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## Quarterly Synopsis of Florida Cases

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# QUARTERLY SYNOPSIS OF FLORIDA CASES\*

This issue of the *Quarterly Synopsis* consists of about eighty Florida cases, excluding memorandum decisions and a few others not of sufficient importance to be noted here, as found in Volume 54 of the Southern Reporter, Second Series, pages 673 through 927 and Volume 55 of the Southern Reporter, Second Series, pages 1 through 872 (advance sheets from December 6, 1951 through January 31, 1952). In addition, there are four federal cases interpretative of Florida law. These are found in 72 Sup. Ct. 118 through 373 (advance sheets from December 15, 1951 through February 15, 1952), 191 F.2d 929 through 1023, all of Volume 192 of F.2d and 193 F.2d 1 through 208 (advance sheets from December 10, 1951 through February 11, 1952), 100 F. Supp. 457 through 1023 and 101 F. Supp. 1 through 768 (advance sheets from December 3, 1951 through February 18, 1952).

**ACTIONS.** *By personal representative of deceased.* The personal representative of a deceased person may not bring an action for the death of such person based upon breach of warranty of fitness of the instrumentality causing death.<sup>1</sup>

**ADMINISTRATIVE LAW.** *Review.* In a workmen's compensation case, the deputy commissioner's findings of fact will not be reversed on appeal to the full commission where there is substantial competent evidence in the record to support them. It is the circuit court's duty on appeal to determine only whether the commission observed the "substantive evidence" rule.<sup>2</sup>

**ARBITRATION.** *Exclusion from hearings.* The common law rule is that all arbitrators shall sit at the hearings and hear the evidence. Exclusion of an arbitrator from the hearings is such "misbehavior"<sup>3</sup> as to justify setting aside an award signed by the other arbitrators.<sup>4</sup>

*Resignation of arbitrator.* The fact that an arbitrator selected under an arbitration agreement resigns prior to the entry of an award does not, per se, invalidate the award, since by statute<sup>5</sup> a majority of the arbitrators are authorized to enter an award.<sup>6</sup>

**ASSIGNMENTS.** *Priority.* A contractor's assignment to a bank of the

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\*This issue of the *Quarterly Synopsis* was prepared for publication by Charlotte J. Barkan, Donald C. McCormick and Stanley M. Pred.

1. FLA. STAT. § 768.01 (1949), *Whiteley v. Webb's City*, 55 So.2d 730 (Fla. 1951).
2. FLA. STAT. §§ 440.25, 440.27 (1949), *United States Casualty Co. v. Maryland Casualty Co.*, 55 So.2d 741 (Fla. 1951).
3. FLA. STAT. § 57.07 (1949).
4. *Cassara v. Wofford*, 55 So.2d 102 (Fla. 1951).
5. FLA. STAT. § 57.07 (1949).
6. *Cassara v. Wofford*, *supra* note 4.

balance due on a contract is inferior to a prior assignment of any amount payable on it to a surety on a performance bond, where the surety made payments of the contractor's defaulted amounts in accordance with the indemnity agreement.<sup>7</sup>

**ATTORNEYS.** *Compensation.* An attorney is entitled to reasonable compensation for services in the absence of an express agreement as to fees. Whether an express contract exists is a matter for the jury to determine.<sup>8</sup>

**BANKS AND BANKING.** *Raised checks.* Where a depositor makes it possible for an employee to raise checks, and there are no circumstances to put the bank on notice, it is absolved from liability.<sup>9</sup>

**CARRIERS.** *Certificate to operate.* Petitioner, a company distributing cookies from Tampa to Miami, contracted to carry on its return trip the fragile products of a Miami manufacturing company. These products required special services and facilities that the common carriers authorized to serve in the area could not, and which petitioner could, adequate provide. It was permitted to operate as a private contract carrier for this purpose.<sup>10</sup>

**CONFLICT OF LAWS.** *Choice of law: Extradition.* In extradition proceedings the legality of the revocation of parole or probation of the person sought to be extradited is a question to be decided by the courts of the demanding state.<sup>11</sup>

**CONSTITUTIONAL LAW.** *Appointment of district officers.* The Palm Beaches Sanitary District Bill,<sup>12</sup> providing for the appointment of members of the Sanitary Board by Palm Beach, West Palm Beach and the Board of County Commissioners of Palm Beach County is not unconstitutional,<sup>13</sup> inasmuch as the appointees are district officers rather than state or county officers and hence need not be elected by the people or appointed by the governor.<sup>14</sup>

*"Tied House Evil" law.* Florida's "Tied House Evil" law<sup>15</sup> by which manufacturers, wholesalers, and distributors of intoxicating liquors are prohibited from having any financial interest in retailers and are limited in their extension of credit to retailers, is constitutional, since it bears a reasonable relation to public health and welfare and is a reasonable regulation under the police power. Since it provides for hearings, it does not deny due process and is not discriminatory.<sup>16</sup>

**CONTRACTS.** *Specific performance.* An optionee under a contract to

7. *Commercial Bank in Panama City v. Board of Public Instruction*, 55 So.2d 552 (Fla. 1951).

8. *Lamoreux v. Lamoreux*, 55 So.2d 799 (Fla. 1951).

9. *Goldsmoth v. Atlantic Nat. Bank of W. Palm Beach*, 55 So.2d 804 (Fla. 1951).

10. *Jack's Cookie Co. v. Florida R.R. & Pub. Util. Comm'n*, 54 So.2d 695 (Fla. 1951).

11. *State ex rel. Williams v. Littlefield*, 54 So.2d 694 (Fla. 1951).

12. House Bill No. 1200, § 14 (1951).

13. FLA. CONST. Art. III, § 27.

14. *Town of Palm Beach v. West Palm Beach*, 55 So.2d 566 (Fla. 1951).

15. FLA. STAT. § 561.42 (1949).

16. *Pickerill v. Schott*, 55 So.2d 716 (Fla. 1951).

purchase real property in which it was stipulated that he should have the right to complete the transaction by delivering a second mortgage for the difference between the purchase price and an outstanding first mortgage, is entitled to specific performance when he obtained an assignment of the first mortgage and offered to give the seller a new first mortgage.<sup>17</sup>

A provision for forfeiture of the down payment in a contract for the purchase and sale of property does not operate as a bar to the purchaser's suit for specific performance on the ground that the contract lacks mutuality.<sup>18</sup>

*To procure insurance.* In the absence of clear and unequivocal terms, a contract to procure public liability insurance must be construed to be a contract to indemnify only against the negligence of the indemnitor, and not against that of the indemnitee.<sup>19</sup>

*COUNTIES. Use of county funds for referendum election.* The Palm Beaches Sanitary District Bill,<sup>20</sup> providing for the expenditure of county funds to hold a referendum election<sup>21</sup> is not unconstitutional<sup>22</sup> as being an expenditure of funds for other than a county purpose.<sup>23</sup>

*Use of proceeds of bond issue.* Dade County issued \$6,000,000 in bonds for the purpose of "extending and improving" Jackson Memorial Hospital. The words "extending and improving" should be construed in the light of the Dade County potential, so that a portion of the proceeds may be used to construct and equip a medical science building as an integral part of the hospital to be used in part as a medical college, but with a view toward improving and expanding the hospital's facilities.<sup>24</sup>

*COURTS. Jurisdiction.* The circuit court has jurisdiction to hear a coparcener's suit for partition, although the county court has previously assumed jurisdiction to administer the will of another coparcener.<sup>25</sup>

*Power to punish violation of injunctive orders.* A trial court has power to punish the willful violation of its injunctive orders and its determination of whether its orders have been violated will not lightly be set aside.<sup>26</sup>

*CRIMINAL LAW. Arrest.* A statement to the arresting officer by a previously convicted bolita seller that the "word was out" that it was safe to sell bolita and that he was so doing is sufficient to justify an arrest.<sup>27</sup>

*Immunity from prosecution.* The statute<sup>28</sup> entitling persons who produce evidence to immunity from criminal prosecution applies only where

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17. *Stoffer v. Adams*, 54 So.2d 801 (Fla. 1951).

18. *Romines v. Nobles*, 55 So.2d 563 (Fla. 1951).

19. *Jackson v. Florida Weathermakers*, 55 So.2d 575 (Fla. 1951).

20. House Bill No. 1200 (1951).

21. *Id.* at § 14.

22. FLA. CONST. Art. IX, § 5.

23. *Town of Palm Beach v. West Palm Beach*, *supra* note 14.

24. *Crow v. Dade County*, 54 So.2d 753 (Fla. 1951).

25. *McQueen v. Forsythe*, 55 So.2d 545 (Fla. 1951).

26. *Fernandez v. Kellner*, 55 So.2d 793 (Fla. 1951).

27. *Burnside v. State*, 55 So.2d 107 (Fla. 1951).

28. FLA. STAT. § 932.29 (1949).

there is compulsion, coercion or an offer of immunity in return for the evidence.<sup>29</sup>

*Larceny.* A single larceny is committed when separate objects are stolen at the same time, from the same place, under the same circumstances and as part of the same act, although the stolen goods belong to different persons.<sup>30</sup>

*Possession of coin-operated devices.* The petitioner was properly discharged of the alleged crime of possession of coin-operated devices where the machines were out of order, obsolete and could no longer be operated by the insertion of a coin, although by repairs and replacements they could be used as gambling devices.<sup>31</sup>

*Procedure: Mistrial and double jeopardy.* The trial court declared a mistrial because it was convinced that one or more of the defendant's witnesses was swearing falsely and that their testimony was prejudicial to his rights. The Supreme Court found this reversible error and held that a second trial would constitute double jeopardy in violation of the Florida Constitution.<sup>32</sup>

*Procedure: Verdict.* The court charged the jury that if it found the defendant guilty of assault with intent to commit rape the form of the verdict should be "guilty of assault *with intent* to rape." (Italics supplied.) The jury returned a verdict of ". . . guilty of an assault *and attempt* to commit rape." (Italics supplied.) The quoted words were held by the Supreme Court to be synonymous.<sup>33</sup>

*DAMAGES. Excessive award.* In an action for work done and materials furnished in pavement construction, where the verdict was excessive and the evidence was too uncertain to furnish a foundation for a remittitur, a new trial should be granted.<sup>34</sup>

*DIVORCE. Grounds: Extreme cruelty.* It is error to deny a divorce on the ground of extreme cruelty when the defendant is found to be so domineering, fault-finding, critical and neglectful that any further effort on plaintiff's part to continue the marriage relationship would result in a nervous breakdown.<sup>35</sup>

*Grounds: Test of extreme cruelty.* The test of whether particular conduct constitutes extreme cruelty is not whether given conduct *should* result in the infliction of pain and suffering, but whether it *does*, in fact, so result.<sup>36</sup>

29. *State ex rel. Raines v. Gravson*, 55 So.2d 554 (Fla. 1951).

30. *Hearn v. State*, 55 So.2d 559 (Fla. 1951).

31. FLA. STAT. §§ 849.15, 849.16 (1949), *Kelly v. State ex rel. Rosowsky*, 55 So.2d 561 (Fla. 1951).

32. FLA. CONST. *Declaration of Rights*, § 12, *State ex rel. Wilson v. Lewis*, 55 So.2d 118 (Fla. 1951).

33. *Henderson v. State*, 55 So.2d 110 (Fla. 1951).

34. *Dixie Builders, Inc. v. Partin*, 54 So.2d 811 (Fla. 1951).

35. *Lyon v. Lyon*, 54 So.2d 679 (Fla. 1951).

36. *Ibid.*

**ELECTIONS.** *Recall: Sufficiency of initiating affidavit.* A mayor-commissioner is estopped from denying the sufficiency of an affidavit initiating his recall when he has agreed to the recall election and has promised not to combat or obstruct it in any way.<sup>37</sup>

**EQUITY.** *Jurisdiction.* There is no authority to transfer to equity a law action for recovery of materials furnished, where the defendant sets up pleas for affirmative relief by way of accounting and counterclaimed for any sum found to be due.<sup>38</sup>

*Rights to disputed fund.* An agreement provided that the debtor would hold the balance due on a building contract until the settlement of conflicting claims to it by several contractors. Despite the fact that one contractor failed to file a lien, his claim to the fund may be adjudicated, along with those of the others, in one equity action.<sup>39</sup>

**EVIDENCE.** *Burden of proof.* Where a common law marriage is prima facie established, those asserting the illegality of the marriage assume the burden of proof of their assertion.<sup>40</sup>

*Impeachment.* The defendant in a replevin action cannot impeach the credibility of the plaintiff by introducing into evidence a record of the plaintiff's conviction for larceny in an unrelated case.<sup>41</sup>

*Purchased testimony.* Purchased testimony alone is insufficient to support a charge that a dental technician practiced dentistry without a license.<sup>42</sup>

**FAMILY LAW.** *Custody: Visitation privilege.* A father's privilege of visitation of his child, custody of whom was given the mother by a divorce decree, is not unduly restricted by permitting him to visit the child for two hours on alternate Sundays at the latter's residence.<sup>43</sup>

**GAMING.** *Possession of gambling implements: Burden of proof.* In a prosecution for the unlawful possession of certain implements and devices for conducting bolita, the burden of proof is on the prosecution to establish that tickets in the possession of the defendant were "lottery tickets in a lottery yet to be played."<sup>44</sup>

*Proof necessary to sustain conviction.* To sustain a conviction for operating a gambling house there must be proof that the defendant owned or controlled the premises and that the condemned game or device has habitually been played or used therein with the owner's knowledge and consent or by his direction.<sup>45</sup>

**JUDICIAL ADMINISTRATION.** *Submission of case to jury.* The character

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37. Long v. Lancaster, 55 So.2d 795 (Fla. 1951).

38. Wood v. Wagner, 55 So.2d 537 (Fla. 1951).

39. Hightower v. Thurmond, 55 So.2d 564 (Fla. 1951).

40. Lambrose v. Topham, 55 So.2d 557 (Fla. 1951).

41. Watson v. Campbell, 55 So.2d 540 (Fla. 1951).

42. FLA. STAT. § 466.29 (1949), Peters v. Brown, 55 So.2d 334 (Fla. 1951).

43. Smith v. Smith, 55 So.2d 735 (Fla. 1951).

44. FLA. STAT. § 849.09 (1949), Harris v. State, 55 So.2d 109 (Fla. 1951).

45. Millman v. State, 55 So.2d 713 (Fla. 1951).

of the evidence in each controversy is determinative of whether submission to the jury is required of an action brought under the Federal Employers' Liability Act,<sup>46</sup> involving the exercise of "such care as that Act requires to furnish an employee a reasonably safe place to work."<sup>47</sup>

**LABOR LAW. Wage rates.** Representatives of general contractors and labor unions in the Miami area agreed to adjust wage rates for all skilled craftsmen, to refer jurisdictional disputes to a committee, and that all future wage agreements would expire on March 31 of each year. Notwithstanding the committee's refusal to allow a carpenters' union a wage rate review, the union prior to March 31 raised the wage scale of carpenters above that set by the committee. The court held that the union was bound by the wage scale fixed by the committee.<sup>48</sup>

**LANDLORD AND TENANT. Rights to security deposit.** A lease provided that the lessee pledged to the lessor ". . . all equipment . . . chattels and appurtenances which may be brought upon the demised premises . . . as security for the payment of the rental . . . and the performance of the covenants . . . hereof." This was construed to encumber only such items as would be sufficient to make the lessor whole for any loss suffered.<sup>49</sup>

**Relationship.** A landlord and tenant relationship exists where one party agrees to permit another to live in his house, in consideration of which the latter agrees to pay all property taxes on the property.<sup>50</sup>

**Constructive trust.** A constructive trust in favor of the lessor exists where the lessee breached the lease agreement by his failure to pay all property taxes on the premises and purchased the property at tax sale.<sup>51</sup>

**LEGISLATION. Post-sessional expenditures.** A House resolution providing for an investigating committee<sup>52</sup> does not authorize the Governor to countersign a Comptroller's order or warrant drawn on the State Treasury to be used in payment of the expenses of the committee and incurred by it after the adjournment of the 1951 session of the legislature, where no appropriation was provided for the committee.<sup>53</sup>

**LICENSES. Liquor.** An ordinance providing for the issuance of one liquor license for each 1,500 people in a city according to the last preceding federal census is not arbitrary, unreasonable, or unconstitutional, and does not prohibit the sale of liquor rather than regulate it.<sup>54</sup>

**LIENS. For labor on farms, orchards and groves.** Labor performed in staking out land into lots, clearing it, cutting out and laying roads, main-

46. 53 STAT. 1404 (1939), 35 STAT. 65 (1908), 45 U.S.C. § 51 (1946).

47. *Seaboard Air Line R.R. v. Hardee*, 54 So.2d 809 (Fla. 1951).

48. *Carpenters' Dist. Council, United Brotherhood of Carpenters & Joiners of America v. Miami Chapter, Associated Gen. Contractors of America*, 55 So.2d 794 (Fla. 1951).

49. *Birbaum v. Murak Realty, Inc.*, 55 So.2d 186 (Fla. 1951).

50. *Ballard v. Gilbert*, 55 So.2d 723 (Fla. 1951).

51. *Ibid.*

52. House Resolution No. 494 (1951).

53. *In re Advisory Opinion to the Governor*, 55 So.2d 99 (Fla. 1951).

54. *Brown v. Miami Beach*, 54 So.2d 689 (Fla. 1951).

taining buildings and grounds, etc., are of such lienable character as to bring them within the statute<sup>55</sup> granting liens for labor performed on a farm, orchard, grove, garden, park or other grounds.<sup>56</sup>

*Mechanics' liens: Property held for public purpose.* Property was donated to and accepted by St. Augustine in trust for the use of the public in perpetuity, the deed providing that neither the city nor its board of trustees were to have the right to sell, mortgage or dispose of the property. A mechanic's lien for labor, services and materials furnished for improving the property will not attach, since the Mechanics' Lien Law<sup>57</sup> must be strictly construed and the city does not fall within the definition of owners<sup>58</sup> of real estate to which such liens may attach.<sup>59</sup>

*MASTER AND SERVANT. Federal Employers' Liability Act.* The defendant's motion for a directed verdict in an action brought under the Federal Employers' Liability Act<sup>60</sup> was properly denied where there was a question whether the employer had taken "precautions . . . commensurate with the dangers which were likely to be expected and which could be removed by the employer."<sup>61</sup>

*MUNICIPAL CORPORATIONS. Bonds.* The City of Arcadia issued refunding bonds, obligated itself by the refunding resolution to levy an ad valorem tax sufficient to produce a given sum each year and levied ad valorem taxes apparently sufficient to produce such amounts. The resolution provided that if the city failed to perform its obligations, the bondholders would be entitled to higher rates of interest. The city utilized delinquent taxes for prior years, when collected, to make up deficiencies in revenue due to unanticipated shortages in current tax collections. The court held that so long as the money was available to pay the coupons as they mature, or thereafter within the grace period allowed, the plaintiff bondholders may not complain as to the source of revenue and are not entitled to the higher rates of interest.<sup>62</sup>

*Election returns.* The City Council of Avon Park, authorized by statute to "judge of the election returns"<sup>63</sup> and by the city charter to "judge the election and return,"<sup>64</sup> is limited to judging the returns themselves and is without authority to judge the legality or validity of returns, based on alleged misconduct at the polls, these being questions for the judiciary.<sup>65</sup>

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55. FLA. STAT. § 85.04 (1949).

56. O'Harra v. Frazier, 54 So.2d 688 (Fla. 1951).

57. FLA. STAT. c. 84 (1949).

58. FLA. STAT. § 84.01 (1949).

59. St. Augustine v. Brooks, 55 So.2d 96 (Fla. 1951).

60. See note 46 *supra*.

61. Seaboard Air Line R.R. v. Hardee, *supra* note 47.

62. Pringle v. City of Arcadia, 192 F.2d 335 (5th Cir. 1951).

63. FLA. STAT. § 165.18 (1949).

64. Fla. Spec. Acts 1927, c. 12514 § 24.

65. Gough v. State *ex rel.* Sauls, 55 So.2d 111 (Fla. 1951).

**NEGLIGENCE.** *Concurring proximate cause.* The plaintiff's negligent act of diving into the defendant's swimming pool about 5 a.m. without giving the slightest heed to existing conditions, when even a casual observation would have disclosed that the pool did not contain sufficient water for swimming or diving, was a concurring proximate cause of his injury and a summary judgment for the defendant was correctly entered.<sup>66</sup>

*Violation of ordinance.* The operator of an automobile is not chargeable with notice that pedestrians may be darting out in front of or behind parked automobiles in the middle of a city block. Thus, where no pedestrians were seen by a driver when starting, there was no duty to sound the horn in compliance with an ordinance<sup>67</sup> requiring that a signal be given before starting on a highway whenever any pedestrian might be affected by such movement.<sup>68</sup>

**PROCEDURE.** *Appeal and error.* An order sustaining a motion to dismiss, with leave to amend an amendment to an amended complaint in a common law action is at most interlocutory and cannot be reviewed on appeal to the Supreme Court.<sup>69</sup>

Verdicts were entered in a negligence action in favor of two defendants who were sued jointly and severally. A motion for a new trial was granted as to one defendant but denied as to the other. For purposes of appeal the judgment in favor of the defendant against whom a new trial was not granted is a final judgment, since the negligence of one or other of the defendants could have been the sole cause of the plaintiff's injury.<sup>70</sup>

The court will not consider on appeal any matter not disclosed by the transcript of record.<sup>71</sup>

A husband filing a counterclaim for divorce to his wife's suit for support and separate maintenance is not an original plaintiff within the meaning of the statute<sup>72</sup> prohibiting an original plaintiff from appealing until he pays accrued costs.<sup>73</sup>

The Florida Railroad and Public Utilities Commission filed a petition for certiorari, praying that the court quash an interlocutory order restraining the Southern Bell Telephone and Telegraph Company from discontinuing telephone service to the plaintiffs, upon the condition that the latter promptly apply to it for a hearing. Certiorari was denied, the court stating, ". . . before a person may bring an appeal he . . . must show that he is, or will be, injuriously affected by the order sought to be reviewed."<sup>74</sup>

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66. *Ryan v. Unity, Inc.*, 55 So.2d 117 (Fla. 1951).

67. *Miami Beach Ord. No. 258* § 53 (a).

68. *Preger v. Gomory*, 55 So.2d 541 (Fla. 1951).

69. *Sumerall v. Florida Tar & Creosote Corp.*, 55 So.2d 713 (Fla. 1951).

70. *Hillsboro Plantation v. Plunkett*, 55 So.2d 534 (Fla. 1951).

71. *McMann v. State*, 55 So.2d 538 (Fla. 1951).

72. *FLA. STAT.* § 59.09 (1949).

73. *Bower v. Bower*, 55 So.2d 797 (Fla. 1951).

74. *King v. Brown*, 55 So.2d 187 (Fla. 1951).

*Charge to jury.* If no objection is made to the court's charge to the jury and no specific instructions are requested on matters to which error is later assigned, such assignments are properly refused.<sup>75</sup>

*Dismissal and reinstatement.* The defendant filed objections to amendment of the complaint and made an oral request to transfer the cause to the law side of the court. For seven years the plaintiff made no effort to secure a ruling and the chancellor, of his own motion, dismissed the cause for lack of prosecution. The order granting the plaintiff's petition for reinstatement was quashed, no "good cause" for reinstatement having been shown.<sup>76</sup>

*Dismissal of cause.* There is no error if the chancellor dismisses a cause when timely application has not been made for an order transferring it to the law side of the court.<sup>77</sup>

*Judgments: Res judicata.* Judgment and payment thereof in a condemnation suit was found *res judicata* and a complete bar to action for an accounting of the amount due for use of plaintiff's property by the city prior to its condemnation, the issues raised in the latter case having been presented by the pleadings in the condemnation suit.<sup>78</sup>

*Motion to strike.* A motion to strike defenses going to questions of estoppel, bad faith and inequitable conduct, which if established by competent evidence may influence the conclusions of the chancellor, should not be sustained.<sup>79</sup>

*Reduction of verdict for contributory negligence.* The amount awarded a plaintiff whose contributory negligence was at least equal to the negligence of the defendant should be reduced by one-half.<sup>80</sup>

*Retaking of stand.* It is within the trial court's discretion to permit the plaintiff to retake the stand and give additional testimony after the defendant's argument for a directed verdict and prior to the court's ruling thereon.<sup>81</sup>

*Summary judgment.* A summary judgment should be entered by the trial court if upon the hearing it appears that an asserted claim is without merit either in law or fact and nothing could be accomplished by submitting the issues to a jury.<sup>82</sup>

*Venue.* For venue purposes the residence of a wife who left her husband without cause is that of the husband.<sup>83</sup>

**PROPERTY. Personal: Gift inter vivos.** No gift inter vivos was made by delivery of a savings account pass book from a son to his mother where the

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75. Fla. Common Law Rule 39(b) (1950), *Eli Witt Cigar & Tobacco Co. v. Matatics*, 55 So.2d 549 (Fla. 1951).

76. *Sudduth Realty Co. v. Wright*, 55 So.2d 189 (Fla. 1951).

77. *Smith v. Beery*, 55 So.2d 580 (Fla. 1951).

78. *Miami v. Osborne*, 55 So.2d 120 (Fla. 1951).

79. *Cotton v. House*, 55 So.2d 178 (Fla. 1951).

80. FLA. STAT. §§ 768.05, 768.06 (1949), *Jones v. Columbia Baking Co.*, 192 F.2d 127 (5th Cir. 1951).

81. *Eli Witt Cigar & Tobacco Co. v. Matatics*, *supra* note 75.

82. *Sawyer Industries v. Advertects, Inc.*, 54 So.2d 692 (Fla. 1951).

83. FLA. STAT. § 46.01 (1949), *Merritt v. Merritt*, 55 So.2d 735 (Fla. 1951).

son had opened and closed several accounts in the name of his mother subject to withdrawals by both, and there was no evidence of such change in the pattern of the son's dealings with the deposits at the time of delivery of the book as would justify the conclusion that he made an outright transfer of title and abandoned any further control over the money.<sup>84</sup>

*Real: Champerty.* The plaintiffs in an ejectment suit transferred the property pending the action. An amended complaint brought by the original plaintiffs for the use and benefit of the purchasers is not champertous.<sup>85</sup>

*Real: Diversion of subterranean water.* A landowner is not prohibited from making excavations on his property on the off-chance that thereby the supply of subterranean water to an adjacent landowner's spring might be diverted or obstructed.<sup>86</sup>

*Real: Fruit on trees.* Since the Internal Revenue Code does not define real property for the purpose of capital gains, state law governs. The Florida rule is that crops of fruit growing on trees, whether mature or immature, are in general a part of the realty until severed.<sup>87</sup>

*RECEIVERS. Appointment.* In the absence of allegations that the administrator of an estate is insolvent, is unlawfully disposing of the estate property or will not be financially able to respond to the payment of all decrees or judgments that may be finally entered and sustained against him, there is no error in refusing the appointment of a receiver.<sup>88</sup>

*TAXATION. Personal property: Intangible.* Notes payable to a corporation for the purchase price of no par stock where the stock certificates are attached as security are intangible personal property and taxable as such even though the makers are not personally liable on the notes, even though they cannot be sold, assigned, transferred or delivered, and even though payment cannot be made without a written request from the corporation.<sup>89</sup>

*Sales tax.* A contract whereby coin-operated juke boxes, pinball machines and skill games are placed on location by the owner, he and the location operator each receiving a percentage of the income therefrom, constitutes a rental of the machines, the income from which is subject to state sales tax.<sup>90</sup>

Rentals from property conveyed by Florida to the United States by a tax-free deed and leased for the operation of a housing project are subject to state sales tax.<sup>91</sup>

84. *King v. King*, 55 So.2d 181 (Fla. 1951).

85. *Alford v. Sinclair*, 55 So.2d 727 (Fla. 1951).

86. *Labruzzo v. Atlantic Dredging & Const. Co.*, 54 So.2d 673 (Fla. 1951).

87. *Owen v. Commissioner of Int. Rev.*, 192 F.2d 1006 (5th Cir. 1951).

88. *House v. Cotton*, 55 So.2d 177 (Fla. 1951).

89. FLA. STAT. c. 199 (1949), *White v. Gapway Grove Corp.*, 55 So.2d 573 (Fla. 1951).

90. FLA. STAT. c. 212 (1949), *Gay v. Supreme Distributors*, 54 So.2d 805 (Fla. 1951).

91. FLA. STAT. §§ 212.03, 212.18 (1949), *Tampa Bay Garden Apts. v. Gay*, 55 So.2d 739 (Fla. 1951).

*Uniform rate.* The Palm Beaches Sanitary District Bill's financing provisions<sup>92</sup> are constitutional even though the rate of taxation differs in each of the municipalities served, since it is uniform within each municipality.<sup>93</sup>

*TORTS. Invasion of water rights.* While excavating its land the defendant found an underground stream which it recognized and identified as the waters that surfaced as the plaintiff's spring. It thereafter continued its excavation, causing the permanent diversion of the natural flow of water to the spring and its destruction. Liability for an intentional invasion of the plaintiff's water rights exists if the defendant's conduct under all the circumstances was unreasonable, a question for the jury.<sup>94</sup>

*WILLS. Insurance policies.* A testator, after making specific bequests, left the residue of his estate in trust for his widow and children. He also left insurance policies payable to his executor, administrator or estate. It was held that the proceeds of the policies did not pass to the widow and children, but to the trustee for their benefit.<sup>95</sup>

*WORKMEN'S COMPENSATION. Lump sum payment.* A claimant under the Workmen's Compensation Act<sup>96</sup> found to be 50% permanently disabled is entitled to a lump sum payment.<sup>97</sup>

*Scope of employment.* An employee of a corporation was authorized but not required to take corporate books home with him to make up his daily sales report. He slipped and fell descending the stairs in his home while carrying the corporate books. Injuries arising therefrom did not arise "out of and in the course of employment"<sup>98</sup> within the meaning of the Workmen's Compensation Act.<sup>99</sup>

*Willful violation of statute.* A statute regulating the speed and operation of automobiles on the public highways<sup>100</sup> is a "safety rule" within the meaning of that provision of the Workmen's Compensation Act denying compensation to an employee for injuries occasioned primarily by ". . . his willful refusal to . . . observe a safety rule . . . required by statute."<sup>101</sup> The test of willful misconduct is whether one consciously intends to do an act which is violative of the statute, not whether he intends to specifically violate it.<sup>102</sup>

92. House Bill No. 1200 § 8 (1951).

93. FLA. CONST. Art. IX, § 1, *Town of Palm Beach v. West Palm Beach*, *supra* note 14.

94. *Labruzzo v. Atlantic Dredging & Const. Co.*, *supra* note 86.

95. FLA. STAT. § 223.13 (1949), *Pacific Mut. Life Ins. Co. v. Jones*, 100 F. Supp. 466 (N.D. Fla. 1951).

96. FLA. STAT. § 44.20(10) (1949).

97. *International Minerals & Chemical Corp. v. Tucker*, 55 So.2d 720 (Fla. 1951).

98. FLA. STAT. § 440.09(1) (1949).

99. *Glasser v. Youth Shop*, 54 So.2d 686 (Fla. 1951).

100. FLA. STAT. § 320.50 (1949).

101. FLA. STAT. § 440.09 (1949).

102. *Gregory v. McKesson & Robbins, Inc.*, 54 So.2d 682 (Fla. 1951).