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Domestic Relations

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DOMESTIC RELATIONS

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INTRODUCTION

The reader is warned that in *this* section of this article, the author is enunciating his own controversial views, which may not receive the approbation of a majority of the bench and bar. Those readers, perhaps few in number, who agree with the author about the happy demise of certain Legislative Bills, are warned that they may be resurrected in future Legislative Sessions and,

> . . . like an unruly dog, which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be. . . .[1]

It is submitted that with the exception of the defeat of measures[2] designed to outlaw common law marriages after January 1, 1956, and a measure[3] allowing the defendant, in a bastardy proceeding, to require that the plaintiff and the child submit to a serological examination to negate the alleged paternity of the defendant, the Legislature is more to be commended for bills which it defeated rather than for the ones which it passed.

Those defeated measures which would have required a six months residence,[4] nine months residence,[5] or a years residence[6] for a divorce, if enacted, might not have had the hoped for effect of seriously decreasing the number of divorces granted to "migratory residents" based upon perjured testimony of residence. In the final analysis, if a divorce seeker is willing to commit perjury about a ninety day residence, he will probably not hesitate to commit perjury about a six months or one year's residence. The real effect of any change in the residence requirement would be to discourage persons from ever coming to Florida for a divorce. If there is a "divorce mill" problem, then the remedy lies in the Bar Association's cleaning its own ranks rather than in placing the burden upon the Legislature.

The Legislature wisely defeated two measures, one of which would have repealed impotency, extreme cruelty, ungovernable temper and habitual intemperance as grounds for divorce,[7] and another which would have prohibited final decrees of divorce until an interloctutory decree had

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1. Kregliner v. New Pategonia Meat & Cold Storage Co., (1914) A. C. 25 at 46.
2. S. 193 and H.R. 500, 35th Regular Session, Florida (1955).
3. H.R. 568, 35th Regular Session, Florida (1955).
4. S.22, 35th Regular Session, Florida (1955).
5. H.R. 803, 35th Regular Session, Florida (1955).
6. S. 54 and H.R. 165, 35th Regular Session, Florida (1955).
7. H.R. 802, 35th Regular Session, Florida (1955).

been in effect for at least six months.[8] The enactment of the first measure would have left adultery and desertion as the most important grounds for divorce. It seems to the author that any lawyer or judge, with even a cursory knowledge of the seamy divorce situation in New York, would realize that it is better public policy to allow divorces for actual reasons than to force the parties in effect, to manufacture a case of adultery.

It is submitted that the so-called divorce problem is essentially a sociological, psychological, theological and economic one rather than a legal problem. Once the parties have decided upon a divorce, there is very little that the law can do to preserve the marriage either by limiting the grounds or by delaying the entry of a final decree.

Another defeated measure[9] designed to supersede the *Slatcoff* and *Frank*[10] cases, would have allowed Chancellors to appoint special masters over the objection of the parties. Obviously, this bill, if enacted, would have been a boon to those judges, few in number, who are either too lazy to carry out their official duties, or who grant certain lawyers compensation (at the litigant's expense) for past and future political support.

This section does not purport to cover all legislation introduced at the last session, but only those bills which the author feels to be of general interest. A full report would unduly extend this already lengthy article.

Common Law Marriages

A woman who has a husband living cannot, of course, be the common law wife of another man. In addition, where she has been living in adultery with an alleged common law husband, then neither of the parties are fit persons to be awarded custody of a child. Further, when she does not contribute to the purchase price of real property, she is not entitled to any portion thereof.[11]

Where the record shows that there was no impediment to the marriage, the general repute and intention of the parties was established to the satisfaction of the County Judge, and when the wife testified, *inter alia*, that the alleged husband had visited her for a considerable time "until I and him agreed to live together as man and wife," then a common law marriage had been established. The court reiterated the "*Lambrose*" rule,[12] that the burden of proof upon the alleged common law wife is only to establish a prima facie case, and then the burden of proof shifts to the person asserting that there is no common law marriage.[13]

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8. H.R. 805, 35th Regular Session, Florida (1955).
9. S. 339 and H.R. 729, 35th Regular Session, Florida (1955).
10. See footnote 101, *infra*.
11. Porter v. LaFe, 68 So.2d 602 (Fla. 1953).
12. Lambrose v. Topham, 55 So.2d 557 (Fla. 1951).
13. *In re* Colson's Estate, 72 So.2d 57 (Fla. 1954).

Where a wife was divorced from her husband, and was receiving $30.00 a week as alimony from him, but continued co-habiting with him subsequent to the divorce decree, the court held that she had not even proved a prima facie case of present assent or a marriage by repute and habitation, because the facts showed that the alleged husband (now deceased) had introduced her as his *former* wife and that she had expressed elation about their divorce. The court stated that the alleged wife was not required to prove that she was the common law wife by a preponderance of the evidence, but the evidence in this case was so weak as to show that there had never been any present assent by the parties.[14]

Where a master found that the parties had lived together as man and wife for a period of five years, but finally determined that there was no evidence of a contract of a marriage between the parties, basing his ruling upon the theory that this alleged marriage was merely an arrangement for "convenience and business reasons" the Supreme Court reversed his findings that no contract had been established, saying that,

> If marriage for convenience and business reasons is sufficient to to hold the agreement illegal, it might be hard to sustain the legality of countless thousands of marriages . . . . It matters not whether the arrangement or the contract or the marriage was for a 'mere convenience' or 'business reason' if the marriage was once established, it remains established until dissolved by death or divorce.

The Supreme Court reiterated its view in the *Fincher*[15] case, that the lower court should sever the issues and first determine whether or not a prima facie common law marriage exists before entering into hearings with reference to alimony and attorney's fees.[16]

In one case[17] the facts seemed to show that the alleged husband and wife started to co-habit as man and wife on June 2, 1949, and that in August, 1952, a divorce suit was filed between them. Pending the hearing of this divorce suit the parties reconciled, but, nevertheless, a divorce decree was entered without the parties ever bothering to have the decree set aside. The wife talked to a doctor after the alleged husband had been injured and told him that they had been living together, but were divorced, and that they planned to get re-married in the future. It was held that there was not sufficient evidence that a common law marriage had been consummated after the divorce decree.

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14. *In re* Klinger's Estate, 73 So.2d 56 (Fla. 1954), *compare with* Navarro, Inc. v. Baker, 54 So.2d 59 (Fla. 1951).

15. Fincher v. Fincher, 55 So.2d 800 (Fla. 1952).

16. Chaachou v. Chaachou, 73 So.2d 830 (Fla. 1954). The reader is referred to this case for examples of corroboration of the alleged common law wife's testimony and the proving of cohabitation by habit and repute.

17. Persico v. Samac Corporation, 74 So.2d (Fla. 1954), *compare with* Navarro, Inc. v. Baker, 54 So.2d 59 (Fla. 1951).

Annulment

Although a wife was committed to the State Hospital at Chatahoochee after the parties had married for a second time the Supreme Court affirmed a finding that the wife was sane at the time of the marriage ceremony, which finding was based on the fact that the minister had questioned the parties as to the sanctity of the marriage vow, and the court later did likewise along with counsel for both parties. The court also ruled that the transcript of testimony of a doctor, made at a prior divorce hearing between the parties, was not admissible in the instant annulment suit absent a showing that he was unavailable to testify in person. Finally, the court approved the entry of a separate maintenance decree unconnected with divorce and the award of counsel fees and court costs against the husband:

> Alimony, suit money, and attorneys fees, always accrue against the husband in a case like this, absent a showing of adultery on the part of the wife in which alimony may not be enforced. Masilotti v. Masilotti, 150 Fla.86, 7 So.2d 132; Chesnut v. Chesnut, 160 Fla. 83, 33 So.2d 730.[18]

Where a husband alleged that his wife was a victim of tuberculosis at the time of their marriage and that she had concealed it from him for the purpose of inducing him to marry her, the Supreme Court refused to decide whether or not the concealment of a disease, such as tuberculosis, is a sufficient ground for annulment in the state of Florida.[19] It is submitted that the better view is that fraudulent concealment of a disease dangerous to the other spouse is a ground for annulment.[20]

Jurisdiction, Domicile and Venue

The court adhered to its views in the *Copeland* case[21] in upholding a defendant's motion to dismiss predicated upon his plea of privilege to be sued in the County of his residence as provided[22] for in the Florida Statutes.[23]

The parties had lived together as man and wife in Florida for several years, and when the wife separated from him she continued to live in Florida. The Supreme Court held,

> 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, but that she may do so if she separates from him for just cause . . . The reason for such ruling is that the law recognizes

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18. Abbe v. Abbe, 68 So.2d 565 (Fla. 1953).
19. Tsapelas v. Tsapelas, 69 So.2d 315 (Fla. 1954).
20. Smith v. Smith, 171 Mass. 404, 50 N.E. 933 (1898) (veneral diseases). Davis v. Davis, 90 N.J.Eq. 158, 106 Atl. 644 (1919).
21. Copeland v. Copeland, 53 So.2d 637 (Fla. 1951).
22. Fla. Stat. § 46.01 (1953).
23. Thames v. Thames, 75 So.2d 191 (Fla. 1954).

> the husband as the head of the family and the residence established by him is the residence of the wife unless through his fault she is compelled to leave the family domicile and establish her own. 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 and set up her residence in this state with the intent independently to become and remain a resident thereof, 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.[24]

In *Grammer v. Grammer* a husband left his first wife in 1931, and she never saw or corresponded with him after 1932. In 1951, the husband obtained a Florida divorce based upon constructive service, and he then remarried. After the husband's death his first wife brought suit to have the divorce decree set aside, alleging that the husband had fraudulently omitted the fact in his bill that she lived at 5345 Harding Avenue, Detroit, Michigan, but had merely stated that she lived at "Harding Avenue, Detroit, Michigan." *Held*: the husband and his attorney had acted in good faith and had done more than enough to establish compliance with the minimum requirements of the law relating to diligent search and inquiry. As regards the required standard of diligence the court said,

> The test, however, is not whether it was in fact possible to effect personal service in a given case, but whether the complainant reasonably employed knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances, to acquire the information necessary to enable him to effect personal service on the defendant . . . . Extraordinary steps to ascertain the whereabouts of the party are not required . . . . Reasonable diligence in such matters is an honest effort, and one appropriate to the circumstances, to ascertain whether actual notice may be given, and, if so, to give it. Such effort, however, need not embrace a search in remote parts of the state (Jacob v. Roberts, 223 U.S. 261, 32 S. Ct. 303, 56 L. Ed. 429); and it is not essential that all possible or conceivable means should be used. But the effort should usually extend to inquiry of persons likely or presumed to know the facts sought.[25]

Estoppel and Reopening of Decrees

Where a husband sued for divorce in Florida while a divorce suit by his wife was pending in Wisconsin, and during the pendency of the Florida suit the Wisconsin court entered a decree of divorce and a certified copy was mailed to the Florida court. *Held*: No attack being made

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24. Frank v. Frank, 75 So.2d 282 (Fla. 1954).

25. Grammer v. Grammer, 80 So.2d 457 (Fla. 1955). Although this case involved the attempted re-opening of a divorce decree, the subject matter of the next section, the author believes, rightly or wrongly, that the jurisdictional issue was the paramount one involved.

upon the jurisdiction of the Wisconsin court, its decree was entitled to full faith and credit in Florida,

> . . . and the judgment or decree first rendered dissolving the marriage relation concludes the question. . . .[26]

A sailor obtained a divorce after service by publication and one year and three months later the divorced wife filed a "motion" to quash the final decree upon the ground that it had been obtained by a fraudulent misstatement of the wife's address. A copy of the motion was mailed to the husband's fleet post office address, but he failed to appear. The court held the attempt to re-open the case by "motion" was improper[27] and since there was no valid service of process and the husband had not submitted to the jurisdiction of the court, the motion could not be treated in the nature of an independent bill; therefore the lower court was wholly without jurisdiction to set aside the final decree. The court felt this decision made it unnecessary to consider the *Soldiers*[28] *and Sailors Civil Relief Act of* 1940.[29]

A husband and wife entered into a property settlement. The husband filed suit for divorce and the wife answered that the agreement was obtained by fraud. At the trial the wife received an additional $4,000.00 and she, through her attorney, waived rights of cross-examination and did not offer any testimony relative to the alleged fraud of the husband. Over a year after the divorce decree the wife filed a bill in the nature of a bill of review alleging substantially the same charges of fraud that she had earlier alleged. It was held in the divorce proceedings the husband and wife were dealing at arms length, she was represented by counsel, no confidental relationship exists between husband and wife in such a proceeding, and she had no right to rely upon him to disclose anything to her with reference to his property, and "litigation should end sometime."[30]

A former wife filed a suit asking for accounting and other relief from her former husband, claiming that there had not been a full and fair disclosure in the divorce suit (wherein a stipulation regarding a property settlement was embodied in the decree), and the chancellor who heard the divorce suit also decided the instant suit on the testimony in the instant case and on the file of the first case. It was held that since

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26. Overly v. Overly, 66 So.2d 706 (Fla. 1953).
27. Citing Lorenz v. Lorenz, 152 Fla. 799, 13 So.2d 806 (1943), and Lorenz v. Lorenz, 149 Fla. 625, 6 So.2d 620 (1942).
28. 54 STAT. 1178 (1940), 50 U.S.C. Appendix, § 501-590 (1952):
> Stay of proceedings where military service affects conduct thereof. At any stage thereof any action or proceeding in any Court in which a person in military service is involved . . . shall, on application to it by such person . . . be stayed . . . *unless, in the opinion of the court, the ability of (the serviceman) to . . . conduct his defense is not materially affected by reason of his military service.* (Emphasis supplied by the court.)

29. Edwards v. Edwards, 67 So.2d 661 (Fla. 1953).
30. Fuller v. Fuller, 68 So.2d 177 (Fla. 1953).

the file of the first case was not incorporated in the appellate record, it was impossible for the Supreme Court to review the lower court orders. The court also held the defense of res adjudicata may be raised by motion where the facts supporting such motion appear from the bill of complaint.[31]

In *Miami Retreat Foundation v. Ervin*, a husband and wife entered into a property settlement, approved in a final decree of divorce. Prior to the divorce, the couple had established a very successful sanitorium for alcoholics. After the divorce, the Attorney General filed a quo warranto proceeding to annul the charter of the sanitorium on the grounds that it was not a charitable institution; the wife was joined as a party and she filed a cross-bill naming her husband and the corporation as defendants. She collaterally attacked the property settlement made in the divorce suit. The defenses of estoppel and res adjudicata were interposed and adjudicated by the lower court and affirmed by the Supreme Court.[32] Subsequently, the wife filed an ex parte application to file on original bill in the nature of a bill of review directly attacking the property settlement. The chancellor granted the request. The defendants filed a petition for certiorari and the court held that in the first appearance of the case, the court did not have the divorce suit before it; only the property settlement was before the court and was adjudicated in the prior case. The court said, "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."[33]

A husband secured a divorce based upon constructive service. Approximately one year after the wife filed a charge with the state contending that her husband had committed perjury in the affidavit for constructive service. The criminal charge was dismissed and the wife filed a complaint to set aside the divorce decree on the same ground. The judge who had tried the perjury action was the judge that heard the instant action and, based upon his *recollection* of the perjury case, he dismissed the wife's complaint. The Supreme Court reversed and said that a judge should not be permitted nor allowed to "browse" among his own records with a view to relieving litigants of trouble and expense, that the records in the perjury action should have been introduced into the instant action. The court said that there was not sufficient proof of laches when the wife waited two years to file the bill of review, absent a showing in the record that the defendant would be injured by the late filing of the bill.[34]

In *Cadieux v. Cadieux* a former wife filed a bill in the nature of a bill of review to set aside a final divorce decree on the grounds that it was

31. Cohen v. Cohen, 70 So.2d 362 (Fla. 1954).
32. Miami Retreat Foundation v. Ervin, 62 So.2d 748 (Fla. 1953).
33. Reed v. Reed, 70 So.2d 836 (Fla. 1954).
34. Kelley v. Kelley, 75 So.2d 191 (Fla. 1954).

obtained by fraud in that the husband had lied about her place of residence. At the time of the divorce decree, and presently, the husband was a sailor in the Navy. He retained counsel in Florida who filed unsworn motions to stay the proceedings in the present action under the *Soldiers and Sailors Civil Relief Act* of 1940.[35] The motion failed to show the defendant's defense was materially affected by reason of his military service, therefore the Supreme Court held that the lower court was correct in proceeding with the case.[36]

In 1952, a wife sued her husband for divorce and obtained a final decree. In April, 1953, the husband filed a bill in the nature of a bill of review seeking to set aside the divorce on the grounds that the wife's affidavit for publication was false. The wife was personally served in the action for review and filed no appearance; the husband then filed an amended bill containing only two minor changes. The wife did not answer the amended bill, and a decree pro confesso was entered; however, before final judgment, the wife moved to vacate this decree, and for permission to file an answer to the amended bill. The Chancellor denied the motion, entered final judgment and the Supreme Court affirmed, stating,

> The wife was properly served with the original bill in the nature of a bill of review, was acquainted with its contents and purposes, and chose to ignore it. The filing of an amended bill, which was not served on the wife and of whose existence she did not even know, did not in any way prejudice the wife or mislead her to her injury. She was in default on the original bill and the husband had the right to take judgment in accordance with the allegations and prayers of the original bill.[37]

The husband and wife were married in 1918 in Rhode Island and lived together there until 1937, at which time the wife secured a divorce from bed and board in Rhode Island and the husband went to Nevada and secured a divorce in 1938; sixteen years later the wife attacked the validity of the Nevada decree in the Florida Courts, and the court held: (1) The Florida Court had jurisdiction of the subject matter of this cause because the wife was praying for an equitable decree to enforce the Rhode Island decree for alimony and support. (2) As *dicta*, that just because the man goes to Nevada for the sole purpose of obtaining a divorce does not mean that he did not *thereafter* become a bona fide resident of Nevada. (3) The wife's complaint that she was never personally served in Rhode Island was not enough because perhaps Nevada does not require personal service on the defendant. (4) If the decree is valid in Nevada it has to be upheld by Florida. The court mentioned being required to take judicial notice of the common law and statutes of every state but stated:

> We do not think that such evidence, in the form of judicial notice, will supply the want of pleading in the Plaintiff's Bill.

35. Stat. 1178 (1940) 50 U.S.C. Appendix, § 521 (1952).
36. Cadieux v. Cadieux, 75 So.2d 700 (Fla. 1954).
37. Davidson v. Davidson, 76 So.2d 303 (Fla. 1954).

(5) The court stressed that the fact that the wife waited 16 years while the defendant had gone through two marriages, the Court stating,

> . . . while the conduct of the defendant in fraudulently obtaining a Nevada divorce, if he did, is certainly reprehensible, the conduct of the plaintiff in standing idly by for a long period of time and permitting innocent persons to be deceived and misled in reliance on an apparently valid decree, has something of the same quality; it is, at least, sufficient to bar her suit under the doctrine of laches, in the absence of some convincing explanation which will excuse her failure to prosecute her action to invalidate the decree until this late date. If such explanation is not forthcoming, we do not see how the Court could conscientiously, under the facts showed by the record now before this Court, invalidate the Nevada Divorce Decree.[38]

GROUNDS AND PROOF FOR DIVORCE

The facts showed that the wife accused her husband of falsifying his income tax return by making false charitable deductions, falsely accused him of immoral conduct, called him a crook, skunk and a liar, in the presence of his friends, insulted his friends and children by a former marriage, and accused him of being selfish and stingy, and:

> that she to indulge these and other samples of her spleen the days were found to be too short, so she would frequently rise up in the night time and harass and annoy the Plaintiff with them . . . and the only refuge left him was in the wisdom of Solomon which he adopted and has found it much better to dwell in the corner of the housetop than with a brawling woman in a wide house.[39]

The court held there was sufficient proof of a charge of cruelty and frequent indulgence in a violent and ungovernable temper.

In another case where a husband had co-habited with his wife during the year she allegedly deserted him, the court held that,

> . . . the continuity of obstinate desertion is broken, and the conduct of a deserting spouse is condoned if the parties co-habit during the period the statute prescribes.[40]

In a case making its second appearance in the Supreme Court,[41] the court seemed to approve the view that the defense of recrimination for wrongs done *subsequent* to the separation is not on the same level as that for wrongs done *prior* to separation, citing the *Stewart* case[42] for the proposition that the application of the doctrine of recrimination is a matter of sound judicial discretion dependent upon public policy, public

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38. Lanigan v. Lanigan, 78 So.2d 92 (Fla. 1955).
39. Longino v. Longino, 67 So. 2d 203 (Fla. 1953).
40. Bittner v. Bittner, 67 So.2d 327 (Fla. 1953).
41. See previous report of this case in 62 So.2d 68 (Fla. 1952) discussed in 8 MIAMI L.Q. 384 (1954).
42. Stewart v. Stewart, 158 Fla. 326, 29 So.2d 247 (1947).

welfare and the exigencies of the case at bar.[43] It is submitted that these are very vague and nebulous standards.

The husband's decree was based upon extreme cruelty and the wife in her appeal contended that desertion and refusal to co-habit does not constitute extreme cruelty. The court did not answer the appellant's assertion in so many words, but stated:

> It appears that refusal of plaintiff to make defendant the beneficiary of a Life Insurance Policy was the bone of contention. This with too much daughter-in-law, cross-firing about the defendant's lack of culinary skill and numerous peccadillos on the part of both, generated a low state of mental and emotional health that reduced the marital union to a sort of hawk and buzzard existence which subjected it to every destructive emotion . . .

The court concluded that this course of conduct caused mental and physical suffering to the plaintiff and rendered further cohabitation of the parties impossible.[44]

An interlocutory divorce decree secured in California was not such a decree as satisfied the requirements of the Florida law[45] authorizing a divorce in favor of the complainant where the defendant has secured a divorce from complainant in another state or country, because the California decree, being interlocutory and subject to modification, did not have the effect of automatically destroying the marital res at the end of the California required one year waiting period.

> . . . 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.[46]

In *Epstein v. Epstein* the wife testified that during the year of their married life her husband ran around with other women in her presence and when she protested he said it was none of her business; also that he nagged and used abusive language toward her and drank, and that she stayed with him for the sake of her children but when the defendant stayed away all night *and* was very abusive toward her she left him for good. The court held that the evidence was ample to sustain a charge of extreme cruelty and that the fact that the wife had waited 12 years before seeking a legal dissolution of the marriage bonds did not bar her suit. "Her grievances against him are just as much an impediment to marital felicity now as they were twelve years ago."[47]

A husband filed suit for divorce based upon the grounds of habitual intemperance, extreme cruelty and desertion and the wife defended by

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43. Busch v. Busch, 68 So.2d 350 (Fla. 1953).
44. Rue v. Rue, 72 So.2d 47 (Fla. 1954)—See the case of Diem v. Diem, 141 Fla. 260, 193 So. 65 (1940) as authority for the Court's ruling.
45. FLA. STAT. § 65.04 (8)(1953).
46. Dwyer v. Dwyer, 72 So.2d 378 (Fla. 1954).
47. Epstein v. Epstein, 73 So.2d 281 (Fla. 1954).

alleging that a suit for divorce *a mensa et thoro* was pending in Washington, D.C., a judgment had been entered in that suit whereby the wife received title to certain real property, and such suit operated as res judicata or estoppel by judgment. The Supreme Court held otherwise, stating that the causes of action were entirely different. In the Washington suit the wife merely alleged desertion and cruelty as grounds for separate maintenance, the ground for habitual intemperance was not in issue in the Washington suit but was an issue in Florida, and the evidence was more than sufficient to sustain the chancellor in finding that the wife had been guilty of habitual intemperance.[48]

ALIMONY[49]

The mere pendency in the state of rendition (Ohio) of a petition for modification of alimony and support money in a final decree of divorce did not preclude the collection of accrued installments by suit in Florida.

> Our view of the law on this proposition is that where the law of the state of rendition (Ohio) is that accrued installments of alimony or support money under its decree may be modified at some subsequent date, that factor, and that factor alone, will prevent collection of accrued installments in the Courts of another jurisdiction, under the full faith and credit clause, without regard to whether a Petition has, or has not, been filed in the State of rendition prior to the institution of suit in a foreign jurisdiction.

The court went on to say that under Ohio law, accrued alimony payments are in the nature of a judgment, not subject to modification unless the decree making the order specifically provides that past due as well as subsequent payments may be modified by the court making the original judgment.[50]

In *Evans v. Evans*, wife No. 2 filed a petition to increase the alimony provisions of a divorce decree and the husband filed a petition to decrease the amount of alimony payments. The facts showed that the husband had been in ill health, his dental practice had declined, his real estate was well incumbered and wife No. 1 had to forego some of her alimony payments in order that the husband could make payments to wife No. 2. The court stated that "the goose now laying the egg should not be killed for some temporary desire or need"; the Court therefore reduced the alimony for wife No. 2 from $40.00 to $25.00 per week.[51]

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48. Roy v. Roy, 73 So.2d 294 (Fla. 1954).

49. The author would like to refer the readers to an Article written by Judge Morris Ploscowe entitled *Is There a Right Amount of Alimony?*, Coronet Magazine, Vol. 37, No. 6, page 140, April, 1955. Although this article is not directed towards lawyers, the author feels that every Judge, lawyer, and law student would learn a great deal from reading it. It is submitted that there is more common sense in this article than any other article the author has seen in regard to what amount of alimony can be awarded without thereby impoverishing the husband and starving the wife.

50. Wolk v. Leak, 70 So.2d 498 (Fla. 1954).

51. Evans v. Evans, 70 So.2d 506 (Fla. 1954).

In an involved situation, a wife sought a decree of divorce from bed and board in Pennsylvania, applying for alimony, and later the husband sued for absolute divorce in that state. Then the husband came to Florida and instituted a divorce suit; the wife asked that the suit in Florida be stayed because of the pendency of the Pennsylvania case but the Supreme Court approved refusal of her request. Having exhausted her remedy to stay the proceedings in Florida, she filed an answer in Florida and prayed for temporary alimony, suit money and attorneys fees. The Supreme Court stated she was not entitled to a double award of alimony, *i.e.*, alimony under the Pennsylvania decree and the Florida law. The lower court had awarded her "nominal" attorneys fees of $500.00 but denied her any suit money. The Supreme Court reversed, in part, and said she was entitled to suit money under the same basis as her request for attorneys fees.[52]

Where the facts showed that the husband was worth about $98,000.00, but was financially heavily involved, his main income consisted of $3,600.00 a year from a hotel, the wife had worked in the past and they both had been married before, the Supreme Court affirmed an award of a total alimony of $4,000.00, payable at $50.00 per week, with additional attorneys' fees of $500.00, together with $250.00 which had been previously awarded. The decree was apparently based upon the fact that the wife had contributed to the financial and emotional difficulties of the marriage rather than to their financial and emotional welfare.[53]

A husband and wife purchased property as tenants by the entirety, the wife contributing about $3,000.00 and the husband about $800.00. They later built a restaurant on the property, both going into debt to build it. The wife was the actual manager of the restaurant, the husband not contributing anything constructive to the operation because of his getting drunk, nagging and "spitting" on the wife in the presence of customers. The Supreme Court awarded her all of the real estate and relieved the husband of any claim of alimony, suit money, costs and attorneys fees. The court pointed out that the Florida Statutes[54] authorize the payment of alimony in a lump sum and cases[55] support the view that a court of equity may decree all property owned by the entireties to the wife or to the husband, or divide it equally between them and thus give full relief and close the matter in litigation. The court went on to say:

> In view of the picture presented by the record we think the Chancellor was authorized by Section 65.08 Florida Statutes 1951, F.S.A., to enter the order he did. He had power to make a lump sum award for alimony, both parties were satisfied with the divorce, the business was small and the wife was the only one who had

52. Harrison v. Harrison, 71 So.2d 730 (Fla. 1954).
53. Pross v. Pross, 72 So.2d 671 (Fla. 1954).
54. FLA. STAT. § 65.08 (1953).
55. Bezanilla v. Bezanilla 65 So.2d 754 (Fla. 1953) and Fuller v. Fuller, 38 So.2d 51 (Fla. 1948).

> shown capacity to conduct it. Under the circumstances the decree entered by the Chancellor was the only one that comported with reason.[56]

In *Chastain v. Chastain* where the husband was the owner of one of the finest cattle ranches in the country composed of about 31,000 acres worth approximately $1,500,000.00, not including the herd of cattle, and had other assets worth $107,000.00, with total liabilities of $70,000.00, the chancellor awarded to the wife the sum of $700.00 per month as alimony, a residence and the rent from the residence. Later, the husband petitioned the court to modify the decree and the chancellor ordered that the alimony payments should be reduced to $4,200.00 a year, leaving the wife with a gross income of between $9,000.00 and $10,000.00 a year, the difference being made up by the rent from the residence. In the original decree the chancellor stated that to determine the husband's ability one must consider the nature of his *capital assets,* as well as his *income.* In the hearing for modification there was no showing that the husband's income had appreciably decreased. The Supreme Court reversed the Chancellor in his modifying of his decree by stating:

> A final decree of divorce awarding alimony should not be modified as to alimony without a strong showing that the husband's ability to pay has depreciated. The burden is upon the complaining party to make this strong showing. Income alone is not necessarily the test in determining the ability to pay. As pointed out by the Chancellor in the final decree awarding divorce and fixing alimony, 'one must consider the nature of his capital assets, as well as his income.'

The court went on to say, regarding the fact that the husband's ranch was operating at a loss, that this loss had not seriously increased since the rendition of the final decree in the divorce action and therefore the chancellor was in error in modifying the decree absent a strong showing of a serious change in the husband's financial position.[57]

In *Horn v. Horn* the lower court entered a decree of divorce against the husband and he filed a notice of appeal. After the notice of appeal was filed the court entered an order requiring the husband to pay the wife's attorneys $1,000.00 as temporary counsel fees and court costs "needed by the plaintiff to protect and defend her rights upon the appeal brought by the defendant herein." Subsequent to this order the lower court entered an order judging the husband in contempt for failure to pay accumulated alimony payments under the final decree and the order provided that the appeal should operate as a supersedeas upon the defendant filing a bond in the sum of $1,000.00, conditioned to pay the wife all awards made to date. The Supreme Court granted certiorari and stated that once an appeal had been perfected jurisdiction becomes vested in the Supreme

56. Halberstadt v. Halberstadt, 72 So.2d 810 (Fla. 1954).
57. Chastain v. Chastain, 73 So.2d 66 (Fla. 1954).

Court, and the lower court loses all jurisdiction over the matter except in the case where the appealing party fails to post a supersedeas bond, which permits the lower court to enforce a decree made therein. In addition the lower court was wholly without power to enter an order requiring the payment of counsel fees and costs in connection with the appeal. If necessity existed for such temporary counsel fees the proper forum was the Supreme Court.[58]

A husband was placed in contempt of court for his failure to pay accrued alimony, but he was allowed the privilege of purging the contempt by paying the accrued alimony and by posting a penal bond to insure compliance with the "financial requirements of the final decree." The husband paid the accrued alimony and then filed a petition for certiorari in the Supreme Court, which held: (1) since the petitioner voluntarily made the payments required by the order and was thereupon released from custody, that portion of the contempt order was not subject to review. (2) the petition, by which this contempt proceeding was instituted by the divorced wife, dealt solely with the *accrued* sum in arrears and contained no reference to future installments of alimony or any request that security be required for their payment, and there was no definite proof that the defaulting husband had been guilty of numerous prior defaults. Under the Florida Statutes[59], there was sufficient authority in Florida whereby the courts may modify a decree of divorce in regard to alimony and require the husband to give security for the future payments. However, in this case there was not a sufficient predicate in the pleading and proof, and consequently, there was not a proper modification of the final decree and the bond requirement was irregular. It appears that if the wife had alleged that there had been a change of circumstances because of the husband's failure to cooperate in making alimony payments, then the court would have been warranted in modifying the decree by imposing a bond or other security measure designed to secure the wife in receiving future alimony.[60]

A husband filed suit for divorce and the wife filed a counterclaim praying for a divorce, counsel fees, alimony and court costs. The husband was a disabled war veteran receiving a pension of $141.00 a month. During their marriage, of one year, the husband had given one-half of his real property to the wife making them tenants in common. There was no proof that the wife assisted the husband in the accumulation of money or property during their marriage. The Supreme Court reversed the lower court on the grounds that by the terms of the final decree the husband had been virtually stripped of all of the remainder of his property, the court stating:

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58. Horn v. Horn, 73 So.2d 905 (Fla. 1954).
59. FLA. STAT. §§ 65.08 and 65.15 (1953).
60. Stern v. Stern, 75 So.2d 810 (Fla. 1954).

> While we do not suggest that the husband should not be required to pay alimony, attorney's fees and costs of suit, it does appear to us that the decree went too far in respect to the award granted; particularly in view of the fact that the counterclaim did not contain a prayer for an award of that nature but that only alimony, attorney's fees and court costs be decreed. . . . We are constrained to the view that . . . a lump sum award should be made only in those instances where some special equities might require it or make it advisable; for instance, where the wife may have brought to the marriage, or assisted her husband in accumulating, property and where it is clearly established that the husband has assets sufficient in amount to pay the gross award . . .

Justice Terrell filed a strong dissent based upon a Statute[61] which permits payment of lump sum alimony as from the circumstances of the parties and nature of the case may be fit, equitable and just, and Justice Terrell felt that the Chancellor, not the Supreme Court is the determiner of what is "fit, equitable and just."[62]

Upon remand of the above case, the wife, with leave of court, amended her counterclaim to ask for the properties of the husband as a lump sum alimony award, and the husband brought certiorari. The Supreme Court held that its previous opinion having decided that the wife was not entitled to the husband's property, the Chancellor should have entered an order based on the record then before him.[63]

In a case which may go down in Florida legal history as the "Husband's Magna Carta," the lower court entered a decree of divorce in favor of the wife, but denied her request for alimony and required the costs of the litigation (except the reporter's fee) to be paid out of the proceeds of the sale of certain property owned by the parties jointly, the remainder of the proceeds to be divided equally between them. The only asset of the parties was the home and its furnishings which had been originally acquired by investing the savings of the husband and upon which the payments were thereafter made by him until he departed from the martial domicile. The wife made payments on the home but she also received an allowance of about $25.00 a month from the Federal Government as a wife of a disabled veteran. The master found that the wife had completely recovered from a nervous disability caused by her marriage and was well able to support herself. The husband had a service connected disability and was without accumulated savings except the home which represented an investment of all of his savings. The court stated:

> Times have now changed. The broad, practically unlimited opportunities for women in the business world of today are a matter of common knowledge. Thus, in an era where the opportunities

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61. FLA. STAT. § 65.08 (1953).
62. Goode v. Goode, 76 So.2d 794 (Fla. 1954). Discussed in 8 U. FLA. L. REV. 256 (1955).
63. Goode v. Goode, 80 So.2d 904 (Fla. 1955).

> for self-support by the wife are so abundant, the fact that the marriage has been brought to an end because of the fault of the husband does not necessarily entitle the wife to be forever supported by a former husband who has little, if any, more economic advantages than she has. We do not construe the marriage status, once achieved, as conferring on a former wife of a ship-wrecked marriage the right to live a life of veritable ease with no effort and little incentive on her part to apply such talent as she may possess in making her own way.

The court went on to say that the Chancellor did not abuse his discretion in refusing to grant alimony to the wife, but that the portion of decree which assessed one-half of the costs of the litigation against the wife had to be reversed under the authority of the *Kneale*[64] case.[65] It is submitted that this case may have a far-reaching effect. To the knowledge of the writer, it is the first case where the Supreme Court has faced reality in holding that the wife and the husband should be treated on somewhat the same plane of equality. To the writer it does seem rather strange that the Legislature has been so prone to pass emancipation acts for women while retaining the view that a wife is still a privileged litigant in a domestic matter. It is submitted that it would behoove the men of Florida to petition the Legislature to pass bills emancipating men.

Pursuant to a wife's application, the lower court sentenced a husband to six months in jail for failure to pay past due alimony. Twelve days later, the court, without giving the wife notice, cancelled all future alimony to the wife. The Supreme Court stated that it was error to enter this order without notice to the wife, and, in addition, that the husband had never complied with the modification provisions of the Florida Statutes,[66] hence there was no basis in the record for a modification.[67]

Custody and Support of Children

The Legislature has finally enacted a statute which provides that any party to an action who in violation of a court order, leads, takes, entices or removes a child from the State with personal knowledge of the order, shall be guilty of a felony and upon conviction shall be punished by imprisonment for a period not to exceed five years.[68] It is submitted that as a practical matter, a judge or a jury might not be too inclined to convict a person who takes or removes his or her own child.

Where a wife of a sailor serving in the Korean theater, abandoned her two children and went through a marriage ceremony with a man in New York, the lower court granted the husband a divorce but because of the tender age of the children awarded their custody to the wife. The

64. Kneale v. Kneale, 67 So.2d 233 (Fla. 1953).
65. Kahn v. Kahn, 78 So.2d 367 (Fla. 1955).
66. Fla. Stat. § 65.15 (1953).
67. Attaway v. Attaway, 80 So.2d 352 (Fla. 1955).
68. Laws of Fla., c.29654 (1955).

Supreme Court affirmed the decree (which was, of all things, based upon cruelty!) but granted custody of the children to the father because the mother's actions fell "far short of measuring up to the degree of care and devotion to her family normally expected of a wife and mother."[69]

Where a mother resided in Dade County, the father and children resided in Orange County, and the mother brought contempt proceedings in Dade County, it was error for the Chancellor to order the father to transfer the children to the mother during the proceedings because the venue statute[70] gives the defendant the privilege to be sued in the county where the subject matter in litigation is located, and the subject matter of a child custody case is the child.[71] A new statute[72] does not change this result, because it only applies to the enforcement of decrees "for the payment of alimony or support money for children or both" and provides that such actions may be brought in the county where the person charged with its payments resides.[73]

A husband and wife were divorced with the wife being awarded custody of their two children. She was later killed in an accident and the lower court modified the divorce decree and gave custody to the father. The Supreme Court reversed, gave custody of the children to the wife's mother and ordered the lower court to award support money for the children.[74] The Chancellor, upon remand of the case, was apparently irate at the Supreme Court's actions and awarded a pitiful sum for their support. The Supreme Court, in unusually harsh language, reversed the Chancellor and ordered the sum of $20.00 per week for support of the children and also awarded attorney's fee to be paid for by the husband.[75]

A five year old child had spent her entire life in the custody of her mother. The lower court entered a divorce decree in favor of the husband and awarded him custody. The husband was a serviceman and had no definite intentions of returning to Florida. The Supreme Court reversed, stating that ordinarily the welfare of a young child was best advanced by being in the mother's custody and therefore they felt that the mother, at least initially, was entitled to custody of the child and to a reasonable allowance for its support and maintenance. The court noted that the effect of the order of the lower court was to place the child with strangers (relatives of the husband) miles from the life long home place of the

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69. Phillips v. Phillips, 67 So.2d 325 (Fla. 1953).
70. FLA. STAT. § 46.01 (1953).
71. Dorman v. Friendly, 146 Fla. 732, 1 So.2d 734 (1941), *compare with* James v. James, 64 So.2d 534 (Fla. 1953), which modifies the *Dorman* case to some extent where both parties submit themselves to the jurisdiction of a court which has no jurisdiction over the children.
72. Laws of Fla., c.28187 (1953).
73. Waterhouse v. Pringle, 68 So.2d 599 (Fla. 1953).
74. Cone v. Cone-Evans, 62 So.2d 907 (Fla. 1953).
75. Cone v. Cone, 68 So.2d 886 (Fla. 1953).

mother and the child without a substantial showing of any necessity therefor.[76]

The lower court awarded custody of a six year old child to the father. The ultimate question was whether the paternal or the maternal *grandparents* should rear the child during its custody. The paternal grandparents had custody of the child for two years in Daytona Beach, Florida, and the maternal grandparents resided in Dallas, Texas. There was no showing that the environment at the maternal grandparent's home in Dallas would be equal to, or superior to, the paternal grandparent's home in Florida. The court awarded custody to the paternal grandparents, stating:

> It is too well settled for cavil that all things be equal, the mother will be awarded the custody of children of tender years in a controversy like this. It is apparent from the record that the attitudes of the parents in this case were such that a suitable environment for the children to grow up was not in prospect. . . . As between the father and mother the record may show that the mother was better qualified but on account of the situation confronting him the Chancellor was not in error in placing the child with the paternal grandparents since there was no showing of conditions at the maternal grandmother's home or her ability and qualification to care for it.[77]

A mother based her case upon the allegations that the father had poisoned the mind of their oldest son against the mother and that she was in fear that he would do the same thing with their youngest boy. The court stated that there was not sufficient evidence to show this alleged mental poisoning. The court went on to say, "But—solely for the sake of argument—even if the record could be interpreted to sustain such finding, it would constitute no legal basis for denying the father partial custody of his young son."[78]

In a proceeding to modify a final decree of child custody, the defendant is not entitled to actual service of process, but he is unquestionably entitled to adequate and proper notice of the new proceedings. In the instant case, more than eight months after a final decree, the plaintiffs filed an amended petition and served a copy on the attorney that had represented the defendants in the original case. There was no proof that the said attorney was still the defendant's attorney and no notice was served on the defendants personally. The court stated,

> Whatever may be the status and rationale of the decisions in other jurisdictions, we hold that after a final decree has been entered and the time for appeal therefrom has expired, no presumption exists that the attorney of record for any party in the original action has

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76. Shores v. Shores, 69 So.2d 312 (Fla. 1954).
77. Zdanowicz v. Zdanowicz, 70 So.2d 546 (Fla. 1954).
78. Jones v. Oakes, 71 So.2d 252, (Fla. 1954). This case also decided other custody questions which the author feels are not of sufficient general interest to be mentioned in this article.

> authority effectively to bind that party in any subsequent proceedings to modify that decree in the absence of his actual appearance therein. The service of notice, alone, on such attorney is not sufficient to empower the lower court to proceed in the cause.[79]

A wife filed suit for divorce against her husband in the state of Illinois, praying for a divorce, custody of a minor child of the parties, alimony, child support and other relief. The defendant filed a personal appearance in the cause but failed to answer. A final decree was entered granting a divorce to the plaintiff awarding her sole care, and custody of the minor child and retaining jurisdiction until some further date as to the actual amount of the support and maintenance for said minor child. Approximately two years after the divorce, the wife filed a petition in the Illinois court asking that the court enter an award for child support and the court granted an award of $7.00 per week. Approximately *nine years* later, the plaintiff received a money judgment in Illinois for the accrued amount. Subsequently, the wife instituted suit in Florida, against the defendant for the purpose of enforcing the Illinois decree both as to delinquent support money and for the future weekly installments. The defendant filed an answer attacking the jurisdiction of the Illinois court decree both as to the delinquent support money and for future weekly installments, on the grounds that he had not authorized the written appearance filed in his behalf. The court held that when the husband had remarried, relying upon a decree of divorce entered against him, he is estopped to attack the divorce under the well recognized rule that when a defendant, in a foreign decree of divorce, does some act, which in itself recognizes the validity of the decree, he is estopped from afterward impeaching the decree. The court further held that no notice was apparently given to the defendant for the application of support money for the child, and under the law of Illinois, procedural due process required some form of notice be given in such cases. Therefore, the decree of Illinois, under the pleadings, was not entitled to full faith and credit.[80]

The court seemed to say that unless a party, who is denied custody of children, requests reasonable visitation privileges, then the Chancellor is at liberty to enter a decree of custody to the other spouse denying the losing party the right to visit the children.[81]

The court reversed the lower court when it stated, in general terms, that conditions had changed since the entry of a prior order modifying custody, because the record did not contain:

> . . . any substantial, competent evidence that there has been any material or substantial change in conditions which bear upon or relate to the question of advisable changes in the custody provisions

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79. Moore v. Lee, 72 So.2d 280 (Fla. 1954).
80. Reichert v. Appell, 74 So.2d 674 (Fla. 1954).
81. Thompson v. Thompson, 72 So.2d 392 (Fla. 1954).

> relative to the children or indicate in any manner that their welfare will be promoted by a change in the provisions of that decree.

The Supreme Court further held that the husband has a right to send the children to either public or private schools and that it is not within the power of the court to tell the parents what kind of schools their children shall attend. The court further reversed the Chancellor in awarding $3,500.00 to the wife for the cost and expenses and upkeep of the two minor children during the six week period in the summer when she had custody of them, and the court also reversed by saying that there was no basis in the record for the award of $250.00 expenses to the wife for attending the hearing on her petition for modification.[82]

In a very unusual case, a modified decree provided that the foster mother of a 13 year old girl would be permitted to visit the girl at such times and places *as the girl may desire*. The Supreme Court affirmed this unusual decree on the basis that the foster mother (the child was an adopted daughter of the foster mother) had become an alcoholic and the foster daughter had very little respect for her. The court mentioned that the Chancellor felt that under such circumstances, an order requiring the child to visit her foster mother would be unwise, and refused to grant it.[83] It is submitted that this is one of the most sensible decrees that the writer has seen in regard to child custody cases.

In the case of *Thompson v. Angel*,[84] the parties were divorced and the minor child was awarded to the maternal grandmother pursuant to the stipulation of the parties. Subsequently, both parties petitioned the court to modify the final decree and this cause was settled by a stipulation whereby the father secured custody of the child. The maternal grandmother, petitioned the court for permission to file a bill in the nature of a bill of review for the purpose of setting aside the modifying decree because it was allegedly based upon the fraud and deceit of the parties. The Supreme Court held that even though the grandmother was acting as next friend of the minor child, neither the child nor the grandmother had any standing in court because neither was a party to the stipulation. "The right to present such a stipulation was peculiar to the parties who stipulated." The court felt that the Chancellor had exercised his discretion properly and had kept uppermost in his mind the welfare of the child.

Ten months after the Chancellor ordered that custody of a minor child be awarded to the father, the Chancellor modified the decree by giving the father custody except on certain holidays and certain months, during which time the mother was to have custody. The father appealed, and the Supreme Court mentioning that both the mother and father were liquor addicts but that the mother was staging a "come-back" and

82. Bennett v. Bennett, 73 So.2d 274 (Fla. 1954).
83. Kelly v. Kelly, 73 So.2d 829 (Fla. 1954).
84. Thompson v. Angel, 74 So.2d 295 (Fla. 1954).

that she was from a "respectable family," upheld the Chancellor in making the partial change of custody.[85]

A wife left her husband and returned to her parents' home. The husband paid all of the expenses incident to the birth of their child and since the birth had paid the sum of $25.00 per week for its support. The wife filed a complaint asking the court to order the husband to continue making said payments. The Supreme Court, affirming the lower court, in its dismissal of the suit, held that there was no controversy between the parties, because the husband had made the support payments, the wife admitted that they were sufficient, and that the husband had not threatened to cease making the payments nor had he in any way interfered with the custody of the child.[86]

A husband and wife were residents of Pennsylvania. The husband left the wife and took their two children with him to Florida. Subsequently, the wife came to Florida and surreptitiously took the children back to Pennsylvania and the husband filed suit in Florida to secure their custody. The wife filed a motion to dismiss, which was overruled and she brought certiorari, which was granted, the court stating:

> . . . This court is committed to the doctrine that when he custody of minor children is involved they must be in the jurisdiction of the court before the question will be considered or adjudicated. There may be exceptions to this if the Mother is personally in the court's jurisdiction. State ex rel. Rasco v. Rasco, 139 Fla. 349, 190 So.510; May v. Anderson, 345 U.S.528, 73 S. Ct. 840, 97 L.Ed. 1221, and James v. James, Fla., 64 So.2d 534; Kallet v. Fitzpatrick, Sup., 131 N.Y.S. 9.

The court further held this was a proceeding in personam against a non-resident defendant, and therefore only the courts of Pennsylvania have jurisdiction over the wife and minor children.[87]

In a case of first impression, a husband and wife entered into a contract in 1928, whereby the husband agreed to pay fifteen dollars a week for the support of their minor child and a divorce was subsequently entered between the parties. The minor child reached his majority in 1947, and the husband died in 1952. The wife filed suit in 1953 seeking to recover $14,000.00 as the arrearages for the period from 1927 to 1947. The court stated that despite the fact that the father has a continuing obligation to support his child, the Statute of Limitations[88] began to run against each payment as it came due, and therefore the liability of the decedent's estate was limited to unpaid installments which fell due within five years

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85. Bryan v. Bryan, 75 So.2d 189 (Fla. 1954).
86. York v. York, 78 So.2d 406 (Fla. 1955). The reader is referred to the companion case of York v. York, 78 So.2d 408 (Fla. 1955) determining the question of venue in this case.
87. Gessler v. Gessler, 78 So.2d 722 (Fla. 1955).
88. FLA. STAT. § 95.11 (3) (1953).

next preceding the death of the decedent. In a strong dissent, Justice Terrell (with whose opinion Justices Thomas and Sandler concurred) considered that the contract is a continuing one and that the Statute of Limitations begins to run on all weekly payments from the date the minor child reached his majority.[89] Under the fine law and logic presented by both sides of the court, the author is constrained to the view that this is a case where reasonable men may differ.

Public assistance may now be given to a dependent child, under one year of age, if the parent or other relative with whom the child is living has resided in the state for one year immediately preceding the application for assistance.[90] This amendment would seem to encourage out of state parents to ship their children (if under one year of age) to Florida relatives and thereby place an additional load on the taxpayers of this State.

The Legislature has repealed the Uniform Support of Dependents Law,[91] enacted in 1953, and has enacted the Uniform Reciprocal Enforcement of Support Act[92] as a substitute. The main improvement of the new act seems to be in the provision for extradition of any person "found in such other state who is charged in this state with the crime of failing to provide for the support of any person in this state . . . ."

Separate Maintenance

A wife sued her husband for separate maintenance unconnected with causes for divorce. The lower court refused to allow her attorneys fees and she appealed. The Supreme Court held that under the Statutes[93], the granting of attorneys fees is not mandatory but within the sound judicial discretion of the Chancellor and the court affirmed a finding that the wife was worth approximately $100,000.00 and therefore there was no need for the wife to be awarded attorneys fees.[94]

The lower court awarded the wife's attorneys $500.00 as a fee in a case of separate maintenance and the Supreme Court refused to grant an additional award, but in regard to suit money, the court held that the wife is entitled to an award against the husband for the actual travelling expenses of her counsel from Miami to Tallahassee pursuant to the *Schuberth*[95] case.[96]

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89. Issacs v. Deutsch, 80 So.2d 657 (1955).
90. Laws of Fla., c.29670 (1955) amending paragraph (b) of Sub section (1) of Fla. Stat. § 409.18 (1953).
91. Fla. Stat. §§ 88.01-88.12, Laws of Fla., c.27996 (1953).
92. Laws of Fla., c.29907 (1955).
93. Fla. Stat. §§ 65.09, 65.10 (1953).
94. McFarlin v. McFarlin, 75 So.2d 580 (Fla. 1954).
95. Schuberth v. Schuberth, 52 So.2d 332 (Fla. 1951).
96. Borodowsky v. Borodowsky, 78 So.2d 868 (Fla. 1955).

ATTORNEYS' FEES AND COURT COSTS, MASTERS' FEES AND MASTERS' REPORTS

In a case involving 800 pages of testimony and three years of litigation, the court affirmed an award of $15,000.00 to the wife's attorneys, but reduced the master's fees from $3,000.00 to $1,500.00.[97]

Where the lower court assessed the court costs equally between both parties, the Supreme Court affirmed the decree on the merits, but reversed as to court costs and assessed all of them against the husband. It is submitted that the Supreme Court may have possibly ruled this way because of their stinging verbal slap at the quality of the husband's brief and the size of the appellate record.[98]

In the case of *McMullan v. McMullan*,[99] the Supreme Court held that, notwithstanding the lack of exceptions to the master's report, the Chancellor should have dismissed the cross bill as well as the bill.

In the case of *Touby v. Touby*,[100] where over 700 pages of testimony were adduced before a master during ten separate hearings, the court affirmed an award of $5,000.00 as attorneys' fees for the wife's attorney, but reduced the master's fee from $1,600.00 to $750.00.

The court has finally ruled[101] that a whole case should not be referred to a master to make findings of facts and conclusions of law unless both parties consent to the order of reference. However, the court did say:

> that the special masters may be appointed to serve in a ministerial capacity to perform a 'particular service', if the chancellor in his discretion decides that such action is necessary to aid the Court in an accurate and expeditious determination of the cause. The validity of these appointments for limited service will not be affected by the want of agreement on the part of litigants, or even their protest, and the reports of Special Masters in such cases shall be advisory.

In regard to the submission of the whole case to a master the court said:

> If a party moves for the reference of the entire cause to a special master and there is no objection, or the adversaries consent, then there is tacit or express waiver of the right to have the Chancellor hear the witnesses without cost to the litigants of a fee for expert appraisal of the testimony. And if that procedure is followed, the chancellor, though he is the final arbiter with power to dispose of the dispute by decree, may not put aside the findings of fact unless they are clearly 'erroneous'."

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97. Kleinschmidt v. Kleinschmidt, 66 So.2d 815 (Fla. 1953).
98. Kneale v. Kneale, 67 So.2d 233 (Fla. 1953).
99. McMullan v. McMullan, 68 So.2d 179 (Fla. 1953).
100. Touby v. Touby, 68 So.2d 365 (Fla. 1953). Note this case as reported in 66 So.2d 222 was withdrawn by the court.
101. Slatcoff v. Dezen, 74 So.2d 59 (Fla. 1954); *accord*, Frank v. Frank, 75 So.2d. 282 (Fla. 1954).

SEPARATION AGREEMENTS

The parties were married in Florida and a child was born to them. Later, the husband left the wife, moved to Missouri, and filed suit for divorce. The wife, still a resident of Florida, entered into a property settlement and child support agreement which was incorporated by the Missouri Court in its final decree of divorce in 1946. The husband complied in every way with this final decree which was entered in 1946. In 1952, the wife filed a petition[102] asking the Florida Court to modify the separation agreement and the Missouri decree as to the amount of support payments because of an increase in the husband's income. Personal service in Florida was had upon the husband who was vacationing here. The court held: (1) the Florida Court has no power to modify or alter retroactively, a final judgment of a sister state.[103] (2) however, the law of Missouri, like the law of Florida, holds that a decree for child support is subject to revision upon proof of a change in circumstances of the parties, hence the Full Faith and Credit Clause does not stand as a constitutional bar to this suit. (3) citing a Massachusetts case,[104] the court held that it has no jurisdiction to *modify* the Missouri decree but only to *supersede* it upon a proper showing of changed financial circumstances of the father and the reasonable needs of the child.[105]

Husband and wife no. 1 entered into a separation agreement whereby, among other things, the wife was to be removed as a beneficiary from her husband's insurance policy and her three children were to be named the new beneficiaries. This agreement was approved by the court which entered a decree of divorce between the parties. Later, the husband remarried and named wife no. 2 (who paid the premiums on the policy) as beneficiary, leaving out his children. The husband died and the children claimed the proceeds as against wife no. 2. The court held that the beneficiary had only an inchoate right in the proceeds of the policy and the insured had the absolute right to change the policy since the policy permitted him to do so. The court mentioned that the children might have some claim against the estate of the father but the question was not decided.[106]

During the pendency of a cause for a divorce, the husband and wife stipulated that she would receive certain properties and that she would not ask for alimony in the final decree. A final decree was entered in accordance with the stipulation of the parties. Subsequently, the former wife filed a petition for modification[107] because of a large increase in the husband's income. The court held that a wife who has accepted money

102. Pursuant to FLA. STAT. § 65.15 (1953).
103. Pursuant to U.S. Const. Art. 4, § 1.
104. Durfee v. Durfee, 293 Mass. 472, 200 N.E. 395 (1936).
105. Lopez v. Avery, 66 So.2d 689 (Fla. 1953).
106. Cadore v. Cadore, 67 So.2d 635 (Fla 1953).
107. Pursuant to FLA. STAT. § 65.15 (1953).

and property is estopped to maintain statutory proceedings to modify the decree and require the husband to pay additional money, the court stating:

> However, this Court has never construed the Statute providing for the modification of alimony 'payments' Section 65.15, Supra, to permit an award of alimony; when a wife has, without fraud or duress, relinquished her right to alimony, in consideration of the conveyance or payment to her of property or money pursuant to a comprehensive property settlement agreement, and such an agreement has been fully executed and performed . . . . To the contrary, it will be found that in every instance where a petition for modification has been considered on its merits, and a new alimony award made or denied, on the ground of changed circumstances since the execution of a property settlement agreement or stipulation between the parties, the Court has granted such relief because the agreement involved was *executory* in nature, and, in most cases did not purport to be a final relinquishment of alimony but merely settled the question of what periodic payments would be satisfactory to the parties, so as to obviate the taking of testimony on that issue. (Emphasis supplied by the court)[108]

A husband and wife entered into a separation agreement which provided, *inter alia*, that if the wife through no fault, neglect or omission, on her part would be put out of her home, then the monthly allowance for the support of a child would be increased to $125.00 per month. The former husband later brought a partition suit against the wife and she and the child were forced to vacate the home. The Chancellor therefore increased the amount of support. At the hearing before the lower court, the proceedings were not transcribed. The Supreme Court stated that because of the absence of a record, they were unable to state that the Chancellor was in error in his construction of the separation agreement and what aids the Chancellor used in deciding that the wife was forced to vacate her home through no fault, neglect or omission on her part.[109]

Before a divorce suit was filed, the parties executed a separation agreement and during the hearing of the suit, a further addition to the agreement was agreed upon which stated that if the premises which the wife was conveying to the husband were sold during the occupancy of the wife, the wife should be entitled to all furnishings, furniture and equipment contained in the beauty shop and apartments occupied by the wife. The lower court entered a decree in accordance with the separation agreement, as modified, and about a year afterwards the wife instituted a suit for declaratory decree stating that it was the intention of the parties that the wife was to have the right to occupy the property so long as she should live, or until she should remarry, and that if such were not the legal effect of the agreement it was to be reformed to so

108. Haynes v. Haynes, 71 So.2d 491 (Fla. 1954).
109. James v. Keith, 78 So.2d 395 (Fla. 1955).

provide. The Supreme Court did not agree with her contentions, the court stating:

> The wife misinterprets the following sentence in Paragraph 4 of the agreement, viz: "The husband agrees to further give the wife all furniture, furnishings, fixtures and equipment contained in beauty shop and apartment occupied by the wife for her use until such time as she may vacate premises of her own accord or remarry." The wife applies the words, "for her use until such time as she may vacate premises of her own accord or remarry," to the beauty shop and the apartment whereas we think such words are applicable only to the furniture, furnishings, fixtures and equipment. This is especially true when we bear in mind that the preceding sentence provides for the payment by the husband of the sum of $4,000.00 in cash to the wife "in complete payment for support, alimony or interest which the wife may have in the property owned by the parties" . . . . Moreover, the evidence of the parties before the master to the effect that in the event that the husband sold the property during the wife's occupancy she would be entitled to all of such furniture and fixtures clearly supports the conclusion that her right of occupancy extended only so long as the husband owned the property or until she remarried.[110]

A separation agreement was entered into and a Nevada court entered a decree of divorce between the parties. A New York court entered a judgment allegedly for all sums due the wife under the separation agreement. The wife brought an equity action in Florida for an accounting and enforcement of payments under the agreement and the husband moved to have the case transferred to the law side of the court. The court stated: (1) basically the wife's complaint is merely one to enforce a decree ordering payment of alimony and it was therefore appropriate to invoke equity jurisdiction. (2) arguments based upon the laws of Nevada and New York were unavailing because there was a complete absence of the foreign law in the pleadings and proof in the case. The *Uniform Judicial Notice of Foreign Law Act*[111] does not operate automatically in every case. The litigant desiring to take advantage of this provision must give reasonable notice to the adverse party either in the pleadings or otherwise. (3) under the pleadings, there was some basis for an action in equity, and the court refused to decide whether some portions of the action related solely to a law action, the severability of an equity suit or whether a portion of an equity action may be transferred to the law side of the court.[112]

Adoption

The legislature has amended certain sections of the Adoption Laws[113] relative to investigations prior to adoption, appointment of guardians

110. Clark v. Clark, 79 So.2d 426 (Fla. 1955).
111. Fla. Stat. § 92.031 (1953).
112. Kingston v. Quimby, 80 So.2d 455 (Fla. 1955).
113. Fla. Stat. §§ 72.08, 72.15, 72.17, 72.18, and 72.20 (1953).

ad litem in certain circumstances, hearing times, and removal of custody of a child upon denial of adoption.[114] The most important change is the repealing of the interlocutory order of adoption provision[115] which provided for interlocutory custody for a period not to exceed one year. Now the only decree is a final one.[116]

Section 72.27[117] of the Adoption Law was amended so that the name of the minor shall not be noted on any docket, index or other record outside of the court file in such proceeding. It is submitted that this drawing of an "Iron Curtain" across the name of the minor *may* have evil effects in that anyone attempting to trace the minor would be practically unable to do so; *i.e.*, if one or both of the natural parents were never informed (by fraud of the adopting parents) of the adoption proceedings, they would probably be unable to ever trace the whereabouts of their child.

Section 72.34[118] of the Adoption Law was amended so as to remove the former requirement that the adopters should have had custody of an adult adoptee for at least five years during the infancy of such adoptee.

PROPERTY AND TORTS

Property

For an interesting case involving the transfer of title to an automobile by a husband to his wife on the day he was served with a summons in a common law action, and the questions of procedure and due process raised by the wife in supplementary proceedings see the first *Dezen*[119] case.

In the second *Dezen* case, the judgment creditor sought to enforce a judgment against the cash surrender value of certain life insurance policies issued on the life of the judgment debtor. A writ of garnishment was served upon the insurance company and the Supreme Court stated that the Life Insurance Exemption Statute[120] extends to the case where the insurance policies were purchased out of the state by a non-resident who thereafter became a resident of Florida. The court pointed out that if the judgment creditor proved that the policy was purchased in fraud of her then the exemption statute would not apply.[121]

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114. Laws of Fla., c.29674 (1955).
115. FLA. STAT. § 72.19 (1953).
116. FLA. STAT. § 72.20 (1953).
117. FLA. STAT. § 72.27 (1953).
118. FLA. STAT. § 72.34 (1953).
119. Dezen v. Slatcoff, 66 So.2d 483 (Fla. 1953).
120. FLA. STAT. § 222.14 (1953):
The cash surrender value of life insurance policies issued upon the lives of citizens or residents of the State of Florida, upon whatever form, shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured, unless the insurance policy was effected for the benefit of such creditor.
121. Slatcoff v. Dezen, 76 So.2d 702 (Fla. 1955).

In a case (whose facts sound like a "True Confession" story), a husband deserted his wife and four children and went through a marriage ceremony with wife No. 2 who did not know of the prior existing marriage. The "husband" and wife No. 2 bought Tracts 1, 2 and 3 of land as tenants by the entirety, and the husband took title to Tract No. 4 in his own name. The husband died and wife No. 1, and her two surviving children, brought suit against wife No. 2, praying that they be declared as owners in fee of Tract No. 4, and as owners of an undivided one-half interest in Tracts 1, 2 and 3. The court decided that wife No. 2 was an innocent party and that the husband, plaintiff's ancestor, was the actual perpetrator of the fraud and he would have been estopped during his life time from contending that the estate created was void because of the bigamous marriage. Therefore his heirs are bound by the estoppel and wife No. 2 was held to be the fee simple owner of Tracts 1, 2 and 3, and that wife No. 1 and the two children were fee simple owners of Tract No. 4.[122]

Although a wife's signature on a contract of sale of homestead property need not be acknowledged,[123] it is still required that the contract be witnessed by two persons. The statute[124] does not dispense with the requirement of two subscribing witnesses, but only with the formal requirement of acknowledgement.[125]

In the case of *Field v. Field*,[126] the lower court dismissed a suit for divorce by the husband based upon his wife's alleged desertion; however, upon a later petition of the husband, the court ordered the wife to sign a deed in order to convey certain real estate to a third person. The Supreme Court reversed, stating:

> In the absence of a regular business partnership, and of a dissolution of the marriage relationship, there is no occasion to undertake to adjudicate the respective rights of the spouses to property in which both have an interest.

In the case of *Reid v. Reid*,[127] the court held that a Chancellor had the power to command a former husband to convey his interest in property, which was held as an estate by the entirety at the time a divorce was entered, to the wife. The court pointed out that since the court may order the husband to convey to the wife property owned entirely by him,[128] there was no reason to hold that the Chancellor cannot order the man to convey to the woman his undivided interest in

122. Alexander v. Colston, 66 So.2d 673 (Fla. 1953).
123. Scott v. Hotel Martinique, 48 So.2d 160 (Fla. 1950) and FLA. STAT. § 708.07 (1953).
124. FLA. STAT. § 708.07 (1953).
125. Abercrombie v. Eidschun, 66 So.2d 875 (Fla. 1953).
126. 68 So.2d 376 (Fla. 1953). Citing: Clawson v. Clawson, 54 So.2d 161 (Fla. 1951) and Pawley v. Pawley, 46 So.2d 464, (1950).
127. 68 So.2d 821 (Fla. 1954).
128. Bezanilla v. Bezanilla, 65 So.2d 754 (Fla. 1953).

property they now own as tenants in common, pursuant to the Florida Statutes.[129]

A daughter took care of her mother for ten years while the mother and daughter resided in the home residence of the mother. Approximately one year prior to the mother's death, she conveyed the home to her daughter. One of the children contended there was fraud and deceit and sought to have the deed set aside. The Supreme Court stated that the ten years of service and care rendered to the mother was sufficient consideration for the conveyance and there had not been any proof of fraud and deceit, undue influence or duress practiced on the mother by the daughter.[130]

A notice of application for tax deed to property held as an estate by the entirety, as required by the Florida Statutes,[131] was not sufficient if properly mailed to *only one* of the spouses.[132]

During the pendency of divorce proceedings between the parties, the wife executed a very ungrammatical writing which seemed to show that she agreed to give the husband all of the real property which they owned. Later she went to the courthouse with the husband and signed deeds conveying all of her interest in the property to him. Still later, she filed a suit to set aside these deeds on the ground that they were obtained by duress and coercion. The strongest part of her testimony showed that the former husband had grabbed her and "pinched her legs" and the Supreme Court held that such evidence was insufficient to prove duress and coercion.[133]

A divorced woman gave a man an option to purchase some real property. It appeared that the man was allegedly acting as an agent for her former husband and when the alleged agent requested performance of the contract, the wife asserted that she would have charged a higher price if she had known that her husband was the actual buyer and that she did not want him to get the property. The court refuted her contentions by holding that she gave the option without any restrictions as to assignment, but that on the contrary, it expressly provided in the instrument that rights under it should enure to the other party's assigns, therefore the other party was entitled to specific performance.[134]

In the case of *Medary v. Dalman*, a widower was a devisee of a one-fourth interest in certain property under his deceased wife's will. Thereafter, the widower filed a suit in equity to have a trust declared in his favor as to the entire property claiming in substance that he had supplied all of the funds for the purchase thereof, that the title was taken in the

129. FLA. STAT. § 689.15 (1953).
130. Regero v. Daughtery, 69 So.2d 178 (Fla. 1954).
131. FLA. STAT. § 194.18 (1953).
132. Montgomery v. Gipson, 69 So.2d 305 (Fla. 1954).
133. Cooper v. Cooper, 69 So.2d 881 (Fla. 1954).
134. Adams v. Stoffer, 69 So.2d 884 (Fla. 1954).

wife's name for convenience only and that the purchase in his wife's name was not intended as a gift or advancement to her. The court decided that where property was purchased by the husband and title taken in the wife's name there was no presumption of a resulting trust, the transfer being regarded prima facie as an advancement, but, of course, it was subject to rebuttal. The court also held that the widower was not required to renounce the devise to him prior to his bringing the suit.[135]

In May 1926, a husband executed a deed to his wife purporting to convey a piece of property on which was located their homestead. In January, 1951, the wife died and left a will leaving a portion of the property involved to her son. The husband attacked this on the grounds it was a homestead and that the will was ineffectual. The court held under the Statutes of Limitations,[136] which provide that after a lapse of ten years from the record of any deed no person shall assert any claims on said land as against such claimant under such deed or the successors in title (the instant deed being placed upon record for more than twenty years and the claimants against said deed having been *sui juris* for more than seven years prior to the institution of the suit), they were barred by the Statutes of Limitations.[137]

In a case, which bears out the old adage "oh what a tangled web we weave when once we seek to deceive," husband no. 1 and his wife were married and he entered into a contract to purchase real property. Later the parties were divorced and the wife remained on the property. The wife married husband no. 2 and he used his own money and effort in improving the property. Husband no. 1 stopped paying the wife alimony and, in settlement of the alimony question, endorsed the land contract for deed to her. Then husband no. 1 induced the wife to secretly divorce husband no. 2. The wife placed the contract for deed in the hands of a real estate broker, as evidence of her ownership, and listed the property for sale. Husband no. 1 obtained the contract for deed and crossed out the assignment. He then procured the deed from the conditional vendor and executed a mortgage to a life insurance company. Later husband no. 2 unaware that he had been divorced, resumed co-habitation with his "wife" and constructed further improvements on the property. Later husband no. 1 and the wife were secretly remarried but she continued to live with husband no. 2. Husband no. 1 authorized the wife to sell the real property and she listed it for sale with the broker. Husband no. 1 gave her two deeds signed in blank. At the closing, the attorney refused to accept the deed signed in blank and insisted upon husband no. 1 signing the deed. Apparently, the wife had an imposter

135. Medary v. Dalman, 69 So.2d 888 (Fla. 1954).
136. FLA. STAT. §§ 95.23, 95.26, and 694.08 (1953).
137. Thompson v. Thompson, 70 So.2d 555 (Fla. 1954).

come to the closing and sign the deed representing himself as husband no. 1. The wife apparently gave some of the proceeds of sale to husband no. 1. Husband no. 1 brought a suit against the purchasers to set aside the deed. The court held that when husband no. 1 procured a deed to himself as the original vendee instead of to his ex-wife, to whom he had assigned his interest, he became a trustee of a constructive trust, ex maleficio, for his wife, and the Statute of Uses[138] will not execute the trust but equity may. Husband no. 1:

> . . . held the legal title charged, in equity, with a trust and though the Statute of Uses will not execute a constructive trust, equity will in this instance. Although the facts established raise doubt as to whether she is in fact the wife of Omwake (husband no. 1) or LaPrelle, (husband no. 2) it is of no consequence in this case. If Marjorie is the wife of Omwake then the estoppel applies to him. If she is the wife of LaPrelle it is of no consequence since the legal title was not vested in Marjorie or La Prelle. The final decree was sufficient to confirm the conveyance or operate as a conveyance (see 31 F.S.A. Equity Rule 67), thereby executing the trust and making good her representations to the purchasors.[139]

A wife, who was the head of a family, consisting of herself and her husband, and who was the sole owner of the home in which she and the husband resided prior to her death, could not devise the home free of any claim or interest on the part of the surviving husband when she had adult children surviving her (although they did not live in the house) because of Section 4 of Article X of the State Constitution.[140] The fact that the children of the deceased wife were not dependent upon her, nor were they minors, did not prevent them from being her children, therefore, under the Constitution, she was unable to alienate her property by will. Justice Terrell, in a strong dissent, said:

> A careful reading of the Constitution and the applicable Statutes, Sections 731.05 and 731.27, F.S.A. reveals no restraint on alienating the homestead by will except where the owner is survived by his wife and lineal descendants. In this case, the wife owned the homestead and died leaving lineal descndants by a former husband who are of age and are not contesting the will. The law imposes no restraint on her disposing of her property, as she desires, free of any claim on the part of her surviving husband. No surviving minor children or dependent adult lineal descendents are involved in this case.[141]

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138. FLA. STAT. § 689.09 (1953).
139. Omwake v. Omwake, 70 So.2d 565 (Fla. 1954).
140. This section reads:
> Nothing in this article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife if such relation exists; *nor if the holder be without children to prevent him or her from disposing of his or her homestead by will in a manner prescribed by law.* (Emphasis supplied by the court.)

141. Stephens v. Campbell, 70 So.2d 579 (Fla. 1954).

A husband and wife purchased real property and gave a purchase money mortgage, both signing the note and the mortgage. Later the mortgagee assigned the note and mortgage to the wife, and the court held that the wife could not enforce the mortgage against the husband on the property she and her husband held as an estate by the entirety.[142]

In the case of *Saint-Gaudens v. Bull*,[143] a former husband sued his former wife and recovered a judgment. Prior to the entry of the judgment, but during the pendency of the suit, the wife, then unmarried, filed her claim of homestead to the property. Later she executed a warranty deed to her daughter who was then residing with her on the property. The wife and daughter did not live on the property from May, 1952 to April, 1953, because of the pending divorce suit, and even though the divorce was granted on July 2, 1952, she was so emotionally disturbed over the divorce and the immediate re-marriage of her former husband that it was in April, 1953, before she became reconciled to the situation and returned to her home. The court held that her absence from the home did not amount to an abandonment of the homestead.

A father furnished a portion of the purchase price for real property and instructed the seller to convey title to his son and daughter-in-law. The father died and the curator of his estate filed a suit asking the court to establish a constructive trust. The Supreme Court held that ordinarily where the purchase money of land was paid by one person and the title was taken in the name of another, the party taking the title is presumed to hold it in trust for him who paid the purchase price. However, this presumption does not arise where the legal title was taken in the name of some person for whom the purchasor was under a legal or moral obligation to provide. And where the father was a wealthy man and very much interested in his son and daughter-in-law, there was a presumption of a gift rather than a presumption of a resulting trust, and such presumption could only be overcome by evidence so clear, strong and unequivocal as to remove every reasonable doubt as to the existence of the gift.[144]

In the case of *Brodgon v. McBride*,[145] a man and woman were married and a daughter was born as issue. Subsequently, the parties were divorced and the father was ordered by the court to maintain and support the daughter. Later, the father began to co-habit in his apartment building with a woman who was not his wife. The father died leaving a will whereby he devised the apartment house to the woman with whom he had been co-habiting. Later this woman died devising the property to another. The minor daughter filed suit, claiming that the apartment

142. Brocato v. Brocato, 74 So.2d 58 (Fla. 1954).
143. Saint-Gaudens v. Bull, 74 So.2d 693 (Fla. 1954).
144. D'Uva v. D'Uva, 74 So.2d 889 (Fla. 1954).
145. Brodgon v. McBride, 75 So.2d 770 (Fla. 1954).

house was the homestead of her father. The Supreme Court held that the minor daughter, although not residing with her father and the other woman, was legally entitled to the father's support; therefore, under the circumstances, the father remained the head of the family of which the minor child was a member. The court further held that since the entire home was under one roof and was not devisable by a perpendicular line without destroying or eliminating a part of that occupied by the owner as his home, the entire building was the homestead of the deceased father.

A husband executed an option contract to sell a going business and lots 1 and 2 on which the business was located. The contract was signed by the husband alone, and it developed that the husband owned lot 1 and an undivided one-half interest in lot 2, but that the wife owned the remaining undivided one-half interest in lot 2. After both parties died, the lessees tendered the amounts due under the contract and demanded performance. The representative of the estate refused and the lessees brought suit for specific performance. The court held that the lessees had made valuable improvements on the un-divided one-half interest of the wife and that they were made with her consent and approval. As a consequence, the vendees were reimbursed for the amount of such expenditures and the legal representative of the deceased husband was ordered to execute a deed for lot 1 and his undivided one-half interest in lot 2; the purchase price was abated because of the inability of the legal representative to convey the title to the undivided one-half interest of the deceased wife.[146]

In the case of *DeJonge v. Wayne*,[147] the parties were divorced, and the former husband quit claimed certain real property to the former wife. Subsequently, the former wife remarried and later a judgment was entered against her. She claimed that the property was homestead property. The facts showed that the title was in her name, but that the head of the household was her new husband and therefore the court denied her claim of homestead exemption.

A mother and daughter purchased land as tenants in common. Two and one-half years later the parties executed an agreement in which it was recited that they intended to take title under said deed as "joint tenants or as an estate by the entireties" so that in case of the death of either the survivor would become the sole owner. When the property was acquired it was agreed that the mother should live on it rent-free

146. Brown v. Griffin, 75 So.2d 781 (Fla. 1954).

147. DeJonge v. Wayne, 76 So.2d 273 (Fla. 1954), *compare with* Bessemer Properties, Inc. v. Gamble, 158 Fla. 38, 27 So.2d 832 (1946), where the husband had *purchased* the land and had the deed executed to his wife. The wife made no contribution of any kind to the acquisition of the property and she did not receive the property as a gift from her husband. After having acquired the property in the wife's name, the husband constructed a home on the property and made other expenditures. The court held he was the head of the family, and the land was homestead property.

as her home during the balance of her life. Later the daughter and her husband began to annoy and harass the mother demanding rent from her and "called her vile names and raised hell with her so passionately that she was compelled to leave the place." The mother instituted suit praying that the court adjudicate the rights of the parties in the land. The court stated that, of course, a mother and daughter cannot be tenants by the entirety, but that the agreement between the parties constituted an agreement not to partition the property and to vest title thereof in the survivor. The court mentioned that such agreements may be dissolved for fraud, over-reaching, or other grounds recognized by law. If the mother could show that the agreement to inherit by the survivor had been breached or that for any legal cause one of the parties had made it inequitable or unduly burdensome for the other to live by the contract, she was entitled to have it rescinded and the rights of the parties adjudicated.[148]

A contractor brought an equity action to foreclose an alleged lien for labor and materials furnished for improvements to real property owned by a married woman. After the time for taking testimony had expired, the defendant moved for a disposition of the case upon bill and answer. The court, in reversing, stated that: (1) the plaintiff had failed to give a written statement that all lienors contracting directly with or directly employed by the contractor had been paid in full;[149] therefore there was no cause of action. (2) under the Lien Law[150] it was required that in order to have a lien established upon the separate property of a married woman, the work must have been done "with her knowledge or assent or pursuant to a contract in writing with her" and that there were sufficient allegations of this in the complaint, but that the defendant wife had denied it in her answer, and it was therefore error to enter a decree in favor of the plaintiff on bill and answer.[151]

In a case making its second appearance in the Supreme Court, a husband and wife executed mutual and reciprocal wills. The wife died first, leaving all of her property to her husband. He remarried, and later died leaving all of his property to his second wife and dis-inheriting a daughter (of the first wife) contrary to the agreement which he had with his first wife. The daughter (who was not the daughter of the husband) filed suit claiming that she was entitled to the estate under the agreement between her mother and her step-father as to the mutual and reciprocal wills. In the first hearing of the case,[152] the lower court held that the second wife had no notice of the agreement between the husband and the first wife, and, therefore, the equities were with her and she was entitled to the whole estate. The Supreme Court remanded the case for further testimony

148. Forhand v. Peacock, 77 So.2d 625 (Fla. 1955).
149. Pursuant to FLA. STAT. § 84.04 (3) (1953).
150. FLA. STAT. § 85.08 (1953).
151. Barton v. Horwick, 78 So.2d 569 (Fla. 1955).
152. Fuller v. Tod, 63 So.2d 316 (Fla. 1953).

in regard to the question of notice to the second wife. After the mandate of the court went down, the Chancellor proceeded to take the testimony and held that the second wife had no notice, but, in spite of that fact, under the law of Florida[153] a husband has complete freedom in testimentary disposition of his property so long as dower rights are assured to his widow. It follows that after his marriage to the second wife he may have made the step-daughter the sole beneficiary of his will and therefore the most that the second wife may claim is her dower interest.[154]

Torts

Where a husband was driving an automobile, accompanied by his wife and another couple, and his automobile collided with another automobile, the husband and wife were not engaged in a joint venture even though the husband was the owner of the automobile:

> Aside from the questions of ownership, the only possible theory upon which it might have been presumed that a joint adventure relationship existed between Mr. & Mrs. Maxson was bottomed upon the fact that the couple were husband and wife and that the husband defrayed the expenses of their joint trip to Florida. If this be the theory it is not maintainable, because the mere relationship of husband and wife does not constitute a sufficient basis upon which to impute to the wife the negligence of the husband.[155]

In the two *Fleming* cases,[156] it appeared that a man was living with a woman, not his wife, and that the man rented an automobile from a rental company and let the woman drive the automobile. He was held responsible for her negligent driving of the automobile, ". . . especially where, to all intents and purposes . . . that person was the bailee's spouse." It is to be noted by these two cases that the Supreme Court, under the dangerous instrumentality doctrine, is not overly concerned with the legal title to the automobile, but rather the legal relationship between a bailor and his bailee, *i.e.*, the bailor may be liable even though legal title may be vested in a third person.

In the *Dobbs'* case, a widow brought suit for wrongful death of her husband. One count was based upon her claim as widow for damages and the other was based upon her claim as administratrix of the estate of her husband. The jury was instructed by the court that a portion of the damages for the administratrix should be based upon the probable, prospective estate which the deceased might have acquired, and they were also instructed to consider the same element of damage in the charge considering the widow's damages. The Supreme Court in reversing the lower court stated:

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153. FLA. STAT. § 731.34 (1953).
154. Tod v. Fuller, 78 So.2d 713 (Fla. 1955).
155. Bessett v. Hackett-Maxson v. Bessett, 66 So.2d 694 (Fla. 1953).
156. Fleming v. Alter, 69 So.2d 185 (Fla. 1954) and Frankel v. Fleming, 69 So.2d 887 (Fla. 1954).

> She was entitled to receive from the estate under a will, should there have been a will, or dower rights or a child's part, or she was entitled to receive the same element of damages as the widow under the count where she claimed as the surviving widow. She was not entitled to receive the same element of damages twice. The charge of the court to the jury should have made it clear that if they allowed the widow these elements of damage under the one count, she could not recover the same elements of damages under the other. As the case was submitted to the jury the defendant is required to pay twice for the same element of damages.[157]

In the first hearing of the *Gissen*[158] case, an 8 year old girl (who apparently was a female "Dennis the Menace") swung a swinging door in the lobby of a hotel and thereby injured an employee of the hotel; the latter filed suit against the minor and her parents. The lower court failed to appoint a guardian ad litem to represent the minor defendant. On appeal, the Supreme Court held that since a Florida Statute[159] requires the serving of a writ or summons upon a guardian ad litem thereafter appointed by the court to represent the minor defendant, and since there had been no guardian ad litem appointed and no service of process upon such guardian, the lower court was totally without jurisdiction over the matter and over the person of said minor defendant.

In the second hearing of the *Gissen*[160] case, the court held, as a matter of first impression, that the parents of a minor tort feasor are not liable unless it is alleged and proved that the child had the *habit of doing the particular type of wrongful act which resulted in the injury complained of* and that the parents have failed to restrain the child from doing the particular act. It is submitted that the parents of incorrigible children are lucky if their children are versatile in their wrongdoing. If their children lack ingenuity in their devilment, the parents may be held liable.

In a case[161] of first impression in Florida, a corporation lent an automobile to its employee to be used by him on a purely personal mission. While driving the automobile, with the knowledge and consent of the corporation, the employee wrecked the automobile and injured his wife who was a passenger. The wife instituted suit against the corporate owner of the automobile to recover for damages resulting from the accident. The court decided: (1) in acocrdance with the weight of authority, and citing the *Restatement of the Law Agency*, § 217:

> A master or other principal is not liable for acts of a servant or other agent which the agent is privileged to do although the principal himself would not be so privileged; but he may be liable for an act as to which the agent has a *personal immunity* from

157. Dobbs v. Griffith, 70 So.2d 317 (Fla. 1954).
158. Gissen v. Goodwill, 74 So.2d 86 (Fla. 1954).
159. FLA. STAT. § 47.23 (1953).
160. Gissen v. Goodwill, 80 So.2d 701 (Fla. 1955).
161. May v. Palm Beach Chemical Company, 77 So.2d 468 (Fla. 1955).

> suit . . . . (Comment b) . . . if an agent has an *immunity* from liability as distinguished from a privilege of acting, the principal does not share the immunity. Thus, if a servant, while acting within the scope of employment, negligently injures his wife, the master is subject to liability. (Emphasis supplied by the court.)

(2) the court further held that in all of the cases cited, recovery was allowed under the doctrine of respondeat superior and that in the instant case, the servant was driving the master's car on a purely personal mission. However, the dangerous instrumentality doctrine in Florida is bottomed squarely upon the doctrine of respondeat superior arising from a principal and agent relationship implied in law and therefore the master may be held liable.

In another case of first impression, a woman was struck by an automobile and died a few hours later on the same day. Her husband sued under the *Wrongful Death Act*[162] and alleged as damages the loss of his wife's future earnings which were disallowed by the lower court because a husband has no right to a wife's earnings. The husband then filed suit under the *Survival Statute*[163] to recover damages for his decedent's loss of earnings for her probable life expectancy or for the loss of her probable estate. The issue, as posed by the Supreme Court was:

> In other words, does the survival of the cause of action carry with it the right to recover the full amount of the damages for impairment of earning capacity which the injured person could have recovered during his lifetime, or does there survive to the personal representative only the right to recover for such damages as were actually sustained by the deceased between the time of his injury and his death?

The court after reviewing the common law history of the survival statutes and their wording held:

> Our conclusion, after consideration of all the above-mentioned matters, is that there can be no recovery under the Survival Statute of damages for impairment of earning capacity beyond the death of the injured person. We are cognizant of the anomaly that results from this ruling, in that the wrongdoer will be required to respond in a less amount of damage if the injured person dies, than if the injured person survives the injury. We must conclude, however, that the problem is essentially a legislative one—and one which, as a matter of fact, arises out of the peculiar provisions of our Wrongful Death Act, rather than the Survival Statute.[164]

It is submitted that the Legislature would be wise to examine this case because the very comprehensive analysis made of the *Wrongful Death Act* definitely points out that certain amendments should be made to remedy this anomalous result.

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162. FLA. STAT. § 768.01 and 768.02 (1953).
163. FLA. STAT. § 45.11 (1953).
164. Ellis v. Brown, 77 So.2d 845 (Fla. 1955); Note, 9 MIAMI L.Q. 491 (1955).

When a husband murdered his wife and then committed suicide, the administrator of his wife's estate had no cause of action under the *Survival Statute*[165] against the husband's estate because the wife herself, if she had survived, would have had no cause of action against the husband for his tortious injury. Therefore her personal representative, who simply "stands in her shoes," can have no greater rights then she would have had during her lifetime.[166]

However, the wife's disability to sue her husband will not bar an action under the *Wrongful Death Statute*,[167] brought by the wife's surviving children against the estate of their stepfather.[168]

The distinction between the two causes of action is predicated upon the theory that under the *Survival Statute*[169] the wife's disability to sue her husband is personal to her and does not inhere in the tort itself, while the *Wrongful Death Act*[170] creates, in the named beneficiaries, an entirely new cause of action, for the recovery of damages suffered by *them*, not the decedent, as a consequence of the wrongful invasion of *their* legal rights by the tort feasor.

A minor child was injured in an automobile accident while a passenger in an automobile belonging to a corporation. The insurance carrier for the corporation agreed to settle with the minor and a friendly suit was filed. Pursuant to stipulation, a judgment was awarded the minor. A check was given to the plaintiff's stepfather and attorney. The attorney turned the proceeds, less his fee, over to the stepfather and the judgment was satisfied. Later, the minor contended that she never received any proceeds of the judgment and asked the court to revive the judgment. The court held (1) that this case was controlled by the *Garner Case*[171] where it was held that an attorney of record for a minor plaintiff, suing by his next friend and obtaining a money judgment may, in his capacity as attorney, receive payment of such judgment and enter satisfaction thereof. The rationale of the case is that the attorney becomes the general agent of the infant and responsible to him for the faithful discharge of the duties required of an officer, of the court, under oath. The court went on to say that the only defalcations which could have occurred under the allegations of the minor's complaint were those of the stepfather who had never been a party to this suit, and that she failed to negative possible benefits which she might have received from the money paid to her stepfather, who, so far as appeared in the record, was under no legal duty to support her from his own funds.[172]

165. FLA. STAT. § 45.11 (1953).
166. Sullivan v. Sessions, 80 So.2d 706 (1955).
167. FLA. STAT. § 768.01 (1953).
168. Shiver v. Sessions, 80 So.2d 905 (1955).
169. See note 165 *Supra.*
170. See note 167 *Supra.*
171. Garner v. I. E. Schilling Co., 128 Fla. 353, 174 So. 837 (1937).
172. Moy v. General Motors Corp., 77 So.2d 875 (Fla. 1955).

In the *Busby case*,[173] the court held that a husband may sue a tort feasor for loss of services, consortorium and companionship of his wife and for medical expenses incurred by him on her behalf, without joinder of his wife.

GUARDIANSHIP

Despite the Florida Statute[174] which provides that no one can be appointed a guardian of the person or property of a person alleged to be mentally or physically incompetent, until there has been an adjudication of incompetency in separate proceedings, the Supreme Court ruled that a ninety-year old woman and her assets could be placed in the hands of a Trustee in spite of the fact that she was not insane:

> . . . but due to the disabilities of old age, incompetent to manage her own affairs. Under the broad general powers of equity, the court had the authority and the power to protect this woman from herself and from all designing persons.

Justice Drew in dissenting said that the laws of Florida require that before a court may appoint a guardian certain proceedings must be had and that there were no such proceedings in this case, hence the authority or right of the court to act was absent. It is submitted that it does seem strange that after the legislature has so catagorically spoken, the court has the judicial effrontery to substitute its own proceedings "under the broad general powers of equity."[175]

A man owned a farm and was later inducted into the Army. After his discharge he was placed in a Veterans Administration Hospital and his father was appointed his guardian. The guardian received a considerable sum of money for his ward from the government. The father made an *oral* application to the County Judge to make certain expenditures on the son's farm and the judge *orally* authorized the expenditures. The money was used for pulling stumps, having the farm bull-dozed, etc., which enhanced the value of the farm. The father filed his report with the County Judge and the Administrator of Veterans Affairs filed his objections. The court held:

> Strictly speaking, it was error to make the expenditures without a written order but in this case the error was a harmless one and the expenditures have been approved by the County Judge and affirmed by the Circuit Judge.[176]

In the *Grant* case,[177] a step-son filed his petition to be appointed curator of the property of his stepfather. He claimed that he was the next of kin

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173. Busby v. Winn & Lovett Miami, Inc., 80 So.2d 675 (Fla. 1955).
174. FLA. STAT. § 744.31 (1953).
175. Donnelly v. Mann, 68 So.2d 584 (Fla. 1953).
176. *In re* Anderson's Guardianship, 75 So.2d 790 (Fla. 1954).
177. Grant v. Odom, 76 So.2d 287 (Fla. 1954).

and was the only heir-at-law of his stepfather. The Supreme Court stated that:

> It is conceivable that a stepson of an alleged incompetent may be the *next* of kin of the incompetent. While the term "next of kin" is sometimes used to refer to "the nearest *blood* relations of the propositus in equal degree," . . . we think the term may not be restricted to this narrow meaning when material and relevant statutes indicate that a broader meaning is intended. . . . Under the statute of descent and distribution a stepson takes as an "heir" of a decedent and consequently as one of "next of kin" of a decedent in those extremely rare and virtually non-existent cases where, because there are not in existence any heirs of the classes prior in preference, the estate decends to "the kindred of the deceased spouse of the intestate in like course as if such deceased spouse had survived the intestate and then died entitled to the estate. Section 731.23 (7), Florida Statutes 1951, F.S.A.[177]

A mother of two minor children was divorced from the father and the custody of the children was awarded to the mother. Subsequently, the parties entered into a stipulation which was approved by the court in a decree modifying the award of custody and placing the custody with the father. Later, the father died and a citizen of Ohio filed a petition in the Florida court asking that she be appointed the guardian of the persons and property of the two minor children. She averred in the petition that the children were residing with her in the State of Ohio. The lower court, without notice being given to the mother of the children and without any actual hearing, awarded the guardianship of the *persons* and *property* of the minors to the Ohio resident. The Supreme Court reversed for two reasons: (1) no notice of any kind was given to the parent of the children as required by law[178] and (2) the guardianship law provides that a *resident* of Florida may be appointed guardian of the *person and property* of a *resident* incompetent[179] and may be appointed the guardian of the *property* of a *non-resident* incompetent,[180] and also that a *non-resident* of Florida may be appointed guardian of the *person* but not the *property* of a resident incompentent.[181] The court went on to say:

> "Nowhere in the low, however, is there any authority for the appointment by the County Judge of a *non-resident* guardian of a *non-resident* incompetent, either as to his property or his person.[182]

The legislature amended Section 744.38[183] of the Guardianship Law to allow the County Judge, for good cause shown, to reduce the amount of bond of any guardian.

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178. FLA. STAT. § 744.33 (1) (1953).
179. FLA. STAT. § 744.27 (1) (1953).
180. FLA. STAT. § 744.18 (1953).
181. FLA. STAT. § 744.27 (2) (1953).
182. Hughes v. Bunker, 76 So.2d 474 (Fla. 1954).
183. FLA. STAT. § 744.38 (1953).

ILLEGITIMACY

Pursuant to a stipulation of the parties, an original decree ordered the alleged father to pay for the expenses of birth, costs, attorneys fees, and $10.00 per week for the maintenance of a bastard child if it were born alive. Several months after the decree the alleged father made application for a reduction of the amount of weekly maintenance.[184] The Supreme Court said that there was no evidence of any changed conditions which would afford a basis for altering the decree. That if there had been any change, it was a change for the better in regard to the father's financial position and that under such circumstances it was a clear abuse of discretion to tamper with the provisions of the original decree which were conclusive as to the conditions then existing.[185]

A woman filed a complaint charging that a man was the father of a child which she bore out of wedlock. The woman relied mainly on the testimony of the defendant's former wife to substantiate her claim. This testimony, admitted by the lower court, was by the former wife when she and the man were living together and was with regard to communications allegedly made to her by her husband at the time when the martial relationship was in full force and effect between them. The court reversed, holding that it was reversable error for the admission of these privileged communications between husband and wife.[186]

In a case of first impression,[187] both under the new and old Bastardy Acts, a resident of New York filed suit (in 1954) against a Florida resident to obtain a decree declaring that the man was the father of her child, born out of wedlock in July, 1943, in New York. The defendant asserted that her claim was barred by lapse of time, both in New York and Florida. The court decided that a bastardy proceeding is barred, under both the new and old acts, if not brought within three years.[188]

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184. Under FLA. STAT. § 742.06 (1953).
185. Crosby v. Calhoun, 76 So.2d 297 (Fla. 1954).
186. Brown v. May, 76 So.2d 652 (Fla. 1954).
187. Wall v. Johnson, 78 So.2d 371, 373 (Fla. 1955).
188. In particular, the court stated:
> This court has not decided this question. We have no difficulty in holding, however, that a bastardy proceedings under the Old Act was subject to the three-year limitation period prescribed by Sub-Section 5 (a) of Section 95.11, Supra. As a liability "created by statute," it was within the expressed terms of the limitations act; and even though bastardy statutes are said to have for their purpose the enforcement of the putative father's duty to support his child . . . , the gist of the cause of the action —the main issue of the trial—is whether or not the accused is the father of the child! . . . What we have said as to bastardy proceedings under the Old Act is equally applicable to proceedings under the New Act, under the rule that a court of equity will apply the statute of limitations in an equity suit with the same substantial effect and same construction as it would receive in a court of law. . . Here, the Plaintiff's cause of action, if it had accrued under the Old Act, would have been barred at least as early as 1948. . . And while, as noted, we held in Rooney v. Teske, 61 So.2d 376 (Fla. 1952) supra, that the new act should be

In the second appearance of the above case,[189] the court held that when the alleged father, pursuant to the decree of the lower court, paid court costs, attorneys fees to the mother's attorneys, and twelve months support for the child, he was not entitled to restitution against the mother and her attorneys, absent proof of bad faith or fraud upon the part of the attorneys:

> . . . there is no showing in equity to support restitution, in fact under the showing made it would be most inequitable to require it. If ever a court was warranted in leaving a plaintiff where it found him to 'stew in his own juice,' that is it.

Juvenile Courts

In September, 1951, the Circuit Court for Polk County, Florida, entered a divorce decree which awarded custody of two minor children to the mother. In October, 1952, the Judge of the Juvenile and Domestic Relations Court of Polk County, Florida, took jurisdiction of the matter, found that the two children were dependent children and awarded their custody to another couple. The mother of the children filed a writ of prohibition to prohibit the Judge of the Juvenile Court from exercising jurisdiction over the matter. The relator claimed that jurisdiction had been vested in the Circuit Court for Polk County and that the court had not transferred the cause to the Juvenile Court and therefore the Judge of the Juvenile Court had no power or jurisdiction over the parties and over the subject matter. The Supreme Court stated:

> This contention is not tenable. For if the power of the respondent Judge to act in cases of juvenile dependency is derived from the fact that the juvenile court involved is granted "exclusive, original jurisdiction" to deal with dependent minors, as the controlling statute provides, (Chapter 27318, Laws of Fla., acts of 1951) the effect of the order rendered by the respondent Judge was to extinguish the power of the Circuit Court for Polk County to make further orders with reference to the custody of the minor children—at least until the respondent Judge entered some appropriate order relinquishing jurisdiction for that purpose. . . . On the other hand, if it can be assumed that under the circumstances shown by the record the Circuit Court for Polk County and the Juvenile Court had concurrent jurisdiction of the minor children, the fact that the Circuit Court acted first in the matter of their custody did not deprive the juvenile court of jurisdiction to act in respect to the issue of dependency and to rule accordingly. This is so far the reason that while, in general, a tribunal first exercising jurisdiction over a cause will ordinarily retain it exclusively for the purpose of deciding every issue or question properly arising in the case, there is nothing to prevent a court of concurrent jurisdiction from acting on the same subject matter at

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given a restropective operation, we do not think its retroactive effect should be extended to revive causes of action which were barred under the old act. . .

189. Wall v. Johnson, 80 So.2d 362 (Fla. 1955).

> the same time, if the parties involved fail, by timely spacing motion, to seek and procure a stay of proceedings in the subsequent action. . . . Therefore, whatever the correct decision as to whether jurisdiction exercised by the juvenile court is "exclusive and original," or is merely "concurrent" because of the pendency of the order made by the circuit court in the divorce proceeding—a matter that may not be decided at this time because the issue is not properly within the scope of this proceeding—it is clear that entering an adjudication that the children were dependent children within the purview of the applicable dependent and delinquent statutes, the respondent judge was acting in pursuance of jurisdiction reposed in hime by the statute.[190]

It is submitted that it would be wise for the legislature to enact an amendment to the Juvenile Court Act delimitting the jurisdictional areas between the circuit and juvenile courts.

Miscellaneous

Although a statute[191] removes the disabilities of nonage of all married female minors, another statute[192] makes it unlawful for any minor, whether or not such person's disabilities have been removed by marriage or otherwise, to be employed in any plane where alcoholic beverages are manufactured or sold.[193]

A father was charged in count one, with unlawful desertion of his minor children, and in count two, with unlawfully withholding means of support from said children. He pleaded guilty and was sentenced to one year on each count. He petitioned for a writ of habeas corpus and the court held that under the statute,[194] desertion and withholding the means of support constituted but one offense, hence the lower court was without jurisdiction to impose the one year consecutive sentence under count two, and the court further held that it also constituted double jeopardy.[195]

A father was tried and convicted on a two count information which charged first, that he unlawfully withheld support from his two minor children from August 15, 1952, to November 23, 1953, and secondly, that he did unlawfully desert his two minor children from August 15, 1953, to November 25, 1953. He was found guilty and sentenced to one year on each count. The court held that it appeared that the petitioners stood convicted of two different crimes, separated by one year in time. This excluded him from the rule in *Deal v. Mayo, supra,* where the imposition of two one year sentences arising from the same unlawful act was condemned.[196]

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190. *Ex rel* Hendricks v. Hunt, 70 So.2d 301 (Fla. 1954).
191. Fla. Stat. § 743.03 (1953).
192. Fla. Stat. § 450.071 (1953).
193. Hunter v. Bullington, 74 So.2d 673 (Fla. 1954).
194. Fla. Stat. § 856.04 (1953).
195. Deal v. Mayo, 76 So.2d 275 (Fla. 1954).
196. Brooker v. Mayo, 77 So.2d 854 (Fla. 1955).