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Quarterly Synopsis of Florida Cases

QUARTERLY SYNOPSIS OF FLORIDA CASES*

ADMINISTRATIVE LAW. *Hotel Commission: License Revocation.* Proceedings by the Hotel Commissioner[1] to revoke the license of a restaurant in which gambling had been carried on were commenced by delivering a copy of the written notice of the proceedings to the defendant sixty-one days after the gambling had been discovered. Proceedings quashed. The copy of the notice must be delivered within sixty days after the cause for revocation arose.[2]

BANKRUPTCY. *Discharge of Debts.* In a tort action against a bankrupt corporation and its president to recover on a claim which arose prior to bankruptcy, it was held the court had jurisdiction. The claim was unpaid; it was not properly scheduled in the bankruptcy proceedings; and the plaintiff had neither notice nor knowledge of the bankruptcy proceedings. Hence, even if the defendants had received a discharge in bankruptcy, the plaintiff's claim was not discharged.[3]

BILLS & NOTES. *Usury: Forfeiture of principal.* Where a lender receives a promissory note from a borrower in an amount so in excess of the amount loaned as to make the interest charge usurious, a conclusion that the lender intended to charge usurious interest and therefore willfully violated the usury statute[4] is justified in the absence of evidence to the contrary.[5]

CONSTITUTIONAL LAW. *Due Process: Divorce Action.* Since a corporation is a "person" within the meaning of the due process clause of the Fourteenth Amendment, it was error to enter a judgment for the husband for money advanced by him to a corporation which was not a party to the action even though the wife was the sole owner of the corporation.[6]

CONTRACTS. *Counterclaim: Interest on debt.* Where a debt found due was deemed a liquidated amount, the filing of a completely unconnected counterclaim upon which appellant had recovered could not prevent

*The Synopsis covers cases (excluding memorandum opinions and others not considered of sufficient importance to note) decided by the Florida Supreme Court in 89 So.2d 329 through 90 So.2d 927. In addition, federal cases interpretive of Florida law, or of general import in Florida, have been included.

This issue of the Quarterly Synopsis was written by Jack Ankus, and edited by Harold P. Barkas.

1. FLA. STAT. § 509.261 (1955).
2. Edgerton v. International Co., 89 So.2d 488 (Fla. 1956).
3. Yoder v. American Aluminum Products, 89 So.2d 351 (Fla. 1956).
4. FLA. STAT. § 687.07 (1955).
5. Short v. Skafte, 90 So.2d 604 (Fla. 1956).
6. Friedus v. Friedus, 89 So.2d 604 (Fla. 1956).

the awarding of interest on the original debt from the date of the filing of appellee's suit.[7]

Offer to Rescind. Where an offer to rescind a contract has been accepted, the offerer may not work a withdrawal of his offer by filing a suit for specific performance of the contract.[8]

CORPORATIONS. *Bond Issue: Taxability.* Florida's documentary stamp tax is a transaction tax that should be levied only upon particular transactions which take place within Florida's territorial limits.[9] It cannot be construed to be a tax on a corporation's privilege to borrow money. When a Florida corporation's board of directors, meeting in New York, authorized the issuance of corporate bonds with all the necessary steps (*i.e.*, execution, sale and delivery of the bonds) taking place outside the state, the corporation was not liable for the documentary stamp tax.[10]

CRIMINAL LAW. *Bail: Pending appeal.* A trial court should admit a convicted defendant to bail pending appeal if the appeal is taken in good faith on grounds not frivolous, and the circumstances indicate that the accused will not flee.[11]

Double jeopardy. The state's motion for a mistrial was granted while the jury was out deliberating its verdict. In the absence of a manifest necessity discharge of the jury for legally insufficient reasons and without the defendant's consent precludes a subsequent trial for the same offense.[12]

Extradition: Uniform law. Defendant, who was charged by Georgia with the crime of abandoning his minor child, was incarcerated in Florida by virtue of an extradition warrant. Habeas corpus was denied. Even though the Georgia warrant lacked an express allegation that the petitioner had been present in the demanding state at the time the crime was committed, a provision[13] of the Uniform Enforcement of Support Act providing for extradition was applicable and was not in conflict with extradition provisions of the state or federal constitution.[14]

Forgery. Habeas corpus petitioner claims that he intended to plead guilty "to intent to create a forgery," but that he was not guilty of uttering a forgery because his attempt to negotiate the instrument was frustrated. The successful consummation of the crime is unnecessary. The tendering

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7. Manning v. Clark, 89 So.2d 339 (Fla. 1956).
8. Hammond Realty Co. v. Wheaton, 90 So.2d 292 (Fla. 1956).
9. FLA. STAT. c. 201 (1955).
10. Peninsular Telephone Co. v. Gray, 90 So.2d 132 (Fla. 1956).
11. Younghans v. State, 90 So.2d 308 (Fla. 1956).
12. State v. Grayson, 90 So.2d 710 (Fla. 1956).
13. FLA. STAT. § 88.061 (1955) . . . on demand by the governor of any other state any person found in this state who is charged in such other state with the crime of failing to provide for the support of a person in such other state. . . .
14. State v. Bennet, 90 So.2d 43 (Fla. 1956).

of the instrument, upon which the payee's signature had been forged by the defendant, with the requisite fraudulent intent constituted an uttering of a forgery, the essence of the offense being the fraudulent intent.[15]

Information: Right to amend. Prosecution for breaking and entering. During defendant's closing argument the prosecutor made a request to amend the information. The court erred in granting the prosecution permission to substitute the full and complete corporate name for the name of the owner of the entered building. Such amendment being a matter of substance, it is necessary that the information be reverified, resigned and refiled.[16]

Manslaughter: Culpable negligence. When it was shown that the defendant operated his automobile at speeds of 80 to 100 M.P.H., on a road known by him to be dangerous, and with an obvious disregard for the safety of his passengers, he could not contend, on appeal, that his conviction of manslaughter was based solely on evidence of excessive speed.[17]

Right to jury trial. Lower court erred in denying the defendant the right to withdraw his waiver of a jury trial. Defendant's right to a trial by jury should always remain inviolate. The defendant should have been allowed to withdraw his waiver of a jury trial unless substantial harm to the public would result.[18]

Search and Seizure. Police officers, searching with a valid warrant authorizing seizure of intoxicating liquor, discovered lottery paraphernalia in the defendant's possession. A crime being committed in their presence, it was proper to convict the defendant of possession of contraband articles not described in the warrant.[19]

Silence of accused. When one in custody accused of a crime has complete freedom to speak and remains silent in the presence of accusations of his guilt, then evidence of such silence may be considered by the jury as tending to show guilt. However, the probative force of such evidence is not great, and it is to be received with caution.[20]

DOMESTIC RELATIONS. *Adoption.* Natural father seeks dismissal of a petition for the adoption of his son. Where aliunde evidence existed upon which the decision of the Circuit Court was sustained, the fact that improper judicial notice of other proceedings may have been taken did not constitute prejudicial error.[21]

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15. Hazen v. Mayo, 90 So.2d 123 (Fla. 1956).
16. Sipos v. State, 90 So.2d 113 (Fla. 1956).
17. Henderson v. State, 90 So.2d 447 (Fla. 1956).
18. Floyd v. State, 90 So.2d 105 (Fla. 1956).
19. Joyner v. Lakeland, 90 So.2d 118 (Fla. 1956).
20. Albano v. State, 89 So.2d 342 (Fla. 1956).
21. *In re* Freeman's Adoption, 90 So.2d 109 (Fla. 1956).

Alimony: Petition for reductions. Plaintiff husband brought about a substantial decrease in his income by making a bona fide change in his employment. The Florida Statute[22] which deals with modification of alimony decree due to changed financial conditions could not bar, as a matter of law, husband's petition for reduced alimony payments.[23]

Counterclaim for Separate Maintenance. Husband instituted an action for divorce. The lower court erred in awarding alimony in a lump sum payment to the defendant-wife on her counterclaim for separate maintenance unconnected with divorce.[24] The statute dealing with separate maintenance unconnected with divorce does not specifically authorize a lump sum payment.[25]

EQUITY. *Foreclosure of a mortgage.* Pledgee of a note and mortgage given by the mortgagee to secure his own note refused to accept payment of the face value of the pledgor's note, because he had contracted with the mortgagor to credit him with partial payment of the pledged note. Under these circumstances the plaintiff-pledgor's attempt to declare the mortgage in default, because the transaction between the pledgee and mortgagor did not constitute proper payment on the pledged note, failed.[26]

Injunction. Plaintiff-vendee seeks to enjoin the sale of defendant's remaining land and at the same time claims damages for misrepresentations made by defendant. Plaintiff contends that if defendant is allowed to sell this land no leviable assets will remain in Florida out of which plaintiff could satisfy any judgment he might obtain. Since no equitable ground for relief was alleged, plaintiff's bill should be dismissed or transferred to the law side of the docket..[27]

EVIDENCE. *Admission of photograph.* Defendant appeals from a conviction of first degree murder without recommendation of mercy. Prejudicial error was committed when a gruesome photograph of deceased lying on a mortuary slab was introduced into evidence, as the only purpose or effect of introducing the photograph could have been to inflame the minds of the jurors.[28]

Admission of testimony. Court erred in admitting testimony of a conversation in which defendant's father accused him of murdering the deceased, who was missing at the time. Defendant's reply, "no, he's around," constituted an unequivocal denial of guilt, and therefore, could

22. FLA. STAT. § 65.15 (1955).
23. Fort v. Fort, 99 So.2d 313 (Fla. 1956).
24. Bredin v. Bredin, 89 So.2d 353 (Fla. 1956).
25. FLA. STAT. § 65.09 (1955) . . . [A]nd the court shall have power to grant such temporary and permanent alimony and suit money as the circumstances of the parties may render just. . . .
26. Cullison v. Dees, 90 So.2d 616 (Fla. 1956).
27. Ramsey v. Lovett, 89 So.2d 669 (Fla. 1956).
28. Dyken v. State, 89 So.2d 867 (Fla. 1956).

not be considered as silence amounting to an admission of guilt. The fact that the accused's own father believed him to be guilty was a circumstance so highly prejudicial that the harmless error rule is inapplicable.[29]

INSURANCE. *Continued insurability.* Insured died of a cancerous condition that existed at the time he applied for the life insurance policy upon which the beneficiary sued and recovered. When an insured, who makes no false representations of fact, has been examined by the insurance company's physician and found to be an acceptable risk, a "sound health" clause should be interpreted as referring only to changes in health occurring between the date of the examination and the date of the delivery of the policy.[30]

Lapse: Waiver of premium. Insured, who was 100 per cent disabled, failed to make application for waiver of premiums on his National Service Life Insurance policy. Beneficiaries' suit on the policy must fail. As the evidence was insufficient to prove that decedent was not physically or mentally incapable of making application for waiver of premiums, disabled insurant's right to a waiver of premium was lost by his failure to make a timely application therefor.[31]

Lapsed policy. An action was brought by the beneficiary under an extended term insurance option in a life policy which had lapsed for non-payment of premium. Suit was for the face value of the policy less the amount of an outstanding loan. The provision reducing the amount of the policy in the proportion that the indebtedness bears to the cash value is null and void, because it contravenes a Florida statute[32] which prohibits discrimination against a borrowing insurant.[33]

LIBEL & SLANDER. *Qualified privilege.* Libel and slander action against a gubernatorial candidate for circulating a defamatory handbill, and against a newspaper for publishing other defamatory remarks made by the candidate. Complaint was dismissed against the newspaper, because remarks which are qualifiedly privileged, even though defamatory, do not create liability in the absence of express malice.[34]

MUNICIPAL CORPORATIONS. *Easements.* Private citizen sought to enjoin the fee owner from obstructing a street in which the city, acting under statutory authority, had relinquished its easement.[35] Injunction denied. The plaintiff failed to show that any of his personal or property rights had been invaded.[36]

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29. Douglas v. State, 89 So.2d 659 (Fla. 1956).
30. Mathews v. Metropolitan Life Ins. Co., 89 So.2d 641 (Fla. 1956).
31. United States v. Sinor, 238 F.2d 271 (5th Cir. 1956).
32. FLA. STAT. § 635.02 (1955).
33. Praetorians v. Fisher, 89 So.2d 329 (Fla. 1956).
34. Abram v. Odham, 89 So.2d 334 (Fla. 1956).
35. FLA. STAT. § 167.09 (1955).
36. McLeod v. Carr, 90 So.2d 112 (Fla. 1956).

Zoning: Validity of ordinance. The preservation of the beauty of the City of Miami Beach, being essential to the promotion of the general welfare, is sufficient to uphold the validity of zoning ordinances.[37]

NEGLIGENCE. *Dangerous instrumentality: Automobiles.* A suit against the United States under the Federal Torts Claims Act was dismissed. Under Florida's dangerous instrumentality doctrine, the contributory negligence of the person driving an automobile with the owner's consent is imputable to him, and therefore the owner is precluded from recovery.[38]

Innkeepers liability: Licensee. The plaintiff, a friend of a registered guest, was injured in a fall when entering the "movie room" of defendant's hotel. Innkeepers extend an implied invitation to friends of guests, and plaintiff was entitled to the same degree of care as other business invitees. This invitation is limited, however, to ways of ingress and egress and does not extend to private or semi-public rooms. Thus, plaintiff's status in "movie room" changed to that of a licensee, and as such the defendant owed her only the duty to refain from willfully injuring her.[39]

Slip and Fall. Motel guest sought damages for injuries received from a fall on slippery steps. A summary judgment for the defendant was proper when the affidavits showed that the guest was aware of the condition of the steps.[40]

PARTNERSHIP. *Accounting.* Partner appropriated the funds of a partnership operating an illegal enterprise, and used them to purchase real estate which was used in a legal partnership business. Another partner's administratrix sued for an accounting of partnership funds. Defendant could not set up the illegality of the first partnership to defeat a suit for an accounting.[41]

PERSONAL PROPERTY. *Tenancy by entireties.* Surviving spouse failed to establish an estate by the entireties in certain savings accounts and government bonds. In order to establish a tenancy by the entireties in personal property the spouses must clearly manifest their intention to create such a tenancy.[42]

PROCEDURE. *Certified Question.* The Supreme Court enumerated certain limitations on certified questions: (1) a single question of law must be involved; (2) the court must not be required to speculate on the existence of essential facts; (3) the court should not be requested to advise litigants to the extent of their claim; (4) the court should not be asked to answer questions involving rights of persons not parties to the cause.[43]

37. International Co. v. Miami Beach, 90 So.2d 906 (Fla. 1956).
38. MacCurdy v. United States, 143 F. Supp. ....O (N.D. Fla. 1956).
39. Steinberg v. Irwin Operating Co., 90 So.2d 460 (Fla. 1956).
40. Connolly v. Sebeco, 89 So.2d 482 (Fla. 1956).
41. Williams v. Clark, 90 So.2d 805 (Fla. 1956).
42. Estate of E. L. Lyons, 90 So.2d 39 (Fla. 1956).
43. Gordon v. Norris, 90 So.2d 914 (Fla. 1956).

Court Rules: Time for appeal. The time for taking appeals must begin with the day the judgment appealed from was "recorded in the minutes of the court." Consequently, appellant could not change the effective date of the judgment appealed from by adding to it the time allowed him to amend his dismissed complaint.[44]

Judgments: Res Judicata. In a suit instituted by a father as next friend of his infant son, a judgment for the defendant did not preclude the father from bringing an action in his own name for damages recoverable by him arising out of the same accident.[45]

Limitation of actions: Relation back. Plaintiff in his complaint erroneously denominated defendant a corporation when in fact defendant company was an unincorporated firm. Plaintiff should be allowed to amend his pleadings, with the amendment relating back to the date of the original pleadings. Expiration in the interim of the period set out in statute of limitations for the plaintiff's instituting their original cause of action is therefore immaterial.[46]

Pretrial conference. A pretrial conference is to be called only after all the issues are settled. This contemplates that all the pleadings have been settled; sufficient notice has been given to permit full preparation; and the parties have had an opportunity to use discovery procedure.[47]

REAL PROPERTY. *Mechanics' Lien: Cautionary notice.* Failure of a lienor to serve upon the owner the requisite cautionary notice[48] regarding materials furnished the owner's contractor, did not, in itself, bar unpaid lienor from enforcing his claim against the owner who had paid contractor "improperly" but in good faith.[49]

Mechanics' Lien Law: Commencement of Operations. Appellant's third mortgage, which was recorded after visible commencement of operations, was not entitled to priority over the appellee's mechanics' lien. The Mechanics' Lien Law[50] demands that all liens arising under it shall relate back to the time of the visible commencement of operations. To vitiate the harshness of the blanket lien theory, or relation back doctrine, the material delivered, or service performed, must have been provided in connection with a single construction project going forward under a common plan prosecuted with reasonable promptness and without material abandonment.[51]

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44. Brenner v. Gelernter, 90 So.2d 306 (Fla. 1956).
45. Youngblood v. Taylor, 89 So.2d 503 (Fla. 1956).
46. Cabot v. Clearwater Construction Co., 89 So.2d 662 (Fla. 1956).
47. Roberts v. Braynon, 90 So.2d 623 (Fla. 1956).
48. FLA. STAT. § 84.04(1) (1955).
49. All State Pipe Supply Co. v. McNair, 89 So.2d 774 (Fla. 1956).
50. FLA. STAT. §§ 84.01, 84.02, 84.03 (1955).
51. Geiser v. Permacrete Inc., 90 So.2d 610 (Fla. 1956).

Mechanics' Lien: Notice to lienors. When an owner acts as his own contractor, the delivery of a sworn statement of payment to lienors or notice of intention to claim a lien is unnecessary.[52] Therefore, the court erred in dismissing materialman's counterclaim for failure to show delivery of a sworn statement to owner in compliance with the Mechanics' Lien Law.[53]

Recording Act: Acknowledgment. An action to foreclose a mortgage raised the question of whether the acknowledgment, which referred to the mortgagee instead of the mortgagor, was sufficient to entitle the mortgage to recordation. Decree of foreclosure granted. Acknowledgments will be upheld whenever substantial compliance with the recording act[54] is established, and obvious clerical errors and all technical omissions will be disregarded.[55]

Tenancy by Entireties: Contribution. Surviving widow seeks contribution from her husband's estate for an amount equal to one-half of the unpaid balance due on a note and a mortgage executed by both plaintiff and decedent. The realty thus encumbered was owned by them as tenants by the entireties. The debt owed, as between the tenants by the entireties, must be considered as being owed wholly by each. It would be unconscionable and inequitable for one deprived of his property by operation of law to be held responsible for a part of the purchase price which remains unpaid.[56]

STATE GOVERNMENT. *Navigable waters.* The dredging of soil from the bottom of a navigable lake by a riparian owner was enjoined because title to lands under navigable waters is held by the State in trust for the people. The navigable character of waters is determined by their capacity for navigation, not their actual usage.[57]

TAXATION. *Sales Tax: Newspaper exempt.* Defendant's publication was not exempt as a "newspaper" from the Florida Sales Tax,[58] since it consisted primarily of advertising format and included only a modicum of local news.[59]

TORTS. *Attractive Nuisance.* A seven-year-old child was burned after allegedly being "attracted" onto appellant's land. Apellant could not avoid liability. A bed of red hot coals covered by grey ashes could not be con-

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52. FLA. STAT. § 84.04(1) (1955).
53. FLA. STAT. § 84.04(3) (1955). Orange Plumbing & Heating Co. v. Wolfe, 89 So.2d 671 (Fla. 1956).
54. FLA. STAT. §§ 695.03-695.09 (1955).
55. Edenfield v. Wingard, 89 So.2d 776 (Fla. 1956).
56. Lopez v. Lopez, 90 So.2d 456 (Fla. 1956).
57. McDowell v. Trustees of Internal Improvement Fund, 90 So.2d 715 (Fla. 1956).
58. FLA. STAT. § 212.08(4) (1955).
59. Green v. Home News Publishing Co., 90 So.2d 295 (Fla. 1956).

sidered a fire; therefore the "obvious peril" exception to the attractive nuisance doctrine was inapplicable.[60]

Fraud and misrepresentation. Vendees allege a fraudulent misrepresentation of the gross income of a hotel purchased by them. Complaint dismissed. The vendor's records of the hotel's gross income were available for the vendees' inspection. The purchasers failed to fulfill their duty of ascertaining for themselves the true facts.[61]

WILLS *Election of dower: Pro rata taxation.* A widow who failed to pay the pro rata share of estate taxes due when she elected to take dower was deemed a trustee of the decedent's beneficiaries as to any sums owed by her to her husband's estate.[62]

WORKMEN'S COMPENSATION. *Anxiety Neurosis.* Workmen's compensation benefits for total disability resulting from an anxiety neurosis were disallowed. Claimant's neurotic disability was so remotely connected with his industrial injury that it was unreasonable to require industry to bear the cost of such disability.[63]

Medical benefits: Out of State Therapy. Under exceptionally unusual facts, the Deputy Commissioner was justified in requiring the compensation carrier to furnish the injured employee, a Florida resident, medical care at the Mayo Clinic.[64]

Temporary total disability: Psychosis. Petitioner suffered an electric shock which resulted in a psychosis. In the absence of any fraud or purposeful malingering, the only conclusion the court could reach was that the petitioner was temporarily totally disabled.[65]

60. Tucker Bros. Inc. v. Menard, 90 So.2d 908 (Fla. 1956).
61. Barrett v. Quesnel, 90 So.2d 706 (Fla. 1956).
62. Dacus v. Blackwell, 90 So.2d 234 (Fla. 1956).
63. Superior Mill Work v. Gabel, 89 So.2d 794 (Fla. 1956).
64. Florida Cartage Co. v. Tyler, 90 So.2d 291 (Fla. 1956).
65. Moses v. Wright & Sons, Inc., 90 So.2d 330 (Fla. 1956).