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Quarterly Synopsis of Florida Cases

QUARTERLY SYNOPSIS OF FLORIDA CASES*

*The Florida Supreme Court decided over three hundred cases during the period reported from January 21, 1955, through May 13, 1955. In addition *four* federal cases interpretative of Florida law are included. Those opinions (excluding memorandum decisions and a few others not of sufficient importance to be noted here) appearing in 78 So.2d 85 to 80 So.2d 368; 218 F.2d 473 (1955) to 221 F.2d 900 (1955); and 128 F. Supp. 822 to 129 F. Supp. 837 (1955) are herewith reported.

ADMINISTRATIVE LAW. *Certificates of Public Convenience.* The Public Utilities Commission had no authority to grant a new certificate of convenience for the transportation of alcoholic liquors and wines over an established route, presently served by existing holders of certificates, without giving the latter a reasonable opportunity to provide facilities for such transportation.[1]

State Improvement Board. When proceedings authorizing the construction of a bridge and causeway had been taken by a lawfully constituted board[2] and no facts were alleged to show that the proceedings were arbitrary or capricious, rulings made at the discretion of that board will not be disturbed.[3]

State Turnpike Authority: Bond validation. The Turnpike Authority filed a petition in the circuit court to secure the validation of turnpike bonds. Before the court filed the validation order, the petitioners were allowed to file a supplemental petition which reduced the amount of bonds for the project and made some slight changes in the plans for the construction of the turnpike. The action of the circuit court was proper and the filing of the supplemental petition did not necessitate the petitioner's giving notice to parties other than those who had appeared in the original validation proceedings.[4]

ATTORNEYS. *Discharge of counsel: Fees.* A party to an action may discharge his counsel at any time but the counsel must be paid reasonable fees before the discharge is effective and before further proceedings may be taken in the suit.[5]

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* This issue of the Quarterly Synopsis was written by Paul M. Low and edited by Richard H. Parker.

1. Tamiami Trail Tours v. Carter, 80 So 2d 322 (Fla. 1955).
2. Laws of Florida, c. 22700 (1945).
3. Pirman v. Florida State Improvement Commission, 78 So.2d 718 (Fla. 1955).
4. State v. Fla. State Turnpike Authority, 80 So.2d 337 (Fla. 1955).
5. D'Agostino v. Peoples Water & Gas Co., 78 So.2d 729 (Fla. 1955).

BAIL. *Forfeiture.* A defendant's bond was properly forfeited when he did not appear until 10 days after the beginning of the term. In spite of the fact that the order to appear did not give a specific day other than "next term," it was the defendant's duty to appear the first day of the term.[6]

CONSTITUTIONAL LAW. *Search and seizure.* The defendant was a passenger in an automobile which, following a traffic violation, failed to stop at the direction of police officers. The officers were in an unmarked car. After a chase, the defendant was captured, lottery tickets in his possession were seized, and subsequently used as evidence against him. The resulting conviction was reversed since the search and seizure were made without a valid warrant, were not based on probable cause, nor were incidental to a valid arrest. The defendant could not be expected to know that his pursuers were officers of the law. Thus, his constitutional rights[7] were violated.[8]

CONTRACTS. *Employment contracts.* No action can be maintained by an employee for breach of an employment contract which is terminable by the employer at will.[9]

Limitation of action. The plaintiff, by oral contract, cared for her deceased aunt for various periods from 1938 until her death. The consideration was to be a bequest in the aunt's will. No such provision was made in the will and the plaintiff filed suit and recovered a jury verdict of $15,000.00. The court ordered a remittitur to $5,000.00 or, in the alternative, a new trial. The reduction to $5,000 was excessive since the plaintiff could claim damages from 1938, and the claim would not be barred by the statute of limitations since cause of action did not arise until the aunt's death.[10]

CORPORATIONS. *Corporate liability for sole owner's debts.* When a solely owned corporation is used to conceal the assets of its owner to hinder creditors from collecting their debts, the sole owner and the corporation will be considered identical. However, the complaining party must first show that the corporation was actually organized for such a purpose.[11]

Receivers. The power to appoint a receiver should be exercised only where sufficient allegations of fraud, insolvency, mismanagement, etc., appear in the application for appointment.[12]

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6. Crompton v. State, 78 So.2d 693 (Fla. 1955).
7. FLA. CONST. D.R. § 22.
8. Ippolito v. State, 80 So.2d 332 (Fla. 1955).
9. Wynne v. Ludman Corp., 79 So.2d 690 (Fla. 1955).
10. Briggs v. Fitzpatrick, 79 So.2d 848 (Fla. 1955).
11. Gross v. Cohen, 80 So.2d 360 (Fla. 1955).
12. Papazian v. Kulhanjian, 78 So.2d 85 (Fla. 1955).

COUNTIES. *Public parks: Fishing facilities.* The County Commissioners of Dade County provided fishing facilities in a public park by leasing a portion of that park for the construction and operation of a fishing pier. The commissioners had the authority to do this since there was no cost or expense to the county and that portion leased was not required or being used for park purposes.[13]

CRIMINAL LAW. *Appeal bonds.* The defendant was convicted of a crime against nature. Pending appeal, the accused applied for an appeal bond but his application was denied. It was improper for a court to refuse to set bond and to deny consideration of the merits of this case solely because the judge was trying to "break up this type of crime."[14]

Bond: Discharge of surety. A surety's obligation under a bond is discharged when the felony charge under which the bond was secured is dismissed. A refiling of the charge by the solicitor does not create a new obligation on the part of the released surety.[15]

Confession of co-defendant. An accused cannot be convicted of an alleged crime when he has denied participation in the crime and there is no evidence against him other than the extra-judicial confession of a co-defendant.[16]

Habeas corpus: Appeal. In a criminal action, the defendant filed an appeal from an order denying habeas corpus. The appeal was filed more than sixty but less than ninety days from the date of the denial. Although it had been previously held that the writ of habeas corpus is civil rather than criminal in nature,[17] nevertheless, in criminal cases, an appeal from denial of habeas corpus must be prosecuted in accordance with the criminal appeal statute.[18] The appeal was allowed.

Habitual Criminal Statute. Since it could not be ascertained from the face of the information whether "resisting arrest" was a felony or misdemeanor, conviction of defendant under the Habitual Criminal Statute[19] for the commission of a fourth felony was error.[20]

DOMESTIC RELATIONS. *Alimony.* The defendant's husband was sentenced to a jail term for failure to pay past-due alimony. The sentencing order provided that the husband could purge himself of the contempt by paying the overdue alimony before a designated time. Twelve days later, without notice to the wife or her counsel, the court ordered that, since

13. Sunny Isles Fishing Pier v. Dade County, 79 So.2d 667 (Fla. 1955).
14. Floyd v. State, 79 So.2d 778 (Fla. 1955).
15. All Florida Surety Co. v. State, 78 So.2d 89 (Fla. 1955).
16. Corbin v. State, 78 So.2d 861 (Fla. 1955).
17. State v. Fabisinski, 111 Fla. 454, 156 So. 261 (1933).
18. FLA. STAT. § 924.09 (1953)(This statute allows 90 days for an appeal in criminal matters); Snell v. Mayo, 80 So.2d 330 (Fla. 1955).
19. FLA. STAT. §§ 775.10, 775.11 (1953).
20. Daniel v. Mayo, 79 So.2d 519 (Fla. 1955).

the husband promised to pay all back alimony and had very little income, all future alimony payments were to be cancelled. It was improper to enter such an order without notice to the wife and without giving her the opportunity to be heard.[21]

Alimony. In a divorce proceeding, it was not an abuse of discretion to refuse to grant alimony to the wife where there were no children, the husband's income was little more than the wife's, and the wife received one half of the proceeds of the sale of the only asset, which had been purchased entirely with the husband's savings.[22]

Alimony awards: Jurisdiction to enforce. Plaintiff sued to have a Nevada divorce decree set aside and to enforce a Rhode Island alimony award. Florida courts do have jurisdiction to entertain suits brought by non-resident wives for the enforcement of alimony and support decrees of sister states. Though the question was not before the court, it was declared that laches should bar the plaintiff from having the 16 year old Nevada decree set aside.[23]

Bastardy: Limitation of actions. The Bastardy Act of 1951[24] does not revive a cause of action which arose under the old act[25] when such cause had been barred by a three year statute of limitations.[26]

Child custody: Jurisdiction. Plaintiff father sought to gain custody of his children who were forcibly taken by the defendant mother from Florida to Pennsylvania. The circuit court was without jurisdiction since neither the children nor the mother were within the state and no jurisdiction could be acquired by service of process by publication.[27]

Child support. A bill of complaint for child support by a wife does not create a triable issue when the husband had agreed and had faithfully continued to support the child before the complaint was filed.[28]

EQUITY. *Class action.* A trial court can not reserve until trial a decision as to whether or not a suit is a class action.[29] Such a decision must be made upon proper motion before trial.[30]

Jurisdiction. The plaintiff and defendant each owned an interest in a hotel. The plaintiff filed a bill in equity in which he alleged that the defendant took a mortgage from the purchaser of the hotel which did not

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21. Attaway v. Attaway, 80 So.2d 352 (Fla. 1955).
22. Kahn v. Kahn, 78 So.2d 367 (Fla. 1955).
23. Lanigan v. Lanigan, 78 So.2d 92 (Fla. 1955).
24. FLA. STAT. § 742.011 (1953).
25. Bastardy Act, Jan. 5, 1828.
26. FLA. STAT. § 95.11 (1953); Wall v. Johnson, 78 So.2d 371 (Fla. 1955).
27. FLA. STAT. Common Law Rules, rule 34 (1953); FLA. STAT. § 744.13(1) (1953); Gessler v. Gessler, 78 So.2d 722 (Fla. 1955).
28. York v. York, 78 So.2d 406 (Fla. 1955).
29. FLA. STAT. § 63.14 (1953); FLA. RULES OF CIV. PRO., 3.6, 3.7.
30. Osceola Groves, Inc. v. Wiley, 78 So.2d 700 (Fla. 1955).

recite the plaintiff's interest therein. He sued for a determination of his interest in the mortgage. It was improper for the trial court to transfer the cause to law side since the complaint was sufficient to invoke equity jurisdiction.[31]

EVIDENCE. *Accident reports.* Statute forbids the use of accident reports in evidence except to prove identity.[32] Since such reports are confidential, it would defeat the purpose of the statute to allow one party to establish the contents of an accident report by the testimony of a witness who had heard the other party make an oral report to the investigating officer.[33]

Expert testimony. Testimony of a police officer who had been qualified as an expert on stopping distances and skid marks was admissible in an action arising out of a collision in which the speed of the automobiles was material.[34]

Res ipsa loquitur. Plaintiff was injured from falling debris resulting from the crash of a jet airplane. In order to invoke the doctrine of *res ipsa loquitor* and successfully prove negligence, plaintiff must not only prove exclusive control of the airplane by the defendant but he must also show that the accident would not have occurred except for the defendant's negligence.[35]

GARNISHMENT. *Bonds.* The statute[36] providing for the amendment of attachment bonds may be construed to apply also to garnishment bonds.[37]

INSURANCE. *Conditions: Waiver.* Insured's mother took out a life insurance policy naming herself as beneficiary. The mother knew that the insured was in poor health. Twenty days after the policy was issued, the insured died. Since there was no evidence that the insurer had any knowledge of the insured's ill-health, the condition that the insured must be in good health at the time of the delivery of the policy was held not to have been waived.[38]

JUDGMENTS. *Res judicata.* The plaintiff purchased trucks under a retain title contract wherein it was agreed that the property sold included all accessories which might be subsequently placed on the trucks. Later, the seller brought suit for replevin and the trucks, on which the purchaser had added equipment, were redelivered to the plaintiff. The purchaser did not defend that suit. In a separate action in trover, the purchaser was

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31. Edlin v. Butel, 79 So.2d 769 (Fla. 1955).
32. FLA. STAT. §§ 317.13, 317.17 (1953).
33. Herbert v. Garner, 78 So.2d 721 (Fla. 1955).
34. Kerr v. Karaway, 78 So.2d 571 (Fla. 1955).
35. Williams v. United States, 218 F.2d 473 (5th Cir. 1955).
36. FLA. STAT. § 76.29 (1953).
37. Corbin v. St. Lucie River Co., 78 So.2d 396 (Fla. 1955).
38. Gulf Life Insurance Co. v. Green, 80 So.2d 321 (Fla. 1955).

estopped from maintaining the action against the seller to recover the added equipment since this issue was *res judicata*.[39]

LABOR LAW. *Fair Labor Standards Act: Scope.* A bakery which receives nearly all of its materials from out of state and ships about one-third of its products out of state is engaged in "interstate commerce" and subject to the Fair Labor Standards Act.[40]

LANDLORD AND TENANT. *Lease: Option to purchase.* The assignee of a lease brought a suit in equity against the lessor for specific performance of a provision which gave the original lessee an option to purchase the realty in question. The evidence established that the lessor had not relied on the personal credit of the original lessee, thus he was estopped to deny the validity of the assignee's exercise of the option.[41]

Leases. The plaintiff was the lessor of a liquor store. Under the terms of the lease it was agreed that the liquor license was to be used by the tenant but could not be transferred to other premises. After the lease had expired, the tenant remained, but transferred the liquor license to another premises in violation of the lease agreement. Even though the tenancy was at will, the tenant was still bound by the covenants in the original lease and the lessor could recover damages for the breach thereof.[42]

LIENS. *Equitable liens.* A contractor is not entitled to an equitable lien when he did not institute foreclosure proceedings within the one year statutory period provided in the mechanic's lien law.[43]

Mechanics liens: Discharge. Failure to institute a suit within one year after the filing of a mechanic's lien discharges the lien.[44] No equitable lien exists merely because the owners have received the benefit of the improved realty.[45]

MUNICIPAL CORPORATIONS. *Public improvements.* Plaintiff sought to enjoin the city from constructing a grade crossing over his property. Such injunction cannot issue unless the complainant shows evidence of damage to either his person or property. This is true even though the crossing was located at a point other than that provided in the master plan.[46]

Sale of option: Profit allowed. When the holder of an option to purchase water works was not employed by the town to obtain such an option, he could transfer the option to the town at a profit. The holder

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39. Avant v. Hammond Jones, Inc., 79 So.2d 423 (Fla. 1955).
40. 52 STAT. 1060 (1938); 29 U.S.C. § 201 (1952); Mitchell v. Royal Baking Co., 219 F.2d 532 (5th Cir. 1955).
41. Rosello v. Hayden, 79 So.2d 682 (Fla. 1955).
42. Rosamond v. Mann, 80 So.2d 317 (Fla. 1955).
43. Blanton v. Young, 80 So.2d 351 (Fla. 1955).
44. FLA. STAT. § 84.23 (1953).
45. Kimbrell v. Fink, 78 So.2d 96 (Fla. 1955).
46. Bennett v. Fort Lauderdale, 78 So.2d 567 (Fla. 1955).

is not required to disclose the price paid for the option in negotiations with the town.[47]

NEGLIGENCE. *Guest Statute: Gross negligence.* An action was brought against the administratrix of the estate of the deceased driver to recover for injuries to a guest riding in the car at the time of the accident. The plaintiff alleged that the deceased driver was travelling more than 60 miles per hour on the shoulder of the highway, and attempted to pass to the right of another car proceeding in the same direction. The plaintiff further alleged that the deceased had no lawful reason to be driving in that manner. Such a complaint is sufficient to state a claim of gross negligence[48] under the Guest Statute.[49]

NEGOTIABLE INSTRUMENTS. *Conditional delivery.* The plaintiff brought an action upon two promissory notes. The defendant answered by stating that the notes were made by him to the plaintiff as evidence of the plaintiff's interest in a partnership and until such time as the plaintiff had established the necessary residence qualifications. The defendant's answer created an issue under the statute[50] which provides that, between the immediate parties, "delivery [of a promissory note] may be shown to have been conditional . . . and not for the purpose of transferring the property in the instrument."[51]

PARTNERSHIP. *Accounting.* Under the terms of a written partnership agreement, a partner who agreed to furnish capital, tools and plant and who was to receive 6% interest on all "cash invested" was not entitled to such interest on the value of tools, building and equipment that he furnished to the partnership.[52]

PROCEDURE. *Amended complaints.* In a personal injury suit, it is improper for the trial court to allow the plaintiff to amend his complaint after the defendant's closing argument since the defendant will have no opportunity to contest the amended complaint.[53]

Appeal: Transcript of testimony. The Supreme Court will not pass on questions raised on appeal where an authenticated transcript of testimony is not included in the record of appeal.[54]

Change of venue. It was not error to deny a motion for a change of venue when such motion was not made until six months after the institution of the suit.[55]

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47. Cook v. Layton, 78 So.2d 690 (Fla. 1955).
48. Bridges v. Speer, 79 So.2d 679 (Fla. 1955).
49. FLA. STAT. § 320.59 (1953).
50. FLA. STAT. § 674.18 (1953).
51. Bassato v. Denicola, 80 So.2d 353 (Fla. 1955).
52. Smith v. Smith, 78 So.2d 687 (Fla. 1955).
53. Seltzer v. Grine, 79 So.2d 688 (Fla. 1955).
54. Johnson v. Roberts, 79 So.2d 425 (Fla. 1955).
55. Inverness Coca-Cola Bottling Co. v. McDaniel, 78 So.2d 100 (Fla. 1955).

Declaratory judgments. Plaintiff filed a bill seeking a declaratory judgment declaring a state statute to be unconstitutional. Since the bill was based merely on fear and the threat of prosecution and not on an actual indictment under the statute, a declaratory judgment could not be rendered.[56]

Discovery. Plaintiff sued for damages resulting from piracy of trade name. The only issue was whether the garments sold by the defendant were manufactured by the plaintiff or were imitations thereof. The trial court erred in failing to give an immediate ruling on the defendant's objection to an interrogatory which would have elicited information relative to the source of supply of the challenged garments.[57]

Request for admissions. A request for admissions[58] must specify a time within which said request must be answered.[59]

Supersedeas bonds. When a supersedeas bond provides for the payment of attorney fees if the appeal is dismissed or affirmed, such condition is legal and enforceable. The bond itself provided for such payment, therefore, statutory and Supreme Court rules[60] prohibiting the imposition of attorney fees as part of appeal expenses were not applicable.[61]

Venue. When a cause of action for libel and slander arose in Dade County and the corporate defendant did not have an office in Martin County where the action was brought, the motion to dismiss for improper venue was properly sustained.[62]

Writ of prohibition. The trial court ruled that the petitioner was under the court's jurisdiction. The petitioner sought to review the order by way of a writ of prohibition filed in the Supreme Court. The petitioner's complaint could not be heard since no ground was afforded for the issuance of a writ of prohibition. The remedy to correct such an erroneous ruling of the trial court is appeal after final judgment.[63]

REAL PROPERTY. *Condemnation.* In a condemnation proceeding, the trial court limited the defendant to the presentation of evidence on the value of the right of way and the consequent damages arising from its appropriation. In order to make a justiciable issue as to the necessity for exercise of the power of eminent domain, the contestant must allege fraud, bad faith or gross abuse of discretion on the part of the condemning authority.[64]

56. Feldman v. Ervin, 129 F. Supp. 822 (S.D. Fla. 1955).
57. Lilli Ann Corp. v. Welsh, 79 So.2d 677 (Fla. 1955).
58. FLA. STAT. Common Law Rules, rule 29 (1953).
59. Campbell v. Blue, 80 So.2d 316 (Fla. 1955).
60. FLA. STAT. § 59.13(6); FLA. STAT. Supreme Court Rules, rule 35 (e) (1953).
61. Ritter v. Bentley, 78 So 2d 573 (Fla. 1955).
62. Krueger v. Coral Gables Supply Co., 78 So.2d 704 (Fla. 1955).
63. State v. Herin, 80 So.2d 331 (Fla. 1955).
64. St. Joe Paper Co. v. Choctawatchee Electric Cooperative, Inc., 79 So.2d 761 (Fla. 1955).

Homestead. The plaintiff sought to enjoin the judicial sale of his land to satisfy a judgment. Since the platted rural lots owned by the plaintiff and the unplatted rural land which he owned and on which he resided constituted one contiguous tract, it was homestead property and, therefore, exempt from judicial sale.[65]

Marketable title. By contract, the vendor bound herself to furnish an abstract of title showing "good merchantable" title. The vendor tendered an abstract showing her title through a tax deed but the abstract showed none of the proceedings leading up to the tax deed. In an action by the purchaser to cancel the contract, the Supreme Court ruled that an abstract reflecting title by bare tax deed entry did not constitute compliance with the covenant in the realty contract to furnish an abstract of title showing good and merchantable title.[66]

TAXATION. *Excess profits tax.* The petitioner purchased all of the stock of a corporation pending dissolution. The proceeds from the sale of one of the corporation's assets, an orange grove, were credited to the petitioner as an individual. Since the corporation was still in existence at the time of the sale, the profits from this sale should have been treated as corporate income and were, therefore, subject to the excess profits tax.[67]

TORTS. *Automobiles: Liability for acts of third party.* Though the records of the Motor Vehicle Commissioner did not show a regular transfer of title, the previous owner had given a bill of sale for his automobile to his insurer, declaring such automobile to be a total loss due to theft and an ensuing wreck. After such a transfer, the owner was not liable for negligent acts of an operator of that automobile even though title had not been properly transferred according to automobile registration regulations.[68]

TORTS. *Contributory negligence.* After leaving the defendant's bus, plaintiff jumped to the curb to avoid a mud puddle, slipped, and was injured. Plaintiff was guilty of contributory negligence as a matter of law.[69]

TRADE MARKS. *Infringement.* An awning shutter manufacturer cannot use the word "ventilated" in the trade name of his business since another company had already adopted it. However, the trade name could contain a derivative of the word "vent" as is common practice in the awning shutter business.[70]

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65. Buckels v. Tomar, 78 So.2d 861 (Fla. 1955).
66. Alexander v. Cleveland, 79 So.2d 852 (Fla. 1955).
67. Snively v. Commissioner of Internal Revenue, 219 F.2d 266 (5th Cir. 1955).
68. Platt v. Dreka, 79 So.2d 670 (Fla. 1955).
69. Jacksonville Coach Co. v. Early, 78 So.2d 369 (Fla. 1955).
70. Rimmeir v. Dickson, 78 So.2d 732 (Fla. 1955).

TRIAL. *Jury instructions.* A trial court is required to hold a conference at the conclusion of evidence for the purpose of settling jury instructions.[71] However, failure to hold such a conference is not reversible error when counsel does not object until after the jury verdict is rendered.[72]

WILLS. *Mutual wills.* A widower executed a mutual will with his former wife providing that the survivor's estate would be left to their sole daughter and, thereafter, the widower remarried and executed a second will attempting to derogate the first by naming his second wife as beneficiary. The second will is null and void. However, in view of the fact that the second wife had no knowledge of the first agreement, she is at least entitled to her dower share of the deceased widower's estate.[73]

WORKMEN'S COMPENSATION. *Awards: Moratory interest.* Although interest is not usually allowed on personal injury judgments, under the Workmen's Compensation Act,[74] claimant is entitled to interest on the award from the date she should have begun receiving payments of compensation.[75]

Third-party tort-feasors: Recovery. An employer's insurance carrier is entitled to its pro-rata share of the employee's recovery against a third-party tort-feasor.[76] In determining the carrier's pro-rata share of the proceeds from the judgment, the carrier should be charged with its share of the court costs incurred by the employee.[77]

71. FLA. STAT. Common Law Rules, rule 39 (b) (1953).
72. Luster v. Moore, 78 So.2d 87 (Fla. 1955).
73. FLA. STAT. § 731.34 (1953); Todd v. Fuller, 78 So.2d 713 (Fla. 1955).
74. FLA. STAT. § 440 (1953).
75. Parker v. Brinson Construction Co., 78 So.2d 873 (Fla. 1955).
76. FLA. STAT. § 440.39 (3) (1953).
77. Baughman v. Aetna Casualty & Surety Co., 78 So.2d 694 (Fla. 1955).