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Quarterly Synopsis of Florida Cases

QUARTERLY SYNOPSIS OF FLORIDA CASES*

The Florida Supreme Court decided about one hundred cases during the period reported from January 22, 1954, through March 23, 1954. Those opinions (excluding memorandum decisions and a few others not considered of sufficient importance to be noted here) found in 70 So.2d 290 to 71 So.2d 751 are herewith reported. In addition, two federal cases interpretive of Florida law are included. These were found from 209 F.2d 1 to 210 F.2d 652 (advanced sheets from January 5, 1954, through March 5, 1954); and 115 F. Supp. 386 to 117 F. Supp. 870 (Advanced sheets from October 23, 1953, through January 14, 1954).

APPEAL AND ERROR. A failure to bring the transcript of record of the first suit, upon which a finding of res judicata was based, was sufficient justification for a finding by the Supreme Court that the order dismissing the complaint was correct.[1]

CIVIL PROCEDURE. *Continuance.* Defendant had "noticed" the case for trial. When the case was called for trial, plaintiffs filed a written motion for a continuance, setting forth that arrangements had been made to take the deposition of a plaintiff in Mississippi, which deposition had not yet been received. The Supreme Court held that the trial court's refusal to grant the continuance did not constitute failure to exercise sound judicial discretion.[2]

Summary Judgments. It was not error for the court to grant a summary final judgment *to the defendant* in a suit where *the plaintiff had moved for* such a judgment, in the absence of timely and meritorious objection, there being no issue as to any material fact. The facts, as properly construed against the defendant, showed that the defendant was entitled to such judgment as a matter of law, despite the fact that he had not moved for it,[3] although it may be better practice to file a cross complaint.[4]

CONSTITUTIONAL LAW. *Double jeopardy.* An information was filed charging defendant with embezzlement of county funds during the month of September, 1952. A demurrer to defendant's plea of double jeopardy, there having been an acquittal under a prior information charging embezzlement during several months, including September, 1952, was sustained. The Supreme Court reversed the judgment of the trial court, holding that the prior acquittal was a bar to the instant prosecution under the constitutional

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1. Cohen v. Cohen, 70 So.2d 362 (Fla. 1954).
2. Rainey v. Roesall Corp., 71 So.2d 160 (Fla. 1954).
3. FLA. STAT. 30 Common Law Rules, Rule 43.
4. Carpinetta v. Shields, 70 So.2d 573 (Fla. 1954).

guaranty[5] against being twice placed in jeopardy for the same criminal offense.[6]

CONTRACTS. *Specific performance.* In an action for specific performance to convey land, the vendor can not take advantage of a delay in performance by the purchaser which he condoned. The failure of the purchaser to complete the contract within thirty days did not preclude him from requiring specific performance by the vendor where there was no definite time set for the closing.[7]

CRIMINAL LAW. *Evidence: Photographs.* The admission of photographs in a murder prosecution was not error where a material issue was involved.[8]

Pardon: Recommitment. An order recommitting a prisoner on a conditional pardon, for breach of the condition, was proper notwithstanding the fact that the period of the original sentence had expired when the conditional pardon was revoked.[9]

Statutes: Punishment clauses. In a habeas corpus proceeding the petitioner was not granted the writ and was remanded to custody, the denial being based upon a special act[10] of the Legislature. On appeal, it was held that since the act[11] failed to state any offense punishable under the laws, its own punishment clause being unconstitutional,[12] the statute[13] providing for the punishment of misdemeanors when punishment was not otherwise provided for, was inapplicable.[14]

DAMAGES. *Wrongful death.* A widow sued in two counts, individually and as administratrix, for the wrongful death of her husband resulting from an automobile injury. The court's instructions, which did not make it clear that if the jury allowed loss of prospective estate of the deceased on one count they could not allow it on the other, constituted reversible error.[15]

DIVORCE. *Alimony: Modification.* In an original final decree of divorce, a wife had relinquished her right to alimony in consideration of a property division and lump sum awards. She could not later be awarded alimony under a statute[16] providing for modification of alimony awards.[17]

Alimony Decree: Modification. Although the Supreme Court is reluctant to modify final alimony decrees, it will do so in order to preserve husband's standard of living and earning capacity as a dentist.[18]

Custody of minor children. In a suit for separate maintenance, wherein the ultimate issue was whether maternal or paternal grandparents should rear the child, the child was properly left with paternal grandparents with

5. FLA. CONST. Declaration of Rights, §§ 11, 12.
6. Bizzell v. State, 71 So.2d 735 (Fla. 1954).
7. Forbes v. Babel, 70 So.2d 371 (Fla. 1954).
8. Henderson v. State, 70 So.2d 358 (Fla. 1954).
9. Beal v. Mayo, 70 So.2d 367 (Fla. 1954).
10. Acts of Fla., c. 29532 (1953).
11. *Ibid.*
12. *Id.* § 2.
13. FLA. STAT. § 775.07 (1951).
14. Taulty v. Hobby, Sheriff, 71 So.2d 489 (Fla. 1954).
15. Dobbs v. Griffith, 70 So.2d 317 (Fla. 1954).
16. FLA. STAT. § 65.15 (1951).
17. Haynes v. Haynes, 71 So.2d 491 (Fla. 1954).
18. Evans v. Evans, 70 So.2d 506 (Fla. 1954).

whom he had resided for the two years prior to the suit. During such time, the child's mental and physical health improved vastly, while there was an absence of evidence showing better conditions at the home of the maternal grandparents in Texas.[19]

Final Decree: Modification. A final decree adverse to a divorced husband was set aside to allow the husband to show that a foreign divorce decree providing for alimony and child support permitted modification of the foreign decree as to accrued payments. The Supreme Court held that the final decree was properly re-entered when the husband did not produce such evidence within a reasonable time.[20]

ELECTIONS. *Statutory requirements.* In a proceeding for a writ of mandamus which required the Supervisor of Registration to certify a relator's election as Justice of the Peace, the Supreme Court, reversing the Circuit Court for Highlands County, held that the statute[21] abolishing justice districts in Highlands County, subject to a majority vote of electors voting in such county *at the next general election,* required approval only by a majority of the electors voting on *the proposition submitted in the special election* at the time and place of such general election.[22]

EQUITY. *Injunction.* In a situation where a statute[23] required discontinuance of telephone service on the premises where service was used for gambling purposes, equity had no power to grant injunctive relief to the owner of the premises, regardless of the owner's knowledge of such illegal use. The owner's only relief lay through reinstatement powers of the Railroad and Public Utilities Commission. The court did not, however, lose its jurisdiction to proceed to a final disposition of the suit by the fact that service was actually discontinued during pendency of the suit. In the event that a showing of special equities is made, equity may consider whether conditions exist under which the statutory penalty attaches.[24]

FLORIDA. *Constitution.* A provision of the Florida Constitution disallows any senator or member of the House of Representatives from being elected to any office that has been created, or the emoluments whereof have been increased, during said legislator's incumbency. However, where such constitutional provision would bar a candidate whose candidacy is obviously not motivated by such increase in the emoluments of the office, and where such increase was limited to the benefit of the incumbent, the provision would be given a reasonable construction in light of the purpose of its enactment.[25]

County Civil Service: Deputy Sheriffs. Deputy sheriffs are "officers," not "employees," therefore a provision of the Hillsborough County Civil

19. Zdanowicz v. Zadanowicz, 70 So.2d 546 (Fla. 1954).
20. Wolk v. Leak, 70 So.2d 498 (Fla. 1954).
21. Sp. Acts 1951 c. 27592, FLA. CONST. Art. 5, § 21.
22. Droit v. State *ex rel* Long, 71 So.2d 259 (Fla. 1954).
23. FLA. STAT. §§ 365.01 *et seq.*, 365.08 (1953).
24. Peters v. Southern Bell Tel. and Tel. Co., 70 So.2d 547 (Fla. 1954).
25. FLA. CONST. Art. III, § 5.
26. State *ex rel* West v. Gray, 70 So.2d 471 (Fla. 1954).

Service Law[27] providing that deputy sheriffs are "employees" within classified service provisions of the act is unconstitutional.[28]

Medical Schools: State subsidies. Citizens and taxpayers, as intervenors, appealed from a declaratory decree of the Circuit Court for Leon County directing the Board of Control to pay to the University of Miami a subsidy authorized by statute[29] in re "the first credited medical school in the state." The Supreme Court rejected the appellants' contention that the Chancellor's acceptance of testimony of sponsors of the University amounted to judicial legislation, and upheld the decree. In citing a previous decision,[30] the court stated that the purpose of the statute[31] was to encourage the establishment of a medical school in Florida, such purpose being clearly manifested by further appropriations subsequent to the subsidy herein discussed.[32]

State Bond Issue: Pledge of general credit. In a proceeding for validation of proposed revenue bonds, which were to be issued by a state agency to finance construction of a bridge system, the Circuit Court for Dade County entered a decree validating the bonds. The state appealed, on grounds that covenants[33] by the State Road Department represented a pledge of general credit, therefore rendering the proposed bond issue unconstitutional.[34] The Supreme Court held that the covenants did not represent a pledge of general credit, and therefore did not require the bond issue, which was payable solely from certain gasoline tax funds, to be presented to freeholders for their approval.[35]

State Racing Commission: Scholarship Racing Days. After holding that § § 550.03 and 550.08, F.S., are not violative of the Florida Constitution,[36] the Supreme Court held that extra scholarship racing days must be awarded either *before* or *after* the regular 120-day racing season, and can not be allowed *within* such 120-day season.[37]

FOREIGN CORPORATIONS. *Similar names.* A Florida corporation brought an action to enjoin an Illinois corporation from doing business in

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27. Sp. Acts 1951, c. 27601, §§ 1 *et seq.*, 18, 23; FLA. STAT. § 30.07, (1953); FLA. CONST. Art. III, §§ 20, 27; Art. IV § 15; Art. XVI, § 4.
28. Blackburn v. Brorein, 70 So.2d 293 (Fla. 1954).
29. FLA. STAT. §§ 242.62, 242.63 (1953).
30. Overman v. Board of Control, 62 So.2d 696 (Fla. 1954).
31. FLA. STAT. §§ 242.62, 242.63 (1953).
32. Overman v. State Board of Control, 71 So.2d 262 (Fla. 1954).
33. The Board of County Commissioners of Broward County authorized and requested the Improvement Commission to enter a lease-purchase agreement whereby title to the bridge system would be taken by the commission, which would in turn lease the system to the State Road Department. The covenants in question resulted in the lease-purchase agreement, the State Road Department covenanting to pay, from other sources than the Broward County Gasoline Tax funds, all costs of current operation, repairs and maintenance, as well as agreeing to complete construction of the bridges if the monies deposited in the "System Construction Fund" should prove inadequate.
34. FLA. CONST. Art. IX, § 6.
35. State v. Florida State Improvement Commission, 71 So.2d 146 (Fla. 1954).
36. FLA. CONST Art. IX, §§ 2, 4; Art. III, § 30.
37. Gulfstream Park Racing Ass'n Inc. v. Florida State Racing Commission, 70 So.2d 375 (Fla. 1954).

Florida because of a similarity in names. The Illinois corporation was allowed to do business provided the qualifying words "of Illinois" were added to its name.[38]

INSURANCE. *Personal injury: Recovery.* Under a policy having a bodily injury coverage of $5,000.00 for each person insured, the insurer was liable for $5,000.00 each to husband and wife but was not liable to them for $10,000.00 jointly. Hence, an award to the husband of $5,000.00 and an award to the wife of $2,000.00 precluded the husband from recovering the $3,000.00 remaining after payment of the wife's claim.[39]

JONES ACT. *Limitation of Actions: Effect of State Law.* The District Court dismissed a suit wherein the plaintiffs brought an action for the death of a seaman under the Jones Act. A failure of the plaintiffs to file notices of claim as required by the Florida nonclaim statute[40] constituted the grounds for dismissal. The Court of Appeals reversed the judgment, declaring that the three year limitation period under the Jones Act is a substantive right and therefore can not be impaired by the Florida statute,[41] which requires the filing of a claim within eight months.[42]

LIMITATION OF ACTIONS. *Municipal Corporations.* A city charter provision for notice within sixty days after receipt of injury, applicable to tort actions, did not govern where the plaintiff's action for an overdose of X-ray treatment was based upon contract. The Statute of Limitations[43] did not begin to run until the plaintiff was first put on notice of the injury.[44]

Statutory Liability. An action was brought under the federal anti-trust laws. The court held that the Florida statute of limitations[45] requiring any action on a liability created by statute, other than a penalty of forfeiture, must be brought within three years was applicable. The Florida statute of limitations[46] providing that any action for relief not specifically provided for must be brought within four years, was inapplicable.[47]

MORTGAGES. *Usury.* The holder of a mortgage who had demanded a bonus exercised his right under an acceleration clause. The rate of interest plus the bonus, *amortized over the period the loan remained in existence,* amounted to a sum in excess of the legal rate, and was therefore usurious.[48] The evidence sustained the master's finding that the mortgagee wilfully and knowingly demanded the excess rate.[49]

MUNICIPAL CORPORATIONS. *Zoning ordinance: Judicial interpretation.* In a suit to restrain the city from enforcing a zoning ordinance which limit-

38. United Life Insurance Co. v. United Insurance Co., 70 So.2d 310 (Fla. 1954).
39. Trombley v. Iowa National Mutual Insurance Co., 70 So.2d 319 (Fla. 1954).
40. FLA. STAT. § 733.16 (1) (1953).
41. *Ibid.*
42. Roth v. Cox, 210 F.2d 76 (5th Cir. 1954).
43. FLA. STAT. § 95.24 (1953).
44. City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954).
45. FLA. STAT. § 95.11 (5) (a) (1953).
46. FLA. STAT. § 95.11 (4) (1953).
47. Crummer Co. v. DuPont, 117 F. Supp. 870 (N.D. Fla. 1954).
48. FLA. STAT. § 687.07 (1953).
49. Sonz v. Eisenstat, 70 So.2d 373 (Fla. 1954).

ed the use of oceanside properties to single family residences, the Circuit Court for Dade County entered a judgment from which the city appealed. The Supreme Court reversed the decision on grounds that although the duty of the courts to maintain the Constitution applies, when properly invoked, against a zoning ordinance as well as against the Legislature, where the zoning question was "fairly debatable"[50] the court could not substitute its judgment for that of the zoning body.[51]

PUBLIC SERVICE COMMISSIONS. *Modification of Findings.* The Railroad and Public Utilities Commission has been granted powers to inflict penalties for inadequacy of equipment, repairs and improvements, as well as rate making powers, by the Legislature.[52] However, a finding by the Commission that an increase in rate was just and reasonable can not be modified, in the same proceeding, by inflicting a penalty for poor or inadequate service.[53]

REAL PROPERTY. *Accretion.* Lots, which were bounded by a dedicated street on one side and by the ocean on the other side, disappeared beneath the surface. The Supreme Court held that the owner had no claim to an irregular strip which was built up by accretion on the farther side of the street.[54]

Broker's commissions: Attorney's fees. Plaintiffs purchased real estate from defendants which included a home and a going business. Alleging fraud and misrepresentation, plaintiffs brought suit to rescind the contract after occupying the premises for two weeks. Defendants sought recovery of the balance of the purchase price and for broker's commissions and attorney's fees. On appeal, the Supreme Court reversed the ruling of the Circuit Court that the defendant-vendors were entitled to broker's commissions and attorney's fees, there being no contract, statute, or other basis for the allowance of such fees.[55]

Contract for Deed. A husband assigned contracts for a deed to his wife, but procured a deed from the vendor to himself. He was estopped from denying the validity of his wife's conveyance to third parties where he had no knowledge of the conveyance. By procuring the deed to himself, he became the trustee of a constructive trust which equity would execute, thereby making good his wife's conveyance to her grantees.[56]

Deeds: Possibility of Reverter. Grantees brought suit to quiet title against a possibility of reverter under a statute[57] cancelling all reverter provisions in plats or deeds conveying any interest in real estate which has been in effect for more than twenty-one years. Despite the "saver"

50. "An ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involve its constitutional validity."
51. City of Miami Beach v. Lachman, 71 So.2d 148 (Fla. 1954).
52. FLA. STAT. §§ 364.03, 364.14, 364.15, 364.21, 364.33 *et seq.* (1953).
53. Florida Telephone Corporation v. Carter, 70 So.2d 508 (Fla. 1954).
54. Earle v. McCarty, 70 So.2d 314 (Fla. 1954).
55. Thornwaite v. Thomas, 71 So.2d 159 (Fla. 1954).
56. Omwake v. Omwake, 70 So.2d 565 (Fla. 1954).
57. FLA. STAT. § 689.18 (1953).

clause in the statute[58] allowing holders of such possibility of reverter one year from the date of the act to enforce their rights, the Supreme Court declared the statute unconstitutional since it impaired contractual obligations[59] in effect for more than twenty-one years, contrary to decisions[60] of the Supreme Court of the United States.[61]

TAXATION. *Homestead.* A homestead owner brought suit to enjoin the imposition and collection of a city ad valorem tax which had been imposed on all property, real and personal, to produce revenues to defray garbage, waste, and trash collection expense. The Supreme Court, affirming the decision of the Circuit Court for Broward County, stated that the tax was violative of the constitutional provision[62] exempting homestead property from all taxation except for assessments for special benefits up to an assessed value of $5,000.00.[63]

TORTS. *Contributory Negligence.* In a suit where there is no genuine issue as to any material fact with reference to the question of contributory negligence, such question should not be submitted to the jury. Submission to the jury of a question of contributory negligence when such question is not supported by evidence is error, tending to confuse and mislead the jury.[64]

TRIAL. *Directed Verdict: Opening statement.* A suit was brought under the automobile guest statute[65] to recover for injuries. The Circuit Court for Dade County granted the defendant's motion to dismiss on the plaintiff's opening statement to the jury, "entirely on the ground that the facts of the opening statement, if proved, would not be sufficient for a jury verdict...." The Supreme Court held that the trial court erred in granting the motion to dismiss, since an opening statement is nothing more than the plaintiff's theory of the case and what he proposes to prove, although he may later prove matters not embraced in the opening statement. An opening statement, therefore, is no basis on which to grant a directed verdict.[66]

WILLS. A joint will was executed by a husband and wife providing that the survivor should succeed to the entire real estate of the spouse first dying, and that *any residue* after the survivor's death should be divided equally among three others. In such a case, the surviving wife was vested with broad powers and liberal discretion in conveying a fee simple title to realty devised by the will.[67]

HOMESTEAD. A wife, who was sole owner of a home in which she and

58. *Ibid.* § 2.
59. The covenants in question were placed in the deeds for the benefit of the parties, and the reverter covenant set out means of enforcement.
60. Sturgess v. Crowinshield, 4 Wheat 122 (U.S. 1819); Home Building and Loan Association v. Blaisdell, 290 U.S. 398 (1933).
61. Biltmore Village, Inc. v. Royal Biltmore Village, Inc, v. Rotolante, 71 So.2d 727 (Fla. 1954).
62. FLA. CONST. Art. X, § 7.
63. City of Fort Lauderdale v. Carter, 71 So.2d 261 (Fla. 1954).
64. Rogers v. Orlando Transit Co., 70 So.2d 551 (Fla. 1954).
65. FLA. STAT. § 320.59 (1953).
66. Van Hoven v. Burk, 71 So.2d 158 (Fla. 1954).
67. Sanderson v. Sanderson, 70 So.2d 364 (Fla. 1954).

her dependent husband lived, and who was survived by her dependent husband and adult children who did not live in the home, could not devise the home by will,[68] there being no minor children. Since the husband was dependent upon the wife for support, the wife was the "head of household."[69]

WORKMEN'S COMPENSATION. *Employee: Definition.* A claimant who had operated a business for six years prior to incorporation, and who, after incorporation, was a director, president and general manager, and could not be fired, was not, within the meaning of the workmen's compensation statute,[70] and employee.[71]

Liability: Intervening Decision. A claimant, seeking workmen's compensation, filed a petition for modification after the Industrial Commission had denied compensation. The commission thereupon treated the petition as a new claim and granted compensation under authority of an intervening Supreme Court decision. The Supreme Court held that since the time for appeal from the original decision had expired, that decision was res judicata. Therefore, even though the intervening decision of the Supreme Court may have changed the liability of rule of law, it is not sufficient ground for the filing of a new claim under the same facts.[72]

Limitation of actions. An employee's claim for additional compensation was not barred by a one-year limitation period prescribed by statute[73] where an additional claim was not made on the ground of a change in condition or mistake in the determination of a material fact at the time of the original award. The full Industrial Commission never having finally determined that the carrier had discharged its obligation to the claimant in full prior to the time of the employee's claim for additional compensation, the matter remained open for adjudication despite the lapse of one year from the date of the last compensation payment and the date the employee filed his petition for additional compensation.[74]

Subsequent benefit increases. Acceptance of workmen's compensation statutes by the employer, employee, and carrier constitutes a contract governed by the statutes as they existed at the time of the injury, even though benefits accruing to the claimant were increased by amendment to the statute[75] *before* the insured's death, but *after* the injury.[76]

68. *See* FLA. CONST., Art. X, § 4.
69. Stephens v. Campbell, 70 So.2d 579 (Fla. 1954).
70. FLA. STAT. § 440.02 (2) (1953).
71. Ben-Jay Food Distributors, Inc., v. Warshaw, 70 So.2d 564 (Fla. 1954).
72. Plymouth Citrus Products Co-op v. Williamson, 71 So.2d 162 (Fla. 1954).
73. FLA. STAT., § 440.28 (1953).
74. Superior Homebuilders v. Moss, 70 So.2d 570 (Fla. 1954).
75. FLA. STAT., § 440.16 (1953).
76. Hecht v. Parkinson, 70 So.2d 505 (Fla. 1954).