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Quarterly Synopsis of Florida Cases

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QUARTERLY SYNOPSIS OF FLORIDA CASES*

ADMINISTRATIVE LAW. *Exhaustion of administrative remedies.* Appellant was denied an injunction against the application of a zoning ordinance to her property. It was held that the suit was prematurely filed, since she, not having first appealed to the town council for a variance, in accordance with the provisions of the ordinance, had not first exhausted her administrative remedies.¹ The dissent² contended that the appellant was in reality contesting the constitutionality of the ordinance, which matter was not within the power of the town council to adjudicate.

Florida Railroad and Public Utilities Commission. The Florida Railroad and Public Utilities Commission exceeded its statutory authority³ by refusing without a hearing, to issue a *for hire* permit. However, it does not follow therefrom that it must now issue such permit as a matter of course.⁴ The dissent⁵ argued that the Commission had already exercised its discretion in refusing a hearing and that it must grant the permit as of course.

APPEAL AND ERROR. *United States Supreme Court.* The Supreme Court of the United States denied certiorari to the Florida Supreme Court in two memorandum decisions.⁶

BROKERS, *Suit to recover commission.* A real estate broker cannot recover a commission allegedly due him where there is ample though disputed evidence that he was not the efficient procuring cause of the transaction.⁷

Suspension. The Florida Real Estate Commission is precluded from suspending the license of a broker for operating as such after it had expired

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1. De Carlo v. West Miami, 49 So.2d 596 (Fla. 1950).
2. *Id.* at 597.
3. FLA. STAT. §§ 323.05(2), 323.05(6) (1949).
4. State *ex rel.* Cone Bros. Contracting Co. v. King, 50 So.2d 175 (Fla. 1951).
5. *Id.* at 177.
6. Sheppard v. Mayo, 71 Sup. Ct. 484 (1951); De Vane v. Court of Appeals, 5th Circuit, 71 Sup. Ct. 502 (1951).
7. Good v. Douglas Gardens Inc., 50 So.2d 349 (Fla. 1951).

because of tardiness in paying his license fee, when despite that fact it had theretofore issued him a license.⁸

CARRIERS. *Registration certificate does not authorize charter party transportation.* A certificate of registration granted by the Florida Railroad and Public Utilities Commission on the strength of a certificate of public convenience and necessity from the Interstate Commerce Commission cannot be construed as authorization to engage in the transportation of charter parties exclusively in the state of Florida.⁹

CONTRACTS. *Conditions.* In an action by the seller against the buyer for failure to carry out the conditions of a sales contract, the seller need not allege performance of the obligations on his part when, by the terms and nature of the contract, it is necessary for the buyer to fulfill his conditions first.¹⁰

Rescission. Repossession of goods by the seller is not, as a matter of law, conclusive evidence of an intention to rescind the sales contract.¹¹

Refund of deposit. It is well settled that a prospective vendee who advances a deposit toward fulfillment of the contract and then refuses to continue with the agreement cannot obtain a refund of the money so paid, where the vendor is at all times ready, willing and able to sell.¹²

CRIMINAL LAW. *Extradition warrant.* The trial court does not have statutory authority¹³ to take and pass on the sufficiency of evidence relating to the charge against a defendant under an extradition warrant from the Governor of Florida on requisition of the governor of another state.¹⁴

Fair Trial. In a per curiam decision the conviction of two of three defendants for stealing a calf was reversed for a new trial.¹⁵ The concurring opinion¹⁶ stated that the one negro juror at the trial was required to eat in a "cubbyhole" separated from the dining room where the white jurors ate. It declared that the bailiff ". . . is not permitted to impose conditions on a negro juror that tend to humiliate or embarrass him or that in any wise detract from his responsibility as a juror."¹⁷

Withdrawal of guilty plea. A plea of guilty to the crime of embezzlement is permitted to be withdrawn where it is made by the defendant without benefit of counsel and in the belief, induced by the trial court, that he will thereby be placed on probation.¹⁸

DAMAGES. *Excessive award.* The largest judgment (\$260,000) in a personal

8. *Bie v. Mann*, 50 So.2d 167 (Fla. 1951).

9. FLA. STAT. § 323.14 (1949); *Serv. Coach Line v. King*, 50 So.2d 880 (Fla. 1951).

10. *Collier v. Fox*, 49 So.2d 801 (Fla. 1951).

11. *Ibid.*

12. *Reitano v. Fote*, 50 So.2d 873 (Fla. 1951).

13. 62 STAT. 822 (1948), 18 U.S.C. § 3182 (Supp. 1950); FLA. STAT. §§ 941.03, 941.06 (1949).

14. *Sullivan v. State ex rel. Pardew*, 49 So.2d 800 (Fla. 1951).

15. *Cacciatore v. State*, 49 So.2d 588 (Fla. 1950).

16. *Id.* at 589.

17. *Id.* at 590.

18. *Rubenstein v. State*, 50 So.2d 708 (Fla. 1951).

injury action in the history of the Florida supreme court was held to be so excessive as to shock the judicial conscience. It was further held that a jury which was so obviously prejudiced upon one issue could not have been free from prejudice on others, and that therefore the entire cause would have to be tried anew.¹⁹

Improper element. Appellants, by virtue of an injunction issued in a prior litigation,²⁰ were ordered to remove an encroachment from appellees' submerged lands and to erect a bulkhead or adequate retaining wall on the dividing line between the litigants' lands to protect against future encroachments. The court reserved jurisdiction, in the event of violation of its decree, to fix and award adequate damages to the appellees. Appellants violated the injunction. On suit to fix an award damages, it was held that an award of the costs of the construction of a bulkhead about the property in question without a requirement upon the part of the appellees to construct a bulkhead was an improper element of damages.²¹

DECEDENT'S ESTATES. Dower. The Florida dower statute²² does not permit a surviving widow, who elects to take dower, to take a larger share than one-third of the testator's personalty in lieu of a smaller share than one-third of his realty.²³

DIVORCE. Costs of litigation. A successful plaintiff-husband in a divorce action must bear the costs of the litigation, including the wife's attorney's fees, if she is without funds.²⁴

EJECTMENT. Description of property. It is permissible to amend a bill of particulars in an ejectment action by introducing parol evidence to show the plat and place of recording thereof, which was omitted in the plaintiff's deed.²⁵

ELECTIONS. Quo warranto. In a quo warranto proceeding,²⁶ appointments to the Duval County Democratic Executive Committee made by the retiring chairman of the State Democratic Committee a month after his term of office expired were invalidated. The appointees of the newly elected chairman were deemed to be the committeemen appointed according to law.²⁷

ENTIRETIES.²⁸ No right of survivorship in murderer. A husband and wife owned an estate by the entirety. He murdered her and then committed suicide. It was not known who died first. The heirs of each, children by former marriages, claimed the property. The court rejected the theory that

19. *Florida Power & Light Co. v. Watson*, 50 So.2d 543 (Fla. 1951).

20. *Hanna v. Martin*, 160 Fla. 967, 37 So.2d 579 (1948).

21. *Hanna v. Martin*, 49 So.2d 585 (Fla. 1950).

22. FLA. STAT. § 731.34 (1949).

23. *In re Ginsberg's Estate*, 50 So.2d 539 (Fla. 1951).

24. *Stern v. Stern*, 50 So.2d 119 (Fla. 1951).

25. *Crowder v. Miami Beach First Nat. Bank*, 50 So.2d 175 (Fla. 1951).

26. *State ex rel. Feltman v. Hughes*, 49 So.2d 591 (Fla. 1950).

27. FLA. STAT. § 102.07(9) (1949) ("... in the event of ... a vacancy occurring ... in any county executive committee, the chairman of the state executive committee shall have the power to fill such vacancy by appointment ...").

28. See *The Status of Entireties in Florida*, 5 MIAMI L. Q. 592.

an estate by the entirety is an inheritable estate subject to the rule that a murderer cannot inherit from the one he murdered.²⁹ It accepted the Missouri view³⁰ that a murderer cannot assert complete ownership in the property as a survivor. The property is to be treated as a tenancy in common by virtue of the severance of the marital tie, similar to divorce, with the heirs of each spouse entitled to one-half of the property.³¹

EVIDENCE. Relevancy. Where a husband admits that the value of his property is approximately \$2,500,000 and that he is financially able and willing to pay any alimony, counsel fees and court costs which the court decrees him to pay, the requirement that he produce income tax returns and records of property which he owns is not material, relevant or pertinent to the issues, and need not be complied with.³²

FRAUD. Damages must be proved. An action for fraud cannot be maintained where the record is devoid of evidence that the plaintiff was injured by the defendant's misrepresentations.³³

Knowledge by plaintiff of misrepresentations. Where the plaintiff knows at the time of the transaction that representations made by the defendant are false, he cannot later be heard to claim that he was defrauded.³⁴

GAMING. Possession of gambling implements. The city of Ft. Lauderdale has the charter power³⁵ to make the mere possession of gambling implements a crime.³⁶

HABEAS CORPUS. Not to be used to examine evidence. The writ of habeas corpus should be used only with great caution to examine the evidence upon which a prosecuting officer acted in presenting an information.³⁷

JUDGMENTS. Statute of limitations. The statute of limitations on a judgment³⁸ is not tolled by a sheriff's suit, authorized by statute³⁹ upon demand by the judgment holder that levy be made, praying that judgment holder and the record title holder of property be required to show cause why he should or should not levy upon the property in question to satisfy the judgment.⁴⁰

LICENSES. Exclusive. No exclusive license to sell the licensor's product can be inferred from the fact that the licensor agrees to allow the licensee to use its copyrighted trade-name, in consideration for which the licensee agrees that 85% of its purchases are to be of the licensor's manufacture.⁴¹

29. FLA. STAT. §731.31 (1949).

30. *Grose v. Holland*, 357 Mo. App. 874, 211 S.W.2d 464 (1948).

31. *Ashwood v. Patterson*, 49 So.2d 848 (Fla. 1951).

32. *Jacobs v. Jacobs*, 50 So.2d 169 (Fla. 1951).

33. *Casey v. Welch*, 50 So.2d 124 (Fla. 1951).

34. *McDonald v. Rose*, 50 So.2d 878 (Fla. 1951).

35. FLA. STAT. § 168.08 (1949).

36. *State ex rel. Allen v. Kelley*, 50 So.2d 527 (Fla. 1951).

37. *Sullivan v. State ex rel. McCrory*, 49 So.2d 794 (Fla. 1951).

38. FLA. STAT. § 95.11 (1949).

39. FLA. STAT. § 30.30(5) (1949).

40. *Calhoun v. Pearson*, 49 So.2d 603 (Fla. 1951).

MUNICIPAL CORPORATIONS. *Employment of fiscal agent.* A city has the general power to employ a fiscal agent to direct it in conducting proceedings to call outstanding refunding bonds and issue in lieu thereof other refunding bonds, if the result is a saving to the city.⁴²

Invalid regulatory ordinance. A Miami ordinance⁴³ restricting the business hours of barber shops is invalid, since it has no relation to the health, safety and welfare of the barbers or the public.⁴⁴

Radio and television stations. The legislature having declared the operation and maintenance of a radio station and the making of improvements thereto by the city of Jacksonville to be a municipal function,⁴⁵ its declaration will not be interfered with by the courts, since no clear abuse of legislative discretion is shown. The construction, installation and maintenance of television facilities in conjunction therewith is an improvement, extension and enlargement rather than the construction of a new and separate station, and is therefore also a municipal function.⁴⁶

NEGLIGENCE. *Instructions as to contributory negligence.* Reversible error was not found in the portion of an instruction dealing with contributory negligence given by the trial court. The supreme court reasoned that instructions must be considered in their entirety; that the instruction on the point of contributory negligence must be considered in the light of all other instructions given; and that there was no error in the record as a whole.⁴⁷

PLEADING AND PROCEDURE. *Request for jury trial.* Under the new Florida Common Law Rules,⁴⁸ a request for a jury trial may still be filed in an amended complaint.⁴⁹

Prejudicial remark by the court. The remark, "Let's don't take advantage of this witness," made by the trial court to the cross-examining counsel in the presence of the jury is not prejudicial error such as would authorize the award of a new trial.⁵⁰

Repeated charge to hung jury. The trial court is authorized to explain anew to a hung jury the law applicable to the case and send them out again for further deliberation.⁵¹ It is not prejudicial error for it to repeat only a portion of the charge to such a jury when the repeated portion is the only matter about which there is disagreement.⁵²

41. *Arden Shoe Corp. v. Dr. M. W. Locke Shoes of Miami*, 50 So.2d 120 (Fla. 1951).

42. *Avon Park v. Sullivan, Nelson & Goss*, 50 So.2d 122 (Fla. 1951).

43. *City of Miami Ordinance No. 3842*.

44. *Miami v. Shell's Super Store*, 50 So.2d 883 (Fla. 1951).

45. *FLA. LAWS 1925*, c. 10711.

46. *State v. Jacksonville*, 50 So.2d 532 (Fla. 1951).

47. *Burns v. Freund*, 49 So.2d 592 (Fla. 1950).

48. *FLA. COMMON LAW RULE 31* (1949).

49. *Messana v. Maule Industries*, 50 So.2d 874 (Fla. 1951).

50. See note 47 *supra*.

51. *FLA. STAT. § 54.22* (1949).

52. *Warmuth v. Greenberg*, 49 So.2d 793 (Fla. 1951).

PUBLIC UTILITIES. *Criteria for rate-fixing bases.* Although indicating a preference for the actual cost criterion to determine the base for public utility rates, the court did not reject the *present fair value method*, and held that the rate-making body may select either plan so long as the end results are rates which are just and reasonable.⁵³

REAL PROPERTY. *Boundaries.* It is well settled that in determining boundaries the question is not where an entirely accurate survey would locate the lines, but where the original survey located them.⁵⁴ The rule is for the protection of persons who have acquired property rights in reliance upon the original survey.

Boundaries by acquiescence. Adjoining landowners orally agreed that a certain fence should constitute the boundary between their respective twenty acre tracts. They thereafter occupied the lands for twenty-seven years with regard to that boundary. Such agreement is binding on their successors in title even though the fence was, unknown to the parties, sixty-four feet west of the true dividing line. Nor does it matter that prior and subsequent deed descriptions denote the quantity of the land to be otherwise. Payment of taxes by the owner who, by the agreement, acquired additional land, assessed in accordance with the deed descriptions, becomes payment on the entire tract enclosed within the fence. A tax deed issued in accordance with the deed descriptions of the tract which lost land by virtue of the agreement is valid only against the land enclosed within the fence.⁵⁵ However, a boundary by acquiescence is not created where one party intends to claim as his own only the land actually given him by his deed.⁵⁶

RECALL. *Grounds.* That a city councilman "has indulged in activities that are inimical to the best interests of the citizens . . ." is an insufficient statement of the grounds for removal which is required to be filed⁵⁷ with any affidavit requesting a recall election.⁵⁸

SEPARATE MAINTENANCE. *Alimony.* Alimony in a separate maintenance action was denied a wife whose net worth was \$24,000, even though her allegations of extreme cruelty by the husband were proved.⁵⁹

STATUTES. *Invalid amendment.* The attorney general, as reviser of the Florida Statutes, inadvertently or through a misconception of his authority, amended a section thereof.⁶⁰ Such amendment is not duly enacted, since the legislature did not adopt by direct reference to entire cumulative sup-

53. *Jacksonville Gas Corp. v. Florida Railroad and Public Utilities Comm'n*, 50 So.2d 887 (Fla. 1951).

54. *Akin v. Godwin*, 49 So.2d 604 (Fla. 1950).

55. *Euse v. Gibbs*, 49 So.2d 843 (Fla. 1951).

56. *Shaw v. Williams*, 50 So.2d 125 (Fla. 1951).

57. FLA. SPECIAL ACTS 1943, c. 22400.

58. *Richard v. Tomlinson*, 49 So.2d 798 (Fla. 1951).

59. *Raley v. Raley*, 50 So.2d 870 (Fla. 1951).

60. FLA. STAT. § 37.20 (1941) ("The fees of constables shall be the same as are at this time allowed sheriffs for like service" became, in the 1945 Cumulative Supplement, "The fees of constables shall be as provided in § 30.23.").

plement in which it appeared, and did not approve the amendment through constitutional enactment.⁶¹

SUPERSEDEAS. *No discretion to limit.* On motion for supersedeas,⁶² the trial court has no discretion to limit the appeal to any one phase or different phases of the order appealed from.⁶³

TAXATION. *Tax distinguished from special assessment.* A tax for a county health unit is not a special assessment which would make homesteads⁶⁴ liable for its levy.⁶⁵

WILLS. *Construction.* Testatrix devised to her brother all her property " . . . left by my father . . . ;" " . . . bequeathed to me by my father . . . ;" " . . . which I own or am entitled to as one of the heirs or devisees under my father's will . . ." The devise was held not to include property devised by the testatrix's father to another heir and subsequently purchased by her at a partition sale.⁶⁶

WITNESSES. *Admissibility of prior consistent statement.* A witness's testimony may be corroborated by his own prior consistent statement where an attempt is made to impeach the truth of the latter testimony. However, where there is no insinuation of fabrication such prior statement may not be introduced.⁶⁷

WORKMAN'S COMPENSATION. *Burden of proof.* To establish a claim for workmen's compensation, the burden is on the claimant to establish a causal connection between his injury and his employment.⁶⁸

Compensation for treatment of incurable disease. The Workmen's Compensation Act⁶⁹ provides that compensation for medical treatment is not to exceed \$1,000 unless the nature of the injury requires treatment in addition to that amount, in which case such additional treatment as may be necessary to effect a recovery is to be furnished.⁷⁰ Claimant suffered an injury which left him with a disease from which there is now no recovery. Attacks recur periodically which, if not treated, might result in his death. Over \$4,000 in medical compensation had been paid plaintiff when the incurable nature of the disease was determined. The insurance company then ceased medical payments and refused to assume further monetary liability. In a case of first impression in Florida the supreme court recognized that workmen's compensation laws should be construed liberally and all doubts resolved in claimant's favor. It held that because of the nature of

61. *Foley v. State ex rel. Gordon*, 50 So.2d 179 (Fla. 1951).

62. FLA. STAT. § 59.13 (1949).

63. *Lockleer v. West Palm Beach*, 50 So.2d 348 (Fla. 1951).

64. FLA. CONST. X § 7.

65. *Whisnant v. Stringfellow*, 50 So.2d 885 (Fla. 1951).

66. *Martin v. Shands*, 49 So.2d 598 (Fla. 1950).

67. *Van Gallon v. State*, 50 So.2d 882 (Fla. 1951).

68. *Reed v. Brinson Electric Co.*, 50 So.2d 877 (Fla. 1951).

69. FLA. STAT. § 440.41 *et seq.* (1949).

70. FLA. STAT. § 440.13(3) (1949).

his disease claimant would continue to receive such medical compensation as might be necessary to effect a recovery from the attacks brought on by the disease.⁷¹

71. *Digiorgio Fruit Corp. v. Pittman*, 49 So.2d 600 (1950).