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# CONFLICT OF LAWS\*

DAVID S. STERN\*\*

## INTRODUCTION

The field of law now under survey has often been said to be one of utter mystery and terrifying uncertainty to judge and legal practitioner alike,<sup>1</sup> cutting across jurisdictional, procedural and substantive fields of law with frank abandon. To make things worse it is a field strewn with semantic quicksands and bordered by many misty, grey forests inhabited by federal-state dichotomies and ruled over by forbidding constitutional rules. In the very center of this fabled land is the tree of territorial sovereignty which houses the central philosophical difficulty, exclusiveness. This charming paradox has enchanted the theorists who would solve the problem. If each sovereign power is total and exclusive within his territory then how do laws and rules and judgments and decrees from other places come to operate within his realm? They cannot do so directly for that would rob him of his omnipotence and yet they do. There are other lesser problems which we will study but before going to that task let us state a fundamental bias. I take as the main purpose of the conflict of laws not uniformity as such but rather the maximum satisfaction of the sound expectations of the parties consistent with the genuine public policy of the forum.

The conflict of laws establishes the limits of power-assertion of a given state, and states general rules for the finding of the appropriate law and the application of the right amount of that law in situations where a tribunal is faced with a case involving elements, the legal effect of which should not be governed by the local law.

Our system of administration of justice is sufficiently complex to have brought within what is generally considered the conflict of laws a large number of non-traditional subjects. The most important of these stem from the federal nature of our government and deal with the

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\*The Survey is designed to cover the cases of the Florida courts contained in Volumes 49 So.2d 1 (1950) through 68 So.2d 927 (1954) and 1 Fla. Supp. 1 (1950) through 3 Fla. Supp. 210 (1952). It considers the changes made in the Florida Statutes by the General Laws of 1951 and 1953. Since it is the first time, certain earlier cases are discussed for reasons of background and continuity. The author regrets that more of this could not have been done. The views and biases where they appear are his and do not reflect in any fashion either those of the University of Miami or the Miami Law Quarterly. The same must be said of the errors or omissions.

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1. The same might be said of the professors, but among this group are some who purport to have found the magic wand with which to pierce the veil of mystery. They stand ready at all times to lead their followers into the promised land. The trouble in the past has been that not all roads lead to the same haven.

control of the field by federal constitutional standards and the difficulties of a dual system of courts.

Jurisdiction, in the sense of power-assertion, must be considered in two general areas: the legislative and the judicial. Each in turn may affect persons, natural and juridical; things, real, personal, tangible and intangible; and all kinds of rights. Overall is the control by the federal and state constitutions of the exercise of power in any particular category. This exercise of power may be absolutely denied. It may be present but withheld voluntarily as in the *forum non conveniens* area. It may exist but be used concurrently as with the enforcement of foreign judgments within the comity area. Finally, when it is asserted, the foreign law may be voluntarily used or compulsively used as in the federal diversity jurisdiction.

This survey must be taken to be more a raw material gathering expedition than anything else. Little attempt has been made to subject the authorities found, whether judicial or legislative, to a searching academic type analysis. In this field it is well enough that one be informed; that alone is often better than that one be learned too. In this connection comment must be made on the quality of the court and the bar in this field. The former inevitably reflects the labor and diligence of the latter. If the court is burdened, perhaps senselessly as it is in Florida, the bar which practices before it must work harder.

#### THE EXERCISE OF CONFLICT OF LAWS JURISDICTION

*In general.*—The purpose of this section will be to bring together certain general observations and particular new rules having to do with the administration in Florida of this field of law. Jurisdiction over persons based on presence and domicile is asserted<sup>2</sup> subject to the normal limitations of fraud<sup>3</sup> and immunity.<sup>4</sup> Jurisdiction over commercial activities has been expanded to the constitutional limits by recent statutes<sup>5</sup> which

2. Thus, for example, *Campbell v. Campbell*, 57 So.2d 34 (Fla. 1952), which held that a regular army officer could not establish domicile for purposes of divorce. *But cf. Gipson v. Gipson*, 10 So.2d 82 (Fla. 1942) in which a soldier ordered to Florida who registered to vote was found domiciled. For the normal rule see *McIntyre v. McIntyre*, 53 So.2d 824 (Fla. 1951), one of the recent cases in a long line, where W's removal to another state without more was held not to rebut a presumption that her domicile remains that of H. And see the curious case of *Harmon v. Harmon*, 40 So.2d 209 (Fla. 1949) commented on in another aspect in 4 *MIAMI L.Q.* 59, 69 (1950). In this case a "check pilot" transferred to Atlanta stated he had no intent to return. Held, this referred to his wife and not Miami.

3. See the authorities cited in the leading case of *Wyman v. Newhouse*, 93 F.2d 313 (2d Cir. 1937). See also the note in 115 *A.L.R.* 460 which reviews the validity of service fraudulently procured in Florida.

4. The most recent case is *State ex rel. Ivey v. Circuit Court in and for the 11th Judicial Circuit*, 51 So.2d 792 (Fla. 1951) reaffirming the right as extended to witnesses. This broad rule has been in existence since *Rorick v. Chancey*, 130 Fla. 442, 178 So. 112 (1937).

5. Such as the foreign insurers act, now *FLA. STAT. § 625.28 et seq.* (1953), and the foreign businessman act, now *FLA. STAT. § 47.16* (1953).

will be discussed in detail below. Florida has always had great concern with the field of domestic relations. This concern has involved the court in more than the normal number of cases dealing with full faith and credit, comity and other devices<sup>6</sup> designed to regulate the effect of judgments obtained in other jurisdictions.

The 1949 legislature changed the rule in the state with regard to the effect given foreign law by enacting the Uniform Judicial Notice Act.<sup>7</sup> Changes were also made in the two legislative sessions under review with regard to adoption, support of illegitimate children and support of dependents.<sup>8</sup>

No startling developments occurred in the area of jurisdiction over things and relationships in the period under consideration. The legislature modified the procedure for title registration in the automobile field<sup>9</sup> and the court presaged interesting innovations in the administration of estates' field.<sup>10</sup>

*Limitations on legislative jurisdiction.*—Two recent federal decisions<sup>11</sup> had occasion to consider the validity of a Florida statute,<sup>12</sup> commonly known as the Florida Unauthorized Insurer's Process Act. These cases involve the construction of a statutory extension of an earlier doctrine

6. These devices are collateral estoppel and *res judicata*, discussed below at p. 226 with regard to the *Gordon* and *Riehl* cases.

7. FLA. STAT. § 92.031 (1953). Of special interest in view of the progressive construction given to a new act see *Peterson v. Paoli*, 44 So.2d 639 (1950) where notice was taken of New York law and construction of same even in advance of action by the courts of that state. On this case, see Comment, 4 MIAMI L.Q. 497, 499 (1950), 16 A.L.R.2d 1094 and 23 A.L.R.2d 1441, 1447. See also Comment, 3 FLA. L. REV. 94 (1950).

8. Fla. Laws 1953, c. 28223, amendatory of FLA. STAT. 731.30 (1951). In determining the validity of an adoption the Act obligates the court to look to the laws of any state or country where the act took place. This new right is cumulative of the already existing rights to inherit from, but not through, both adopting and natural parents, FLA. STAT. § 72.22 (1953), and see the interesting Adoption of an Adult Act, FLA. STAT. §§ 72.31-29 (1953). On support of illegitimate children see The New Bastardy Act, FLA. STAT. § 742.01, *et seq.* (1953). The Uniform Support of Dependents Act is contained in Fla. Laws 1953, c. 27996. For a general observation see Comment, 6 FLA. L. REV. 244 (1953). Several difficult constructional questions are presented by this law and the scope it will be given will depend in large measure on the attitude of the court. Its first construction came, merely in an allusion, in *Waterhouse v. Pringle*, 68 So.2d 599 (Fla. 1953). Further comment is withheld pending more significant action by the court.

9. See discussion of Fla. Laws 1953, c. 28184 which substantially amended FLA. STAT. c. 319 (1951), *infra* p. 241 *et seq.*

10. In its novel holding in *Beverly Beach Properties v. Nelson*, 68 So.2d 604 (Fla. 1953) which is the latest in a series of cases discussing full faith and credit in the probate field. For earlier stages in this legal battle see *Miller v. Nelson*, 160 Fla. 410, 35 So.2d 288 (1948) and *Nelson v. Beverly Beach Properties*, 47 So.2d 310 (Fla. 1951). That the review is being sought in the United States Supreme Court, see *The Miami Herald*, Jan. 17, 1954 at p. 22a.

11. *Parmalee v. Commercial Travelers Mut. Acc. Ass'n*, 206 F.2d 523 (5th Cir. 1953), and *Parmalee v. Iowa State Traveling Men's Ass'n*, 206 F.2d 518 (5th Cir. 1953), hereinafter referred to as the *Parmalee* cases.

12. FLA. STAT. §§ 665.28-665.33 (1951). The constitutionality of statutes in this general field was upheld in *Travelers' Health Ass'n v. Virginia*, 339 U.S. 643 (1950); Note, 5 MIAMI L.Q. 149 (1951).

which recognized that the insurance industry has always been peculiarly sensitive to state regulation. This is particularly true after the passage of the McCarran Act,<sup>13</sup> as the court points out in its majority opinion in the first case.

. . . by the passage of the McCarran Act . . . Congress has given support to state systems for regulating the business of insurance. It can not be disputed that Florida has the power, within constitutional bounds, to prescribe the terms upon which insurance may be placed and kept in force upon its residents. We are without the benefit of any decision of the Florida courts construing and applying the terms of the Florida statute here involved. We attempt no construction of the statute further than is necessary for the present decision. It seems clear, however, that as to policies held by residents of the state which are issued and delivered to them in the state by insurers not authorized to do business there, the Legislature in the exercise of its power to protect such residents, established and defined, for the purpose of the statute, what constitutes doing business in the state. We construe the legislation to apply only to policies of insurance delivered in Florida to Florida residents.<sup>14</sup>

This was specifically underlined in the second *Parmalee* case in which the court refused to permit jurisdiction over the defendant insurer based on issuance of a policy in Kentucky and before the effective date of the enactment. Much support has been given to the point of view taken in these present cases. Many years earlier the Supreme Court, in *American Fire Insurance Company v. King Lumber & Mfg. Co.*,<sup>15</sup> found that the Florida legislature could constitutionally enact the same type provision<sup>16</sup> where an insurance company had an agent within the state. In answer to the argument that the section as construed would violate the full faith and credit clause of the constitution in that it would deny such faith and credit to the laws of the state of Pennsylvania and that it would violate the privilege and immunities' clause, the due process clause and the equal protection clause of the 14th Amendment, the Court found there was nothing unreasonable about the Florida statute, since it did not attempt to invade Pennsylvania and exercise control there. It stayed strictly at home, only attempting to regulate the insurance company when it comes to the state to do business with the citizens of the state and their property.

Frequently, the legislature seeks to bring a transaction within the orbit of regulation by giving a special definition to a conflict of laws term such as "place of making" or an internal law term as "agent."<sup>17</sup>

13. 15 U.S.C. § 1011 *et seq.* (1946).

14. 206 F.2d 518, 521-22 (1953).

15. 250 U.S. 2 (1919), *affirming* 74 Fla. 130, 77 So. 168 (1918).

16. Now FLA. STAT. §§ 626.02, 626.03 (1951). Then FLA. GEN. STAT. §§ 2765, 2777 (1917). Subsequently C.G.L. § 6222 (1929).

17. See comment to principal case in CHEATHAM, GOODRICH, GRISWOLD AND REESE, *CASES AND MATERIALS ON CONFLICT OF LAWS*, 521-22 (3d ed. 1951).

Attempts on the part of legislatures to extend control by these means have been upheld by the Supreme Court of the United States as in the instant case, but where they appear to be unreasonable have been overthrown.<sup>18</sup> The doctrine originally laid down by *Home Insurance Co. v. Dick*<sup>19</sup> was that the normal rule, that to protect its interests a state may not be required to enforce in its own courts terms of an insurance policy subject to the laws of another state where such enforcement will conflict with the public policy of the state of the forum, does not operate when the contract was made elsewhere and neither the original insured nor the company are residents of the state where the property insured was located. Where all of the elements are absent, the state can be subjected to constitutional control over both characterization and choice of law. In *Griffin v. McCoach*<sup>20</sup> some of the elements were present and the court was permitted to regulate on the basis of its local policy.<sup>21</sup>

This localizing technique, used by the legislatures, is also frequently utilized by the courts. In a case<sup>22</sup> involving the construction of the Homestead Tax Exemption,<sup>23</sup> the court defined the phrase "citizen of and resides in the State of Florida" as excluding aliens under the United States Constitutional terminology stating, "The court is of the opinion that the phrase [in question] was intended to comprehend only such persons as under Section 1 of the Fourteenth Amendment to the United States Constitution would be entitled to claim citizenship in the state of Florida in addition to residing in the state."<sup>24</sup> (Brackets supplied).

Ellis, P. J., dissented in an opinion which stated, among other things, that he felt that the construction adopted by the majority of the court ignored the rights of the state in virtue of its sovereignty to confer citizenship within its own limits where the rights incident to such a status are not those of the citizenship mentioned in the Federal Constitution. He stated that the term "citizen" as used in the 1934 Amendment has no reference to allegiance. It is, as used in the amendment, almost convertible with "inhabitant." The term certainly has no implication of a political or civil right; it merely means permanent resident and inhabitant of the state.

While the term 'citizenship' is not synonymous with 'residence,' the two words 'citizen' and 'resides,' when combined in the phrase 'citizen of and resides in the State of Florida,' convey the idea of permanent residence in Florida—an inhabitant of the state residing in it.<sup>25</sup>

18. *Hartford Accident and Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934).

19. 281 U.S. 397 (1930).

20. 313 U.S. 498 (1941).

21. *Cf. Kryger v. Wilson*, 242 U.S. 171 (1916) where the state was entitled to regulate it in a fashion which it otherwise might not have done on the basis of the fact that the property was present within the boundaries of the state.

22. *Stewart v. State ex rel. Doleimascolo*, 119 Fla. 117, 161 So. 378 (1935).

23. FLA. CONST. Art. 10, § 7 as amended in 1934.

24. 161 So. 378, 379 (1935).

25. *Id.* at 380.

He then went on to point out that this view would preserve the amendment in question from attack, for all those who felt that it was unwise to abandon completely the separate grounds of state citizenship and federal citizenship.<sup>26</sup>

In addition to the *Parmalee* cases another recent Florida decision has appeared construing the extent of legislative jurisdiction.<sup>27</sup> The *Weber* case was an original petition in prohibition alleging that the Circuit Court of Polk County lacked jurisdiction over the person and therefore lacked jurisdiction to proceed in the cause pending therein. It involved the non-resident businessman statute,<sup>28</sup> and turns upon the construction of the words "business or business venture." The petitioners here had been non-resident operators of an orange grove for quite some time. They entered into a contract with the relator, Weber, for the sale of the grove subject to the usual commission. The statute, as applied to them, was attacked as being unconstitutional in that it violated both the due process and the equal protection of the laws' sections of the Federal Constitution.

Both the majority and the dissenting opinions discuss the leading cases<sup>29</sup> and authorities, but it is submitted that the handling of these authorities by the dissent is much more persuasive.

The majority<sup>30</sup> of the court held that the parties in question were

26. As a matter of historical interest, the section was again amended at the 1938 general election to read: "Every person who has the legal title or beneficial title in equity to real property in the state and who resides thereon and in good faith makes the same his or her permanent home shall be entitled, etc." In *Smith v. Voight*, 158 Fla. 366, 28 So.2d 426 (1946), the court held that the purpose of the change in language was obviously to reinstate the rule of the dissenting judge [Ellis] in the *Steuart* case and perhaps the original intent of the 1934 amendment. They said: "*Steuart v. State* . . . was decided under the superseded section and is of no help here other than to obviously signify a purpose in the change noted in the later (1938) amendment."

27. *State ex rel. Weber v. Register*, 67 So.2d 619 (Fla. 1953). In another case the same statute was applied with greater soundness, see *Chippy Furniture v. Borochoff*, 2 Fla. Supp. 165, *aff'd, id.* at 166, *cert. denied*, 64 So.2d 794 (1952).

28. Fla. Laws 1951, c. 26657, now FLA. STAT. § 47.16 (1953).

Omitting the formal parts not pertinent to the case the statute reads:

The acceptance by any person or persons, individually, or associated together as a copartnership or any other form or type of association . . . of the privilege extended by law to nonresidents and others to operate, conduct, engage in, or carry on a business or business venture in the State of Florida . . . shall be deemed equivalent to an appointment by such persons and foreign corporations of the secretary of state of the State of Florida as the agent of such persons or foreign corporations upon whom may be served all lawful process in any action, suit or proceeding against them, or either of them, arising out of any transaction or operation connected with or incidental to such business venture . . .

29. *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Hess v. Pavloski*, 274 U.S. 352 (1927); *Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Sugg v. Hendrix*, 142 F.2d 740 (5th Cir. 1944).

30. The majority opinion was written by Hobson, J., with Roberts, C.J., Terrell and Mathews, J.J., concurring and Thomas, J., agreed to discharge the writ of prohibition. Justice Sebring joined Drew, J., in the dissent.

not conducting a business but that the offer to sell the property was a "business venture" within the meaning of the statute. They said:

One may engage in a 'business venture' without operating, conducting, engaging in or carrying on 'a business.' . . . the act of listing the property for sale amounted to a transaction 'connected with or incidental to' the 'business venture' which the Webers initiated when they acquired the grove.<sup>31</sup>

In applying these standards the majority makes the error of equating one single, isolated transaction with that consistent course of conduct which has always been required in order to give *in personam* jurisdiction based on substituted service on a defendant. The relator took the position that to be valid this statute must embody one of those extraordinary subject matters falling within the police power of the state. The majority of the court destroys this idea completely and states that it is perfectly permissible to have such service because, in effect, the statute guarantees due process by providing for notice, a reasonable opportunity to defend, etc. Mere recitation of such provisions does not bring the subject-matter within state power, if it bears no relation to state-interest. One can doubt if, even in Florida, the protection of the real-estate vending industry is such a matter. They make the further error that actual notice, because it existed in this case, is sufficient constitutionally to satisfy procedural due process.

Justice Drew, in his dissenting opinion, after making a careful semantical analysis of the statute and concluding that the statute was directed to a more or less continued activity, makes several very cogent observations. He first points out that in *Crockin v. Boston Store of Ft. Myers, Inc.*,<sup>32</sup> the court held that a single or isolated transaction did not constitute "doing business" within the meaning of a statute<sup>33</sup> very similar in meaning to the statute here in question. He also emphasizes, and I think in this he is probably far closer to the modern trend than the majority, the language from *International Shoe Company v. Washington*<sup>34</sup> that:

the activities carried on in behalf of appellant in the State of Washington were *neither irregular nor casual*. They were *systematic and continuous* throughout the years in question. They resulted in a larger volume of interstate business, *in the course of which appellant received the benefits and protection of the laws of the state, . . . It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be*

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31. 67 So.2d 619, 620 (Fla. 1953).

32. 137 Fla. 853, 188 So. 853 (1939).

33. FLA. STAT. § 613.01 (1951).

34. 326 U.S. 310 (1945).



*actual \* \* \* Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit.*<sup>35</sup>

What is important about this distinction is that the power-assertion principle demands something either affecting the police powers, if it is a single transaction, or a continuous series of transactions if it is without the police power so that the state has a vested interest in the conduct of the particular party. To lose sight of these controls creates a very dangerous<sup>36</sup> situation as Justice Drew pointed out:

It is my view that to extend the terms of the act to the point that is done in the majority opinion, subjects substantially every non-resident of Florida to the jurisdiction of the Florida Courts in any action which might arise against them in this State. If that is the effect, I feel the act offends Section 2 of Article IV of the Constitution of the United States, which provides that citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. It is my view, as stated by the late Judge Curtis Waller in *Sugg v. Hendrix*, . . .<sup>37</sup> in speaking of a similar Mississippi act, 'If the regulation be one for the protection of the health, safety, and welfare of those within its borders, rather than a mere attempt to extend the jurisdiction of its courts over citizens beyond its borders, the state is not without power to legislate to that end.' [142 F.2d 743] (Italics supplied).<sup>38</sup>

*Lack of jurisdiction of person or subject matter.*—Another recent case raises interesting questions in the already troubled area of res judicata in Florida. This case, *Kessler v. McGlone*,<sup>39</sup> began with three attempted actions for divorce, brought by W against H in Virginia, each of which was discontinued. She thereupon moved to Florida and established a domicile. The bona fides of this action were not attacked. Her decree of divorce was granted in 1946, and she died shortly thereafter. H thereupon sued the executor of W's estate in Virginia for his statutory portion as the surviving spouse. The executor defended on the ground that the Florida divorce which W had secured was valid.

After a full litigation on the merits the court granted full faith and credit to the Florida decree, holding H not entitled to take.<sup>40</sup>

35. *State ex rel. Weber v. Register*, 67 So.2d 619, 624-625 (Fla. 1953). (Emphasis and asterisked omissions supplied by the court).

36. The extent of the danger may be seen in *McGriff v. Antell*, 256 P.2d 703 (Utah 1953) by the contention, albeit rejected by the Utah Supreme Court, that television advertising without more was "doing business" so as to subject the advertiser to the type of control approved in the principal case.

37. See Comment, 3 MIAMI L.Q. 623, 625 (1949).

38. 67 So.2d 619, 626 (Fla. 1953).

39. 55 So.2d 791 (Fla. 1951), which affirms Judge Milledge's opinion in 1 Fla. Supp. 118 (1950).

40. On appeal, affirmed by both the intermediate appellate and the Virginia Supreme Court, 187 Vt. lxii, 46 S.E.2d 1, cert. denied, 335 U.S. 860, rehearing denied, id. at 894 (1948).

H then journeyed to Florida and brought a bill in the nature of a bill of review in the original court alleging that the decree had been secured by fraud. Again the executor defended, this time on the grounds of full faith and credit, *res judicata* and estoppel. Without deciding the question of the personal incompetence of the plaintiff to raise the particular objection, the circuit court set aside and vacated the decree granting the divorce. The reason given by the court was that the wife, while she may have been a perfectly valid and bona fide domiciliary of Florida, had fraudulently given an incorrect address for H. H had therefore not had that notice<sup>41</sup> which is required by the due process clause and the divorce was for that reason void *ab initio*.

The *per curiam* affirmance stated merely, "affirmed under the authority of *Mabson v. Mabson*."<sup>42</sup>

The *Mabson* case was decided at a time when the courts still talked in such archaic terms as *matrimonial domicile*.<sup>43</sup> H was domiciled in Florida, W was in New York and was served by publication.<sup>44</sup> In due time H secured his final decree. W also instituted suit in New York for separate maintenance and support. H was served personally in the New York litigation and subsequently W's bill was dismissed by the New York court on the ground that ". . . the matrimonial domicile of the parties was in Florida . . . , that the Florida court had so held by granting to the husband a final decree of divorce, by reason of which the New York suit between the same parties would not lie."<sup>45</sup>

Thereafter W brought her bill in the nature of a bill of review to attack the divorce decree which had been rendered in favor of H against W. She predicated her attack upon the authority of *Shrader v. Shrader*.<sup>46</sup>

41. Both the domicile and notice requirements of FLA. STAT. § 48.01 (1953) have been held to be jurisdictional on numerous occasions. See cases F.S.A. § 48.01 *et seq.* (1953).

42. 104 Fla. 162, 140 So. 801 (1932). The court might have given some serious consideration to several vexatious questions. What is the limit of the equity power to set aside decrees? That such a limit exists has been reaffirmed by the court in *Edwards v. Edwards*, 67 So.2d 661 (Fla. 1953), a case very similar to the one under discussion. What effect does such a denial of the faith and credit given in another state to a Florida decree have on future Florida decrees? The publicity attendant on the recent "exposé" of the divorce practice can have an even more serious national impact if the two phenomena be taken together.

Is there any situation in which the court cannot exercise these extraordinary powers? As by reliance, estoppel! It would be extremely interesting to follow this case through to its logical conclusion. Suppose that H returned to Virginia. Will he be met there with a plea of *res judicata*? And would that, of course, bar him from asserting that the decree which Virginia formerly gave full faith and credit to had now been set aside as null and void? Is Virginia required to adopt the Florida interpretation of its own law? See *Johnson v. Muelburger*, 340 U.S. 581 (1951). Perhaps if Virginia refuses H, the Supreme Court will grant certiorari the next time.

43. On the demise of this concept see *Williams v. North Carolina (I & II)*, 317 U.S. 287 (1942) and 325 U.S. 226 (1945).

44. Under C.G.L. § 4895, now FLA. STAT. § 48.01 (1953).

45. *Aff'd*, 251 N.Y. 584, 168 N.E. 436, *affirming* 225 App. Div. 744, 232 N.Y. Supp. 802 (1st Dep't 1929).

46. 36 Fla. 502, 18 So. 672 (1895).

In that case, however, there had been a total failure of jurisdiction by not fulfilling the essential requirements of the constructive service statute. The court properly held that where a party had not had an opportunity to appear or plead, he might bring a bill to set aside the void decree.

In the *Mabson* case the husband filed a plea setting up the defense, in effect, of *res judicata*.<sup>47</sup> The court stated the essential point and a most vital one:

We are not favorably impressed with the contention that the plea was properly held good as a plea of *res judicata*. Many cases have been cited to support it on that basis, but in our opinion these cases are inapplicable to a situation such as we have here . . . .<sup>48</sup> In all of the cases cited, the proposition involved was whether or not a judgment of the court of one state which had been rendered to enforce a judgment of the court of another state could, when sued upon in the courts of a third state, be attacked for grounds which would have rendered the judgment unenforceable in the second state. No such situation is involved here. This is a suit filed in a Florida court setting up the contention that the very court in which it was filed had previously rendered a void decree against the complainant . . . . *Such a proceeding is not a collateral attack but is a direct attack upon the decree . . . .* The fact that an attempt has been made to collaterally attack the [Florida] decree . . . in a proceeding between the same parties in the state of New York in which proceeding the courts of the state of New York had adjudged that the Florida decree was not subject to such collateral attack cannot be said to be *res judicata* of a controversy in the Florida courts between the same parties respecting the Florida court's jurisdiction in the previous suit.

*This Court is committed to the doctrine that the courts of this state have a right to determine whether judgments or decrees which have been entered by them on constructive service were validly entered . . . .*

The right of a Florida court to determine whether or not its own jurisdiction has been properly invoked and exercised cannot be barred by what has been determined by the courts of any other state. The courts of this state *retain at all times jurisdiction* to entertain a bill or other proceeding making a direct attack upon the validity of decrees entered here, so *whatever may have been decided in some other state in a collateral proceeding*, whether between the same parties or not, *would constitute no bar* to a proceeding in the courts of this state in which the courts of this state are called upon to determine for themselves their own jurisdiction and the regularity of their own judgments.<sup>49</sup>

47. The court's precise language is "here denominated as a plea of *res judicata*," 104 Fla. 162, 140 So. 801, 803 (1932). The lower court had sustained the plea on two grounds, that of *res judicata* and as a bar to the suit itself on equitable grounds.

48. The court cited, among other important cases, *Roche v. McDonald*, 275 U.S. 449 (1928); *Fauntleroy v. Lum*, 210 U.S. 230 (1908); and *Dobson v. Pearce*, 12 N.Y. 156 (1854). All of these cases involved a judgment reviving a judgment.

49. 40 So. 801, 803-4 (Miss. 1906). (Italics supplied). The court then proceeded to decide the case on the ground that even if this is not *res judicata* still the wife

The holding in the *Mabson* case and the dicta quoted are sound but the two cases are not in *pari materia*.<sup>50</sup> In *Mabson* both parties were still alive and able to testify as to their conduct. In *Kessler* there was reliance of the most definitive type, the wife had died.

*Extraterritorial jurisdiction.*—Another extremely interesting case, *McCord v. Smith*,<sup>51</sup> raised questions concerning full faith and credit as well as the construction of Florida probate law. Appellants brought actions for injuries caused to them by appellee's decedent, one Oscar Smith, in Iowa. On petition of the executor, appellee herein, the two cases were consolidated and removed to the federal district court, where they were litigated to judgment for plaintiffs, appellants here.

Proof of claim was then filed in probate and, after various mesne proceedings,<sup>52</sup> this appeal resulted. The court below was of the opinion that the language of the statute in question<sup>53</sup> meant any *Florida* court of competent jurisdiction. The Supreme Court felt that "any court" should not be territorially limited<sup>54</sup> since the cardinal purpose of the statute was to facilitate an orderly and expeditious settlement of estates. The intent of the legislature was to require that the claim be filed either in the office of the county judge or presented by service of process in an action against the personal representative. The purpose for this is to make certain that notice to the creditors and the personal representative would be given. If the second method is followed, as in the present case,<sup>55</sup> the law requires the administrator or executor to file a suggestion of the pendency of the suit in the office of the county judge.

Should the personal representative be derelict in his duties it is no concern of the creditor. The object to be accomplished is fulfilled as completely in the instance of a claim determined in

had so estopped herself as not to be able to attack the decree. It seems to me that this alternative ground destroys a great deal of the force of the reasoning of the court as to its basic point.

50. Nor does the court, in its *per curiam*, tell us on which it relies, holding or dicta and if the latter on which of the many.

51. 43 So.2d 704 (Fla. 1949).

52. Proceeding below in the County Judge's Court, Orange County. The Executor filed objections and demurred. The court sustained his demurrer to claimant's pleas.

53. FLA. STAT. § 733.16 (1951), after making general provisions for an eight month non-claim period, sets forth in (1)b the following:

Any suit heretofore commenced and in which service of process was had upon the personal representative within the period hereinabove specified, (eight-months from first publication) and which may now be pending in any court against the personal representative . . . (Italics supplied).

54. In this they followed *Brooks v. Federal Land Bank*, 106 Fla. 412, 143 So. 749 (1932) where they had held another statute valid insofar as it had extra-territorial effects reasoning that, since there was no discrimination between residents and non-residents, that statute ought to be interpreted in such a way as to give it the most equitable effect possible. But they said it should be limited to "every court in a jurisdiction wherein a statute similar to our statute §§ 47.29 and 47.30 . . . and which does not violate organic law, exists." For similar construction of "any court" in the support field see *Lopez v. Avery*, 66 So.2d 689 (Fla. 1953), *infra* note 72.

55. FLA. STAT. § 733.16(1)(a) (1951).

another state as in one wherein the claim was adjudicated in this jurisdiction.

We do not believe it necessary to cite authority for the well established general rule recognized in this State that acceptance of service is as effective as service of process upon the defendant in personam.

Our Statute does not require personal service of process upon the executor. Consequently, we believe it was the legislative intent to encompass each and every type of service which does not offend the constitutional requirement of 'due process,' and is legally sufficient as a basis for a judgment or decree in personam.<sup>56</sup>

The court then made this important statement concerning the scope of full faith and credit.

If our conclusion be construed as giving extraterritorial application to [the] chapter . . . .<sup>57</sup> to the extent indicated, we hold that it should and does have extra territorial application . . . . The Statute does not attempt to make a claim which arose in a sister state or the claim of a non-resident—per se—invalid and we see no reason why any prejudice should exist (with reference to the presentation of a claim) against a non-resident creditor whose claim was adjudicated in a court of another state. Indeed, under the full faith and credit clause of the Federal Constitution we are required to recognize such judgments. It seems clear, therefore, that we should not give to the Statute a restricted interpretation which would result in a failure to treat all creditors alike. Such is not the policy of the law.<sup>58</sup>

*Extraterritoriality.*—The Conflict of Laws, particularly in its choice-of-law area, is one of the more important control mechanisms in our federal-state system. Lawyers are always well-advised to have the entire field in mind when litigating problems, but the importance of a careful study of the extraterritorial effects of proceedings had in Florida can never be underestimated.<sup>59</sup> Even in the field of ordinary interstate litigation,<sup>60</sup> it is obvious that lawyers practicing before the Supreme Court of Florida (and sometimes the court itself) are unmindful of these consequences.

56. 43 So.2d 704, 708 (Fla. 1949). A fortiori where not only has there been service but participation. Some limitations are placed on the doctrine. Thus the court expressed no opinion "as to what our conclusion might be in a case wherein attempted service of process was not recognized, accepted and treated by the executor as valid and binding."

57. Fla. Laws 1947, c. 23970.

58. 43 So.2d 704, 708 (Fla. 1951). (Italics supplied).

59. It is true that this same caution must be exercised in the legislative field and for the same reasons. Florida is a jurisdiction which must preoccupy itself more with the problems inherent in the migratory character of mid-twentieth century life than perhaps any other state. For one attempt to resolve such problems see Stern & Troetschel, *The Role of Modern Arbitration in the Progressive Development of Florida Law*, 7 MIAMI L.Q. 205 (1953).

60. The abnormal situations created by large numbers of non-national transients must also be remembered, but planning in this area is even more difficult. Cf. *Pawley v. Pawley*, 46 So.2d 464 (Fla. 1950).

*Johnson v. Johnson* is an excellent example.<sup>61</sup> W secured a divorce *a mensa et thoro* in Maryland and was awarded alimony and support for an infant child. Two years later H obtained a decree of divorce in Dade County. No petition for alimony was made at the time of granting the original decree but in a supplemental decree the court stated:<sup>62</sup>

. . . nothing in this decree shall be held or construed to relieve the plaintiff in any manner from complying with the support and maintenance provisions of that certain decree rendered by the Circuit Court . . . of Baltimore City, State of Maryland . . . .

H then petitioned the Maryland court to amend its decree eliminating the alimony award in view of the Florida divorce decree.<sup>63</sup>

In the previous opinion<sup>64</sup> the court had pointed out that the husband's domicile in Florida was not questioned, and that the wife had appeared generally, so that a question of "the divisible-divorce doctrine"<sup>65</sup> was not presented here. Insofar as the technical choice of law question was concerned, the Maryland court appeared disposed to follow the results reached in the *Lynn* case.<sup>66</sup>

Having thus made its choice of law, the court makes it abundantly clear that the alimony provision could not, under Maryland law, survive the dissolution of the marriage by the Florida court.<sup>67</sup> The point which must be stressed is this:

"That [Florida] decree was obviously based on the erroneous assumption that the obligation to pay alimony in Maryland would

61. 92 A.2d 330 (Md. 1953). It must be made clear that no individual criticism of the attorneys involved in this case is intended. The case is one of many and as the Florida record is bare, extenuating circumstances may have existed. For a case illustrating dual litigation see *Kleinschmidt v. Kleinschmidt*, 66 So.2d 815 (Fla. 1953) and the same case 343 Ill. App. 539, 99 N.E.2d 623 (1953).

62. 97 A.2d 330, 331 (Md. 1953).

63. W meanwhile appealed the original Florida decree which was affirmed, without opinion, 49 So.2d 340 (Fla. 1951), cert. denied, 342 U.S. 941 (1952).

64. 86 A.2d 520 (Md. 1951), in which the same court had reversed an increase in maintenance award entered by the lower court.

65. *Estin v. Estin*, 334 U.S. 541 (1948). In the same earlier opinion the court also cited *Lynn v. Lynn*, 302 N.Y. 193, 97 N.E.2d 748 (1951), wherein the New York Court of Appeals had held that a general appearance Nevada decree in which the wife had failed to ask for alimony and the court had failed to grant it superseded the alimony provisions of a prior separation decree obtained by W in New York.

66. See note 65 *supra*; the New York court felt that the effect of the Nevada decree as such should be governed by Nevada law, but that its consequences with regard to the New York separate maintenance award should be governed by a New York law.

67. See the various Maryland authorities, 97 A.2d 330, 332 (Md. 1953). On prior appeal, 86 A.2d 520, 523 (Md. 1952) the court had stated:

If the Maryland court actually possesses any of the jurisdiction which seems to be reserved to it in the Florida decree, obviously neither the Florida decree nor the full faith and credit clause prevents the Maryland Court from exercising such jurisdiction. If, however, under Maryland law the Maryland Court has no authority to act as permitted under the Florida decree, then obviously the Florida Court has no power to confer jurisdiction upon the Maryland Court, and the Maryland Court has no right or duty, under the full faith and credit clause or otherwise, to exercise such jurisdiction.

survive a dissolution of the marriage in Florida. Under the laws of some states the obligation would survive, but we have held otherwise. . . . On that question the Maryland law must control, despite the declaration of the Florida Court disavowing any intentions to relieve the plaintiff from his obligations under the Maryland decree. It may be noted that the supplemental decree did not purport to impose an obligation to pay alimony in Florida where it was not asked for. It may well be that the Florida Court had, and may still have, authority to award alimony in its own right.<sup>68</sup>

The misconstruction of Maryland law was most unfortunate in this case. While there may be a possibility of the continuing right in Florida, still the most efficacious fashion in which this particular wife could have been protected has undoubtedly been lost.

In the field of family law, it is often very difficult to determine exactly which proceedings are subject to constitutional control and where the lines will be drawn within those proceedings which are *partially* subject to that control.<sup>69</sup> For this reason the opposite result to that in *Johnson v. Johnson* was reached in *Lopez v. Avery*,<sup>70</sup> where the court exercised its admitted power to vary a support decree made in another jurisdiction.

H brought suit for divorce in Missouri. W, who was then, and still is, a domiciliary of Florida, personally defended the suit. During the litigation an agreement between H and W was reached which provided for a property settlement and \$100 monthly support for the child. The agreement was approved and incorporated in the final decree of the Missouri court.

Several years later plaintiff (wife) filed a complaint in Florida alleging inadequacy of the amount provided for in the agreement. At the time H was in Florida on vacation and was served personally. The Circuit Court for Duval County granted H's second motion to dismiss on the ground of lack of jurisdiction over the cause of action. On appeal the Supreme Court reversed:

Broadly stated, the rule in respect to foreign judgments and decrees is that one state may not modify or alter the judgment or decree of a sister state, because . . . full faith and credit must be given to it as it stands. However, . . . it will be seen that upon one theory or another the courts of many of the states have permitted suits to readjudicate the extent of parental liability for

68. Cf. *Roseman v. Roseman*, 155 Fla. 750, 21 So.2d 215 (1945) in a note by the court. The difficult question of the effect of the award in Florida of alimony, had it been made, was left open. Its enforceability is an open question in many jurisdictions.

69. There is a total absence of full faith and credit control in the field of adoption, filiation and custody. The 14th Amendment controls are relaxed, but not totally absent. The same used to be true in the administration of estates area, but quare now in Florida with the recent decision in *Beverly Beach Properties v. Nelson*, 68 So.2d 604 (Fla. 1953).

70. 66 So.2d 689 (Fla. 1953).

support of minor children domiciled within the state, even when a provision for child support has been incorporated in a prior sister state's decree. While recognizing the general rule that foreign decrees as a class are *res judicata* of the matters involved for all time in the future, the courts make a distinction in respect to orders or decrees for child support when by the laws of the state of rendition such orders subject to change. *Decrees for child support and custody are usually regarded, in fact, as being impermanent in character, and hence, by their very nature, are res judicata of the issues only so long as the facts and circumstances of the parties remain the same as when the decree was rendered.*<sup>71</sup>

The appellee (H) maintained that to extend the provisions of the statute<sup>72</sup> to foreign decrees would be contrary to the provisions of the full faith and credit clause of the Federal Constitution and would make the statute unconstitutional to that extent. "We cannot agree with this contention," said the court. "The law of Missouri is that the terms and conditions of a decree for child support rendered in that state is (sic) subject to revision in that jurisdiction 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. What Missouri could do by way of making new provisions for support payments, Florida may also do; for the decree has no constitutional claim to a more conclusive or final effect in the state of the forum than it has in the jurisdiction where rendered."<sup>73</sup>

The court then goes on to make the distinction that it is powerless to vary the terms of the Missouri decree directly but that upon a proper showing of a change of circumstances it may achieve the same result ". . . by way of supersession of the terms and conditions thereof . . ."<sup>74</sup>

It should be pointed out that the principal case leaves open the question of whose law and whose standards are going to be used to determine whether the amount of support is adequate; the standard of living of the particular parties may be entirely different in Florida than in Missouri.

71. *Id.* at 691-692. (Italics supplied); *cf.* *Minick v. Minick*, 111 Fla. 469, 149 So. 483 (1933).

72. FLA. STAT. § 65.15 (1953) insofar as here material, states, "whenever any husband and wife . . . shall have entered into any agreement . . . or whenever any husband has pursuant to the decree of any court of competent jurisdiction been required to make . . . any such payments . . ." then, on change of circumstances, either of the parties may apply for an order and judgment of a changed amount.

This is another instance, see note 54 *supra*, for the construction of same language in the estate situation, where the court must construe the meaning of "any court."

As to the effect of the modification, the statute contains this interesting language: ". . . such agreement, or such decree, for the purpose of all actions or proceedings of every nature and wherever instituted, whether within or without this state, shall be deemed . . . modified accordingly." Does not the principal case, by its own result, allow this to be "superseded"? Certainly Florida cannot go this far, or can it?

73. 66 So.2d 689, 693 (Fla. 1953). The court cites as authority for this proposition *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

74. 66 So.2d 689, 694 (Fla. 1953), emphasis supplied by the court. It is interesting to note that Fla. Laws 1953, c. 27996, the Uniform Support of Dependents



*Effect of prior proceedings: Herein of full faith and credit and comity.*— Many foreign created rights and judgments do not fall within the strict scope of full faith and credit. When a tribunal is faced with the problem of deciding on the efficacy of a prior proceeding not within the constitutional area, it will normally give effect through the doctrine of comity.<sup>75</sup> This does not mean that it must abandon any of the policy grounds which would be effective to deny full faith and credit were it dealing with the type judgment entitled to such respect. Neither should it free the court to strike down apparently valid international judgments capriciously. The general compromise has been to adopt the doctrine of reciprocity.<sup>76</sup>

Several Florida cases have dealt with this question. In *Ogden v. Ogden*,<sup>77</sup> H and W were married in 1930, and established a domicile in England. H moved to Florida, established a domicile and requested that his wife and child join him. W refused and brought an action in the High Court of Justice to restore her conjugal rights. The court awarded her £2,000 "alimony."<sup>78</sup> H then brought an action for divorce in Florida on the grounds of desertion which W moved to dismiss on the grounds that the English proceeding was *res judicata*. The court below refused to give it this effect as to the matter of desertion and granted the divorce.

The Supreme Court affirmed, saying in effect that since an English court in the suit to restore conjugal rights would deny effect to a similar decree issued in a foreign country on the grounds of lack of finality, Florida was entitled to give the English decree the same respect.

In addition the court stated that if W's interpretation of the English

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Act, provides very serious civil responsibility for non-support. The constitutionality of the act has not yet been established in Florida. On the subject, in general, see Brockelbank, *Is the Uniform Reciprocal Enforcement of Support Act Constitutional?*, 17 MISS. L. REV. 1 (1952). There is little difference between lack of proper support and total lack of support. Perhaps the ultimate on the support problem is the recent decision, *State v. James*, 100 A.2d 12 (Md. 1953), wherein Maryland joined Pennsylvania and Massachusetts in applying criminal penalties, in addition to civil remedies under the Uniform Act, to enforce support of dependents not within the jurisdiction. See RESTATEMENT, CONFLICT OF LAWS § 457 (1934) and Comment, 22 U.S.L. WEEK 2221 (Nov. 24, 1953). It seems obvious that this line of cases, as well as the rationale of the Uniform Act, would wipe out the implicit basis for the holding in the principal case that there is an obligation to prevent persons from becoming public charges.

75. On the doctrine of comity the landmark case is *Herron v. Passailaigne*, 92 Fla. 818, 110 So. 539 (1926). The court laid down this proposition: "The rules of comity may not be departed from, unless in certain cases for the purpose of necessary protection of our own citizens, or of enforcing some paramount rule of public policy." *Id.* at 542. But *cf.* the remarks of Terrell, J., in *City of Thomasville v. Turner*, 100 Fla. 748, 130 So. 7 (1930).

76. *Hilton v. Guyot*, 159 U.S. 113 (1895), the leading authority, calls for strict reciprocity. The Supreme Court has not made it a rule of decision for the lower federal courts, so that apparently a court sitting in the 2nd Circuit could follow the more liberal rule of *Johnston v. Compagnie General Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926). A narrow policy in the field could lead to its occupancy by the federal government: *cf.* the tragic consequences of *United States v. Pink*, 315 U.S. 203 (1942). For a very interesting commentary on the importance of liberality see Nadlemann, *Reprisals Against American Judgments?*, 65 HARV. L. REV. 1184 (1952).

77. 33 So.2d 870 (Fla. 1948).

78. This would be the equivalent, in our terms, of separate maintenance.

procedure be correct then it so fell below the American standards of due process that it "would lift it out of the class rightly entitled to international reciprocity."<sup>79</sup>

Further consideration was given the same difficult question in *Pawley v. Pawley*.<sup>80</sup> Here W refused to remain with H in China where he felt compelled, for business reasons, to establish the matrimonial home. He subsequently returned to Cuba and became domiciled there. In Cuba he instituted a suit for divorce on the ground of desertion. W brought this action for alimony<sup>81</sup> and the Chancellor dismissed it. On appeal, the Supreme Court held that the Cuban divorce was entitled to the same effect as a divisible divorce within the scope of the full faith and credit clause. It had terminated the marital status but did not end W's right to alimony, which could only be effected by an in personam proceeding.<sup>82</sup>

In *Sackler v. Sackler*<sup>83</sup> we have an example of comity being extended to the point of greater full faith and credit than the Constitution would require. W had obtained a divorce with support provisions in New York. She sues for arrearages in Florida and invokes the general equity powers of the court. Below she was granted only a judgment for those amounts past due but on appeal the Supreme Court extended this to include the full amount and added that this decree should be enforced as if it were a domestic decree.

We hold, therefore, that under the rule of comity, as well as the principles of public policy involved in the obligation of a husband to support his wife and children, the New York decree, as to future installments, may be established as a local decree and enforced by those equitable remedies customary in the enforcement

79. 159 Fla. 604, 33 So.2d 870 (Fla. 1948). The court seems to have confused, perhaps unintentionally, the public policy exception as applied to judgments from common-law countries which are given a wide enforceability with the narrower scope normally given to non common-law type judgments. Also it seems somewhat surprising that the Florida court should consider an English ex-parte adjudication of desertion to be a violation of due process. Cf. note 1 of the court in *Pawley v. Pawley*, 46 So.2d 464, 471 (Fla. 1950).

80. 46 So.2d 464 (Fla. 1950), *cert denied*, 340 U.S. 866 (1950). It should be noted that Mr. Justice Terrell, who wrote the opinion for the court in *Ogden v. Ogden*, dissented here. Perhaps he felt that his own dictum, "jurisdiction of the parties is the first prerequisite to a valid judgment . . . and it makes no difference whether the parties are lounge lizards or the highest ranking citizens" was not being paid proper heed. See 33 So.2d 870, 874 (Fla. 1948).

81. Unconnected with a cause for divorce under FLA. STAT. § 65.10 (1953).

82. The court intimated that had not the grounds for divorce in Florida been complied with in fact the result might have been different. It should be pointed out that the court when it said that insofar as *Ogden* spoke of citizenship as a jurisdictional prerequisite it was incorrect that it should have said residence is really not being semantically exact. What it really meant to say was domicile. That it may become constitutionally possible to substitute mere residence for domicile in divorce jurisdiction will depend on the decision of the Supreme Court of the United States in *Alton v. Alton*, 207 F.2d 667 (3rd Cir. 1953), *cert. granted* and assigned docket No. 531, 22 U.S.L. Week 3206 (U.S. Feb. 9, 1954), Note, 67 HARV. L. REV. 516 (1954).

83. 47 So.2d 292 (Fla. 1950); see Note, 5 MIAMI L.Q. 105 (1950) and 4 U. of FLA. L. REV. 243 (1951).

of our local decrees for alimony and support money. If it were otherwise, a husband, determined to defeat a decree for alimony, could cross the border lines of our 48 states to avoid enforcement by contempt, and by resort to fraudulent practices endeavor to put his property or income beyond the reach of an execution . . . . We have no desire to make this state a haven for fugitive husbands.<sup>84</sup>

*Res judicata and estoppel by judgment.*—In the preceding part of this section the distinction between the almost automatic enforceability under full faith and credit and the rather tenuous effect under comity was adverted to. The courts have recognized the need for some middle ground that will give flexibility and liberality at the same time. In an effort to create such a middle ground, the Supreme Court of Florida has become involved<sup>85</sup> with a rather sinister and unmanageable dichotomy—that of *res judicata* and *estoppel by judgment*. While hints of the doctrine have appeared in numerous earlier cases, it received its first full blown exhibition in *Gordon v. Gordon*.<sup>86</sup> Some of the difficulties became apparent almost immediately as may be seen from another case that followed on the heels of the *Gordon* litigation, *Riehl v. Riehl*.<sup>87</sup>

The problem in the *Gordon* matter was subjected to a most protracted litigation. In its first appearance before the Supreme Court,<sup>88</sup> that eminent tribunal found that the chancellor below had failed to give full faith and credit to the Pennsylvania proceeding between the same parties, which had resulted in a decree adverse to W. The first action in Florida was on the basis of "extreme cruelty" and the court held that a bar should operate since the foreign divorce action on the basis of "indignities to the person" involved the same testimony and general grounds. Upon remand, W amended her bill to include a charge of desertion, the decree was entered and H appealed. Once again the court considered the problem of whether full faith and credit to the Pennsylvania decree required that this new action be barred.

Apparently some lawyers and text book authors believe there is confusion in the law of this jurisdiction upon the question, under what circumstances does the doctrine of *res adjudicata* or the principle of *estoppel by judgment* become operative. In all probability the confusion which apparently exists stems from a failure clearly to comprehend the difference between the doctrine of *res adjudicata* and *estoppel by judgment* and to understand the

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84. 47 So.2d 292, (Fla. 1950). This expresses the same policy as was enacted into statutory form in the Uniform Support of Dependents Act, note 74 *supra*. Cf. *Carpenter v. Carpenter*, 93 F. Supp. 225 (S.D. Fla. 1950), another situation in which full faith and credit was given.

85. That the need which gave rise to this problem is not confined to Florida, see Dean, *Conflict of Laws*, 28 N.Y.U.L. REV. 1366 (1953). For general background, see, Millar, *Res Judicata and Estoppel*, 39 MICH. L. REV. 1 (1940) and 35 ILL. L. REV. 41 (1940).

86. 59 So.2d 40 (Fla. 1952).

87. 60 So.2d 35 (Fla. 1952); see Note, 7 MIAMI L.Q. 250 (1953).

88. 160 Fla. 838, 36 So.2d 774 (1948).

test proper to be applied in determining which, or whether either, may be appropriately invoked. Estoppel by judgment has its counterparts, or at least its quasi-counterparts, in 'estoppel by verdict' and 'conclusiveness of verdict.' Either *res adjudicata* or estoppel by judgment furnishes the primary test in determining the applicability of the full faith and credit clause of the Federal Constitution, Art. 4, § 1.<sup>89</sup>

What is it that the court would have us understand? Does the Constitutional mandate of faith and credit operate in the case of both doctrines, with a difference in scope or is faith and credit given in one instance and denied in another?

The court continues:

This Court has at least indicated that full faith and credit need not be given to a final decree of a sister state when estoppel by judgment is the appropriate test unless the 'precise facts' offered by the plaintiff in the Florida action were heard and determined in the former suit which was adjudicated in the foreign jurisdiction.<sup>90</sup>

This might be contrasted with the following language of the court:

We have held as a general proposition that when a final decree or judgment of a court of competent jurisdiction becomes absolute it puts at rest and entombs in eternal quiescence every justiciable, as well as every actually adjudicated, issue. This pronouncement is considered by us as controlling only when *res adjudicata* is the proper test. By this we mean it is not controlling except in an instance wherein the second suit is between the same parties and is predicated upon the same cause of action as the first.<sup>91</sup>

The court does not tell us, although it intimates that the decision would be by the forum, whose law will be used to determine what is a cause of action or when there is identity of causes. It would seem that a narrow or restrictive holding on this question could destroy the very purpose of the full faith and credit clause. But the court continues:

A great many courts and text book writers treat '*res judicata*' and '*estoppel by judgment*' as synonymous. The most erudite legal minds appear to have difficulty in stating the difference which they consider exists between them . . . Although dissertations have come to our attention in which the doctrine of *res judicata* is considered as a sub-division or branch of the law of estoppel, strictly and technically speaking, such treatment is not proper . . . The difference which we consider exists between *res judicata* and estoppel by judgment is that under *res judicata* a final decree or judgment bars a subsequent suit between the same parties based upon the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised, while the

89. 59 So.2d 40, 43 (Fla. 1952).

90. *Ibid.* But see the reference which the court makes to *Bagwell v. Bagwell*, 153 Fla. 471, 14 So.2d 841 (1943).

91. *Ibid.*

principle of estoppel by judgment is applicable where the two cause of action are different, in which case the judgment in the first suit only estops the parties from litigating in the second suit issues—that is to say points and questions—common to both causes of action and which were actually adjudicated in the prior litigation.<sup>92</sup>

Thus the court reached the conclusion that full faith and credit need no longer be given the Pennsylvania decree since the amended bill of complaint raised grounds not litigated and neither part of their dichotomy would operate to protect the holder of the rights vested under the prior decree.

Subsequently in the *Reihl* case<sup>93</sup> the court referred to this clarification process outlined above and found an identity of parties and cause of action; hence *res judicata*; hence full faith and credit. This result should not, however, be taken to be automatic in either of its stages, the classification under *res judicata* or estoppel by judgment and the faith and credit to be given if placed in *res judicata*. Certainly, the respect paid under the latter is not what the constitutional norm envisaged.

#### LIMITATIONS ON JURISDICTION

*Full faith and credit: Foreign custody decree.*—In *Lambertson v. Williams*,<sup>94</sup> H and W, the parents of the child whose custody was in litigation, were divorced in New Jersey, custody having been awarded to W. W married H2 and came to Florida with one child, leaving the other with her parents in New Jersey. The grandparents petitioned the New Jersey court for a modification of the original decree granting them the custody of the child in question. W appeared through counsel and participated in the hearing on the petition which was granted. On the basis of the decree awarding them custody the grandparents brought *habeas corpus* in Florida. The court below found the decree was not binding in Florida—that Florida might act independently considering solely the best interests of the child.<sup>95</sup> On appeal this decision was reversed. W, the mother, had her choice of forums and having litigated in New Jersey is not entitled to relitigate the *same* issue. A change in conditions<sup>96</sup> would have given the Florida courts authority to enter a new

92. *Id.* at 44.

93. See note 87 *supra*. The court states quite properly that *Bagwell*, note 90 *supra*, is not controlling since the test used there was that of estoppel by judgment, whereas the instant case is one to which *res judicata* should be applied.

94. 61 So.2d 478 (Fla. 1952).

95. It acted on the authority of *Dorman v. Friendly*, 146 Fla. 732, 1 So.2d 734 (1941). The more recent Florida cases rely on the "change of circumstances" rule of *N.Y. ex rel. Halvey v. Halvey*, 330 U.S. 600 (1947). They are *Littler v. Franklin*, 40 So.2d 768 (Fla. 1949); *Eddy v. Stauffer*, 160 Fla. 944, 37 So.2d 417 (1948), 3 *MIAMI L. Q.* 279 (1949); *Gilman v. Morgan*, 158 Fla. 606, 29 So.2d 372 (1947).

96. *Cf.* the rule on support laid down in *Lopez v. Avery*, 66 So.2d 689 (Fla. 1953).

custody award without violation of constitutional precepts. Here, however, the New Jersey decree was entitled to full faith and credit.

*Determination of legitimacy.*—One of the most interesting statutes passed by the 1951 legislature was the new Bastardy Act.<sup>97</sup> It provides a somewhat more liberal procedure for the determination of paternity, and raises the amount of support to be provided the filiated children by the parent or parents found to be responsible for the procreation of such children.

The first case to litigate the scope of the Act was *Rooney v. Teske*.<sup>98</sup> Action was brought charging defendant with being the father of the plaintiff. The immediate question before the court was whether the Act could apply constitutionally to a child born before its effective date. The chancellor granted defendant's motion to dismiss. He ruled that the action would not lie because the child was born in Massachusetts in 1949 and the Act could not be made retroactive.

The court found the Act could constitutionally overcome both objections of time and territory. Mr. Justice Terrell stated:

We think it makes no difference whether the accouchement took place in Florida or in Massachusetts as the record discloses, or that it took place two years before the effective date of the Act . . . [It] was designed to require the father of a bastard child, when its paternity is established, to contribute to its support, and whether born before or after the effective date of the act (l. c. sic) is not material. As to paternity and support the act (l. c. sic) shows on its face that it was intended to be retroactive as well as prospective in effect.<sup>99</sup>

The opinion fails to consider, even for a minute, what law should be selected to determine the question of paternity or legitimation which

97. FLA. STAT. § 742.011 *et seq.* (1951).

98. 61 So.2d 376 (Fla. 1952). See also *Phillips v. McGriff*, 61 So.2d 634 (Fla. 1952).

99. *Ibid.* The court points out that the State-Federal *ex post facto* prohibition applies only to "criminal Acts." *Surf Club v. Tatem Surf Club*, 151 Fla. 406, 10 So.2d 554 (1942); *Ambrosia Brewing Co. v. Bowles*, 147 F.2d 550 (Em. Ct. App. 1944). That this Act contains no element of the "criminal" is taken for granted. Because his (Mr. Justice Terrell's) language is always colorful, although sometimes over-enthusiastic, some more is set forth here:

In addition to this, the act [again lower case] conforms with every impulse of right, justice and decency. Even the birds, the dumb animals and the savages are imbued with an instinctive sense of responsibility to provide for their young while they are unable to provide for themselves. [It must be assumed that "they" refers to the young, although in the context the phrase is not entirely free from ambiguity. Author's note]. That is all the Act in question does and the reason is that the ill-fated mother and the equally ill-fated offspring may not become a charge on the public. There is no better settled principle of public policy than that it is the duty of every man to provide food and raiment for his own, and the purpose of the Statute was to spell out this principle and apply it to all of his own even though they be bastards. It imposed no responsibility that was not already in good conscience incumbent on the father of a bastard. 61 So.2d 376, 377 (Fla. 1952).

is closely associated with it. Nor does it concern itself with the infinite possibilities of blackmail which might flow from the broad interpretation of the statute made in this case.

The question whether a filiation and support judgment, obtained before the 1951 Act, was *res judicata* in a similar proceeding brought under the new Act was decided in *Wagner v. Baron*.<sup>100</sup> The lower court had so held it. The Supreme Court, in reversing, stated:

The cases are legion which hold that *res judicata* is not a defense in a subsequent action where the law under which the first judgment was obtained is different than that applicable to the second action, or there has been an intervening decision, or a change in the law between the first and second judgment, creating an altered situation.<sup>101</sup>

The prior judgment can hardly be binding as to rights which were not in existence and which could not have been litigated at that time. The doctrine of *res judicata* "is not meant to create vested rights in decisions that have become obsolete or erroneous with time."<sup>102</sup> "We hold then, that, the former judgment is not *res judicata* of the matters presented by the instant suit, including the question of paternity as well as the question of the amount, if any, to be awarded as support for the child."<sup>103</sup>

The reasoning of the majority of the court is quite interesting. They felt that to apply the principle of *res judicata* would be "to penalize the appellant for her diligence in prosecuting her action against the putative father . . . and would reward the indolent mother who failed to so proceed [under the old Act]."<sup>104</sup>

Interesting as this reasoning may be, it failed to produce a unanimous court.<sup>105</sup> There was also a concurring opinion by Mr. Justice Terrell,

100. 64 So.2d 267 (Fla. 1953).

101. *Ibid.* Among the numerous cases cited to this rule, however, not a single Florida case is to be found.

102. *Imbrici v. Madison Ave. Realty Corp.*, 199 Misc. 244, 99 N.Y.S.2d 764 (Sup. Ct. 1950) quoted with approval in 64 So.2d 267, 268 (Fla. 1953).

103. 64 So.2d 267, 268 (Fla. 1953).

104. It is rather hard to see how the court could allow relitigation of a determination of the filiation question adverse to the interests of the unwed mother on the basis of the language of the 1951 act. That the amount of support, previously awarded, could be changed, even in the absence of specific statutory authority, on the basis of the public policy argument of Terrell, J. in *Rooney v. Teske*, 61 So.2d 376 (Fla. 1952) is clear, and might have been adverted to here.

Of course herein nothing is said about the obligation of the state to see that ill-fated mothers and bastards do not become public charges. With this control removed, the act, as construed by the court, can become even more easily a convenient way for some "unwed mothers" to better their positions in the world.

105. Mr. Justice Thomas dissented with whom Sebring and Matthews, JJ. concurred. He stressed this very point, (see note 104 *supra*) saying:

. . . instead of the strife having ended and certainty as to individual rights having been produced by the adjudication, . . . there would be an invitation to all similarly situated to come into Court and get a readjudication of the same issue in the hope that the second award would be an enlargement of the first. 64 So.2d 267, 270 (Fla. 1953).

which deserves a nobler fate than an almost anonymous burial in the Southern Reports.<sup>106</sup>

#### STATE LAW IN THE FEDERAL COURTS

*The Erie Doctrine.*—Two recent cases will give some indication of the trend in the use of (and the limitations on that use) state law in the federal courts sitting in diversity cases. The first is the typical case in which the Federal Court gives the standard *Erie v. Tompkins*<sup>107</sup> respect to the state law. It comes out of the fifth circuit and construes a matter of Florida law.<sup>108</sup> Suit was brought by an insurer to rescind a life policy because of alleged material misrepresentations knowingly made in the application for the policy. After considering the various factual matters involved in the case, the Court made the following statement:

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106. The Old Act [of Jan. 5, 1828] was passed more than 100 years ago and required the father of a bastard child to contribute not exceeding fifty dollars annually for his support. That amount would not supply him with candy and ice cream cones at the present prices . . . .

Since the Old Act was repealed, the New Act substituted in its place and paternity adjudicated under the Old Act, I think all the mother was required to do was to petition the Court to decree support as required by the New Act. There was no reason for the New Act except to provide a reasonable living scale for bastard children. It is not even suggested that it prescribed a basis of support out of harmony with present day cost of food, raiment and schooling, let alone nurture and baby sitting.

It seems to me that the only real point for determination is whether or not gentlemen (?) who sneak around and propagate bastards may be required to support them in keeping with their means and ability to meet present economic standards.

I think this question impels an affirmative answer. The legislature certainly had power to enlarge the pattern of support. [Author's note: Logically then why could not the legislature have removed all stigma, penalty, and disequ沿海 by granting the courts acting in support of bastards the same type of jurisdiction, the flexibility they have when decreeing that of legitimate children and leaving the amount subject to modification for change of circumstances.] The wonder is that they waited so long and in the face of rising prices to do so. When the Old Act was passed a midwife's charge for officiating at the accouchement was five dollars. You could buy a 300 pound steer for four dollars, pork was two cents the pound, eggs were ten cents per dozen, corn and potatoes were 25 cents per bushel and you could hire a room in the best hotel in Jacksonville for fifty cents. It was the good old days when our great, great grandfathers and mothers bought their snuff and tobacco in bladders, cured their sausage in chitterlings, read their Bibles on their bellies in front of the log fire and planted corn when the oak leaves got as big as possum ears. Such were the criteria that determined the standard for a bastard's support at that time . . . . I do not think the doctrine of *res judicata* has any place whatever in this litigation. I think it is out of all reason to hold that the legislature intended that the father of last year's bastard might contribute support by a standard fixed more than 100 years ago, while the father of this year's bastard must support at present commodity prices. I cannot read any such logic in the New Act.

64 So.2d 267, 269 (Fla. 1953). For other Terrellisms, see *Morgan v. Morgan*, 40 So.2d 778 (Fla. 1949) and particularly, 4 *MIAMI L.Q.* 59 n. 72 (1950); *Cohen v. Schott*, 48 So.2d 154, 156 (Fla. 1950) and Comment thereon in 5 *MIAMI L.Q.* 286 n. 60 (1951). It is to be hoped that the time has come for some "aficionado" to collect the judicial opinions of Justice Terrell. Such a volume would enrich the lives of all of us.

107. 304 U.S. 64 (1938).

108. *Reliance Life Ins. Co. v. Everglades Discount Co.*, 204 F.2d 937 (5th Cir. 1953).



The policy is a Florida contract to be interpreted according to Florida law. *Barnett v. New England Mutual Life Ins. Co.*, 5 Cir., 123 F.2d 712. By its express terms, the statements made in the application are representations, not warranties. In *Metropolitan Life Ins. Co. v. Poole*, 147 Fla. 686, 3 So.2d 386, the Supreme Court of Florida held that false answers, made by an insured in good faith in an application for a life insurance policy, do not necessarily vitiate the policy. This decision followed an earlier Florida decision, *New York Life Ins. Co. v. Kincaid*, 122 Fla. 283, 165 So. 533 . . . . The questions asked in the Kincaid case are comparable to those here involved. In *Madden v. Metropolitan Life Ins. Co.*, 5 Cir., 138 F.2d 708, 709, 151 A.L.R. 984, this court in interpreting the Poole case, said: "In so ruling, the Florida Supreme Court, expressly rejected the distinction made in the Madden case (on a prior appeal), and accepted by most of the courts in the country . . . ."<sup>109</sup>

and further stated:

Whether or not, in all the circumstances, the insured regarded the tumor as inconsequential, and hence was in good faith in failing to report it, was a question of fact for the jury under the Florida decisions, and under our Madden case, 138 F.2d 708.<sup>110</sup>

The quoted language, particularly the first quotation, will show that the federal court sitting in diversity cases is not only properly using the Florida substantive law, but is also by implication using the Florida choice of law, because we must assume that there will be situations in which the facts tying a particular contract to a particular state law will not be as clear as they were in the instant case. The assumption is that even if the facts were not so clear, the federal court will look to the local standards of characterization and choice of law to determine whether under those local standards the particular contract in question would be interpreted as a Florida contract.

In the other recent case, which is cited merely as an example,<sup>111</sup> the following statements were made with regard to the Federal Tort Claims Act.<sup>112</sup> This is the act which in its Section 1346 (b) contains the interesting choice of law provision which gives jurisdiction to the district courts over actions and injuries caused by an employee of the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Concerning this provision, the court stated:

On the other hand it is a settled law of that state [New York], following the common-law, that the release of one of several

109. *Id.* at 940.

110. *Id.* at 941.

111. *Rushford v. United States*, 204 F.2d 831 (2d Cir. 1953), *per curiam*, Learned Hand, Augustus N. Hand, and Frank, Cir. JJ.

112. 28 U.S.C. §§ 1346, 2671 *et seq.* (1946).

joint tort-feasors, without reserving any claim against the others, releases all. [Citing authorities] The plaintiff's answer to this is that, although the Act adopts the local law so far as concerns those facts that are necessary to determine whether a claim arises at all, it stops there. Transactions that may release the claim, or, we assume, may affect its continued existence in any other way, are not within the words: 'Under circumstances where . . . a private person, would be liable.' We need not say whether the effect of a release, executed in another state, is to be determined by the law of that state, or by the law of the state where the claim arises, for the release at bar was executed in New York; and the plaintiff does not tell us to what law we are to look: whether to some 'general' or 'federal' law under the doctrine of *Swift v. Tyson*, 16 Pet. 1, 10 L.Ed. 865, or elsewhere. Nor need we seek any such umbrageous refuge; for it is plain that Congress meant to make the proper state law in all respects the model for the liabilities it consented to accept; and that the 'circumstances' included as much those facts that would release a liability once arisen, as those on which its creation depended.<sup>113</sup>

Several other attitudes are possible with regard to the applicable state law when a federal court sits in diversity cases. One is the use of the state law for constructional purposes where the court, in effect, chooses that one of a variety of state laws which it finds appeals to its taste. In *Rosenblatt v. United States*,<sup>114</sup> a case involving an action for wrongful death under the Federal Tort Claims Act, the court stated the following:

The North Carolina law controls. It is true that North Carolina, differing from some other jurisdictions, has adopted the rule that a driver of an automobile who 'outruns his headlights' is guilty of contributory negligence, and in several cases our Court has found such guilt as a matter of law. For example, in the case of *Morgan v. Cook*, 236 N.C., at page 477, 73 S.E.2d 296, . . . such was the holding.<sup>115</sup>

The court then goes on to state that there are other cases to like effect.

But there are North Carolina cases in which apparently a contrary conclusion was reached. In *Pawell v. Lloyd*, 234 N.C. 481, 67 S.E.2d 664, in reversing a judgment of nonsuit, the Court declared: 234 N.C. at page 486, 67 S.E.2d at page 667, 'The plaintiff cannot be charged with contributory negligence as a matter of law merely because he did not stop when the high shining lights of oncoming traffic partially blinded him . . .'<sup>116</sup>

The court then discusses several other possible variations, particularly those stated in another federal opinion, and reaches this conclusion:

I do not find, either as a matter of law or fact, that he failed to exercise the care of a person of ordinary prudence . . . It follows from the above that the contention of the defendants that the negligence of the driver of the automobile was the sole

113. 204 F.2d 937 (5th Cir. 1953).

114. 112 F. Supp. 114 (E.D. N.C. 1953).

115. *Id.* at 117.

116. *Ibid.*

proximate cause of the collision and resulting deaths and injuries must be rejected. Respect is given to the North Carolina cases cited by the defendant, but it is held that they do not require the holding suggested in this case.<sup>117</sup>

This might very well be called "the construction of the state law" method.

Then we have another brief example in the case of *Beck v. F. W. Woolworth Co.*,<sup>118</sup> which is an action construing a lease. Here we have one of the traditional reactions of a federal court sitting in diversity cases where it encounters no state law.<sup>119</sup>

The applicable law is that of the State of Iowa. There are no Iowa cases directly in point. In the case of *Oskaloosa Water Co. v. Board of Equalization*, 1892, 84 Iowa 407, 51 N.W. 18, there was involved the right of the taxing authorities to assess improvements of a permanent nature . . . to the lessee as real estate . . . .

The case most strongly relied upon by the plaintiffs is the case of *Roach v. Matanuska Valley Farmers Cooperating Ass'n*, D.C. Alaska 1949, 87 F. Supp. 641. That case was appealed to the United States Court of Appeals for the Ninth Circuit, 1951, 188 F.2d 162, which affirmed the judgment of the trial court . . . .

The court stated the conclusion which it reached as follows:

In this case jurisdiction is based upon diversity of citizenship. There are no direct holdings of the Iowa Supreme Court on the rules of law here involved. In such a situation federal courts have to anticipate which rule, or rules, will be followed by the highest court of the state when such court is presented with a similar situation. . . .<sup>120</sup>

Federal courts in the situation referred to are warranted in assuming that the highest court of the state will follow the more generally recognized rule, or rules, of law. They are not justified in assuming that such court will follow a single decision from another jurisdiction. *Werthan Bag Corp. v. Agnew*, 6 Cir., 1953, 202 F.2d 119, 124, 125. While the cases on the question involved in the present case are not numerous, yet it seems to be the more generally stated or otherwise recognized rule that where a lessee erects a structure of a permanent character on the leased premises under a lease of moderate length without the right of removal that, in the absence of over-riding considerations, the duty of

117. *Id.* at 118.

118. 111 F. Supp. 824 (N.D. Iowa 1953).

119. The most classic case of this, of course, has been *Sutton v. Leib*, 199 F.2d 163 (7th Cir. 1952). There have been a large number of articles written on the question of what is "state law" for purposes of *Erie v. Tompkins*. See Rosenfield, *Administrative Determination as State Law Under Erie v. Tompkins*, 24 N.Y.U.L.Q. Rev. 319 (1950). In *United States v. Standard Oil of California*, 332 U.S. 301 (1947) the general test was laid down that "state law" is that which is established by any "state authority" acting as such.

120. 111 F. Supp. 824, 831 (N.D. Iowa 1953).

paying the taxes thereon rests upon the lessor. In the present case no considerations are found which are generally recognized as being of an over-riding character.

It is the view of the court that, until there is a specific holding by the Iowa Supreme Court on the question here involved, it may properly be assumed that the Iowa Supreme Court would follow what seems to be the more generally recognized rule and would hold that in situations such as the one presented in the instant case the duty of paying the taxes involved rests upon the lessor.<sup>121</sup>

*Federal law in the state courts.*—While the problem of federal law in the state courts is not as troublesome as its converse, the existence of certain difficulties must be mentioned. Federally created rights of the non-constitutional class were properly handled in a recent case typical of the area, *Chambers v. Loftin*.<sup>122</sup> Here the sole question on appeal was the propriety of the trial court's order taking the case from the jury and directing a verdict for the defendants. In reversing, the court stated:

The rights which the Federal Employers' Liability Act creates in favor of employees engaged in interstate commerce are federal rights protected by federal rather than local rules of law . . . Whether the trial court acted properly in taking the case from the jury must therefore be determined in the light of applicable federal decisions.

Under the federal decisions the rule obtains that courts must submit the issues of negligence to a jury if the evidence might justify a finding either way on those issues.<sup>123</sup>

One of the difficulties referred to above occurs in that area midway between a clear *Erie* situation in the federal courts and the pure state jurisdiction as above, even though federal law may be involved. This grey area is presently composed of two main subdivisions. One is where a federal court, sitting in federal-question jurisdiction, must choose law. This is discussed in another section. The other is when the federal court sits in diversity but finds no satisfactory state law. In this latter situation the federal court may wait or it may lead. The possibility of such influence from federal to state law is illustrated in *Hay v. Wanner*.<sup>124</sup> Suspecting a new trend in the Florida court, the federal court has anticipated the possibility of a reversal of old doctrine.<sup>125</sup>

121. See note 118 *supra*.

122. 67 So.2d 220 (Fla. 1953).

123. *Id.* at 221.

124. 204 F.2d 355 (5th Cir. 1953).

125. Thus it distinguished the long line of cases stemming from *Norton v. Baya*, 88 Fla. 1, 102 So. 361 (1924) as being based on a purely gratuitous attempt to change homestead to an estate by the entireties. In finding a consideration for the transaction in question it scented and followed the new trend of thought in the state court as expressed by Terrell, J., dissenting in *Florida National Bank of Jacksonville v. Winn*, 158 Fla. 750, 30 So.2d 298 (1947).

## FULL FAITH AND CREDIT

*Lack of jurisdiction in granting court.*—One of the limitations<sup>126</sup> on the enforceability of foreign judgments under the full faith and credit clause, and one of the issues that may always be re-litigated in the state where enforcement is sought is that of the jurisdiction of the court in the granting state over parties and/or subject matter. *Markham v. Nisbet*<sup>127</sup> raised the original lack of jurisdiction point.

Action was brought in Florida (F2) on a judgment obtained in Ohio (F1). The judgment was based on a promissory note dated April 18, 1928, payable one year from date and containing a warrant of attorney authorizing confession of judgment. Suit had been filed in F1 on April 15, 1949. Appellant raised the defenses that it affirmatively appeared on the face of the judgment roll that the action in Ohio had been barred by the 15-year statute of limitations of that state; that necessarily any warrant of authority would expire by operation of law with the action; and that there had been no personal service. Below, all these defenses were overruled. The Supreme Court properly governed these questions by Ohio law.<sup>128</sup> It found that appellee had not sustained the burden of proving validity of the F1 judgment and reversed without prejudice to such further action on the note as would be possible.<sup>129</sup>

*Penalty, public policy and foreign statutes.*—The decision of the United States Supreme Court in *Hughes v. Pether*<sup>130</sup> has given impetus to a changing attitude with regard to the enforceability of foreign created rights. The change in the statute implementing full faith and credit to include statutes passed almost unnoticed.<sup>131</sup> Not so the decision which

126. Others are lack of finality, lack of a tribunal in which enforcement may be had, penalty and violation of core public policy of F2. As to penalty see the discussion of *Burkman v. Taran, infra*. As to core public policy, cf. the limitations implicit in *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

127. 60 So.2d 393 (Fla. 1952).

128. The Ohio law on these two points was admitted by appellee. As to the rule that a judgment in personam without jurisdiction is a nullity see *St. Clair v. Cox*, 106 U.S. 350 (1882). The Florida authorities on the right to raise this attack are *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526 (1893) and *Herron v. Passailaigue*, 92 Fla. 818, 110 So. 539 (1926). The second of these cases, and the principal case, involved defects apparent on the face of the judgment rendered in F1. That the problem may be much more difficult where such is not the case or even where jurisdiction in F1 has been incorrectly determined, see *Treines v. Sunshine Mining Co.*, 308 U.S. 66 (1939).

129. The real question was that of the Ohio law on the matter of the burden of pleading absence of the obligor so that the Statute of Limitations would be tolled. The Ohio law was that absence tolled even in a confess-judgment note situation. But the Florida court adopting the rule in *Horowitz v. Shafer*, 94 N.E.2d 201 (Ohio 1950) distinguished the *Sammis* case and *Carroll v. Gore*, 106 Fla. 582, 143 So. 633 (1932) in that there the judgments were prima facie valid and the judgment debtor should have the burden, whereas in the present case with the defect apparent, the judgment creditor should have the burden.

130. 341 U.S. 609 (1951).

131. By part of the 1948 revision of the Judicial Code, conforming the language of 28 U.S.C. § 1738 (1946) to the Constitution for the first time in 150 years. See comment on the clause in general in Jackson, *Full Faith and Credit—The Lawyer's*

gave it real force. Now Florida has joined the progressive states in striking down the exception to full faith and credit with regard to actions on foreign tax statutes. The traditional view has been that these statutes were penal in nature and that only after the cause of action had been reduced to judgment could extraterritorial enforcement be had.<sup>132</sup> This most important case was decided at circuit and it is set forth below in extenso<sup>133</sup> due to the fact that opinions of these

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*Clause of the Constitution*, 45 Col. L. Rev. 1 (1945) and on this particular aspect see the excellent Article by Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. of Cm. L. Rev. 339, 343, (1952).

132. *Milwaukee County v. White Co.*, 296 U.S. 268 (1935).

133. *Burkman v. Taran*, decided by Giblein, J., at law. For those who might wish more of the background of this case the docket number is 28594-H, 11th Judicial Circuit, 1953:

The plaintiff sues, in behalf of the State of Minnesota, for the recovery of an income tax in excess of \$6,000 assessed against the defendant for the calendar year 1944 (during which the defendant was a resident of Minnesota). The validity of the assessment and the amount of the tax are not disputed. Counsel for the defendant advances the contention that an action for the collection of a tax due to another state is not maintainable in the courts of this state. It must be conceded that the opinions and decisions of the courts of other states, cited by counsel, support his contention. See cases cited in 51 Am. Jur. 868-9 in footnotes to the text, and in 165 A.L.R. in the annotation at pages 769-801. In some of the cases relied on by counsel for the defendant the courts have reasoned that taxes are imposts collected for the support of the government, and not debts in the ordinary sense of the term, and that the principles which preclude a state from enforcing the penal laws of another state should be applied to revenue laws so as to preclude a state to which taxes are due from maintaining in the courts to another state an action for the collection of the taxes. In other cases, the courts, appreciative of the obvious dissimilarity between penal laws and revenue laws, have boldly held, without any attempt to provide logical support for their conclusions, that since the revenue laws of one state have no force in another, no action can be maintained by one state in the courts of another state for the recovery of taxes due in the former.

The precise question here presented has not been decided by the Supreme Court of the United States or by the Supreme Court of Florida. Consequently, I am not guided by any binding precedent.

Stripped of their sophistry, the opinions and decisions in the cases on which the defendant's position is bottomed are that by crossing state lines one may escape his obligation to pay an income tax to a state of which he has been a resident and in which he has realized the taxed income. I am asked to follow such precedents and to hold that Florida is a sanctuary for tax evaders. I refuse to do so.

If the defendant owed a debt to a private citizen of Minnesota, there would be no impediment to the institution and prosecution in Florida by the creditor of an action for the recovery of the amount due. Why, then, should a sovereign state, a member of a union of states, be denied a right which we freely accord to one of its citizens? There is no justification, in my opinion, for not permitting an action in the courts of this state for the collection of a debt due another state. The principles of comity, it seems to me, demand that we grant to the sister state the right to sue. The contrary doctrine has no place in a union of states such as ours.

My conclusion finds cogent support in the opinions and decision in *State ex rel. Oklahoma Tax Commission v. Rodgers (Mo.)*, 193 S.W.2d 919, in which the same question here raised was presented.

Unfortunately, however, while I hold that an action by the plaintiff, in behalf of the State of Minnesota, against the defendant in this court for the recovery of the tax in question may be brought, I am constrained to deny relief to the plaintiff for the reason that our statute of limitations, to

courts are only irregularly reported.<sup>134</sup>

#### SUBSTANCE—PROCEDURE

*State law.*—One of the most important regulatory devices in the conflict of laws is that known generally under the label of characterization. We deal in this section with that part of the characterization process which attempts to distinguish between procedure and substance in the conflict of laws. This topic today has two entirely different meanings: (1) state "procedure-substance" and (2) federal diversity "procedure-

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which I am required to give effect because it has been appropriately invoked by the defendant, provides a bar to recovery in this action.

When a state enters the courts of another state, it does so with no other or greater rights of immunities than those enjoyed by individuals or private corporations. It is subject, like all other suitors, to the provisions of the statutes of limitation of the state in which it seeks relief. 34 AM. JR. 307-8. The tax involved was assessed for the calendar year 1944. As admitted in the complaint, and as established by the evidence, the defendant has been a resident and domiciliary of Florida since 1946. This action was not commenced until April 23, 1953.

Concededly it was not brought within three years after the accrual of the liability, as was required by the applicable and governing provision of our statute of limitations (section 95, 11 F.S.) Counsel for the plaintiff, however, points to section 95.07 F.S., which provides that 'if after the cause of action (against a person) shall have accrued he depart from the state, the time of his absence shall not be part of the time limited for the commencement of the action.' Counsel argues that since it was shown, without dispute, that the defendant, after establishing residence in Florida in 1946, absented himself from the state several times, and since the defendant has not proved that the aggregate of the periods during which he was in the state was three years or more, it has not been established that the action is barred.

The argument is not tenable, because the generally recognized and accepted rule is that when a plaintiff relies on a defendant's absence as interrupting the running of a statute of limitation it is necessary for *him* to show such absence as will preclude the application of the statute. 34 AM. JUR. 354. The burden of introducing evidence may shift several times in one case. While the defendant may have the burden of showing that a claim is barred, he need only make a prima facie case to shift the burden to the plaintiff, who then will be obliged to prove such facts as toll the running of the statute, and if he does, the burden of introducing evidence may again fall on the defendant. 34 AM. JUR. 353.

The plaintiff's admission and the uncontradicted proof that the defendant has resided in Florida since 1946 shifted to the plaintiff the burden of showing that the aggregate of the defendant's periods of absence on sojourns to other states was such as to reduce the aggregate of the periods during which he was in the state to less than three years. The plaintiff introduced no such proof. I must hold, therefore, that the action is barred. The defeat of the claim is attributable solely to the delayed and tardy commencement of the action.

134. Nothing invidious is intended by the use of the term "irregularly," in fact, only the farsighted work of the publishers of the Florida Supplement make its use possible. Formerly one would have stated simply that these cases are not reported at all. There are several benefits from this series of publications but one of the most important is that evidenced by the proceedings in *Cone v. Cone*, the latest decision being 68 So.2d 886 (Fla. 1953). When this per curiam opinion was released (from the language used one might see the fine hand of Mr. Justice Terrell) it caused extravagant comment in the public press. This is almost inevitable when a superior court describes an inferior as indulging in a "crude, vulgar and

substance."<sup>135</sup> In the former, the most difficult problems have usually fallen in the area where the state court attempts to decide, as an initial matter, what things in a particular litigated affair are going to be controlled entirely by the law of the forum, so called *lex fori*, and what things will be governed by a reference to some foreign law. Normally, if the state has any other contact with the matter in litigation than the fact that it is the forum, it will be able to exercise a great deal of freedom in labeling things as procedural and hence governed by some part of the internal law of the forum.<sup>136</sup>

Certain problems, however, have been felt to lie on a border line between being properly governed by the law of the forum and properly governed by the law of some foreign jurisdiction, according to the particular choice-of-law rule which might be exercised. These problems concern matters of statutes of limitations, burden of proof and presumptions. In Florida we find that statutes of limitations are characterized as procedural and hence are controlled by the *lex fori*. There are two statutory rules which vary this general proposition and in effect make the statute of limitation substantive for the Florida courts. The first,<sup>137</sup> and less important, provides that an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States or of any foreign country, shall be barred within seven years. This provision has been interpreted to mean that the seven years shall commence with the presence of the judgment debtor within the State of Florida.<sup>138</sup>

Second, there is the more important incorporation or "borrowing" statute,<sup>139</sup> which provides that when the cause of action has arisen in another state or territory of the United States or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of lapse of time, no action thereupon can be maintained against him in this state. With these provisions on the

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unbecoming display of nasty temper" and says that he has "descended to the very mudsills of indecorum." For the press comment see Miami Daily News, Dec. 19, 1953 page 3a and The Miami Herald, Dec. 20, 1953. The latter newspaper, and through it the public, had the opinion of the judge in question available to it. 3 Fla. Supp. 168. This permits an important balance to be achieved which otherwise could not be present. What conclusion one would reach from a careful reading of the opinion is not as important to the legal profession in its entirety as the existence of an antidote to the assault on the dignity of the administration of justice implicit in "Returns High Court's Fire" and "Denies He 'Blew Top.'" He who gives rise to such unfortunate comments is the real culprit.

135. A third may now be arising in the Federal Courts when they are sitting in federal-question jurisdiction. See *Austrian v. Williams*, 198 F.2d 697 (2d Cir. 1952) and Comment, 39 A.B.A.J. 927 (1953). Two alternatives appear to exist: the first, an analogical application of the *Erie* rule and the second, a return to *Swift v. Tyson* general law.

136. *Hartford Accident v. Delta Pine and Land*, 292 U.S. 143 (1934). *But cf.* *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

137. FLA. STAT. § 95.11(2) (1953).

138. *Van Deren v. Lory*, 87 Fla. 422, 100 So. 794 (1924).

139. FLA. STAT. § 95.10 (1953).



books and since all the other statutory limitation provisions<sup>140</sup> have been held by the Supreme Court of Florida to be governed by the law of the forum, the "tolling" question is the most difficult remaining.

The *Van Deren* case<sup>141</sup> interpreted the language "return to the state" and hence incorporated the tolling provisions of the Florida law,<sup>142</sup> normally governing only in procedural matters, into the foreign statute. This could give rise to a substantive characterization by a state in order to take advantage of a double tolling provision. The foreign courts construing the Florida statutes have normally held them to be substantive.<sup>143</sup> The basic distinction appears to be that if the limiting statute is a part of another statute which creates the right, it is held to be a part of that right controlled by the foreign jurisdiction. Doubt arises when we reach the problem, of whether this includes the tolling provisions of the state in question as well.

*Federal law.*—The other area in which substance-procedure is important, and in which, as has been pointed out, it has entirely different meaning, is that of the federal diversity jurisdiction. In the fifteen years since *Erie v. Tompkins* we have witnessed a trend of decisions<sup>144</sup> ending with the general rule that the federal courts sitting in diversity must apply the state law of the state in which they sit in all matters where to apply federal law would substantially affect the outcome of the litigation. This rule has given rise to an extremely flexible (and somewhat artificial) terminology which attempts a new classification labeling those matters in which the federal court has the right to use its own law procedural, and those in which it must use the state law substantive.

An extremely recent and very interesting decision is that of *Mark v. Ormond Beach*,<sup>145</sup> construing a burden of proof statute recently passed in Florida.<sup>146</sup> It was held that this statute must be utilized by the federal courts, in spite of the fact that the statute had not been characterized in the state courts of Florida. Simpson, J., stated:

Under the doctrine of *Erie Railroad Company v. Tompkins* . . . , if Section 51.12 deals with procedural matters only, it has no effect

140. See generally annotations to F.S.A. c. 95.

141. See note 138 *supra*.

142. FLA. STAT. § 95.07 (1953). See discussion in *Burkinan v. Taran*, note 133 *supra*.

143. *But cf.* *Alropa Corp. v. Smith*, 240 Mo. App. 376, 199 S.W.2d 866 (1947) with *Alropa Corp. v. Kirchwehm*, 138 Ohio 30, 33 N.E.2d 655 (1941).

144. That the rule includes the state's characterization rules, *Sampson v. Channell*, 110 F.2d 754 (1st Cir. 1940), *cert. denied*, 310 U.S. 650 (1940), and its conflict rules, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) which were logical extensions, through the cases destroying procedural hegemony, *Angel v. Bullington*, 330 U.S. 183 (1947); *Guaranty Trust v. York*, 326 U.S. 99 (1945); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) and culminating in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), 4 MIAMI L.Q. 380 (1950).

145. 113 F. Supp. 504 (S.D. Fla. 1953).

146. FLA. STAT. § 51.12 (1953).

in the United States Court and the complaints should be dismissed, for they clearly fail to state a claim on which relief could be granted under common law. However, if the statute relates to matters of substance, the statute applies in the United States Court and the motions should be denied.

It is my view that the statute is more than merely procedural and that the changing of the burden of proof at the trial and establishing a presumption of liability thereunder, grant the plaintiff a substantive right, the benefit of which he is entitled to receive in the Federal Court, as well as in the State Court.

The statute has never been construed by the Supreme Court of Florida, and research does not indicate the construction of a similar statute by the Courts of another State or by any United States Court. But much authority . . . indicates that matters touching burden of proof are substantive in nature, rather than procedural.<sup>147</sup>

What is most interesting about the court's statement is that it assumes that the construction of the statute by the Supreme Court of Florida would bind the federal court. The extent to which a federal court in diversity cases must accept the characterization by the state court of its own law has not been definitely decided as yet. Some of the federal courts have held that the acceptance of the characterization is sufficient without more, and that once having accepted the characterization made by the state court they may then proceed to utilize an entirely different set of choice-of-law rules than those of the state court which made the characterization.<sup>148</sup>

#### CHOICE OF LAW

*Creation and transfer of interests in tangible chattels.*—The general question of the law to be selected to govern the validity of chattel mortgages has arisen in several recent Florida cases dealing with automobile-transfer problems. No specific guides for the selection of general choice-of-law rules to determine the relationship between the original parties to a chattel mortgage or other security transaction have been found in the Florida cases. The decisions close to point assume without deciding that the law normally applicable to personal contracts, e.g. the place of making, will control rather than the law of the situs of the chattel at the time of the making of the contract.

The most difficult problems in the field of security transactions

147. 113 F. Supp. 504, 505 (S.D. Fla. 1953). Reference is made by the court to the collection of authorities on this general rule in 21 A.L.R.2d 257 and to the substantive character granted another statutory right, that created by FLA. STAT. § 768.05 (1951) establishing a presumption of negligence on the part of a railroad company in a grade crossing accident. For similar respect paid an analogous right see the treatment of FLA. STAT. § 625.08 (1951) in *Phoenix Indemnity Co. v. Anderson's Groves Inc.*, 176 F.2d 246 (5th Cir. 1949), 4 MIAAMI L.Q. 398 (1950).

148. For what is a really astounding error in this field, see *In re Mutual Life Ins. Co. of New York*, 188 F.2d 424 (5th Cir. 1951) where the court stated that the *Erie* doctrine only applies to matters arising ex delicto original opinion 161 F.2d 1 (5th Cir. 1947).

are those of the innocent purchaser vis-a-vis the chattel mortgagee or other holder of a secured title. In 1947, the Supreme Court decided the case of *Lee v. Bank of Georgia*.<sup>149</sup> The owner of the automobile, a resident of Georgia, had borrowed money from the Bank of Georgia. To secure repayment, he executed a "Bill of Sale" in proper local form and the bank duly recorded same. The owner removed the automobile without the bank's consent and sold it. The present defendants acquired the title as remote transferees without notice of plaintiff's lien and in reliance on a Florida certificate of title duly issued by the Motor Vehicle Commissioner showing that the automobile was free of liens.

At that time the statute<sup>150</sup> required recordation and the court held that it protected a bona fide purchaser even where the failure to record was non-negligent or due to the wrongful removal of the chattel.

The court stated the general rule to be that:

. . . if the mortgage is valid according to the law of the state where the property was located before removal, . . . it will be enforced in the courts of the state to which the property had been removed *as a matter of comity*, although it is not executed or filed according to the requirements of the law of the state of removal. This is especially true where the property is removed without the knowledge or consent of the mortgagee.<sup>151</sup>

The statute said nothing to indicate that the recordation requirement extended to foreign chattel mortgages but the court concluded its opinion with this language:

In this case there is no question of violation of any constitutional provision but only the withdrawing of comity which would otherwise exist.<sup>152</sup>

After several statutory changes, the court decided *McQueen v. M. and J. Finance Corporation*<sup>153</sup> in 1952. Here an automobile had been

149. 159 Fla. 481, 32 So.2d 7, 13 A.L.R.2d 1306, 1336 (1947).

150. FLA. STAT. § 319.15 (1953), which provided:

No liens for purchase money or as security for a debt in the form of a retain title contract, conditional bill of sale or chattel mortgage, or otherwise, on a motor vehicle, . . . shall be enforceable in any of the courts of this state, against creditors or subsequent purchasers for a valuable consideration and without notice, unless a sworn notice of such lien [containing certain information] shall be recorded in the office of the motor vehicle commissioner of the State of Florida . . . .

151. Quoted by the court 32 So.2d 719 (1947). (Italics supplied). Stress must be placed on the fact that the whole question of validity is dealt with in terms of "comity." The court assumes that the presence of the chattel, even wrongfully acquired or created, gives constitutional power to adjudicate interests therein. It analogizes a movable tangible to land. Would the court consider that the law of the place of recordation should determine the legal status of the remover? For it he be thief, he cannot pass good title!

152. *Ibid.* The doctrine adopted was a minority one, see *Lee v. Bank of Georgia*, 159 Fla. 481, 32 So.2d 7, 13 A.L.R.2d 1306 (1947). The case caused the passage of a new statute, Laws of 1949, c. 25150, now FLA. STAT. § 319.27 (1951), which made 319.15 inapplicable to automobiles and provided for notations of liens on the certificate of title. See generally FLA. STAT. c. 319, (1953).

153. 59 So.2d 49 (Fla. 1952).

brought in to Florida still bearing foreign license plates. Under the then prevailing law, the existence of such out-of-state license plates was held to put the purchaser on notice. Mere inquiry of the Florida Motor Vehicle Commissioner as to the state of the title would not be sufficient to make him a bona fide purchaser.<sup>154</sup> If the purchaser is put on such notice as to destroy his bona fides by the presence of foreign license plates, then he must, logically be given a means of protecting himself; particularly in those states where no notation of lien is required to be placed on the certificate of title or where the recordation of lien is in the county or city of the original purchaser's residence and he has moved before coming to Florida.

The *McQueen* case was followed in the same year by *Livingston v. National Shawmut Bank of Boston*.<sup>155</sup> There one Zeady had purchased an automobile from a dealer in Maine and executed a conditional sales contract to secure the balance due. This contract was assigned to the bank and recorded in the office of the city clerk in Portland, Maine, as required by the laws of the State of Maine. The state issued its official certificate of registration to Zeady and he came to Florida where he sold the automobile to the Parrish Motor Company. The certificate of registration and bill of sale were transferred to Parrish together with Zeady's warranty that the title was free of encumbrances. Parrish sold same to a third person without obtaining a Florida certificate of title.<sup>156</sup>

While this third person was applying for his Florida certificate of title and thus, inferentially at least, while the automobile still bore foreign license plates, the bank intervened, filed its notice of the lien and attempted to have the conditional sales contract noted on the certificate. The Commissioner declined to so note<sup>157</sup> and the present litigation commenced. Temporary injunction issued against the Commissioner. Parrish Motor Company repurchased the car from the subsequent purchaser. The chancellor below reached the conclusion that the lien of the bank was prior and superior to Parrish and that it was entitled to the entire proceeds.

On appeal, the Supreme Court stated as follows:

Insofar as such final decree holds that the lien of the Bank is superior to the rights of the Parrish Motor Company, we find no error. Section 319.15, Florida Statutes . . . as interpreted by

154. The court, inter alia, construed §§ 319.21, 319.22 and 319.28. No action had been taken under 319.28, and 319.22 was held applicable to transfers of Florida titles, not to situations where no title existed here. The dealer's authority to assign under 319.21 was limited to situations where the removal has not been so recent as to put the purchaser under a duty of inquiry at the State of licensing.

155. 62 So.2d 13 (Fla. 1952).

156. Under the authority of FLA. STAT. § 319.28 (1953).

157. Cf. action of this officer and its consequences in *Wilson v. Bankers Inv. Co.*, 47 So.2d 779 (1950) and comment thereon in 5 *MIAMI L.Q.* 282 especially n. 13 (1951). For another intermediate case, see *Inman v. Rowsey*, 41 So.2d 655 (1949).

this Court in *Lee v. Bank of Georgia* . . . no longer controls the rights of lien holders whose liens attached subsequent to August 1, 1949, by virtue of the provisions [of what is now Fla. stat. §] 319.27 . . .

There is nothing in Chapter 319, as amended, . . . to indicate that the Legislature intended to cut off the rights of holders of liens valid in and registered under the law of the State wherein such liens were created, as such rights had been previously enforced in this state under the rule of comity. Nor can the contention of . . . Parrish . . . that it was a 'bona fide purchaser' be sustained. See *McQueen v. M. & J. Finance Corp.* Fla. 59 So.2d 49.<sup>158</sup>

It is interesting to note that these results of the *McQueen-Livingston* doctrine were given legislative sanction at the 1953 session.<sup>159</sup> This action, particularly the new Section 319.27 (3) (f) (3), apparently resolves the question of the extent of notice given a purchaser of an automobile not having a Florida certificate of title, and makes the scope of inquiry more specific. The statute represents an advance in that it codifies the rule and makes the duties and obligations of the purchaser of that most important of movable chattels clearer.<sup>160</sup>

158. 62 So.2d 13, 14 (Fla. 1952). The court concluded by granting the bank superiority only to the extent of its lien and remitted the balance, if any, to Parrish as junior lienholder.

159. By § 7 of c. 28184, Laws of 1953 which was part of a general law amending title certificate procedure. This section completely changed FLA. STAT. § 319.27 (3) (1951). The pertinent lettered subsection is (f) which reads:

Any person, firm or corporation purchasing a motor vehicle upon which not certificate of title has been issued in Florida shall be deemed to be an innocent purchaser for value, without notice, of any retain title contract, conditional bill of sale or chattel mortgage, provided such purchaser:

- (1) Procures from the person selling such vehicle a sworn statement showing:
  - (a) That no lien does exist.
  - (b) Name and address of owner on the date the current tag on such vehicle was acquired;
  - (c) County and State where current tag on such vehicle was acquired;
- (2) Attaches to such sworn statement the certificate of title if one has been issued.
  - (a) If a certificate of title has not been issued, procures from the seller an oath that no certificate of title has ever been issued, and
- (3) Obtains a telegram or statement in writing from the Motor Vehicle Commissioner, or like officer, in the state of the current tag, to the effect that no lien does exist on said motor vehicle. If facilities do not exist in that office for the recording liens, then the purchaser shall obtain a telegram or statement in writing from the recording officer of the city or county and state of the residence of the seller as shown by the sworn statement, that no lien against said motor vehicle is of record in such county.

160. Some questions are still left open. Suppose the purchaser inquires at the place of residence on the sworn statement but the recordation is not at that place; or the problem arises as to the law to be selected to determine the scope and effect of notice which is to be given the recordation of a lien in a place foreign to that of licensing.

## CONCLUSION

In an article such as this one, limited to a period as it is, many fields of conflict of laws have not been touched by the courts or legislature. It is hoped that these omissions will not result in too deficient a product. As the surveys continue, more and more can be added through the cooperative efforts of the bar, the students at the various colleges of law and the courts. Without any attempt at including even a significant portion of the enormous literature in this subject, brief mention should be made of recent and readable articles which may contribute much to this development.

Invaluable, of course, are the pioneer surveys (of American Law and New York Law) to which this author wishes to pay his humble respects for guidance in the writing of this article. For an excellent synthesis of the work of the Supreme Court, reference should be had to the Harvard Law Review.<sup>161</sup> The Vanderbilt Law Review published an excellent collection of articles in a symposium dedicated to this field.<sup>162</sup>

Among the single articles, particularly rewarding are Judge Clark's comment on *Crosskey and The Brooding Omnipresence of Erie*,<sup>163</sup> a series<sup>164</sup> of articles by Ehrenzweig presenting some well developed new points of view and a fine historical introduction by Yntema.<sup>165</sup>

In closing, then, another mention should be made of the fine work done by the law reviews presently published by two of the Colleges of Law in this state. No attempt has been made to list the notes and comments written. A glance at the cumulative indices will clearly show the effort already expended on this difficult field. It is hoped that it will be expanded in the future, both in the scope of treatment by the existing reviews and by the addition of new legal magazines within this area.

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161. In the first number of each volume appears a review of the work of the Supreme Court in the preceding term. For the 1951 term see 66 HARV. L. REV. 89 (1952); for the 1952 term see 67 HARV. L. REV. 91, 121, 150 (1953).

162. 6 VAND. L. REV. 441 (1953).

163. The full title of this Article, which forms part of a symposium on Prof. Crosskey's book, is *Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins*, 21 U. OF CHI. L. REV. 24 (1953).

164. The series is made up of his, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus The Restatement*, 36 MINN. L. REV. 1 (1951); *Interstate Recognition of Custody Decrees* (same sub-title), 51 MICH. L. REV. 345 (1953); *Recognition of Custody Decrees Rendered Abroad*, 2 AM. J. COMP. L. 167 (1953), and *Adhesion Contracts in the Conflict of Laws*, 53 COL. L. REV. 1072 (1953).

165. *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297 (1953).