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## Quarterly Synopsis of Florida Cases

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# QUARTERLY SYNOPSIS OF FLORIDA CASES\*

**ADMINISTRATIVE LAW.** *Florida Milk Commission: Price controls.* Once the Florida Milk Commission has established price controls, it has no authority to suspend enforcement of the controls without first giving notice and opportunity to be heard to those affected.<sup>1</sup>

**APPELLATE PROCEDURE.** *Judicial review: Evidence.* In determining the effect of evidence, judicial review of a verdict in a comparative negligence case<sup>2</sup> is no different from judicial review of other cases.<sup>3</sup>

*Motion to affirm judgment.* A motion to affirm judgment that fails to point out clearly and concisely the exact matters on which it is based will be disposed of summarily.<sup>4</sup>

*Summary judgment: Appeal period.* A summary judgment in a law action cannot be attacked by a petition for rehearing or by a motion for a new trial. Filing of such a petition or motion will not toll the running of the appeal period against the summary judgment.<sup>5</sup>

**ATTORNEY AND CLIENT.** *Proceeding for unemployment compensation: Fees.* When the Florida Industrial Commission appeals a circuit court order allowing unemployment compensation, the Commission must pay reasonable fees to the claimant's attorney<sup>6</sup> because the appeal was not initiated by the claimant.<sup>7</sup>

**CIVIL PROCEDURE.** *Estoppel by judgment.* A husband and wife were involved in an accident in which the husband was killed. The wife, as administratrix, sued and recovered for his wrongful death. A subsequent suit by the wife in her own behalf against the same defendant was not barred by res judicata. However, as the pleadings raised no issue of liability

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\*The Synopsis covers cases (excluding memorandum opinions and others not considered of sufficient importance to note) decided by the Florida Supreme Court in 87 So.2d 497 through 89 So.2d 328. 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 Iva W. Kay, Jr., and was edited by Patrick McGrotty.

1. FLA. STAT. § 501.13 (7) (1955); *Adams v. Lee*, 89 So.2d 217 (Fla. 1956).

2. FLA. STAT. § 768.06 (1955).

3. *McAllister v. Tucker*, 88 So.2d 526 (Fla. 1956).

4. *Rood Co. v. Board of Pub. Instruction*, 89 So.2d 21 (Fla. 1956).

5. *Counne v. Saffan*, 87 So.2d 586 (Fla. 1956).

6. FLA. STAT. § 443.16 (2)(b) (1955).

7. *Florida Industrial Comm'n v. Ciarlante*, 89 So.2d 3 (Fla. 1956).

which had not been adjudicated in the prior action, the only issue was damages.<sup>8</sup>

*Discovery: Accounting.* Suit was brought for an accounting to determine money due under an alleged employment contract. Plaintiff submitted interrogatories<sup>9</sup> relating to profits of his employer. The employer was not required to answer them before a determination of plaintiff's right to an accounting.<sup>10</sup>

*Foreign judgment: Motion to dismiss.* Plaintiff sued on a New York judgment entered pursuant to arbitration procedure. To grant a motion to dismiss for lack of jurisdiction the complaint must reflect, by its own allegations, a lack of jurisdiction in the New York court to enter the judgment. However, a denial of the motion will not bar the defendant from alleging a lack of jurisdiction in his answer.<sup>11</sup>

*Pleadings: Admissions.* A finding that vendors were not liable for commissions allegedly due an escrow holder and broker was error, as this liability was admitted in the pleadings.<sup>12</sup>

*Prejudicial remarks: Objections.* A judgment will not ordinarily be reversed because of prejudicial remarks unless timely objections are made. However, redress may be afforded if conduct is so extensive and prejudicial that it impairs a calm and dispassionate consideration of the evidence and merits.<sup>13</sup>

*Rehearing before successor judge.* On a rehearing a successor judge does not have authority to reverse his predecessor as to those points and facts considered in the prior hearing.<sup>14</sup>

*Trial by jury: Discretion of court.* Even though the parties make no such demand, a trial judge may order a jury trial provided the order does not violate the rights of the litigants.<sup>15</sup>

*Venue: Resident.* When a non-resident and a resident are joined as co-defendants, the resident defendant has a "right" of not being sued other than where she resides, or where the cause of action accrued.<sup>16</sup>

**CONFLICTS OF LAWS.** *Foreign judgment: Statute of Limitations.* Judicial notice will be taken of a foreign statute of limitations in a suit upon a foreign judgment if the party who intends to take advantage of the foreign law gives reasonable notice to adverse parties. In lieu of such notice it

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8. *Shearn v. Orlando Funeral Home*, 88 So.2d 591 (Fla. 1956).

9. *FLA. R. CIV. P.* 1.27 (1955).

10. *Charles Sales Corp. v. Rovenger*, 88 So.2d 551 (Fla. 1956).

11. *Pacific Mills v. Hillman Garment*, 87 So.2d 599 (Fla. 1956).

12. *Carvell v. Kinsey*, 87 So.2d 577 (Fla. 1956).

13. *Seaboard Air Line Ry. v. Strickland*, 88 So.2d 519 (Fla. 1956).

14. *Groover v. Walker*, 88 So.2d 312 (Fla. 1956).

15. *FLA. R. CIV. P.* 2.1 (b)(d)(1955); *Shores v. Murphy*, 88 So.2d 294 (Fla. 1956).

16. *FLA. STAT.* § 46.01 (1955); *Kaufman v. King*, 89 So.2d 24 (Fla. 1956).

will be assumed that the statute of limitations of the foreign state is the same as Florida's.<sup>17</sup>

**CONSTITUTIONAL LAW. *Appointing power of Governor: Circuit judge.*** Where a circuit judge disappeared under circumstances indicating foul play and had been missing for over a year, the Governor can declare the office vacant and appoint a successor.<sup>18</sup>

***Due process: Notice of hearing.*** The Juvenile Court entered an order temporarily committing an infant to the custody of an agency. A subsequent order of the court placing the child with an agency for adoption was held invalid. Due process required that the parents have notice of the subsequent order despite their attorney's waiver of notice and the court's reservation of jurisdiction over the parties.<sup>19</sup>

***Florida Milk Commission: Price controls.*** In a suit in which the defendant was restrained from retailing milk below prices set by the Florida Milk Commission, the constitutionality of the act<sup>20</sup> creating the Commission was sustained on the basis of the legislative determination that regulation of the milk industry was essential to the public health and welfare.<sup>21</sup>

***Mechanics' Lien Law: Liability of owner.*** The court declared invalid that provision of the Mechanics' Lien Law<sup>22</sup> which provides that an owner shall be personally liable for, and the property improved subject to, a lien in the full amount of bills due subcontractors, laborers, and materialmen if the owner fails to require a performance bond or fails to withhold twenty percent of the progress payments from a building contractor. The provision is unduly harsh and unreasonably interferes with the rights of the owner.<sup>23</sup>

***Power of the Governor to call special sessions of the legislature.*** The Governor has the power to convene the legislature in special session in the event of an extraordinary occasion,<sup>24</sup> even though they may be in recess from, or engaged in the work of a prior special session.<sup>25</sup>

***Retirement: Judges.*** An act<sup>26</sup> providing retirement benefits or pensions for widows of circuit judges in any judicial circuit embracing two or more counties, one of which has a population of more than 300,000, is not arbitrary or invalid because the largest county of the circuit is required

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17. *Aboandandolo v. Vonella*, 88 So.2d 282 (Fla. 1956).

18. *In re Advisory Opinion to the Governor*, 88 So.2d 756 (Fla. 1956).

19. *Noeling v. State*, 87 So.2d 593 (Fla. 1956).

20. FLA. STAT. § 501 (1955).

21. *Shiver v. Lee*, 89 So.2d 318 (Fla. 1956).

22. FLA. STAT. § 84.05 (11) (1955).

23. *Greenblatt v. Goldin*, 88 So.2d 141 (Fla. 1956).

24. FLA. CONST. Art. IV § 8.

25. FLA. CONST. Art. VII § 3; *In re Advisory Opinion to the Governor*, 88 So.2d 131 (Fla. 1956).

26. LAWS OF FLA. c. 30454 (1955).

to pay the entire amount. The fact that Duval County is the only county within the purview of the act does not affect its validity.<sup>27</sup>

*Statutes: Scope of Title.* The defendant moved to quash an indictment of manslaughter, contending that the relevant statute<sup>28</sup> was unconstitutional. The motion was granted, since the body of an act can contain no valid provision beyond the range of the subject stated in the title.<sup>29</sup>

**CORPORATIONS.** *Promissory note: Usury.* In a suit instituted after the repeal of a statute denying corporations the defense of usury,<sup>30</sup> it was held that the defense was not available to a corporation which issued a promissory note prior to repeal of the statute.<sup>31</sup>

*Transfer of land to stockholders: Documentary tax.* Stockholders in a grantor corporation were conveyed interests in land proportionate to their stockholdings. The grantees were entitled to a refund of the documentary tax,<sup>32</sup> since they had transferred nothing of value to the corporation in exchange for the land.<sup>33</sup>

**COUNTY OFFICERS.** *Suspension from office: Back pay.* The appellant, a constable, was suspended from office pending disposition of criminal charges. Upon reinstatement to office he was entitled to reimbursement from the county for net receipts received by his replacement from county and private sources.<sup>34</sup>

**CRIMINAL LAW.** *Manslaughter: Operation of automobile.* Running a stop sign, while traveling at or near the speed prescribed by law, is not a degree of negligence sufficient to support a verdict of manslaughter.<sup>35</sup>

*Procedure: Habeas corpus.* A petition of habeas corpus can not raise questions that the petitioner had a fair and adequate opportunity to raise during the formal trial and appeal. Further, allegations that Negroes had been discriminated against and denied equal protection in rape cases as indicated by fewer verdicts with recommendations of mercy was without merit and irrelevant.<sup>36</sup>

*Revised statutes: Illegal sentence.* Where two statutes<sup>37</sup> defined the offense with which the petitioner was charged, the sentence should have been in accordance with the penalty provisions of the latter statute.<sup>38</sup>

**DOMESTIC RELATIONS.** *Annulment.* Where the plaintiff was so intoxi-

27. *Greene v. Gray*, 87 So.2d 504 (Fla. 1956).

28. LAWS OF FLA. c. 30227 (1955).

29. FLA. CONST. ART. III § 16; *State v. Tindell*, 88 So.2d 123 (Fla. 1956).

30. FLA. STAT. § 612.62 (1951).

31. *Holland v. Gross*, 89 So.2d 255 (Fla. 1956).

32. FLA. STAT. § 201.02 (1955).

33. *State v. Green*, 88 So.2d 493 (Fla. 1956).

34. FLA. CONST. ART. IV § 15; *Wright v. MacVicar*, 88 So.2d 541 (Fla. 1956).

35. FLA. STAT. § 782.07 (1955); *Porter v. State*, 88 So.2d 924 (Fla. 1956).

36. *State v. Mayo*, 87 So.2d 501 (Fla. 1956).

37. FLA. STAT. §§ 811.021, 817.01 (1955).

38. *Anglin v. Mayo*, 88 So.2d 918 (Fla. 1956).

cated as to be non compos mentis at the time of marriage, she was entitled to an annulment in the absence of a subsequent ratification of the marriage contract.<sup>39</sup>

*Divorce: Custody of Children.* In a divorce proceeding there was no abuse of discretion in awarding custody of minor children to their grandparents where the evidence showed a lack of fitness and ability of the parents to properly care for the children.<sup>40</sup>

*Divorce: Modification of child support.* A petition for modification of a child support provision in a divorce decree is not a new action. Therefore, no new service of process is necessary upon the adverse party. However, adequate notice and opportunity to be heard are required before the original decree is altered in a manner directly affecting person, status or property.<sup>41</sup>

*Separation agreement: Claim against estate.* A decree of a Pennsylvania court required the deceased to pay his ex-wife the difference between a sum specified in a separation agreement and the income of a trust set up by him for his ex-wife's benefit. A claim against his estate for this difference was denied because it was not filed within the time specified by statute.<sup>42</sup>

*Equity. Injunction: Contempt.* Petitioner executed leases to certain lands prior to being enjoined from growing potatoes on these lands, or from allowing others to do so. The lessees grew potatoes after issuance of the injunction. The petitioner was not in contempt, as a decree cannot be violated prior to its entry.<sup>43</sup> Since the lessees acquired their rights prior to the injunction and had not been made parties, they were not bound by the decree.<sup>44</sup>

*Reinstatement: Estoppel.* A physician brought an action to require a hospital to reinstate him as a staff member. He alleged assurances that a proposed by-law would not be used to dismiss him. However, the court held that he was estopped from questioning its validity as he had actively supported and voted for it.<sup>45</sup>

*EVIDENCE. Automobile collision: Traffic violations.* In a suit arising out of an automobile collision, it was error to admit into evidence the testimony of the investigating officer that the defendant had not been arrested for a traffic violation.<sup>46</sup>

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39. Mahan v. Mahan, 88 So.2d 545 (Fla. 1956).

40. Shepard v. Shepard, 87 So.2d 807 (Fla. 1956).

41. Watson v. Watson, 88 So.2d 133 (Fla. 1956).

42. FLA. STAT. § 733.16 (1955); Van Sciver v. Miami Beach First Nat'l Bank, 88 So.2d 912 (Fla. 1956).

43. South Dade Farms v. Peters, 88 So.2d 891 (Fla. 1956).

44. Alger v. Peters, 88 So.2d 903 (Fla. 1956).

45. Hodkin v. Perry, 88 So.2d 139 (Fla. 1956).

46. Eggers v. Phillips Hardware Co., 88 So.2d 507 (Fla. 1956).

*Dead man's Statute: Witness.* Decedent, a prospective lessor of a liquor store, received money from the plaintiff to obtain a liquor license, and money from plaintiff's son as an advance of rent. The son was precluded from testifying for the plaintiff because of his close alliance in the transaction.<sup>47</sup>

*GIFTS. Joint bank account: Donative intent.* Where a joint bank account with right of survivorship is established with funds of one person, a gift of the balance in the account at the death of the creator is presumed. This presumption may be overcome by evidence showing a lack of donative intent.<sup>48</sup>

*Promissory note: Donative intent.* A note was made payable to husband and wife. Prior to a divorce, a letter from the husband to the maker authorizing payment of the note to the wife was held to evidence a gift.<sup>49</sup>

*INSURANCE. Double indemnity: Robbery.* The insured went into shock and died following a robbery in which he was "roughed up." The beneficiary's claim for double indemnity was denied, as the death did not result directly from the robbery, but was primarily caused by prior infirmity and disease.<sup>50</sup>

*Murder of insured: Beneficiary.* The named beneficiary of an insurance policy had been acquitted of murdering her husband, the insured. Although acquitted, she would not be entitled to the proceeds of the policy if it were determined in a civil suit that the homicide was intentional and unlawful in nature.<sup>51</sup>

*Settlement negotiations.* The insurer was not liable for failure to notify the insured or the excess insurer of excess claims. An insurer must act in good faith toward the insured, but is not held to the standard that a man of ordinary care and prudence should exercise in the management of his business.<sup>52</sup>

*MUNICIPAL CORPORATIONS. Bonds: Off-street parking facilities.* A circuit court has the authority to amend the Supreme Court's final decree validating municipal parking bonds, where all parties to the original appeal had notice of the supplementary proceeding and the amendments were either clerical corrections or of such nature that the validity of the bond issue was not affected.<sup>53</sup>

*Contracts.* An oral agreement whereby the city waived rights to certain permit fees in order to induce construction of a housing development was

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47. FLA. STAT. § 90.05 (1955); *Jensen v. Lance*, 88 So.2d 762 (Fla. 1956).

48. *Spark v. Canny*, 88 So.2d 307 (Fla. 1956).

49. *Ward v. Bush*, 89 So.2d 11 (Fla. 1956).

50. *Berg v. New York Life Ins. Co.*, 88 So.2d 915 (Fla. 1956).

51. *Carter v. Carter*, 88 So.2d 153 (Fla. 1956).

52. *American Fidelity and Cas. Co. v. Greyhound Corp.*, 232 F.2d 89 (5th Cir. 1956).

53. *Test v. State*, 87 So.2d 587 (Fla. 1956).

void. Under the city charter, an agreement of this nature could be made only by ordinance, resolution, or written contract.<sup>54</sup>

*Police powers: Use of streets.* The City of Miami granted permission to the defendant to place limited advertising markers at bus stops. In the absence of express legislative authority, a city has no power to grant to an individual a privilege to use any portion of its streets for this private purpose.<sup>55</sup>

*Public Improvement Certificates: Streets and sewers.* In a proceeding to validate public improvement certificates to finance improvement of streets and sewers, it was determined the certificates could be retired from city utilities tax revenue and, if that was insufficient, from one-half of the city cigarette tax.<sup>56</sup>

*Zoning ordinance: Standards.* A municipal zoning ordinance is invalid when it does not contain reasonable standards as guides to enforcement.<sup>57</sup>

**NAVIGABLE WATERS.** *Character: Size.* To be navigable, a body of water must be permanent in character, of sufficient size, and so situated that it may be used for purposes common or useful to the public in the locality.<sup>58</sup>

**REAL PROPERTY.** *Homestead: Waiver.* Defendant executed a note in which he waived his homestead rights. The waiver is unenforceable, as it is contrary to the policy of Florida's exemption laws.<sup>59</sup>

*Mechanics' Liens: Lease protecting lessor.* A 99-year lease provided that improvements made upon land would not subject the lessor to mechanics' or materialmen's liens. The liens were sustained as the lease conclusively showed that both parties contemplated improvements being made upon the premises.<sup>60</sup>

*Public roads: Dedication.* The mere fact that a road has been laid out and opened pursuant to statutory requirements<sup>61</sup> is not, in itself, a dedication to public use that will deprive the owner of compensation.<sup>62</sup>

*Tax deed: Notice.* Failure to comply with the statutory requirement that an application for a tax deed must indicate the person in whose name the property was assessed<sup>63</sup> is a material defect that will void the deed.<sup>64</sup>

**TORTS.** *Malicious prosecution: Probable cause.* The defendant landlord

54. *Cook v. Navy Point, Inc.*, 88 So.2d 532 (Fla. 1956).

55. *Smith v. Bus Stops of Greater Miami*, 89 So.2d 221 (Fla. 1956).

56. *State v. City of North Miami*, 89 So.2d 8 (Fla. 1956).

57. *North Bay Village v. Blackwell*, 88 So.2d 524 (Fla. 1956).

58. *Baker v. State*, 87 So.2d 497 (Fla. 1956).

59. FLA. CONST. Art. X § 1; FLA. STAT. § 222.09 (1955); *Sherbill v. Miller Mfg. Co.*, 89 So.2d 28 (Fla. 1956).

60. FLA. STAT. § 84.03 (2) (1955); *Anderson v. Sokolik*, 88 So.2d 511 (Fla. 1956).

61. FLA. STAT. § 336.07 (1955).

62. *Pocock v. Town of Medley*, 89 So.2d 162 (Fla. 1956).

63. FLA. STAT. § 194.16 (1955).

64. *Wells v. Thomas*, 89 So.2d 259 (Fla. 1956).

was charged with malicious prosecution for bringing a suit for eviction. A judgment for the landlord in the eviction suit was conclusive as to probable cause for instituting the suit, although the judgment was later reversed.<sup>65</sup>

*Negligence: Agreement to hold harmless.* Plaintiff sued the F. E. C. Railroad in negligence for the death of his minor son at a private crossing. The railroad had permitted use of the private crossing in consideration of the plaintiff's agreement to save them harmless from all claims arising out of its use. The agreement did not contravene public policy and precluded suit.<sup>66</sup>

*Automobile Guest Statute.* A guilty plea to a charge of reckless driving<sup>67</sup> is not sufficient to support a judgment for personal injuries under the guest statute.<sup>68</sup>

A cause of action was stated under the automobile guest statute<sup>69</sup> by alleging that an automobile with attached housetrailer, driven at excessive speed in an inhabited area, collided while attempting to pass a truck signaling for a turn.<sup>70</sup>

*Liability of manufacturer.* While inspecting a rocking chair in a retail store, plaintiff was injured by concealed mechanisms in the chair. A cause of action exists against the manufacturer for failure to exercise reasonable care in the adoption of a safe design.<sup>71</sup>

*Newspaper carriers.* Plaintiff was struck and injured by a motorcycle operated by a paper carrier. A judgment against the newspaper was reversed upon the finding that the carrier was an independent contractor.<sup>72</sup>

*Railroads.* The defendant is entitled to judgment where it is conclusively shown that the decedent was in such a position that he could have observed the train and thereby avoided the accident.<sup>73</sup>

*Res ipsa loquitur.* The doctrine of *res ipsa loquitur* did not apply where a patient was burned after the physician's cautery instrument broke during an operation.<sup>74</sup>

*Wrongful death.* The standard of care as set forth by the automobile guest statute<sup>75</sup> is applicable in an action for wrongful death<sup>76</sup> of a minor son who was a guest in defendant's automobile.<sup>77</sup>

65. Goldstein v. Sabella, 88 So.2d 910 (Fla. 1956).

66. Russell v. Martin, 88 So.2d 315 (Fla. 1956).

67. FLA. STAT. § 317.21 (1955).

68. FLA. STAT. § 320.59 (1955); Bolick v. Sperry, 88 So.2d 495 (Fla. 1956).

69. FLA. STAT. § 320.59 (1955).

70. De La Concha v. Pincero, 88 So.2d 922 (Fla. 1956).

71. Matthews v. Lawnlite Co., 88 So.2d 299 (Fla. 1956).

72. Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956).

73. McAllister v. Tucker, 88 So.2d 526 (Fla. 1956).

74. Hine v. Fox, 89 So.2d 13 (Fla. 1956).

75. FLA. STAT. § 320.59 (1955).

76. FLA. STAT. § 768.03 (1955).

77. Brailsford v. Campbell, 89 So.2d 241 (Fla. 1956).

**TRUST AND SUCCESSION. Wills: Compromise and settlement agreement.** A compromise and settlement agreement with beneficiaries to accept a fixed sum in lieu of contesting a will is valid when entered in good faith and for valuable consideration.<sup>78</sup>

**Gifts to charity.** Gifts to charities were void where the testator, a family man, had not executed his will six months prior to his death.<sup>79</sup> The doctrine of dependent relative revocation was not applicable, though a prior will allegedly provided for the same gifts.<sup>80</sup>

**Intent of testator.** The testator's will stated an intent to dispose of his entire estate, including community property held with his wife. A further proviso indicated one-half of his estate was to go to his widow. It was held that the widow was entitled to all properties held jointly plus one-half of the remainder.<sup>81</sup>

**WORKMEN'S COMPENSATION. Award: Modification.** The legislature passed a law increasing the period during which an award might be modified<sup>82</sup> after rendition of a lump sum award to the injured employee. It was held that the award could be modified, since the period allowed by the existing statute had not run when the amending statute became effective.<sup>83</sup>

**Death resulting from employment: Causal connection.** Proof that the deceased died while in the performance of his employment is insufficient, of itself, to allow a logical inference of a causal connection between the death and the employment.<sup>84</sup>

**Scope of employment: "Going and coming rule."** A State Road Department employee on call twenty-four hours a day and doing work requiring immediate availability in event of emergency calls is within the coverage of the Workmen's Compensation Act with respect to an automobile accident occurring while on his way home from work in a road department vehicle.<sup>85</sup>

**Suit for wrongful death.** The Workmen's Compensation Statute providing that an employee, his dependents or personal representatives may pursue his remedy by action at law, or otherwise, against a third party tort-feasor,<sup>86</sup> does not permit a dependent mother to bring an action for wrongful death where there is a surviving widow.<sup>87</sup>

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78. *Hendrick v. Redfearn*, 88 So.2d 620 (Fla. 1956).

79. FLA. STAT. § 731.19 (1955).

80. *In re Pratt's Estate*, 88 So.2d 499 (Fla. 1956).

81. *Colclazier v. Colclazier*, 89 So.2d 261 (Fla. 1956).

82. FLA. STAT. § 440.28, as amended, LAWS OF FLA. c. 28241 (1953).

83. *Walter Denson & Son v. Nelson*, 88 So.2d 120 (Fla. 1956).

84. *Pridgen v. International Cushion Co.*, 88 So.2d 286 (Fla. 1956).

85. *Blount v. State Road Dept.*, 87 So.2d 507 (Fla. 1956).

86. FLA. STAT. § 440.39(1) (1955).

87. FLA. STAT. § 768.02 (1955); *McCoy v. Florida Power and Light Co.*, 87 So.2d 809 (Fla. 1956).