ct. 1955) a case involving New York and Florida. The policy on equitable relief is well stated in *Sackler v. Sackler*, 47 So.2d 292 (Fla. 1950), note 29. The party that proceeds in violation of such an injunction works a fraud on the local court as well as risking the lack of faith and credit in the issuing state as to any decree rendered in favor of an injunction violator. For further consideration of the consecutive jurisdiction problem, see the discussion of the *Gessler* case, *supra* note 81.

84. 64 So.2d 267 (1953); 1 SURV. FLA. L. 230.

85. *Id.* at 267; 1 SURV. FLA. L. 230 note 104.

86. 71 So.2d 162 (1954).

87. Opinion of the Commission in 4 Fla. Supp. 82 (1954), earlier opinion in 3 Fla. Supp. 105 (1953).

88. *Id.* at 84. The case relied on was *Gray v. Employers*, 64 So.2d 650 (Fla. 1954).

The precise language of the Commission was:

The contention has been advanced that the previous proceedings . . . are *res judicata* to the present claim. We are of the opinion that the defense of *res judicata* is not available to the parties . . . where there has been an intervening decision such as the *Gray* case, *supra*, changing the law governing the first determination. *Wagner v. Baron*

89. 71 So.2d 162, 163 (1954).

It would appear, therefore, that the court has disposed of part of the dictum in the *Wagner* case. The amplitude of the language at the beginning of the final paragraph quoted above would seem to indicate an intention to apply the holding to all forms of action, but the later mention of "claim" in that same sentence might be utilized by the court at some future time to limit the doctrine to Workmen's Compensation proceedings. The fairer interpretation is that the court intended to restore the sound doctrine of judicial repose by removing the larger part of the *Wagner* exception and restricting changes in the law to those created by statutory enactment.⁹⁰

The dissentients in the *Wagner* case achieved a second limitation on the doctrine of that case—this in the field of limitation of actions. The opinion was written by Roberts and concurred in by Mathews, Terrell and Sebring.⁹¹ The statute,⁹² admittedly retroactive as to the amount of liability for support and geographically unlimited as to the place of creation of the bastard child for whom support was sought, was held to be limited by the general statute of limitations. Neither the New Act⁹³ nor the Old Act⁹⁴ contained a specific limitation:

We have no difficulty in holding, however, that a bastardy proceeding under the Old Act was subject to the three-year limitation period prescribed by Subsection 5(a) of Section 95.11 [Fla. Stat.] What we have said as to bastardy proceedings under the Old Act is equally applicable to proceedings under the New Act⁹⁵

At the same time, it is unfortunate that the Court once again avoided consideration of the difficult question of the possible applicability of foreign law in determination of the status being litigated in Florida. Even on the point of the period of limitations, which is frequently deemed to be controlled by the *lex fori*, the court merely mentioned in passing, but without comment that ". . . appellant's answer . . . also alleged that the . . . cause

90. It is to be hoped that, even within the narrower exception as now construed, the court will limit the exception to statutory changes which embody some fundamental public policy, as in the *Wagner* case, and not permit it with regard to any change in mere private rights that the legislature might make. On the authority of the principal case, another order of the Commission was quashed in *Iowa National Mutual Ins. Co. v. Harland*, 72 So.2d 47 (1954).

91. *Wall v. Johnson*, 78 So.2d 371 (Fla. 1955).

92. FLA. STAT. § 742.011 (1953).

93. *Id.*

94. See 1 SURV. FLA. L. 230 and notes 104, 105 and 106.

95. 78 So.2d 371, 373 (Fla. 1955). The use of the legal limitation in a court of equity applies under the doctrine of *H.K.L. Realty v. Kirtley*, 74 So.2d 876 (Fla. 1954). For a discussion of this case, see *supra* note 13. The present court admitted that in *Rooney v. Teske*, 61 So.2d 376 (Fla. 1952), 1 SURV. FLA. L. 229 and *Wagner v. Baron*, 64 So.2d 267 (Fla. 1953), no decision had been made as to "what were the limits, if any, of such retroactivity." Here, in rationale at least, the court has boldly (and correctly, it is submitted) adhered to and given support to the essence of Mr. Justice Thomas' dissent in the case. See 1 SURV. FLA. L. at 230, and note 105.

Particularly noteworthy is this language: "The nature of such a charge, and the difficulties inherent in a defense thereto, are such that a prompt determination of the question of paternity is highly desirable." 78 So.2d 371, 373 (Fla. 1955).

of action was barred by lapse of time both in the State of New York and in this state."⁹⁶

The decision recognizes the "double-barreled" nature of the New Act which both grants new remedies for formerly existing causes of action and creates new causes of action.⁹⁷ In its concluding language, the court loses sight of this distinction and speaks of the retrospectivity of *Rooney v. Teske* as not being so extensive that "its retroactive effect should be extended to revive causes of action which were barred under the Old Act—and, by analogy, to confer retrospectively a right of action for bastardy, regardless of the time when the operative facts which give rise to such a right of action occurred." Quite correctly, the court points out that the limitation problem was not at issue in the previous decisions but the statement quoted fails to apply the distinction alluded to above. Before the New Act there was no cause of action for non-residents, hence it could not be barred three years before the Act which created it. The quoted language confuses the clarification made; a clear decision that there should not be retroactivity in *newly created* rights would have been more honest than a false analogy.⁹⁸

96. 78 So.2d 371, 372 (Fla. 1955).

97. . . . it goes without saying that no greater period of retroactivity should be allowed to causes of action *created* by the New Act than to those which existed prior to its enactment—particularly in view of the fact that it might be argued that, as to the latter class (the existing rights), the New Act was not subject to the presumption against retrospective operation since it did not create a *new* cause of action but merely provided an enlarged remedy for an *existing* cause of action." 78 So.2d 371, 372.

98. It cannot be argued that the application of the general statute of limitations to the newly-expanded but formerly existing causes of action is a sound countervailing of public policy in the state's interest, in seeing that bastards and unwed mothers are maintained. Perhaps the same public policy should be applied to the new act's new causes of action. This decision does not do it, since the quoted language shows that the actions had not accrued; however the Court seems worried lest the previous decisions be construed to give unlimited retroactivity to both classes of rights. In haste, to avoid this possibility, the court created a new point of possible confusion when it stated that:

"these decisions are not, then, authority for the . . . contention that the New Act should be given an unlimited retroactive effect." *Id.*

What does the court mean by use of the word "then"? If the court now intends "then" to equal "now," after this decision, it can be argued that the only limitation imposed is the temporal one because that is all that the instant case deals with. On the other hand, if "then" means "at the time of the decision of the respective cases," the court implies the existence of not only this, but other limitations which will be divided in the future, as necessary or convenient, destroying immediately the reliability of both prior decisions.

For further proceedings in *Wall v. Johnson*, see 80 So.2d 362 (Fla. 1955) wherein a putative father petitioned for restitution of counsel fees and additional support paid before reversal; the court held that in the absence of fraud or bad faith trial court's discretion in refusing to order same was supported by the respective equities of the parties and would not be disturbed. For a non-conflict determination of the meaning of *res judicata* see *Thomal, J. concurring specially in Dade County v. Rauzin*, 81 So.2d 508, 510 (Fla. 1955).

CONSTITUTIONAL CONTROL OF CONFLICT OF LAWS

*Effect of prior proceedings: Herein of full faith and credit and comity.*⁹⁹—The Florida court continued, during the period under review, both its struggle with the unmanageable dichotomy of *res judicata* and estoppel by judgment, and its attempt to follow the proper mandate of the Supreme Court with regard to the faith and credit to be given the other jurisdictions. Since the state remains¹⁰⁰ one of the major forums for the settlement of domestic problems and creates a vast amount of family law, the court would be well advised to respect out of state proceedings with a generosity similar to that granted Florida proceedings abroad.¹⁰¹

Continuing its attack on the real substance of the full faith and credit clause, the court decided *Roy v. Roy*¹⁰² without mention of either the *Gordon* or *Riehl* cases.¹⁰³ W sued H for separate maintenance in the District of Columbia and had been awarded title to certain real property. The grounds were desertion and cruelty. Subsequently H sued W for divorce alleging cruelty, desertion and habitual intemperance. The granting of the decree was affirmed. The Court simply said: "The causes of action were entirely different."¹⁰⁴ The prior proceeding was denied effect both as *res judicata* or estoppel by judgment.

In *Dwyer v. Dwyer*,¹⁰⁵ the court found that an interlocutory California divorce decree was not such a decree as would satisfy the ground for a Florida divorce "that the defendant has obtained a divorce . . . in any other state or country."¹⁰⁶ The answer admitted the California decree and H moved to dismiss the complaint on the ground that it was *res judicata*. The court reversed the decree granting W the divorce on the basis that

99. In this section, we will discuss not only the matters covered in the same section in 1 SURV. FLA. L. at 224, but also those dealt with in the section on *res judicata* and collateral estoppel, *id.* at 226, as well as certain new questions raised in the general area of faith and credit.

100. All this in spite of several attempts during the 1955 legislative session to lengthen the period of residence for divorce purposes to one year; in spite, also, of Judge Giblin's continued efforts to raise the standards in this field, which have produced such novel and salutary results as the naming of a special master to investigate charges of adultery made by letter in *Bartulis v. Bartulis*, Ch. No. 170991, 11th Judicial Circuit, creating thereby a sufficient interest in the state that the action be no longer subject to voluntary dismissal.

101. By "abroad" is meant both intra-and international. See *Stern v. Stern*, 132 N.Y.S.2d 817 (Sup. Ct. 1954) and *Dunne v. Saban*, 3 All E.R. 586 (1954) commented on in 71 L.Q. REV. 191 (1955); 33 CAN. BAR. REV. 475 (1955); 4 INT'L & COMP. L.Q. 220 (1955); but cf. further comment on the principal case *id.* at 392-93 by Kennedy, especially this statement at 393: "Dunne v. Saban is so obviously ill-considered that no more need be said of it for the moment. Let us hope that it is taken to a higher court."

102. 73 So.2d 294 (Fla. 1954).

103. *Gordon v. Gordon*, 59 So.2d 40 (Fla. 1952) and *Riehl v. Riehl*, 60 So.2d 35 (Fla. 1952). Comment on the former in 1 SURV. FLA. L. at 226-28 and the latter at 228.

104. 73 So.2d 294 (Fla. 1954).

105. 72 So.2d 378 (Fla. 1954). The same division that decided the instant case was later to decide *Roy v. Roy*, *supra* note 102. It consisted of Terrell, Roberts, Sebring and Mathews, JJ.

106. *Id.* at 379. The language is from FLA. STAT. § 65.04 (8) (1953).

the statutory ground demands such finality as would satisfy the full faith and credit clause. This reversal seems correct on the basis of both the general California law and the nature of the decree in question.

It is curious that in neither of these cases did the court choose to enlarge on the previous adjudication aspect of the litigation. Certainly some effect ought to be given even if it falls short of the automatic one given matters within the mandate.¹⁰⁷ The *Dwyer* case also contains this interesting language:

In the first place, to satisfy the requirement of F.S. § 65.04(8), F.S.A., entitling the decree of divorce to full faith and credit . . . the decree must be absolute . . .¹⁰⁸

And further:

It is held in this jurisdiction that the decree of a foreign state that is subject to modification may not be accorded full faith and credit under Section 1, Article IV, Federal Constitution.¹⁰⁹

It does not seem consistent to confuse the finality required to satisfy a local statutory ground for divorce with that which is required so that the court must give heed to a foreign adjudication, nor does it seem appropriate that the local law should be used to define a constitutional norm which operates independently of it. The second statement is not true universally and if it were to be made, it should be qualified, especially since the case law of Florida gives effect to support and alimony decrees which are subject to modification.

A Florida decree was given the broadest possible support by the Colorado Supreme Court in *Minnear v. Minnear*.¹¹⁰ He had been required to pay alimony by the decree and sought to set aside the property settlement contained therein. He relied on the power of the court to make new orders where "reciprocal support of dependents statutes" are involved. The Colorado court held the act unconstitutional as violative of the full faith and credit clause of the Constitution, stating that ". . . our courts are open for the recognition and enforcement of valid foreign judgments, and not to declare a judgment of another state . . . totally void . . ."¹¹¹

In *Wolk v. Leak*¹¹² the court reached the same conclusion as the Colorado court with regard to an Ohio decree for alimony and support money not subject to modification. "The rule is settled in this jurisdiction that foreign divorce decrees providing for alimony and support money are

107. See previous discussion in 1 SURV. FLA. L. at 224 and note 75.

108. 72 So.2d 378, 379 (Fla. 1954).

109. *Id.* at 380. The court cited *Boyer v. Andrews*, 143 Fla. 462, 196 So. 825 (1940), and *Cohen v. Cohen*, 158 Fla. 802, 30 So.2d 307 (1947) as authority for this proposition.

110. ——— Colo. ———, 281 P.2d 517 (1955).

111. *Id.* at ———, 281 P.2d at 519.

112. 70 So.2d 498 (Fla. 1954). The decision was by the same division as in the *Dwyer* and *Roy* cases.

entitled to full faith and credit in Florida"¹¹³ To this must be added the presumption which runs against the judgment debtor that past due installments are *not* subject to modification. The court felt that to deprive such a decree of faith and credit enforcement the law of the state of rendition must clearly provide for modification of past due installments, and that failing such a provision, the mere pendency of a petition for future modification could have no effect on the result in the instant case. A full scale and careful analysis of the Ohio authorities¹¹⁴ was made by the court in reaching this conclusion.

Significant comments in this area of Florida law were made in two New York cases.¹¹⁵ Both held that recovery for support money could be had for past due installments without first obtaining a Florida court order and both construed the power to modify under the change of circumstances and ability to pay rule as being solely prospective.¹¹⁶

*Reichert v. Appel*¹¹⁷ gave the court an opportunity to establish one of the accepted limitations on the full faith and credit clause and also provided a case of "divisible divorce." H, defendant in the original action in Illinois, now sought to impeach the appearance filed therein and was

113. *Id.* at 500. Citing also *Boyer v. Andrews* and the *Cohen* case, *supra* note 109, for this proposition.

114. *Id.* at 501.

115. *Moore v. Mackay*, 132 N.Y.S.2d 813 (Sup. Ct. 1954) and *Stern v. Stern*, 132 N.Y.S.2d 817 (Sup. Ct. 1954) *supra* note 101. The court in the former case found that the "thereafter" in FLA. STAT. § 65.15 (1953) was crucial, and the second case relied on this determination. The language in *Wolk v. Leak*, *supra* note 112, bears out the correctness of this determination. With regard to a more general question, the New York court made this statement:

The Supreme Court of the United States, in *Griffin v. Griffin*, 1946, 327 U.S. 220 . . . , adopted the view that under New York law, accrued alimony was not a vested right although no modification of the decree had been made prior to its accrual. The Court of Appeals, however, in the case of *Waddey v. Waddey*, 1943, 290 N.Y. 251 . . . indicated that it entertained the opposite view, and since this involves a question on state law, the view of the Court of Appeals would be controlling in this instance. *Erie v. Tompkins*, 304 U.S. 64 *Moore v. Mackey*, 132 N.Y.S. 2d. 813, 815 (Sup. Ct. 1954).

116. For a recent construction of the same section by the Florida court see *Chastain v. Chastain*, 73 So.2d 65 (Fla. 1954). Except for modification possible within this section, the decree was given the effect of *res judicata*. In an earlier case, the court had already held that where, without fraud or duress, the wife had relinquished her right to alimony in consideration of a property settlement and money payment, the agreement was fully performed and alimony would not be awarded under FLA. STAT. § 65.15 (1953) (change of circumstance rule) *Haynes v. Haynes*, 71 So.2d (Fla. 1954). On prior review (*interlocutory certiorari*) the court had merely determined that the question of fulfillment of the stipulation was within the scope of the section. *Idem*, 40 So.2d 123, 125 (Fla. 1949). The court cited *Norton v. Norton*, 131 Fla. 219, 179 So. 414 (1938), for an explanation of the difference between a property settlement and alimony in installments. The intent of the parties governs as per the agreement incorporated in the decree. Only where there is doubt as to the total relinquishment of rights, and when the agreement is executory should it be modified, *Cohn v. Mann*, 38 So.2d 465 (Fla. 1949). The court also determined the collateral point in the principal case that, if the wife moves to modify, suit money is not recoverable under FLA. STAT. § 65.16 (1953); only if she is forced to defend an attempted modification by the husband, *Simpson v. Simpson*, 63 So.2d 764, 765 (Fla. 1952), is such recovery allowed.

117. 74 So.2d 674 (Fla. 1954).

held by Illinois law to be estopped to challenge the decree since he had married a second time in reliance thereon.¹¹⁸ The court found, however, that an issue of material fact was tendered by his present answer that no notice had been served on him at the time the decree for support money was entered against him. Summary judgment on the Illinois judgment for arrearages should not have been granted W on the basis of the provision in Illinois law¹¹⁹ that procedural due process requires such notice before the money judgment can be entitled to full faith and credit. This is true notwithstanding the fact that valid personal jurisdiction for divorce had been obtained on H.

On the matter of "divisible divorce"¹²⁰ the Court of Appeals for the District of Columbia has reopened all of the troublesome problems implicit in this concept in a case involving a Florida decree. *Hopson v. Hopson*¹²¹ was decided by the Court sitting en banc, the majority reaching the conclusion that an *ex parte* Florida divorce did not terminate W's right to support and maintenance. The dissenting judges, Stephens and Wilbur K. Miller, raised questions both as to the propriety of the exercise of jurisdiction over parties not domiciled in the District, and as to the survivability of a non-adjudicated claim for maintenance.¹²²

Of particular importance to the Florida practitioner is this statement of the majority, after modifying the rule of the *Meredith* case¹²³ as to general equity powers of the courts of the district:

. . . [in allowing maintenance actions] there may be no necessity for a frontal attack upon the validity of the foreign *ex parte* divorce There are two important reasons why courts should seek to avoid such an attack. First, because of the deference due to the proceedings of a sister state; and second, the result of the attack might well be to stigmatize unnecessarily a subsequent marriage and the children born thereof. Since the question of

118. Citing as authority RESTATEMENT, CONFLICT OF LAWS, § 112 (1934), as well as the always reliable 19 C.J. Divorce, § 850, 27 C.J.S. Divorce, § 337 and 17 AM. JR. Divorce and Separation, § 401. Cf. *Doherty v. Traxler*, 66 So.2d 274 (Fla. 1951).

119. 74 So.2d 674, 676 (Fla. 1954). It is not made clear just what the form of notice should be in order to satisfy procedural due process once the in personam jurisdiction is attached—which is presumed to continue where it is specifically retained as in the case. The standards of "the general rule" are to be found in *Griffin v. Griffin*, *supra* note 115, but cf. comment on that case in *Moore v. Mackay*, *supra* note 115 and in *Benjamin v. Benjamin*, 78 Fla. 14, 82 So. 597 (1919) and *Peacock v. Peacock*, 160 Fla. 630, 36 So.2d 206 (1948).

120. For a general discussion on this problem see *Ogden v. Ogden*, 33 So.2d 870 (Fla. 1948) in 1 SURV. FLA. L. 224 and in note 77. For a comment on this case see, *Graveson, Judicial Interpretation of Divorce Jurisdiction in The Conflict of Laws*, 17 MOD. L. REV. 501 (1954).

121. 221 F.2d 839 (D.C. Cir. 1955).

122. A detailed discussion of the lengthy opinions is not included, as they deal principally with the local law of the District. The case is included in this Survey in view of the continuing importance of the jurisdiction for divorce, the basis thereof, and the consequences of such adjudications as the *Alton* case, see 1 SURV. FLA. L. 225 and especially note 82, and the recent decision in *Granville-Smith v. Granville-Smith*, *supra* note 69.

123. *Meredith v. Meredith*, 204 F.2d 64 (D.C. Cir. 1953).

maintenance does not depend in each case upon the invalidity of the foreign divorce, sound judicial practice ordinarily will avoid a frontal attack upon such decree.¹²⁴

The entire court focuses its attention on the scope of *Estin v. Estin*¹²⁵ and *May v. Anderson*¹²⁶ taken together in this perplexed field of migratory divorce, and the maintenance of the by-products thereof. In view of the prestige of the court whose opinion is now under discussion, and the continuing interest of the Supreme Court, as well as the badly confused state of the law of faith and credit in this entire field, a new consideration of these problems by the high court may result herefrom. No easy solution has yet been found nor has a satisfactory one been announced. Perhaps the former does not exist but hope should not be lost that the latter will some day be discovered.

*Jurisdiction in matters of child custody:*¹²⁷ *Herein of the change of circumstances exception*¹²⁸—Normally matters involving custody of minor children and support money for them are litigated together and the exception with regard to change of circumstances has been applied in both categories. As has been shown, the obligation of support must be based on in personam jurisdiction and sufficient notice to satisfy procedural due process. Hence, the statute permitting modification¹²⁹ is impliedly subject to that control. In the analogous field of custody, the Florida court had evolved the doctrine that once jurisdiction has attached, through presence of the children, or in certain exceptional cases, presence of the parents,¹³⁰ no faith and credit need be given custody proceedings in another juris-

124. 221 F.2d 839, 847 (D.C. Cir. 1955) Stephens, C.J. dissenting in this respect, makes this comment on the majority holding:

In the *instant case* this court, taking the Meredith decision, . . . as a point of departure, rules in respect of that decision thus: The court accepts and affirms its ruling in the Meredith case that a grant of maintenance after a valid foreign *ex parte* divorce decree is a question of local policy and not a full faith and credit problem. *Id.* at 850.

125. 334 U.S. 541 (1948).

126. 345 U.S. 528 (1953) commented on in another aspect *infra* note 137. For a neighbor's comment on this problem see the excellent consideration of the Commonwealth authorities in O'Connell, *Recognition and Effects of Foreign Adoption Orders*, 33 CAN. BAR. REV. 635 (1955).

127. For the basic authorities see 1 SURV. FLA. L. 228 and note 95. That the change of circumstances exception still governs, see a recent case, *York v. York*, 78 So.2d 406 (Fla. 1955) and *Id.* at 408. The authorities cited in note 95 are characterized at 408 as having been "controversial" cases to distinguish them from the curious *York* cases.

For the title of this subsection the author is indebted to Prof. Max Rheinstein whose admirable article in 26 CONN. BAR. JOUR. 48 (1952) is highly recommended. See reference thereto in Briggs, *op. cit. infra* note 149 at 351; see also note 87.

128. See in general the discussion in 1 SURV. FLA. L. 222, 223, 228, especially note 69; see also *Moore v. Mackay*, 132 N.Y.S.2d 813 (Sup. Ct. 1954).

129. FLA. STAT. § 6515 (1953) and especially questions raised in 1 SURV. FLA. L. 223 at note 72, and discussion *supra* note 115.

130. *State ex rel. Rasco v. Rasco*, 139 Fla. 349, 190 So. 510 (1939) and authorities collected therein.

diction.¹³¹ So important has the presence of the minors become that the legislature enacted a law in the past session making it a felony for a party to an action to knowingly remove a child from the jurisdiction.¹³²

The first intimation that the court was to stiffen its interpretation of the change of circumstances rule, giving greater faith and credit to a foreign decree, came in *Jones v. Oakes*.¹³³ W was the plaintiff in the original divorce proceedings in Missouri and was given custody of the four minor children of the marriage. H had visitation rights and possession in alternate summer and Christmas vacations. Each parent was to bear the expenses during the time of possession of the children. Both parents had remarried by the time of this action, in which W sought full time custody of the youngest child and greater support for the two younger children while out of her possession. Both prayers were granted as well as a decree that H support an institutionalized child. W's petition for reimbursement was denied.

On appeal the Supreme Court reversed the entire award insofar as it favored W and affirmed the lower court's denial of reimbursement. It stated:

The decree of the Missouri Court is conclusive as to all matters properly before the court there that were finally determined in that decree. The only jurisdiction reserved . . . was to 'alter, amend, or modify . . . to meet the needs and best welfare of said children.'¹³⁴

The court found that in no way was the welfare of the institutionalized child involved, and that under the facts and the Missouri decree the mother had borne only the proper amount of the expense. As to the matter of custody of the youngest child (Whipple Jr. or Boochie), the court concluded "that no facts have been established that would justify any change in the Missouri decree. . . ."¹³⁵

This is the first indication that the power of the court, having the parties present, would be restricted to the authority reserved by the court in the prior proceeding. While the court does not adumbrate the coincidence, it may be meaningful that the reserved power was aimed at the same interest as that which the Florida court would normally protect.¹³⁶

131. In a case involving both aspects of this question, the Colorado court held that a Texas child support decree was not res judicata in Colorado. *Potter v. Potter*, 278 P.2d 1020 (Colo. 1955), 27 ROCKY MOUNTAIN L. REV. 350.

132. Laws of Fla., c. 29654 (1955).

133. 71 So.2d 252 (Fla. 1954).

134. *Id.* at 254-55.

135. *Id.* at 256. For a non-conflict case explanatory of such a change in circumstances, see *Child v. Child*, 4 Fla. Supp. 128 (1953).

136. Cf. *Bennett v. Bennett*, 73 So.2d 274 (Fla. 1954), a non-conflict, all-Florida case in which the court referred to *Jones v. Oakes* with approval and as controlling, *id.* at 278, and quoted the language quoted in the text *supra*. That the interest is the same may be seen from this statement, also at 278:

The primary concern of this Court is and should be the welfare of the children. If any change is to be made . . . we are warranted . . . only on

Before the decision in *May v. Anderson*,¹³⁷ the mother in *Gessler v. Gessler*¹³⁸ would have found herself in a most difficult position. H and W were married in Pennsylvania and had been domiciled there until shortly before this action. Shortly after separation H brought the two minor children of the marriage to Florida and informed W, whom he supported, that he intended to establish a domicile. H had been in Florida only a few days when W appeared and recaptured the children, removing them to Pennsylvania. About ten days thereafter H instituted this suit with construction service on W. Her special appearance being overruled, W took certiorari to the Supreme Court under Rule 34.

In granting the writ with directions to dismiss the bill, the court stated:

We see no escape from the conclusion that this is a proceeding in personam against a non-resident defendant, that the courts of Pennsylvania have jurisdiction of the wife and the minor children¹³⁹

In reaching this conclusion the court flatly rejected H's contention that his intention to establish a domicile was sufficient to found "jurisdiction over the mother for custodial purposes . . . secured by publication."¹⁴⁰ In line with the decision in *May v. Anderson*, the court in the *Gessler* case affirmed the doctrine of presence of the children before guardianship may be litigated, or at least the personal presence of both parties. And they noted that in the case:

Justice Jackson pointed out that for the reason that [sic] we are historically a mobile people the rigid concept of domicile rooted in the common law because of feudal attachment to land is too stern for a society so restless as ours. Our law, however, recognizes separate legal entities, consequently the means so provided is the method of recognizing them.¹⁴¹

the basis of a change . . . occurred since the date of [the] decree or on the basis of facts bearing upon the question which were in existence at the time the decree was made but were unknown to the Court *Sayward v. Sayward*, Fla. 1950, 43 So.2d 865. And, even if we do determine that there has been a substantial change in conditions, we would be warranted in altering said decree only where it appears that the welfare of the children will be promoted thereby.

137. 345 U. S. 528 (1953).

138. *Gessler v. Gessler*, 78 So.2d 722 (Fla. 1955).

139. *Id.* at 724. Under the new statute, see note 132 *supra*, but for a few days difference, a wife removing her children might become liable for a crime, were her special appearance to be overruled. The existence of this penalty will probably act to strengthen the rule in the *Gessler* case and may even result in reciprocal legislation making the original removal by the husband from the basic domicile punishable. That the removal of children in custody from the jurisdiction does not terminate the duty to support, and is authorized unless expressly forbidden by decree, see *Gorgol v. Gorgol*, 5 Fla. Supp. 174 (1952).

140. *Id.* at 723. The court went on to say that neither the children were present nor did the mother come here personally to move for dismissal and that when guardianship is the question, habeas corpus is the remedy.

141. *Id.* at 724. And the decision remains valid notwithstanding the liberalization of the legislature in providing in FLA. STAT. § 744.13(1) (1953) that both parents are joint guardians of their minor children and that either may establish a domicile for the purpose of determining custody. But *cf.* the latest in *Cone v. Cone*, 4 Fla. Supp. 123 (1953), 1 SURV. FLA. L. 238, note 134.

These two decisions taken together mean that the court has taken a position of much stricter faith and credit than was apparent before. If the interests of the present litigants will be measured by the scope of the initial decree in an area not formerly protected even by the doctrine of *res judicata*, and the rights of absent parents protected by the refusal of jurisdiction, the trend may be expected to carry over to the alimony and support field in which the legislature has taken an even greater interest.¹⁴²

Full Faith and Credit: Powers of Foreign Appointed Guardian over Local Res.—In the previous Survey, note was made of the fact that this field is imposed.¹⁴³ Note was also taken of the surprising final decision in *Beverly Beach Properties v. Nelson*¹⁴⁴ and further comment was withheld pending action that might be taken by a higher court.¹⁴⁵ To reach the result that it did in the principal case, the court not only had to characterize the subject matter of the litigation in a new way—changing it from a question of the power to sell local land to the power to vote shares of stock in local corporations—it had also to extend faith and credit to a new field. Since greater than imposed respect for acts in another state would not disturb the Supreme Court, it is easy to see why certiorari was not granted.¹⁴⁶

It is not possible to criticize apparent inconsistencies in the facts found in each of the various stages of this litigation. The court now finds that Zetterlund had the capacity to acquire a new domicile in California and surrender his former domicile in Florida. It might be supposed that even if he had lost the capacity to change his domicile, the court would construe the California law as giving the competent court the power to appoint a guardian for him, on the basis of his presence without domicile.

Then follow the interesting statements

The full faith and credit clause of the Federal Constitution requires that the courts of this State recognize the action of the California

142. For a recent federal case in this area, see *In re Adoption of Minor*, 214 F.2d 844 (5th Cir. 1954).

143. 1 SURV. FLA. L. 222 note 69. But *cf.* discussion in preceding section.

144. 68 So.2d 604 (Fla. 1953). For prior history of this litigation see 1 SURV. FLA. L. 211 at note 10; Note 9 MIAAMI L.Q. 85 (1955).

145. *Ibid.*, cert. denied, 348 U.S. 816 (1955); for newspaper comment see Miami Daily News, May 22, 1955, P. 16A, col. 1, under headline "Way is Cleared for Big Project in S. Broward." Excerpts are instructive on the handling by the press of legal matters:

In a recent decision, the U.S. Supreme Court refused to review the case of the Estate of Olof Zetterlund vs. Samuel Friedland For the next six years the case shuttled between the circuit courts and the Florida Supreme Court. In August, 1955, the Florida Supreme Court reversed an earlier decision (which) ruled out the fraud angle and termed the transaction a fair one.

The U.S. Supreme Court, in effect, upheld the state's jurists for it contended that no constitutional question was involved.

146. A general comment might be made with reference to the Supreme Court's attitude toward review of Florida decisions. Outside of the civil rights area little interest has even been shown, as witness not only the denial here, but also in the final stage of the *Kessler v. McClone*, 55 So.2d 791 (Fla. 1951), litigation; see comment 1 SURV. FLA. L. 217 at note 42.

court in the appointment of the guardian, in the construction of the legality of that appointment and the actions of the guardian as such, so long as the guardian was acting under the laws of the State of California. . . . It is conceded . . . that the California guardian could not have sold real property situate in Florida without ancillary proceedings . . . but we think a different rule applies with reference to the voting of shares of stock (intangible personal property to which the rule *mobilia sequuntur personam* is applicable) in corporations chartered by this¹⁴⁷ State . . . If this were not a case in which we are required . . . to give full faith and credit, . . . we would, nevertheless, be required to recognize the legislative enactments of California and the judicial acts of the Superior Court . . . as a matter of comity.¹⁴⁸

For the sake of consistency and clarity of reasoning it would have been better for the court had it stopped its opinion at that point. Having stated that the public policy of the state was not injured by giving effect to the California appointment, more than enough would have been said. Since a doubt remained as to the future settlement of the estate of Zetterlund, the court felt compelled to go on to explain that the faith and credit extended only to the period of guardianship and not to the time after the death of the ward.¹⁴⁹

STATE LAW IN THE FEDERAL COURTS

The Erie Doctrine.—Cases during the period under survey have not dealt with the classic *Erie* situation¹⁵⁰ frequently; rather they have gone off into the area of difficult decision posed by the absence of "state law" to

147. 68 So.2d 604, 609 (Fla. 1953).

148. *Ibid.* The court cites *Herron v. Passailaigue*, 92 Fla. 818, 110 So. 539 (1926), 1 SURV. FLA. L. 224 at note 75, for the quotation approved as the alternative ground for the decision in the principal case.

149. Nothing can be gained by delineating the inconsistency of this present opinion with the rationale of the decision of the 9th circuit in *Nelson v. Miller*, 201 F.2d 277 (9th Cir. 1952), which will be found at 68 So.2d 610, 611 (1953). The reader can draw his own conclusions from reading the cases. Justice Hobson must have had the refrain "full faith and credit" on his mind when he wrote this opinion, for having just cited the decision of another court denying faith and credit, he said:

If we adhere to this doctrine as established by the said Federal decision, then we are required to give full faith and credit to the proceedings . . . which took place during the period of the guardianship administration. *Id.* at 611.

The rule of this case has been given legislative sanction in Laws of Fla., c. 29892 (1955) amending FLA. STAT. § 732.26 (1953), so that no property passes to a personal representative of a Florida decedent until after local probate of the will; but a companion statute, c. 29893 amending FLA. STAT. § 733.01 (1953), flies in the face of all established doctrines. Its provisions would involve Florida in an "Isle of Tobago" situation in that it commands the personal representative to "take possession of the personal property wheresoever situate" of a Florida decedent. On the Isle of Tobago situation, see Briggs, *The 'Legislative-Jurisdictional' Principle*, 4 INT'L & COMP. L.Q. 329, 340 (1955). For further discussion, see Recent Legislation, *supra*.

150. For an explanation of the normal amplitude of state law in the diversity situation, see 1 SURV. FLA. L. 231, especially note 119 at 234. See also Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953).

be applied in the federal court, or the encounter with applicability of state law in a non-diversity situation.

*Macarages v. Raymond Concrete Pile Co.*¹⁵¹ is the closest to the classic situation. It involved the question whether workers in statutory¹⁵² hazardous occupations were covered by the Florida Workmen's Compensation Act¹⁵³ or had a distinct status allowing them to sue as at common law. Appellants urged the position that the Compensation contract fell within the prohibition of Florida Statute Section 769.06 of the earlier act and that, "in the absence of a decision by the Supreme Court of Florida covering the precise point . . ." ¹⁵⁴ they should not be deprived of the right to sue for negligence. The trial court rejected this argument, and in affirming, the Court of Appeals stated:

Any doubt as to the correctness of the judgment . . . must now, it seems to us, be completely swept away by the language of the Florida Supreme Court in *Winn-Lovett Tampa, Inc. v. Murphree* . . . "The contract of employment under the Workmen's Compensation Act is statutory and the act is implicit . . . irrespective of the nature of the employment . . ." ¹⁵⁵

Passing now to the cases that dealt with the application of the Erie technique in the absence of clear or decisive state authorities, the first case is *Murray v. G.F.C. Corp.*¹⁵⁶ Herein was involved the question of priority of lien in chattels between an unrecorded mortgage and a general creditor of the mortgagor. The mortgagee had not complied with the statute granting priority against general creditors with notation.¹⁵⁷ The lower court held that there was no reason to construe the statute granting priority as destroying the former rule generally obtaining under other recording acts of the state: "that the lien of an unrecorded mortgage is prior in right to the rights of a general creditor who has not obtained a lien upon the mortgaged property."¹⁵⁸

The court further held:

The district judge in a diversity case has so construed the statute, and, *in the absence of authoritative decisions* of the Florida courts construing it to the contrary, we are of the opinion that the construction given it by the district judge was the correct one.¹⁵⁹

151. 220 F.2d 891 (5th Cir. 1955).

152. FLA. STAT. § 769 (1953).

153. FLA. STAT. § 440 (1953).

154. 220 F.2d 891 at 893 (5th Cir. 1955).

155. *Id.* at 894.

156. 214 F.2d 344 (5th Cir. 1954).

157. FLA. STAT. § 319.27(2) (1953). For a discussion of the effect of this statute *cf.* section on interests in tangible chattels, *infra.* note 211.

158. 214 F.2d 343, 346 (5th Cir. 1954).

159. *Ibid.* Emphasis supplied.

This technique, previously referred to as "the construction of the state law" method,¹⁶⁰ was applied in the second circuit in the following fashion. In a case involving rights of a third party in a surety bond,¹⁶¹ the court first localized the problem with this language:

The record shows that the defendant Casualty Company was an Illinois corporation, that its principal—the subcontractor—was a Vermont corporation, and that the prime contractor was a Massachusetts corporation, and that the subcontract was one to be performed in Vermont. There is nothing in the record to show that the parties . . . contemplated . . . that it was to be interpreted or governed by the law of any particular state. Accordingly, we think the problem presented should be determined by the law of Vermont.¹⁶²

Having achieved this result the court then goes on to state:

However, there seems to be neither statute nor judicial precedent in Vermont bearing on this problem. And the problem presented has been variously decided in various jurisdictions. Confronted with this dilemma our task is not to surmise which line of judicial precedent a Vermont court would follow . . . but rather . . . to define the pertinent law which when thus ascertained is presumably the law of Vermont even though as yet unannounced by a Vermont Court.¹⁶³

The *Erie* technique was also applied by the Court of Appeals for the Fifth Circuit in a quasi non-diversity situation. The case of *Johnson*

160. 1 SURV. FLA. L. 234 (1953).

161. *Socony-Vacuum Oil Co. v. Continental Casualty Co.*, 219 F.2d 645 (2d Cir. 1955).

162. *Id.* at 647. If the reader wants to test the validity of Brigg's policy-centered choice of law, see 4 INT'L & COMP. L.Q. at 333 ff, on this set of facts. Consider also the fact that the court relied on *Erie v. Tompkins* as authority for what it does, and then did not even mention the terms of its reference to Vermont law, except to demonstrate the futility of the reference in the passage next quoted. Cf. conclusions in note. 68 HARV. L. REV. 1212, 1222-24 (1955).

163. *Ibid.* For this astounding proposition the court, composed of Clark, Frank and Hincks, JJ., relies on MOORE COMMENTARY 338-40 (1949).

In another recent federal decision, *Zaccar v. United States*, 130 F. Supp. 50 (D.C.Mo. 1955), state law is made specifically applicable by the built-in choice of law clause, of a federal statute. In this case, the court followed the line of reasoning expressed in Federal Tort Claims Act, 28 U.S.C. §§ 1346 (b), 2674 (1952). The liability of the United States is determined by the law (?) of the place where the act or omission occurred (Maryland). The statute in question does not classify the right to contribution but, while there are arguments in favor of a uniform national rule, this court preferred to apply the analogy of the *Erie* doctrine and made this right depend on "local substantive law." *Id.* at 51.

"As in diversity cases involving similar questions, we must apply the substantive law of the state and the procedural law of the federal courts'. *Gray v. Hartford Accident & Indemnity Co.* D.C.W.D. La., 31 F. Supp. 299, 306." *Ibid.* The court goes on to state that "The Court of Appeals of Maryland has never passed flatly on the question . . ." *Id.* at 52. In fact the court adds: "I have never heard of such an action being filed in Maryland . . ." *Id.*

But the court nevertheless found a federal case that has reached the same conclusion and sufficient authority to forecast that the Maryland law will be that contribution cannot exist because of a failure of the right of an unemancipated infant to sue its parent for damage resulting from the parent's negligence.

*v. Remy*¹⁶⁴ was an action in interpleader where no diversity of citizenship existed. Whether the *Erie* doctrine is applicable where this is the foundation for the federal jurisdiction was an open question,¹⁶⁵ but the court simply stated:

The federal district court sitting in Florida must conform to the conflict of laws rule prevailing in Florida state courts. [Footnote omitted] Under that rule, the distribution of the proceeds of the insurance policy is governed by the law of the State of Florida; indeed, both parties agree that Florida law is controlling.¹⁶⁶

It would be enlightening to know which of the many parts of the conflict of laws the court has reference to when it states "that rule," and also what conceivable effect the agreement of the parties has on measuring the federal jurisdiction and the law applicable therein.¹⁶⁷ After a lengthy consideration of an apparently irreconcilable confusion of cases at the state level, the court reached this conclusion:

We now find ourselves in agreement with Judge DeVane that, since the ruling of the Supreme Court of Florida in *In re Seaton's Estate* (18 So.2d 20) is the latest decision of that court on the question purely of state law, it is controlling on the federal courts.¹⁶⁸

Another variation on the *Erie* theme, and this a very self-satisfactory one in the increasingly popular game of who makes the state law, is to be found in *Martin v. Theockary*.¹⁶⁹ Here jurisdiction was apparently based on diversity, thus full *Erie* treatment was afforded, as can be seen from the opening sentence of the opinion:

The sole question on this appeal is whether, under Florida law, . . . ¹⁷⁰ a co-employee could be sued for damages within the "third person exception" of the workmen's compensation law.¹⁷¹ At the time of the argument of the case before us, there was no Florida case on the precise point. . . . We therefore undertook to

164. 220 F.2d 73 (5th Cir. 1955).

165. *But cf.*, the contrary conclusion that interpleader is merely a remedial extension of the diversity jurisdiction, 68 HARV. L. REV. 1224.

166. *Supra* note 164, at 74. In the omitted footnote in the opinion, numbered 4, the court cites *Glaxon v. Stentor*, 313 U.S. 487 (1941), see 1 SURV. FLA. L. 240 and note 144 (1953), discussing the scope of this part of the *Erie* rule, and *Tucker v. Texas*, 204 F.2d 918, 920 (5th Cir. 1953) as authority for this proposition.

167. Since the court seems to have disposed of the case in a non-conflict area, no discussion of the apparently sound construction of the Florida law as it *then* existed is included.

168. 220 F.2d 73, 78 (5th Cir. 1955). The legislature was apparently unsatisfied with the decision in the instant case or the interpretation of *Seaton's Estate* because it enacted Laws of Fla., c. 29861 (1955), which added a further proviso to FLA. STAT. § 222.13 (1953), therein construed, making insurance payable to the insured or his executors, administrators or assigns pass to the personal representative in the event he died intestate or left a will which did not specifically bequeath the proceeds of any such policy. *Cf.*, the statement in the principal case 220 F.2d 75 (5th Cir. 1955).

169. 220 F.2d 900 (5th Cir. 1955).

170. *Ibid.*

171. FLA. STAT. § 440.39(1) (1953).

'assume the duty the Supreme Court of Florida would have if the case were before it, to state the proper interpretation of the amended statute.' *Holliday v. Wade*, 5 Cir., 117 F. 2d 154, 156. However, before our opinion was printed, we find that, subsequent to argument, the Florida Supreme Court has now decided in *Franz v. McBee Company*, 77 So. 2d 796 (1955)¹⁷² precisely as the district court did in this case. Since we, of course, are bound to follow the state law in construing such a Florida statute, it is unnecessary for us to add our reasoning to the excellent treatment of the question by the Florida Supreme Court.¹⁷³

Once again one is driven to the generalization that the Federal courts are not paying sufficient heed to the proper scope to be given the state law in the diversity and quasi-diversity situation. The failure on the part of the Supreme Court of the United States to protect the existing national forum is perhaps as much responsible for this state of affairs as any single thing. The abandonment of the diversity forum to state law has carried with it much former national law; the process of fragmentation of the federal judicial power does not serve well the ends of the nation.

Federal law in the state courts.— Several different uses of federal law were made by the Florida courts during the period under survey. Respect, similar to that shown the same statute¹⁷⁴ in *Chambers v. Loftin*, noted in the previous Survey,¹⁷⁵ was given in *Seaboard Air Line Railroad Co., v. Strickland*.¹⁷⁶ In reversing the judgment rendered below in favor of the employee, and ordering entry of judgment for the employer the court stated:

In cases arising under the Act in question, this court is required to determine questions relating to the negligence of the employer in accordance with the principles of law established and applied by the Federal courts.¹⁷⁷

172. This case must be noted for the other extremely interesting jurisdictional question which it decided and which is not adverted to as being immaterial to the decision of the principal case. The court also decided that failure of a foreign corporation to qualify to do business in the state under Section 613 did not deprive its Workmen's Compensation contract of validity and thereby give the corporation the protection of that statute. This result was achieved by placing the contract under the protection of FLA. STAT. § 613.04 (1953), see 7 So.2d 796, 797 (1942). Thus even though not fully present within the jurisdiction, legislatively or otherwise, the corporation has capacity to act to this extent.

173. 220 F.2d 901 (5th Cir. 1955). For another case where it was necessary to construe state law in the absence of state authority, see *Continental Casualty Co. v. Padgett*, 123 F. Supp. 847 (E.D.S.C. 1954). Here the court quoted with approval the formula of *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943), to the effect that the court must construe "with the aid of such light as was . . . at hand and in accordance with the applicable principles for determining state law." A diving rod might do as well! For another *Erie* case see, *Atlantic Coast Line Ry. v. DeMayo*, 222 F.2d 462 (5th Cir. 1955).

174. Federal Employers' Liability Act, 53 STAT. 1404 (1939) 45 U.S.C. § 51 (1952).

175. See 1 SURV. FLA. L. 235 (1953). For an improper use of the cited case as authority in a state law situation to which it was not applicable, see the reliance of Mr. Justice Hobson, dissenting in *Burdette v. Phillips*, 76 So.2d 805, 811 (Fla. 1954).

176. 80 So.2d 914 (Fla. 1955).

177. *Id.* at 916.

And in concluding its judgment, it made this statement:

So long as the Congress of the United States, by its lawful Acts, requires proof of negligence on the part of the railroad company before it can be held responsible . . . , just so long must we require strict adherence . . . to the common-law concept of negligence¹⁷⁸

The second use of federal law is a novel one but one that will grow in frequency with the further need for construction of the new Florida rules. In *Carpineta v. Shields*¹⁷⁹ the court turned to construction of an identical federal rule for solution of its problem. It made this statement:

Rule 43 is identical with Rule 56, Federal Rules of Civil Procedure While there are no Florida cases in point, the majority rule in respect to Federal Rule 56 is stated in *Hennessey v. Federal Security Adm'r*,¹⁸⁰

The court cited a large number of other federal cases and reached a decision based on that rule.

In *Cadieux v. Cadieux*,¹⁸¹ W brought a bill in the nature of a bill of review to set aside a divorce granted H on the ground of fraud in the procurement. H, a member of the armed forces, had moved below for a stay of proceedings under the Soldiers' and Sailors' Civil Relief Act.¹⁸² This was denied, and H appealed from the decree for W. The sole question was whether the trial court had abused its discretion in denying the stay; for the solution the court turned to the act¹⁸³ and the construction thereof by the federal courts. Guided by the decision of the Supreme Court in *Boone v. Lightner*¹⁸⁴ the court affirmed the decree finding that there had been no abuse of discretion which properly was lodged in the trial court under the federal rule.¹⁸⁵

178. *Id.* at 917. A similar respect was given in *Martin v. Johnston*, 79 So.2d 419 (Fla. 1955), to the intent of Congress and the federal cases construing that intent in defining the word "car" as used in the Safety Appliance Acts, 36 STAT. 298 (1910) 45 U.S.C. §§ 1-16 (1952).

179. 70 So.2d 573 (Fla. 1954).

180. *Id.* at 574.

181. 75 So.2d 700 (Fla. 1954).

182. 54 STAT. 1178 (1940), 50 U.S.C. § 501, Appendix (1952).

183. In the instant case section 521 provided that action "shall . . . be stayed . . . unless, in the opinion of the court, the ability of [the service man] to . . . conduct his defense is not materially affected by reason of his military service." This same language is quoted by the court, 78 So.2d 700, 702.

184. 319 U.S. 561 (1943).

185. It is important to note that, presumably relying on the authority of these cases and pursuing his continuing desire to raise the ethical level of conduct of divorce cases in his court, Giblin, J. has reached a similar result in *Strickland v. Strickland*, Ch. No. 175514, 11th Judicial Circuit 1955. In that case, husband sued his wife for divorce in Missouri and when the wife sued for the same relief in Florida, the husband moved for a stay of proceedings under the act; it was granted. A master was appointed by the court to investigate the bona fides of the parties and protect the interest of the absent defendant. When it was discovered that the husband had proceeded to decree in Missouri, the court vacated the stay and granted the wife relief and custody of the child in the Florida proceeding. This case has importance, therefore, in determining the question of double jurisdiction, comity and priority of

The Erie doctrine and the federal-question jurisdiction.—In the first Survey article mention was made of this emergent problem in two different aspects.¹⁸⁶ The first was to bring to the attention of the legal profession that area in which both federal and state legal standards may be applicable in a single case in either jurisdiction—the federal diversity (including the non-diversity already subsumed under this rubric) or the state. The second was the mention of a possible new category of substance-procedure classification for the federal question; federal jurisdiction which would not involve either a mere mimicing of the *Erie* doctrine or a retrogression to the “federal common law” of *Swift v. Tyson*.

The first case¹⁸⁷ to throw light on this difficult area arose, in the period under survey, in the state courts. It involved the interaction of a contractual limitation of action contained in a bill of lading of an interstate shipper¹⁸⁸ and a remedial provision contained in a state statute of limitations.¹⁸⁹ The court was divided on the question of whether the federal law had pre-empted the field so as to preclude the state remedial measure. The uniform express receipt provided two years and a day after notice of denial of claim in which to commence an action against the carrier. Shipper's action, which had been reversed¹⁹⁰ above, had been so commenced, but the new action had not, although within the one year proviso of the state law.

The court admitted that the Carmack and Cummins amendments as construed by the Supreme Court “withdrew” questions of validity of stipulations from the state field. But, said the majority, only to the extent of invalidating any stipulations providing for a period shorter than that provided in the Federal law. At this point the majority opinion stated:

The history and development of the interstate commerce act has been set forth . . . to point up the fact that the Congress has not yet seen fit to enact into law a statute of limitations against an interstate carrier by a shipper . . . The United States Supreme

determination, and it is hoped that it will be reported, as was the decision of the same judge in another amicus curiae appointment in a divorce case, *Levine v. Levine*, 6 Fla. Supp. 54 (1954), as well as his decision noted in the prior Survey, see comment on *Burkman v. Taran* (Law No. 28594-H, 11 Judicial Circuit, 1953, 1 SURV. FLA. L. 237 (1953), note 133 and on the work of the Florida Supplement, *id.* at 238 and note 134. The *Burkman* case can now be found in 4 Fla. Supp. 182 (1953).

186. 1 SURV. FLA. L. 239 (1953) especially note 135 and the final paragraph of the text on p. 235.

187. *Hoagland v. Railway Express Agency*, 75 So.2d 822 (Fla. 1954), noted in 9 MIAMI L.O. 226 (1955). The court split 4-3 with the majority opinion by Roberts, then C.J. The late C.J. Mathews, Sebring and Thomas dissented, opinion by Mathews, *id.* at 828, 831.

188. The principle provision in question is found in 54 STAT. 916 (1940) 49 U.S.C. § 20(11) (1952).

189. FLA. STAT. § 95.06 (1953). It provided that a plaintiff, who had a judgment reversed in a higher court, might have one year from such reversal in which to commence a new action.

190. But not on the merits, see the statement in 75 So.2d 822, 823; for previous opinion, see *Railway Express Agency v. Hoagland*, 62 So.2d 756 (Fla. 1952).

Court has often said that in those fields of commerce where national uniformity is not essential, either the state or federal government may act.¹⁹¹

Finding that there is no requirement of uniformity here and no clear conflict or inconsistency of the provisions in question, the court goes on to state:

We are cognizant of our duty to adhere to the decisions of the Supreme Court of the United States . . . but counsel have cited no decision of that court . . . in which the facts are so similar as to make such a decision binding on this court.¹⁹²

The majority attempted to bolster their position by classifying the statute in question as remedial. This is not done in the technical conflict sense but rather by indirection to hint that similar "remedial" statutes classify the second action as a continuation of the former action.¹⁹³ In view of the congressional mandate, the court could not have taken the direct conflict approach of excluding the federal norm by classifying the element as procedural (another term for remedial) and governable by state law. This, however, is the effect of the holding.

In another indirect brush with the science of conflicts, which the court appears to avoid as a technical discipline, the court looks to the law of New York, "the place where the instant contract was made,"¹⁹⁴ to find a similar remedial statute to Section 95.06 and borrows that jurisdiction's construction of that statute making it applicable to contractual limitations. No explanation of the use of any logic, other than that given by common sense and normal legal training, is evidenced in the balance of the opinion. In this last situation, use of choice of law techniques could have added considerably to the strength of an otherwise not overly convincing judicial utterance.

Brief mention must be made of another dual-jurisdiction situation before concluding this discussion. In *Cox v. Roth*¹⁹⁵ the Supreme Court of the United States decided several questions having a bearing on matters just discussed in the preceding part of this section. Suit was brought under the Jones Act¹⁹⁶ and the question was whether action would survive the death of the tort-feasor. The Court of Appeals for the Fifth Circuit held¹⁹⁷ in the negative on the question under the Federal act, but allowed

191. *Id.* at 825.

192. *Ibid.* This notwithstanding that a bare minority of the same court found decisions so persuasive as to render an almost cavalier dismissal of the majority's position. See especially *id.* at 829 and the attitude of the same court in *Henderson v. State*, 65 So.2d 22, 25 (1953) quoted at 830.

193. 75 So.2d 822 (Fla. 1954). See particularly statements made at page 827.

194. *Ibid.*

195. 348 U.S. 218 (1954).

196. More particularly 41 STAT. 988 (1920); 46 U.S.C. § 688 (1952).

197. 210 F.2d 76 (5th Cir. 1954).

recovery under Florida law. Relying on the "welfare" intent of Congress and analogizing from the corporate survival provisions of the FELA, which marked the general limits of seamen's rights under this act, the court allowed survival. On the final point, of analogical importance to the discussion of the *Hoagland* case, *supra*, it made this statement:

Petitioners make the further claim that . . . , this suit must fail because petitioner did not comply with the Florida statute governing the distribution of decedent estates. The short answer to this is that Congress, within its constitutional power, decreed a 3-year statute of limitations uniformly throughout the Nation . . . and no state statute can diminish this period.¹⁹⁸

SUBSTANCE-PROCEDURE

State law.—Two recent cases have thrown considerable doubt¹⁹⁹ on the continuing validity of a statement made in the prior Survey. Both involved the enforceability of Florida judgments in Kentucky. In the state court, *Ley v. Simmons*²⁰⁰ decided that, where a Florida judgment was still valid under the twenty year Florida limitation, suit was barred by the Kentucky fifteen year limitation which had run. This was decided notwithstanding a local statute which gave validity to foreign judgments as long as they were not barred by the limitation of the rendering state. In a similar action in the federal court,²⁰¹ the same result was reached apparently on the basis of a classification of the state rule as "substantive" for the federal courts sitting in diversity. In rationale, both cases relied on the strong holding of the Supreme Court in *Wells v. Simonds Abrasive Co.*²⁰²

Federal law.—As pointed out in the discussion of the *Erie* rule, a new classification as to substance and procedure in the federal courts must now be made for those cases arising in the federal question jurisdiction.

198. 348 U.S. 207 (1954).

199. The doubt is only partial since the statement was: "The foreign courts construing the Florida statutes [of limitation] have normally held them to be substantive." 1 SURV. FLA. L. at 240 (1953). The cases noted in the present text did not involve only the construction of the Florida statutes but the classification made was quite clear and undermined the statement made.

200. — Ky. —, 249 S.W.2d 808 (1952).

201. *Albanese v. Ohio River-Frankfort Cooperage Corp.*, 125 F. Supp. 333 (W.D.Ky. 1954).

202. 345 U.S. 514 (1953). This decision was rendered in the analogous field of faith and credit to causes of action arising under sister-state statutes which are now assumed to be subject to the same strictness of respect as that to be accorded to judgments in the cases now being commented upon. See discussion of *Hughes v. Fetter*, 1 SURV. FLA. L. 236 (1953); see also extension of the doctrine in *First National Bank v. United Air Lines*, 342 U.S. 396 (1952). The *Wells* case established the rule, similar to that in the text, that the forum could apply its own time limitation to the death statute of a sister state even though that statute contained a longer period of limitation. For a discussion of the same procedural classification of a statute of limitation (this one foreign international) see *Bournias v. Atlantic Marine Co.*, 220 F.2d 152 (2d Cir. 1955) and an excellent discussion of the former distinction between statutes "barring the right" and "barring the remedy" in note to *Bournias* in 2 U.C.L.A. L. REV. 558 (1955).

Two very fine contributions²⁰³ have been made to recent legal literature on the precise point raised in two bankruptcy cases decided in the years now under survey. *Bruce v. McClure*²⁰⁴ was an action by the trustee in bankruptcy of a corporation against the president of said corporation and his wife, to have payments by the corporation on a mortgage set aside and held a pro tanto purchase by the corporation. The reference seems to have been in terms of governing the entire question by forum law, in this case Florida law. The opinion considers exclusively the Florida law of estates by the entireties and the Florida rule that even an integrated contract may be modified by subsequent parol. The court made no statements as to the scope of, or reason for, the reference to state law.²⁰⁵

In *M. M. Landy, Inc. v. Nicholas*²⁰⁶ there occurred a similar application of state law in a bankruptcy proceeding. Again there is no formal explanation of the reasons for applying state law.²⁰⁷ The court's main conclusion is:

. . . that an assignment of a claim against the Government not conforming to the statute,²⁰⁸ but after the issuance of warrants, is valid against a bankruptcy receiver if it is perfected according to local law and otherwise meeting the tests of s.60, sub. a of the Bankruptcy Act.²⁰⁹

On the facts of the instant case, the court found that the assignment conformed to the requirements of a pledge under Florida law in that it was not the type of instrument requiring conformity to the Florida statute.²¹⁰ The case was, however, remanded for trial on the issue of voidable preference.

203. The first, a superb job of pioneering by Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013 (1953) and the later useful note, *Applicability of State Conflicts Rules When Issues of State Law Arise in Federal Question Cases*, 68 HARV. L. REV. 1212 (1955). The scope of the latter article is much broader than merely the bankruptcy question; see conclusion, 68 HARV. L. REV. 1212, 1228-29.

204. 220 F.2d 330 (5th Cir. 1955).

205. Cf. statement in note, *supra* note 203.

In suits by a bankruptcy or reorganization trustee the enforcement of a state-created cause of action, taken together with the existence of concurrent jurisdiction, justifies a Klaxon result. *Id.* at 1228.

206. 221 F.2d 923 (5th Cir. 1955).

207. In a third case, *Fahs v. Martin*, 224 F.2d 387 (5th Cir. 1955) such a policy of limiting the use of state law to a minimum was followed. The case also contains, at 396, one of the pioneer discussions of characterization in the conflict of laws. While the particular result is blurred by considering the decision as having the same outcome whether made according to federal or Florida law, the problem has been recognized. Further comment will be made in the next survey article, particularly with regard to the statements made in note 9 of the opinion, at 398, which raises the ghost of *renvoi* in this new field; also in note 13, *ibid.*, containing the statement, "Since uniformity of result is the basic object of Conflict of Laws . . ." Cf. 1 SURV. FLA. L. at 209 (1953).

And the type of action, under section 60 of the Bankruptcy Act, would seem to furnish less basis for such a reference.

208. The Federal Assignment of Claims Act., 54 STAT. 1029 (1940); 31 U.S.C. § 203 (1952).

209. 221 F.2d. 923, 927 (5th Cir. 1955).

210. The Florida Assignment of Accounts Receivable Act., FLA. STAT. §§ 524.01-09 (1953).

It is difficult to explain the results of either of these cases in terms of a fixed policy. Where the federal question jurisdiction attaches, or even where the scope of process differs drastically as in the quasi-diversity jurisdiction in interpleader, and especially where federal policy is involved, the use of state law, whole or conflict, should be kept to a minimum.

CHOICE OF LAW

Creation and transfer of interests in tangible chattels.—The statutory law with regard to that most important "tangible and mobile chattel" has not been changed since the prior Survey. The doctrine of the *McQueen-Livingston* cases²¹¹ has been adhered to.

In *Vincent v. General Motors Acceptance Corp.*,²¹² a Georgia automobile with a duly recorded interest of the conditional vendee was brought into Florida without the latter's consent. The original conditional vendor sold it to X who obtained a Florida certificate of title; X then sold it to used-car dealer 1 who sold it to used-car dealer 2. It was argued that the purchasers after X were innocent and without notice and should have an interest superior to GMAC. The court affirmed the superiority of the lien of the conditional vendee on the authority of the *McQueen-Livingston* doctrine. In addition, it was pointed out that the original Florida title, by law,²¹³ carried an indication of the prior foreign registry. This destroyed the innocence of any subsequent purchaser and the duty of inquiry imposed by Florida Statute Section 319.27(3)(f) runs with the title, even though it might have been thought to cover only the first purchaser. This salutary holding will aid in discouraging the flight of automobiles to jurisdictions where titles can be "washed out" and then reintroduced into Florida—an ever increasing threat to the sound lender of money on this ubiquitous chattel.

This extended doctrine was later applied in a case²¹⁴ where the purchaser attempted to defeat the effect of Section 319.27 by pointing out that under the law of creation of the interest (Missouri) a subsequent mortgage containing a correct description was held to prevail over a prior mortgage containing an incorrect description. The attempt failed because both the original title on which purchaser based his claim and the instrument creating the lien contained the identical incorrect description. As was pointed out in the prior Survey,²¹⁵ this result seems very sound. The policy is designed to protect diligent purchasers and is based on an extension of the doctrine of comity to foreign created interests. Thus, if the original

211. For comment and citations see I SURV. FLA. L. 241 ff. The statute, FLA. STAT. § 319, was not affected in any substantial way by the Laws of 1955.

212. 75 So.2d 778 (Fla. 1954).

213. FLA. STAT. § 319.23(4) (1953).

214. *Clinger v. Reliable Discount Co.*, 80 So.2d 606 (Fla. 1955).

215. But see the questions still left open which were raised in note 160, 1 SURV. FLA. L. 244 (1953).

lien-holder by his negligence permits a diligent purchaser to be misled, he should suffer the same loss as the careless purchaser does under the *McQueen* doctrine.²¹⁶ What is negligence on the part of the lien-holder is properly measured by the law under which the lien was created.²¹⁷

Creation of interests—intangibles.—Two cases in the period under survey dealt with the question of the law applicable to changes in interests in intangibles, although neither discussed these matters as being technically within the conflict of laws. In the first, *Weissman v. Lincoln Corp.*,²¹⁸ shares of stock had been issued subject to a valid shareholders' agreement which was indicated on the face of the shares. The court held that the restrictions on alienation of this stock survived a foreign foreclosure proceeding and that, at the foreclosure sale, the pre-emptive rights of the shareholders to release this stock by satisfying the debt on default were paramount to those of the purchaser.

The court stated, after discussing the general validity of such options:

. . . it is plain that in the present case neither the corporation nor the stockholders were made parties to the New York proceedings under which the pledged stock was sold and no notice was ever given Consequently they were not given the right which the law contemplates to protect themselves . . . by bidding at the sale. Under these facts we think the court below was correct in ruling . . . that by so purchasing he took the stock subject to such restrictions as were contained in the agreement and merely became subrogated to the rights of the pledgee²¹⁹

What the court failed to clarify is what is meant by use of the word "law" in the paragraph quoted. Some indication was given, in a rather general fashion, that New York law is indicated by the language which stated that appellant suffered nought since the stockholders got no more than they would have had they participated in the New York proceeding and the appellant had not shown that he is getting anything less. Thus, in place of a scientific discussion of the proper law applicable, we are told that "it cannot be assumed that the terms of the decree are inequitable in this respect."²²⁰

216. Quoted with approval by the court, 80 So.2d 607 (Fla. 1955).

217 The rationale of this statement is based on the quotation from *Lee v. Bank of Georgia* to be found in 1 SURV. FLA. L. at 242 (1953). *Murray v. G.F.C. Corp.*, 214 F.2d 344 (5th Cir. 1954) should be mentioned here because it involved the analogous problem of non-conflict priority of liens in automobiles. It is discussed more fully in the section on state law in the federal courts, *supra* note 150 and the related text.

218. 76 So.2d 478 (Fla. 1954).

219. *Id.* at 483 relying on *Reichert v. Appel*, *supra* note 118. The court also found that the notice more than satisfied the requirements of the Uniform Stock Transfer Act, FLA. STAT. § 614.17 (1953) without bothering to consider that New York law might be applicable.

220. *Ibid.*

The second case was *Wright v. Board of Public Instruction*²²¹ in which the court held that a purchaser from a Maryland bank of time warrants of the board, where the bank had notice of lack of consideration for the full face value after its original lien attached, was only free of personal defenses to the extent of that lien. The court applied the Florida law of negotiable instruments to the transfer,²²² while noting that the rights of a holder in due course through a holder in due course were created by a transfer in another jurisdiction. Similarly it said "that these derivative rights inure to a purchaser after maturity, see *United States v. Bryant*, D.C.Fla., 58 F.Supp. 663, affirmed 5 Cir., 157 F.2d 767."²²³ It further limited the rights of the foreign transferee to those which would inure under Florida law. While no criticism of the result is intended, some authority might have been cited.

CONCLUSION

In concluding this survey, mention should once again be made of current and choice writings which have contributed to the general development of the field. No attempt is made to list all of the articles, notes and comments, even though they have not been as numerous in the past two years as formerly, but only to list certain ones that are felt to have special importance for the Florida student, teacher or practitioner. Bayitch has made two outstanding contributions, *The Connecting Agreement*²²⁴ and *Conflict Law in United States Treaties*.²²⁵ Yntema has continued his study, which it is to be hoped will soon appear as a treatise, with his usual brilliance and charm in *Contract and Conflict of Laws: "Autonomy" and Choice of Law in the United States*.²²⁶ *Full Faith and Credit for Judicial Proceedings* by Summer is an excellent review of this always interesting field.²²⁷

Several references have been made to the latest in the series by Prof. Briggs, and the following article is of further interest: "*Legislative-Jurisdictional Principle*" in a *Policy-Centered Conflict of Laws*.²²⁸ And another in

221. 77 So.2d. 435 (Fla. 1955), reversing, 4 Fla. Supp. 178 (1953).

222. FLA. STAT. §§ 674.30 and 674.00 (1953).

223. 77 So.2d 439 (Fla. 1955).

224. 7 MIAMI L.Q. 293 (1953). The appearance of the same article rewritten especially for the Civil audience as *La Autonomia de las Partes en la Eleccion del Derecho Aplicable a los Contratos*, 7 BOL. INST. DER. COMP. (Mexico) 41 (1954), is one of the happiest by-products of our Inter-American Law Program to date. See also comment on both articles in Yntema, *infra* note 227, at 63.

225. 8 MIAMI L.Q. 501 (1954), 9 *id.* at 9, 125.

226. 1 N.Y. LAW FORUM 46 (1955). Citation of this new law review cannot be let to pass without special mention. It is a fine addition to our national juridical scene and its excellence a just tribute to the school that publishes it.

227. 2 U.C.L.A. LAW REV. 441 (1955).

228. 4 INT'L. & COMP. L.Q. 329 (1955). At the same time mention should be made of two notes appearing in the same review, Kennedy, *Recognition of Foreign Divorces: the Effect of Travers v. Holley*, *id.* at 389 and Braybooke, *New Zealand:*

the excellent series of Ehrenzweig, *American Conflicts Law in its Historical Perspective*,²²⁹ to conclude this brief summary on the thought-provoking level of which that writer is so eminently capable.²³⁰

Divorce and Matrimonial Causes Amendment Act, 1953, *id.* at 209. It is not usual to make comments on the articles listed in this section but in the case of Briggs's the temptation to make one observation cannot be resisted. At 340 the author states that he agrees with L. Hand and Yntema "that conflicts under our Constitution generally should be models for international situations." Cf. also his note 45 *ibid.* How, without the superior power of the Supreme Court to enforce a *unified* concept of "governmental interest," would this be achieved? If, as stated, the "Isle of Tobago" may in certain circumstances govern most, if not all, of the world, to what organ or which body would Briggs have us look to fix the limits?

229. 103 U. PA. L. REV. 133 (1954). Appropriately, in view of its predecessors in series, see 1 SURV. FLA. L. 245 (1953), note 164, subtitled "Should the Restatement Be 'Continued'." Two points are vital in Ehrenzweig's position. First, that the law of conflicts should not at this time be frozen, and secondly, that no one abroad should be misled by the exportation of the Restatement as prevailing international U.S. conflict law. The time needed for translation presents an inevitable lag and the translator often obtains a vested interest in imposing his efforts. On this latter danger see comment by Briggs, *op. cit. supra* notes 141 and 228, at 355, and note 98. The growing awareness of the need to separate interstate and international conflict rules is evidenced by a panel discussion of the problem by a distinguished group of experts in New York, May 1955 (copy furnished the author through the courtesy of Prof. Cheatham).

230. Tribute must be paid here to Mr. Justice Terrell. Since no other *aficionado*, see 1 SURV. FLA. L. 231 (1953), note 106, has appeared, there are listed herewith some more "Terrellisms," especially *Rue v. Ruc*, 72 So.2d 47 (Fla. 1954) where the style of the case stirred the master to outdo himself; *Kelly v. Kelly*, 73 So.2d 829 (Fla. 1954); *Halberstadt v. Halberstadt*, 72 So.2d 810 (Fla. 1954); *Tsapelas v. Tsapelas*, 69 So.2d 315 (Fla. 1954), the marital caveat emptor rule; and, *Heps v. Burdine's, Inc.*, 69 So.2d 340 (Fla. 1954).