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# HISTORICAL BACKGROUND OF FLORIDA LAW\*

JAMES MILTON CARSON \*\*

## I

### THE NATURE AND ORIGIN OF LAW

All law must derive from the psychology of the people of each particular jurisdiction, and when we speak of the psychology of the people we mean the controlling, or "mass," or "mob" psychology of the people in any particular jurisdiction. Clarence Darrow in an article in the *American Mercury*,<sup>1</sup> went very deeply into the history of the influence of the masses of the people upon laws sought to be imposed from above, and demonstrated that even in countries whose governments are considered despotic or monarchical, the people themselves must support the laws, or else they fall into disuse and are finally repealed.

Since law must depend upon the psychology of the people in the particular jurisdiction, it becomes essential in trying to trace the development of law in a state such as Florida to consider the different influences which enter into the formation of the so-called "mob" psychology of the people. Of course, the psychology of any people cannot be understood without some analysis and discussion of their historical, cultural, and traditional background.

One of the most important things to consider in connection with the history of Florida is that it was a state of very sparse population and great area. The earliest census of this state was taken when it was the Territory of Florida, in 1830, and the total population was fewer than 35,000. The development was comparatively slow until after 1880, but even after that date, the state did not pass the half-million mark in population until sometime between the state census of 1895 and the federal census of 1900.<sup>2</sup> The 1945 state census gave Florida a population of two and a quarter million, and it is believed that the 1950 census will show a population of approximately three million. Of course, this great growth could not have happened without a very great deal of immigration.

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\*This article is adapted from the first part of Mr. Carson's new book, *FLORIDA LAW OF THE FAMILY, MARRIAGE AND DIVORCE*, to be published by The Harrison Company, Atlanta, in the near future.

\*\*Mr. Carson, a member of the Florida Bar, is the author of the widely known book, *FLORIDA COMMON LAW PLEADING*; he has also written for various legal periodicals, and formerly taught in the School of Law, University of Miami.

1. *The Ordeal of Prohibition*, 2 *AMERICAN MERCURY* 419 (Aug. 1924).

2. The constitution of Florida provides for state censuses to be taken every ten years ending in five. The first one was taken in 1885. The figures given here were taken from the official publication of *The Seventh Census of the State of Florida*, 1945, page 9. There are many other interesting studies with regard to the shift and change and growth of population in different sections of Florida to be found in this publication.

After the Civil War a great many northern people came to Florida. Many people from the older states of the South who had lost everything they owned, helped make up a tide of immigration. Beginning again after the discovery by medical men of means of controlling yellow fever, malaria, smallpox and other epidemics of tropical diseases that had flourished in the territory which is now the state, from very early days, there began another tide of immigration which is still in full swing. So that since 1900, the population of the state has multiplied more than four times.

The effect on our laws has been greater than can be gathered by a study of numbers. One of the things that has made the state interesting as a field of law is that people coming in from other states, and even from other countries, have always brought their own ideas along. When they come to Florida they remind the people of this state what provisions of law other states have as to different subjects of human activity, but gradually they all become absorbed in the community (that is, they do if they remain here); so that, Florida, probably more sensitively than any of the other Southern states, responds to experimental ideas as to law brought in from other states by newcomers. Also, the fact that Florida has been so dependent upon newcomers for the settlement of its vast area has brought about in this state much legislation designed to attract them. We have, for example, a constitutional prohibition against any State Income Tax. We have also, a constitutional provision against inheritance taxes, except in such amounts as one can get credit for from the Federal Government. We get a large share of revenue from legalized gambling at race tracks. We have many forms of sales tax, but not under that name; for example, we get money to run the state and the counties from gasoline tax, from cigarette tax, from tax on liquor and other things which are designed not only to attract people from other states, but to have them contribute to some extent to the support of government.

It may not be amiss to call attention to the fact that when he signed the 1935 Act<sup>3</sup> shortening the jurisdictional period of residence for the filing of a divorce, Governor Sholtz in a message to the legislature said that we were inviting transients into the state in the hope that they would become permanent residents.<sup>4</sup> All of these psychological factors make it necessary to study very carefully the historical background of the state.

## II

### FLORIDA HISTORY BEFORE 1821

Florida was purchased by the United States from Spain by a treaty of

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3. Fla. Laws 1935, c. 16975, F.S.A. § 65.02 (1935).

4. See Willock, *Historical Review of the Divorce Laws of Florida* (1943) (c. 65, F.S.A.).

1819,<sup>5</sup> but possession was not transferred until the so-called "change of flags" in 1821. The history of the state before the "change of flags" was a curious one. On account of its geographical location Florida was eagerly desired for centuries by the French, the Spanish, and the English. It was first under the French flag; then was under the Spanish flag from 1565 until 1763; the English flag from 1763 to 1783; and the Spanish again until 1821.

The Spanish claimed as being Florida, a large part of the southeastern part of what is now the United States, but as a matter of a settled claim, until the Louisiana Purchase, Spanish Florida claimed all of the territory from the Atlantic Ocean to the Mississippi River, as far north as Natchez, Mississippi.<sup>6</sup> After the Louisiana Purchase, the United States occupied that part of West Florida which was west of the Perdido River and west of the Mississippi with the exception of the so-called Florida parishes in Louisiana. Those are the parishes east of the Mississippi in southern Louisiana.

For administrative purposes the Spaniards had divided Florida into two parts, East Florida and West Florida, the capital of the former being at St. Augustine, and of the latter at Pensacola. Of course, all of the laws of Spain were in full force and effect during both the Spanish occupations.

By treaty of 1763 the Floridas, that is East and West Florida, were transferred to England. The two provinces of East Florida and West Florida remained tory during the Revolution and did not join with the original thirteen colonies.

The geographical location of the territory had made it a bone of contention between the Spanish and the French and the English; and the English, having lost the mainland on the eastern coast of what is now the United States, were not so anxious to retain Florida as formerly.

Thus, by the treaty of 1783 they transferred both Floridas back to Spain. There had been considerable colonization under the English. Many of our local place names came from titled Englishmen who came to Florida for the purpose of helping nail down, by actual settlement, the claim of the crown of England to the two provinces. Also, under the English, many grants of land were made for colonizing purposes, the most notable among them being the "Turnbull Grant" at New Smyrna.<sup>7</sup>

During the English occupation Florida was under English law. After the transfer back to Spain most of the English settlers left the state and Florida went back under Spanish law, and remained there until the "change of flags."

The Honorable R. A. Gray, Florida Secretary of State, has called attention in his text book on the government of Florida to the fact that very little

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5. This treaty was negotiated by John Quincy Adams, Secretary of State under James Monroe, but there was much delay in its ratification.

6. See CARSON, *FABULOUS FLORIDA* (map, p. 87) (1942).

7. See CORSE, *DOCTOR ANDREW TURNBULL AND THE NEW SMYRNA COLONY* (1928).

influence of the Spanish law was left in the state after 1829, or is now left.<sup>8</sup> Certain of the Spanish grants are the basis of titles in Florida, and the effect on property rights of certain of the Spanish laws with regard to ganancial rights as between husband and wife still remains;<sup>9</sup> but after Florida had been transferred to the United States, the change of attitude was very noticeable within a few years.

Rembert Patrick in his history of Florida writes of it as having been under five flags.<sup>10</sup> In *Fabulous Florida*, by Ruby Leach Carson, it is pointed out that Amelia Island and Fernandina had had at least three other flags before the "change of flags" when the Americans took possession. Those were the flag of the "Green Cross," the flag of the Mexican Republic, and the flag of the so-called "Republic of East Florida."<sup>11</sup> These three flew over Fernandina and Amelia Island during the Spanish occupation, around the time of the War of 1812, in which war Florida was a pawn again in the struggle between the United States and England. The Spanish government was too weak to control the territory, and these other, more or less piratical, flags flew over Amelia Island and Fernandina for short periods.

It is generally believed by historians that the attempt to establish the "Republic of East Florida" was an undercover effort by the United States Government (using the residents of the territory in an international game), to prevent the English from using the then extremely important Port of Fernandina.

The five flags referred to by Patrick were the French, Spanish, English, American and Confederate flags. Each of these flew over all the state at one time or another. The other three which were flown at Fernandina brought the total number in that part of the state to eight. There was in addition in the western part a "Republic of West Florida," which had its own flag.

During the second Spanish occupation and before the "change of flags," one Andrew Jackson, who had been a soldier, a lawyer, and a judge, boldly

8. See GRAY, *THE GOVERNMENT OF FLORIDA* (1941).

Although Florida was first colonized by the Spanish, and over it have flown the flags of five different peoples, the basis of the state government is largely the same English tradition and those newer political features peculiar to American ideas which are the foundations of the governments of the original thirteen English colonies. . . .  
*Ibid.*

Florida's early settlements were Spanish and the territory was owned by Spain when purchased by the United States in 1819, some years after the establishment of the United States government. Though the Spanish settlements left their impress in some few parts of the State and Spanish types and customs are still reflected to some extent in these communities, yet it is remarkable how any evidence of governmental influence of these Spanish settlements seems to be almost entirely missing from the present constitutional and legislative enactments of Florida. The influence of the English-speaking settlers, who early came to Florida from the other states with their English customs and traditions and new American ideas, were the dominant influences in shaping the government of Florida even from before the time it became a State in 1845. *Ibid.*

9. The rights and privileges of ganacias are stated in *McGee v. Doe ex dem. Alba*, 9 Fla. 382,398 (1861).

10. PATRICK, *UNDER FIVE FLAGS* (1945).

11. CARSON, *FABULOUS FLORIDA* 107-109 (1942).

invaded Spanish territory and executed two British subjects whom he accused of having encouraged the "Spanish Indians" to fight the armies of the United States. Jackson had defeated the Creek Indians at the Battle of Horseshoe Bend, or Tohopeka, in 1814, and followed the Indians into Florida under what he claimed to be international law, and although it was Spanish territory, he did later seize and execute the two British subjects.

Jackson had a very deep hatred for all things Spanish; he was determined not to permit the Indians to use Florida as a haven of refuge, and while he had bitterly fought the British and won the Battle of New Orleans against them, he preferred the English law (in accordance with his legal education) to the law of Spain.

He took charge as the first military territorial governor of Florida. His very profound influence upon the state was somewhat suspended for a period of a few years, because President James Monroe did not permit Jackson to make or influence his other appointments in Florida, but, a Jackson man, William P. Duval, became the first civil territorial governor.

### III

#### INFLUENCES UPON FLORIDA LAW, 1821-1845

Although Florida contained the oldest European settlement upon that part of the North American Continent which is now the United States, after it became an American possession, it was for all intents and purposes a pioneer state, not only on account of the great area and sparse population, but because, in fact, all of the English had already left, and all of the Spanish were in the process of leaving.

It is said that there are only four families left in Florida today who are descended from the original Spanish families. There are a good many distinguished families descended from the Turnbull Colonists, who are popularly called "Minorcans," but after the purchase by the United States the process of incorporating Florida into the United States was rapidly begun.

In two recent excellent biographies of James Monroe, President of the United States, he is described as "The last of the Cocked Hats," or "The last of the Virginia Dynasty."<sup>12</sup> He was both. His portraits show that he wore the formal costume which gentlemen of the Old Dominion had worn until his time, but which has not been worn since his day. What is not very well remembered is that he was the last of the Revolutionary leaders who was President of the United States. He was also a great Nationalist and a believer in the expansion of the country.

It has been a cardinal point of American policy ever since the days of

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12. CRESSON, *JAMES MONROE* (1946); STYRON, *THE LAST OF THE COCKED HATS; JAMES MONROE AND THE VIRGINIA DYNASTY* (1945).

Jefferson for our Government to try to get, for the United States, the colonies of France and Spain on our southern and western borders.

At this date it is difficult to realize that the men who lived in Tennessee, and Kentucky, and what is now Mississippi and Alabama, were called "Westerners"; and these "Westerners" were particularly anxious to have the French and Spanish driven from North America, or persuaded to leave voluntarily. Jefferson by his purchase of Louisiana, and Monroe by the so-called purchase of Florida, accomplished that result without warfare. In those days all of the people in the United States were thoroughly conscious of the fact that we had won, not only independence, but a complete revolution in methods of government, and in ideals. After Florida was purchased by the United States the effect of that revolution began to make itself felt in the new Territory.

The treaty between the United States and Spain is found in 25 F.S.A. beginning at page 251. It was signed originally on February 22, 1819, and ratifications were exchanged on February 22, 1821. James Monroe was President and John Quincy Adams was Secretary of State.

It may be wondered whether the Spanish authorities realized that both the original signing and the exchange of ratification were on the birthday of George Washington, the Father of this country. On March 10, 1821, Andrew Jackson received three commissions signed by Monroe and his Secretary of State, John Quincy Adams.<sup>13</sup> The instructions to Major General Andrew Jackson were dated March 12, 1821.<sup>14</sup> The treaty provided that the "change of flags" should occur within six months from ratification. Jackson took possession on July 17, 1821 at Pensacola. He immediately issued his proclamation signed by Andrew Jackson and by R. K. Call, Acting Secretary of West Florida. Call had been in the military service with Jackson and was a Jackson man. He was later twice territorial governor of Florida.

Andrew Jackson, without any hesitation or delay, took the first step to supersede the tyrannical Spanish laws by the common law of England.<sup>15</sup> His ordinance, dated July 21, 1821, contained this provision, which is Section 3 of the ordinance.

That the judicial proceedings in all civil cases shall be conducted, except as to the examination of witnesses, according to the course of the existing laws, or to the laws of Spain, and in criminal cases, according to the course of the common law: that is, no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, and in all criminal cases, the accused shall enjoy the right to a speedy, and public trial, by an impartial Jury of the county where-in the crime shall have been committed; and to be informed of the nature

13. 25 F.S.A. at pp. 257 *et seq.*

14. 25 F.S.A. at pp. 264 *et seq.*

15. 25 F.S.A. at pp. 275, 276, § 3. It will be noted that this ordinance of Major General Andrew Jackson was signed at Pensacola by Andrew Jackson himself, and by R. K. Call, Acting Secretary of West Florida.

and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defence.

The original act of Congress establishing a territorial government in Florida was passed on March 30th, 1822.<sup>16</sup> It provided for the appointment by the President of a governor who should hold office for three years; it defined his powers; it provided that in case of the death of a governor the secretary of the territory should be acting governor; it provided for two superior courts: one for East Florida, and one for West Florida. Their jurisdiction covered the counties, established by General Jackson, of Escambia which was all that part of Florida west of the Suwannee River, and St. Johns which was that part of Florida east of the Suwannee River, so that in those days there were East Florida and West Florida. This original act of Congress is interesting for two other reasons: as showing the general development of the psychology of the people of the new Territory, and the influence on them of Congress.

The third sentence of Section 5 prohibited any act of the legislative council of Florida from interfering with religious opinions, professions, or worship. The legislative council was to consist of 13 citizens of the United States who were residents of the territory, and who were to be appointed by the President of the United States.

Section 10 of the original act repeated not in exact language, but almost exactly, the Bill of Rights contained in Andrew Jackson's ordinance which was promulgated on July 21st, 1821. The first amendment to that act was passed on March 3rd, 1823.<sup>17</sup> It merely elaborated the general provisions, kept up the distinction between East Florida and West Florida, and repeated in Section 12 the provisions of the Bill of Rights.

In another amendatory act, passed on May 26, 1824, provision was made for a third court to sit in the territory between the Apalachicola and Suwannee Rivers.<sup>18</sup> That was the beginning of the "middle circuit," or "Middle Florida," as it was thereafter called for many years. In that act, for the first time, it was provided that there should be a court of appeals, but it was further provided that the court of appeals should be composed of the judges of the superior courts of said territory, any two of whom should be a quorum; therefore, there was not yet provided any independent supreme court.

In the act of May 15, 1826, it was provided for the first time that the legislative council of thirteen should be elected by the people of the territory; it was further provided that each of them should be an inhabitant of the territory, and should be elected for one year, their terms to commence on the

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16. 3 STAT. 654 (1822).

17. 3 STAT. 750 (1823).

18. 4 STAT. 45 (1824).



second Monday of December annually.<sup>19</sup> The responsibility for dividing the territories into districts was placed upon the territorial governor. There were many other acts of Congress affecting in one way or another the territory. There is no point in reviewing them all in detail, except to point out that some of them, in later years, were enacted for the purpose of encouraging the settlement of the state, and to provide for the confirmation and settlement of private land claims.<sup>20</sup>

The influence of Congress was expressed in these acts, but the real influence which followed the acquisition of the territory, up to and including statehood, was the influence of Andrew Jackson. It should be pointed out that all of the acts of Congress which provided for the organization of the territory protected slavery, but prohibited the slave trade, and all of them undertook to recognize as fully as was possible the provisions of the Bill of Rights. The influence of Andrew Jackson cannot be traced directly through the acts of Congress except that they copied so many of his own provisions in his ordinance, and except for the fact that he served in the United States Senate from March, 1823, until October, 1825.<sup>21</sup> Then, of course, he did become President on March 4th, 1829, and remained as President until his retirement on March 4th, 1837. Most of his influence, however, was exerted through the fact that Jackson men were territorial governors, throughout the life of the territory of Florida, and also because the most devoted of the Jackson men, Richard Keith Call, was governor at the time of the adoption of the Constitution of 1838 which was enforced until long after Florida had been admitted to the Union.<sup>22</sup>

By act of July 2nd, 1836, for the first time, we find a superior court described in an act of Congress as a superior court for the "middle district of Florida." That part of the state which is now called South Florida is mentioned not under that name, but otherwise, in the act of August, 1842, and that of June, 1844, both of which acts provided for the armed occupation and settlement of the unsettled part of the peninsula of Florida. In the Constitution of 1838 provision was made for four judicial circuits in which, for the first time, the words Southern Florida are used; so that until statehood, the state was referred to as East Florida, West Florida, Middle Florida, and Southern Florida, which in those days consisted only of territory on the Keys and the lower west coast of Florida.

It will be recalled that under the Spanish and English, the territory of

19. 4 STAT. 164 (1826).

20. Two other acts are published in full in 25 F.S.A. at pp. 310, 311; and the next four pages have a great number of congressional acts, cited only by title, date and the citation in the United States Statutes.

21. See "Andrew Jackson," BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS UP TO 1927.

22. For a sketch of the life of Richard Keith Call, see BIOGRAPHICAL DIRECTORY OF AMERICAN CONGRESS, *supra*.

West Florida extended to the Mississippi River. The provinces had two capitals; West Florida was at Pensacola, and East Florida had its capital at St. Augustine. After the acquisition of the territory, the western boundary was recognized as being at the Perdido River just a few miles west of Pensacola. The distance between Pensacola and St. Augustine is more than four hundred miles, and it was necessary, in the judgment of the territorial council, to select a central location for the capital of the new territory. Two commissioners were appointed and they selected the present site of Tallahassee as the site for the new capital of the territory. Tallahassee has remained the capital of the territory and the state ever since.

The Southern states as distinguished from the Western states, that is to say, the Carolinas, Virginia, and Georgia, immediately began sending many of their best citizens to move into that part of the new territory which was "Middle Florida," in and around Tallahassee. The Congress of the United States granted a township of land to the Marquis de Lafayette, situated at Tallahassee. The flower of many parts of the Old South came to the territory, bringing their slaves with them. Middle Florida thus rapidly became the most important part of the state, and was settled by the planters from the Old South, who mingled with the "Westerners" as we have called them, who were really in charge of the territory.<sup>23</sup>

Governor Duval, who had taken office on April 17th, 1822, was a Virginian who had gone to Congress from Kentucky; Richard Keith Call, who had signed the original proclamation of Andrew Jackson, and the original ordinances as acting secretary to the governor of West Florida, did not become governor until 1836, although in the meantime he had practiced law in Pensacola. He also was a Virginian by birth, had practiced law in Kentucky, and was therefore, a "Westerner."<sup>24</sup>

From the beginning of territorial rule until statehood, the influence of Andrew Jackson was all persuasive and all pervasive. His former Secretary of War<sup>25</sup> was appointed as one of the territorial governors, and a former Secretary of the Navy under Jackson became another.<sup>26</sup> Richard Keith Call, who served two separate terms as governor, was the oldest and most devoted of the Jackson friends. These men are mentioned here for the purpose of showing that the Jackson influence was not always directly used, but was due to the loyalty and devotion of the men who had been and remained his friends, and who had served under him.

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23. For an interesting factual account of one of the early voyages from an older state to Florida, see *Smith and Armistead v. Croom*, 7 Fla. 81, 99 (1857).

24. For a brief life of Governor Duval, see the *BIOGRAPHICAL DIRECTORY OF AMERICAN CONGRESS*, *supra*, under the title, "William P. Duval."

25. John H. Eaton, former Senator from Tennessee, former Secretary of War, husband of the famous Peggy O'Neil, who had quite an influence in the history of the Jackson Administration at Washington.

26. John Branch, formerly from North Carolina.

The Honorable R. A. Gray, Secretary of State, in a recent newspaper article, has stated that the reason Florida did not follow the course of the other states which had been under the Spanish flag and which brought with them into the Union some of the Spanish laws,<sup>27</sup> was based almost entirely upon the influence of Andrew Jackson. We shall see later that this probably entered into the liberality of the Florida divorce laws, and we certainly are entitled to say now that it is the fundamental reason for the adoption by Florida of the English common law and the complete repudiation of the Spanish system of laws. Of course, in making that deliberate choice, the people of the new territory were following the influences not only of the new "Western states," but of the older Southern states which had taken a large share in the fighting of the Revolution.

In less than nine years after the "change of flags" the territorial council passed the act which was approved on November 6th, 1829, providing that the common and statute laws of England which are of a general and not of a local nature, with certain named exceptions, down to the Fourth of July, 1776, were declared to be of force in the territory. This act still stands.<sup>28</sup>

Reference to the common law has been made and emphasized, because that method of thinking has run through all our court decisions since the date of the enactment of the statute just cited.

There was no divorce at common law.<sup>29</sup> Divorces in England were under the jurisdiction of the Ecclesiastical courts and were based on the religious doctrines of the Canon Law. All of our divorce procedure, and all of our law of divorce is purely statutory, beginning with the Act of 1828,<sup>30</sup> as amended in 1835,<sup>31</sup> and as slightly amended on several occasions since.<sup>32</sup> The English Ecclesiastical courts had distinguished between two forms of divorce, one from the bonds of matrimony, and the other from bed and board.<sup>33</sup> We do not have that distinction in Florida now, except that our procedure for alimony

27. These states are Texas, New Mexico, Arizona, California, not to mention Louisiana, which state brought into the Union with it the French law, since its system is based upon the "Code Napoleon."

28. F.S.A. § 2.01. That section as amended, reads as follows:

"Common law and certain statutes declared in force. The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state."

29. *Chisholm v. Chisholm*, 98 Fla. 1196, 125 So. 694 (1929); *McGowin v. McGowin*, 122 Fla. 394, 165 So. 274 (1936).

30. Act of October 31, 1828 (5 F.S.A. at pp. 435 *et seq.*).

31. Act of February 14, 1835 (5 F.S.A. at pp. 536-537).

32. All of these minor changes in the law of divorce are collected by Willock in *Historical Review of Divorce Laws, supra*.

33. See 17 Am. Jur. 147. The abolition of the distinction in Florida was by the Act of 1835, *supra*.

unconnected with divorce can hardly be distinguished from the ancient form of divorce from bed and board.<sup>34</sup>

The historical facts that led to the development of our liberal divorce laws probably are not capable of being proved conclusively, but it may be well to call attention to the fact that Andrew Jackson's wife, Rachel, had not been divorced at the time he married her, but that they both thought she had been, because they had heard before their marriage that she had been granted a legislative divorce in Kentucky. The fact that divorce was difficult, and that legislative action had been thought to be required, may explain why the new territory started out with liberal laws as to the grounds for divorce, and why, in the very first constitution, legislative divorces were prohibited in Florida.<sup>35</sup> In the early days, Florida, so far as law was concerned, was under the influence of Andrew Jackson, and the Constitution of 1838 was adopted when Richard Keith Call was governor.

As Willock points out in his excellent historical sketch, there were only two legislative divorces granted by the territorial council; and the Supreme Court of Florida later held that no legislative divorce from the beginning was valid.<sup>36</sup>

The constitutions of 1838,<sup>37</sup> 1861,<sup>38</sup> 1865,<sup>39</sup> 1868,<sup>40</sup> and 1885<sup>41</sup> all prohibited legislative divorces. In Florida, the divorce laws started out on a much more liberal basis than those of either England, or Spain, or of the other American colonies, and have continued to be interpreted liberally by the courts, although in the very early days the decisions of the courts as to the proof required for each of the separate statutory grounds were not nearly as liberal as they have become in the past twenty or thirty years.

In territorial days all divorces from the bond of matrimony (*a vinculo matrimonii*) were under the jurisdiction of the superior courts.<sup>42</sup> Alimony unconnected with divorce (the equivalent of divorce *a mensa et thoro*) was under the jurisdiction of the county courts.<sup>43</sup> Jurisdiction over the cases of

34. F.S.A. § 65.09, 65.11; *Underwood v. Underwood*, 12 Fla. 434 (1868); *Chaires v. Chaires*, 10 Fla. 308 (1863).

35. FLA. CONST. Art. XVI, § 5 (1838) (25 F.S.A. at p. 349).

36. *Ponder v. Graham*, 4 Fla. 23 (1851).

37. 25 F.S.A. at pp. 329 *et seq.*

38. FLA. CONST. (1861) (25 F.S.A. at pp. 359 *et seq.*).

39. FLA. CONST. (1865) (25 F.S.A. at pp. 381 *et seq.*).

40. FLA. CONST. (1868) (25 F.S.A. at pp. 411 *et seq.*).

41. The Constitution of 1885 is thoroughly annotated in Volumes 25 and 26 of F.S.A. beginning at page 449, of Volume 25 and extending to the end of that Volume and all of Volume 26. These annotations are very valuable. The other constitutions in Volume 25 are not annotated, but Florida Statutes Annotated, published by the Harrison Company and the West Publishing Company are on the whole extremely well annotated, and pocket parts are issued yearly. This is based upon the official 1941 Statutes as revised, and published, by the State. The numbers of sections in F.S.A. are the same as in that Volume so far as is possible. Later enactments and decisions are included in the pocket parts.

42. Act of February 14, 1835, *supra*.

43. Act of 1828, *supra*.

alimony was transferred to the circuit courts, so that all divorces are now matters of chancery jurisdiction, as well as suits for alimony, and all other matters connected with divorce.<sup>44</sup>

In the beginning, there were no appellate judges in the territory, but the circuit or superior court judges acted as appellate courts,<sup>45</sup> so that all through territorial days, and for the first three volumes of the Florida Reports, the decisions of the Supreme Court of Florida were handed down by circuit judges. There was no separately organized supreme court until 1851.<sup>46</sup>

The first supreme court was elected by the legislature, and it was not until 1853 that the supreme court was elected by the people.<sup>47</sup> Some of the very ablest opinions in the Florida Reports are found in the early volumes of those reports. There are many of them, but attention will be called in the footnote to only one or two.<sup>48</sup>

Students of history know that Andrew Jackson was a very strong Union man. His famous challenge to John C. Calhoun, while he was President, is quoted everywhere by historians. Jackson, of course, had been the great hero of the War of 1812. During that war, secession was agitated by the New England states, and after the war Calhoun came up with his doctrine of nullification, but the division between the North and the South, which led to the Missouri Compromise of 1820, and to the later so-called compromise of 1850, was becoming sharper from year to year. Florida and Iowa were admitted by the same act of Congress, one as a free state, and one as a slave state.<sup>49</sup>

Richard Keith Call, the strong Jackson advocate from Florida, was also a strong Union man, and in the years immediately following statehood was known as a "Whig." In fact, he was the leader of the Whigs in Florida, and later led the opposition to secession. Florida's first elected governor, William D. Moseley, took a strong Southern position,<sup>50</sup> so that the Southern states began to advocate the very secession which they had so strongly opposed when the New England states began to agitate just as strongly against secession as they formerly had in its favor.

We close our history of the territorial days, so far as the law of Florida is concerned with the reminder that the division between the North and the South had begun, at the very time Florida was admitted to the Union as a

44. We shall not discuss Florida chancery jurisdiction or practice, except incidentally, but there are two excellent publications available on the general question of Florida chancery practice: KOOMAN, *FLORIDA CHANCERY PLEADING AND PRACTICE* (1939); MCCARTHY, *THE CHANCERY PRACTICE ACT* (1940).

45. Act of Congress, *supra*, relating to the territory of Florida. FLA. CONST. Art. V, § 3 (1838).

46. Acts of 1851, c. 371 (25 F.S.A. at pp. 354-356).

47. See 152 Fla. XXIV (1943).

48. Barber v. State, 5 Fla. 199 (1853); Smith and Armistead v. Croom, 7 Fla. 81 (1857).

49. 5 STAT. 742, 788, 789 (1850).

50. Inaugural Address of William D. Moseley (1845).

state, to nullify, and to modify, and completely to reverse, part of the Jackson influence, which had in its very infancy been so important to Florida.

#### IV

##### HISTORICAL INFLUENCES, 1845-1885

What Mr. Churchill has called the "Gathering Storm" (referring to World War II) was comparable to the situation in Florida from 1845 until secession. The Constitution of 1838 remained in force with some amendments until 1861, when Florida was the second state to secede from the Union;<sup>51</sup> at the same time it adopted another constitution with very few changes from that of 1838, and those were designed to enable it to become a member of the Confederate States of America, or State in the Confederacy.

Then from '61 to '65, of course, Florida was at war. John Milton was the governor. Very little of the war touched Florida territory, but it became a source of supplies for the Federal Army and for the Confederate Army. Cattle from that part of the state west of the Kissimmee River were driven up through the state and across the line to other states, as supplies for the Confederacy. Cattle from east of the Kissimmee River were generally driven up to St. Augustine as a source of supply for the Union Armies which held St. Augustine throughout the war. Key West remained in the hands of the United States, as did some of the forts at Pensacola. Florida's value was as a source of supply. Many people from the other Confederate states came to Florida in that connection.

Dr. John L. Crawford, who was Secretary of State for many years, came to the Gulf Coast to set up a salt works for the Confederacy. The only battle of any consequence fought on Florida soil<sup>52</sup> was the result of an attempt by the Federal Army to cut off the supply of meat to the Confederate Armies.

When the news of Lee's surrender reached Tallahassee, Florida's war governor, who had been the leader of the secessionist faction, committed suicide. The state accepted the result of the war, and adopted the Constitution of 1865, operating under it for a short time, but the Congress of the United States had fallen under the control of the so-called "Radicals," and would not accept that constitution. That led to the adoption of the Constitution of 1868. From that year until 1876, Florida struggled under Reconstruction. The history of that era has never been very well written so far as Florida is concerned, but it has been covered so far as the South as a whole is concerned, by Claude Bowers, in his fine book, *The Tragic Era*.

There were several decisions during those troubled years with regard to

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51. The ordinance of secession was passed on January 10, 1861. (25 F.S.A. 359).

52. The Battle of Olustee, fought on February 20th, 1864.

the political situation, but they need not concern us in a book of this sort, nor need we be concerned about the internal development of the state. The Swamp and Overflowed Land Act of 1850, and the Act of 1855,<sup>53</sup> which set up the Board of Trustees of the Internal Improvement Fund, and later similar developments, affected other fields. However, we may say that the hardships and the poverty which followed the Civil War and the Reconstruction days led to a series of measures which were expected to and which did in fact have the effect of protecting a man's wife and children so that they should not become public charges.

The first Homestead Exemption provision was in Article 9 of the Constitution of 1868; it exempted the homestead property from sale by legal process in cases where the debt was contracted, liability incurred, or judgment obtained before the tenth of May, 1865; so that it obviously was a result of the poverty of the state following the devastation of the Civil War. That article was enlarged in the Constitution of 1885 in Article 10, and the state has since enlarged it by exempting homesteads from taxation up to the amount of \$5,000.00.<sup>54</sup>

As proving the purpose of these provisions from 1865 until today, so far as they affect the law of the family, attention is called to Chapter 2065 of the Laws of 1875, which provided that no writ of attachment or garnishment should issue to attach or delay the payment of anything due to any person who was head of the family in the state when the money or other things of value is due for the personal labor or services of such person.<sup>55</sup> The courts have several times held that the purpose of that enactment was to preserve to the unfortunate citizen and his family certain things necessary which enable him to earn his livelihood.<sup>56</sup> That is an illustration of a principle that is incorporated into the law for the protection of the family. Another proof that that is the intention of that Section is the fact that garnishment even of the salary of public officers is available to enforce decrees for alimony or for support of the wife or children.<sup>57</sup>

The election of 1876 ended Reconstruction, but the Constitution of 1885 was not adopted until some nine years after that election. Governor Drew took office in 1877, Governor Bloxham in 1881. The state was struggling with the debts piled up by the Carpet Bag government, and with the general disorganization of government. The Constitution of 1885 was an attempt to correct

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53. The original act was Chapter 610 of the Laws of 1855, and vested the title to the lands, granted to the state by the United States, in a Board of Trustees, to be handled by them as Trustees for public improvements. Chapter 253 of F.S.A. contains the original enactment and the many amendments which were later added, together with annotations.

54. This amendment appears in the Constitution of the State of Florida of 1885 as published in F.S.A. as Section 7 of Article 10.

55. This is now Section 221.11, F.S.A.

56. *Patten Package Company v. Houser*, 102 Fla. 603, 136 So. 83 (1931); *Wolf v. Commander*, 137 Fla. 313, 188 So. 83 (1939).

57. F.S.A., § 65.13.

some of those evils, but it carried forward the provision as to Homestead Exemption, enlarged it a little, and had a very definite provision as to the property of married women.<sup>58</sup> The poverty following the war and Reconstruction had quite an influence on the policy of the law of Florida as to the law of the family.

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58. FLA. CONST. Art. 11 (1885). There are very full annotations on this Article in Vol. 26 of the F.S.A. beginning on page 536.