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Quarterly Synopsis of Florida Cases

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QUARTERLY SYNOPSIS OF FLORIDA CASES

PUBLIC LAW*

MUNICIPAL CORPORATIONS. *Dissolution.* In past decisions the court has subjected lands, within a municipal corporation unconstitutionally created, to taxes for payment of municipal indebtedness incurred prior to ouster of the corporation provided the lands were actually benefited or reasonably susceptible to benefits.[1] In a recent case such taxes were challenged in an equity suit on the ground that the valuation used was higher than in 1933, the year of ouster, and that the tax millage was higher than in 1933, and that the tax was assessed as a tax on improved property although the property was unimproved in 1933.[2] The chancellor had overruled a motion to dismiss and his ruling was reversed. The court said that such land is to be taxed in the manner in which all other property subject to such tax is taxable and in the manner in which property is taxable under the statutes and the constitution.[3]

TAXATION. Offices and warehouses not used for the display and sale of merchandise to the public are not "stores" within the Chain Store Tax.[4] All sales of the business were made by house-to-house salesmen.

Documentary Stamp Tax. From facts stated in a concurring opinion, it appears the court held that an executory contract to build a building is not subject to the tax under § 201.08, FLA. STAT. 1941.[5]

CRIMINAL LAW AND PROCEDURE. *Crimes.*[6] Of course, the necessary intent in a burglary case can be proved by circumstantial evidence. Recently, the court upheld a conviction for burglary in a case in which the trial court had found the intent to commit grand larceny from the circumstances surrounding the defendant's actions including the fact that defendant was appre-

*This section of the synopsis includes cases from advance sheets 43 So.2d No. 8 through 44 So.2d No. 4.

1. See *Quarterly Synopsis*, 3 MIAMI L.Q. 593 at 597-598 (1949).

2. Largo v. Caraher, 44 So.2d 84 (Fla. 1950).

3. The court also upheld a decree removing zoning and deed restrictions requiring that the property affected be devoted to single family residences. On the basis of the facts stated in a dissenting opinion, there would appear to be some question whether there had been sufficient change in the nature of the territory affected to justify a holding that the zoning was unreasonable. Siegal v. Adams, 44 So.2d 427 (Fla. 1950).

4. L. B. Price Mercantile Co. v. Gay, 44 So.2d 87 (Fla. 1950).

5. Gay v. S. & B. Construction Co., 44 So.2d 286 (Fla. 1950). For taxation of leases see *Quarterly Synopsis*, 4 MIAMI L.Q. 37 at 42, 43 (1949).

6. Three cases omitted in the last *Quarterly Synopsis* are included here.

hended upon entering a room containing personal property valued at $20,000.[7] The facts related in the opinion clearly support the decision.

The court also affirmed a conviction for endeavoring to incite and procure another party to commit perjury in a divorce suit.[8] The defendant had proposed the plan of perjury in New York and driven the party to Florida to secure a divorce pursuant to this plan. The subsequent bill for divorce contemplated the perjury.

Search and Seizure.[9] Affidavits for a search warrant must be issued upon probable cause. The court held that this requirement was not met when affidavits stated that affiants believed and had good reason to believe that gambling was being conducted in a certain building by unknown persons and that the reason for the belief was that they had learned of such gambling from an investigation.[10] Previous Florida cases and cases in many other states hold that an affidavit does not state probable cause if it contains only a statement which is a mere equivalent to a statement that the affiant believes on information and belief the fact of the violation of law stated.

Grand Jury. In a habeas corpus proceeding, the relator argued that the indictment under which he was held was returned by an eighteen man jury in Dade County after the jury had been discharged by a new statute establishing a twenty-three man jury.[11] The indictment had been returned June 23, 1949, by an eighteen man jury impaneled May 10, 1949. The statute creating a twenty-three man jury became effective June 13, 1949. The court held that the new statute did not apply to the grand juries lawfully constituted and impaneled under the former statute until succeeded by the next regularly impaneled grand jury. It found support for its conclusion in another 1949 statute which provides that grand juries in counties having a population of 315,000 or more should not be discharged until the grand jury for the following term of Court is impaneled.[12]

The Court refused to consider a challenge to the constitutionality of the twenty-three man grand jury statute since the relator did not charge that this statute invaded her rights in any way. This conclusion has been

7. Rebjebian v. State, 44 So.2d 81 (Fla. 1949). An accomplice waiting in a getaway automobile was convicted as a principal in the second degree. This conviction was also affirmed.

8. Matthews v. State, 44 So.2d 664 (Fla. 1950).

9. The rule that a peace officer may not arrest a person without a warrant unless he has reasonable ground to believe a felony has been or is being committed and that the person to be arrested has committed or is committing it was applied in a recent case affirming a conviction for unlawful possession of lottery tickets. A search of the defendant at the time of arrest was held justified under FLA. STAT. § 401.21 (1941). Diaz v. State, 43 So.2d 13 (Fla. 1949).

10. DeLancy v. Miami, 43 So.2d 857 (Fla. 1950).

11. State *ex. rel.* McClure v. Sullivan, 43 So.2d 438 (Fla. 1949).

12. Fla. Laws 1949, c. 25559.

criticized in some quarters, but since the court interpreted the statute as it did, its refusal to consider the constitutionality of the twenty-three man jury seems justified.

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PRIVATE LAW*

CONTRACTS. *Construction. Employment contracts.* When an employment contract is for an indefinite period, it is treated as one from day to day, month to month, or year to year, according to the unit of compensation, with weight being given to the customs of the particular trade or industry.[1] Where an airline assigned a radio operator, employed for an indefinite period at a monthly salary, to a foreign station, stating that it was the policy of the company to retain employees at foreign stations for three years, this was held to be a contract to employ for three years.[2]

Judicial bonds. Apparently overruling a case which we criticized last quarter,[3] liability upon a judicial bond was determined by reference to the order of court and rules of practice under which it was exacted, and not by construction of the instrument.[4]

Contracts of suretyship. A mortgagee is not liable on an oral contract to pay a materialman for improvements to the mortgaged premises, furnished under contract with the mortgagee, but this rule does not prevent the mortgagee from subordinating the lien of his mortgage to the materialman's lien by oral agreement. Acceptance of the improvements upon his security will operate to postpone the mortgage on a theory of equitable estoppel, if not by legal contract.[5]

Insanity of party. Is a contract attempted by an insane person void or voidable? The Supreme Court of Florida has taken the latter view, ruling that evidence of insanity, which would tend to show a party incapable of contracting, is inadmissible under a plea of *non est factum.*[6] The court

*The cases reviewed in this section are reported in Volumes 43 and 44, SOUTHERN REPORTER (Second Series), beginning with the advance sheets issued February 23, 1950 (No. 8) and ending with those of March 30 (No. 4).

1. To the effect that this is often regarded as a contract at will, see 35 AM. JUR. 458.

2. Mead v. Pan American Airways, 44 So.2d 283 (Fla. 1950). The employee was employed for an indefinite period at $250 per month, with $150 per month additional while at his foreign station. The policy of the company, as stated to the employee in an order transferring him, was to recall the employees to the United States after three years and to extend a sixty day vacation at that time. The employee was discharged to effect economies two weeks after his arrival. The court appears to have treated the case as one of fact for the jury, not one of construction for the court, which is unorthodox.

3. Lieberman v. Lieberman, 43 So.2d 460 (Fla. 1949), noted *supra*, p. 344.

4. Pan American Surety Co. v. Watterson, 44 So.2d 94 (Fla. 1950).

5. Cook v. Federal Construction Co., 44 So.2d 650 (Fla. 1949). Barns, J., dissented.

6. Perper v. Edell, 44 So.2d 78 (Fla. 1949).

having previously ruled, in the same case, that a contract to employ a real estate broker cannot be avoided for insanity after the broker has obtained a purchaser,[7] it is now apparent that insanity is not available as a defense in brokerage contracts.[8]

Brokers. A contract with a real estate broker is unilateral. Unless the broker complies strictly and in time with the terms of his employment, his service is regarded as a counter offer.[9] While the commission is normally earned when an enforceable contract to sell is formed, it is competent for the parties to provide that performance shall be a condition precedent to the broker's entitlement.[10]

Agency. Two cases dealt with the scope of an agent's apparent authority.[11]

Negotiable instruments. Because a bill or note partakes of the qualities of a specialty, lack of consideration is an affirmative defense. It is therefore error, when the plea is lack of consideration but the execution and delivery of the note are not in issue, to refuse to admit a note in evidence until consideration has been proved.[12] A dictum to the effect that the burden of proof is on the holder, is probably inadvised.

Insurance. In the absence of misrepresentation, waiver, or illegality, the parties are bound by the specific terms of an insurance policy. Failure to call attention to printed provisions voiding an automobile collision policy if there is an undeclared encumbrance on the insured's title, does not constitute fraud or waiver.[13]

Damages. Liquidated damages or deposit. Where a contract provides for liquidated damages, that is the measure of recovery: no more, no less; but there is a problem of construction for the court in determining whether sums paid in advance by a purchaser are to be retained as liquidated damages or as a deposit. Conduct of a party after breach may estop him

7. Perper v. Edell, 160 Fla. 477, 35 So.2d 387 (1948), reviewed in *Quarterly Synopsis*, 2 MIAMI L.Q. 322 (1948). After the prior hearing, a plea of avoidance because of insanity was abandoned.

8. If the price was grossly inadequate or disadvantageous, fraud on the part of the broker rather than insanity of the seller, might be a defense.

9. Kistler Co. v. Hotel Martinique, 44 So.2d 299 (Fla. 1950).

10. Seminole Fruit & Land Co. v. Rossborough-Weiner, Inc., 43 So.2d 864 (Fla. 1950). The last installments of commission were to be equal to a percentage of the principal payments on the purchase money mortgage.

11. Mead v. Pan American Airways, 44 So.2d 283 (Fla. 1950). An agent whose authority to assign an employee to foreign service is evidenced by transportation furnished and pay received, has apparent authority to contract to employ for three years. Stiles v. Gordon Land Co., 44 So.2d 417 (Fla. 1950). An agent who has previously sold a building to be removed from the premises has apparent authority to sell another.

12. Maloney v. McBride's, 44 So.2d 296 (Fla. 1950).

13. Globe & Rutgers Fire Insurance Co. v. Segler, 44 So.2d 658 (Fla. 1950). On transferring an existing policy to cover a new car, insured failed to state, and the agent to determine, that there was encumbrance on the new car. The endorsement issued to the insured stated, in a space provided, that there was no encumbrance.

from asserting a particular construction during litigation. Such conduct should be immaterial in determining the proper construction of the contract; but a recent case was apparently decided on this basis.[14]

Building contracts. The measure of a builder's damages when the owner repudiates a building contract, is the value of the work done, plus lost profits on the entire contract. Only the first element, however, is the proper subject of a mechanic's lien.[15]

CORPORATIONS. *Doing business.* A foreign corporation which enters into a charter party for a ship to be used in interstate and foreign commerce, is not doing business in the state where the contract was made.[16]

Promoter's contracts. While a corporation is not bound by the contracts of a promoter unless it ratifies them, it may be held to have ratified a contract when it takes real property from the promoter with notice of a specifically enforceable contract constituting an equitable lien. If there is an adequate remedy at law against the promoter, an equitable lien cannot be asserted.[17]

REAL PROPERTY. *Mechanics' liens.* The amount of a mechanic's lien is not necessarily the same as the measure of damages for breach of a construction contract.[18]

Restrictive covenants. Covenants running with the land which restrict the use thereof are not enforceable when the character of the neighborhood has so changed that no useful purpose can be served thereby. Community and group pressure are not the equivalent of the futility which must be shown to satisfy this rule. The standard is virtually the same as that employed in holding a zoning ordinance unconstitutional.[19]

Conversion. A sale of buildings to be dismantled and removed by the purchaser is a sale of personal property. Title passes to the purchaser when the sale is made, not when the building is removed.[20]

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14. Kuharske v. Lake County Citrus Sales, Inc., 44 So.2d 641 (Fla. 1949). A contract to purchase fruit provided that a sum deposited should be held as liquidated damages. The purchaser, when making payment on the last fruit picked before breach, deducted that sum as if it were to be treated as a deposit. On trial the court ruled that the said sum was the limit of recovery over objection of the seller. Reversed.

15. Golub v. De Linardy Flooring Co., 44 So.2d 75 (Fla. 1950). The circuit court based the lien on the relative value of the work completed to the whole job at the contract rate, which would thus include profits on the part completed.

16. Schwartz v. Frango Corp., 44 So.2d 292 (Fla. 1950).

17. Greenfield Villages v. Thompson, 44 So.2d 697 (Fla. 1950). The promoter, who was not joined, purchased land for development and promised the salesmen, who made advance sales to raise the purchase price, an interest in the corporation to be formed.

18. Golub v. De Linardy Flooring Co., 44 So.2d 75 (Fla. 1950). Note 15, *supra.*

19. Siegel v. Adams, 44 So.2d 427 (Fla. 1950). The court was closely divided (4-3) as to whether the facts were sufficient to show that the ordinance was unconstitutional. The majority did not notice the fact that restrictive covenants were also involved.

20. Stiles v. Gordon Land Co., 44 So.2d 417 (Fla. 1950). In an action for a declaratory judgment and for specific performance, the court held for the buyer. The result is therefore more consistent with treating the buildings as real property.

Married women's contracts. The doctrine that an oral contract to sell land is enforceable where the purchaser has paid part of the purchase price and has been placed in possession, does not apply to give validity to a married woman's contract to convey which has not been signed by her husband.[21] We had previously found the law to be stated otherwise.[22]

Homestead exemption. In a strong decision, the court held that the homestead exemption cannot be asserted against a claim for support of the owner's children.[23] In this respect, a previous case has been overruled.[24]

DECEDENTS' ESTATES. *Probate jurisdiction.* Testing a principle which is historically correct, that when performing the duties of a register of wills, the county judge acts as an administrative rather than a judicial officer, a writ of mandamus was sought to review a county judge's refusal to admit pleadings in a pending case.[25]

Parties. An administrator is not a proper party to contest the probate of a subsequently discovered will.[26]

PERSONAL PROPERTY. *Gifts.* Two cases turned upon the evaluation of facts to determine whether or not a gift or a sale was intended. Unless an agreement to pay consideration is proved, a transfer by a woman to her former husband is presumed to be a gift.[27] A transfer of an estate by the entireties upon marriage by a man to his wife is likewise presumed to be a gift, and not in consideration of a successful marital venture.[28]

FAMILY LAW. *Custody of children.* While custody of children of tender age should be given to the mother, unless unfit, reasonable visiting privileges must be given to the father.[29] Split custody, as distinguished from

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21. Dixon v. Clayton, 44 So.2d 76 (Fla. 1949).

22. Baker v. Rice, 37 So.2d 837 (Fla. 1948). See also Stephenson, *Quarterly Synopsis*, 3 MIAMI L.Q. 292 (1949).

23. Anderson v. Anderson, 44 So.2d 652 (Fla. 1950). Since husband, residing on the premises, had a duty to support the children, the homestead character thereof may have been retained. The court ruled only that the exemption laws should not be permitted to defeat the claims of the very persons for whose protection the laws were designed.

24. Olsen v. Simpson, 39 So.2d 801 (Fla. 1949), *supra*, p. 58.

25. State *ex rel.* Johnson v. White, 44 So.2d 661 (Fla. 1950). The county judge answered that the pleadings had been filed and considered, whereupon the alternative writ was denied.

26. *In re* Armstrong's Estate, 44 So.2d 294 (Fla. 1950). An order authorizing the administrator to defend and to expend sums necessary to investigate, *held* error. An unsuccessful executor may in proper circumstances be allowed the costs of offering the will for probate.

27. Parker v. Priestly, 44 So.2d 74 (Fla. 1950). The case was before the court earlier this season, and has been noted. 39 So.2d 210 (Fla. 1949); *supra*, pp. 55, 56.

28. Ray v. Ray, 44 So.2d 286 (Fla. 1950). Since there was no third party conveying title, this was not a purchase money resulting trust, although the court apparently regarded it as such.

29. East v. East, 44 So.2d 81 (Fla. 1949).

visitation, is not advisable.[30] The fact that the mother is nervous and excitable does not render her unfit.[31]

Alimony. A wife who has received generous gifts may be denied alimony in appropriate circumstances.[32] A petition to amend an award should be based on changes in need or ability to pay. It is not to be used by way of review.[33]

Homestead. The father may not assert the homestead exemption laws against the enforcement of an order for the support of his children.[34]

Decree in filiation proceedings. An award for the support of bastard children has historically been regarded as a penalty for the crime of fornication, aggravated by bastardy. It is not a civil judgment like an order of support entered in divorce proceedings. For that reason, it is often denied enforcement in jurisdictions other than that in which rendered on the principle that full faith and credit does not require one state to enforce the penal laws of another. This distinction was not noted in a recent case, the supreme court treating the question as one of finality of the judgment.[35]

EQUITY. *Resulting trusts.* The distinction between express and resulting trusts became important in a current decision, although it is not clear from the opinion that the question was not merely one of semantics.[36]

Inter vivos trust and inchoate dower. There has been a tendency to hold that a living trust in which the husband reserves a life estate and power to revoke, may not be used to defeat the inchoate right of dower in personalty. This question was presented in a case in which the wife, after her husband had been adjudicated incompetent but before his death, moved to set aside the trust as in fraud of her rights.[37] The court found that the husband was competent when he created the trust, and that there was other property. It may be that the wife's action was premature.[38]

TORTS. *Negligence.* The exception in the guest statute protecting children going to and from school is applicable when they are given a short "lift"

30. Lee v. Lee, 44 So.2d 904 (Fla. 1949). Reversed an order awarding the husband custody every other weekend.

31. Sayward v. Sayward, 43 So.2d 865 (Fla. 1949). The circuit judge, a youthful bachelor, was persuaded otherwise. *Caveat.*

32. Ray v. Ray, 44 So.2d 286 (Fla. 1950). The marriage lasted only one week; but the court refused to set aside a settlement of the husband's life savings.

33. Monyak v. Monyak, 43 So.2d 903 (Fla. 1949).

34. Anderson v. Anderson, 44 So.2d 652 (Fla. 1950).

35. Peterson v. Paoli, 44 So.2d 639 (Fla. 1950).

36. Smehyl v. Hammond, 44 So.2d 678 (Fla. 1950). It may be that the deed described the grantee as trustee for named persons without stating the terms of the trust. If that is the case, the problem should have been treated as one involving a passive trust, executed under the Statute of Uses.

37. Bee Brand Cattle Co. v. Koon, 44 So.2d 684 (Fla. 1949). The opinion is as prolix as the former is cryptic. The trust was for nieces and nephews, settlor being childless.

38. It may be that the trust would be considered as in satisfaction of the legacy to nieces and nephews, thus restoring the balance between the wife's share and the collaterals'.

by a neighbor at a distance from the school.[39] When an ordinance is offered to show reasonable speed, care must be taken to show that it is operative in the area.[40] A trespasser is liable for the actual consequences of his trespass, regardless of care; but running over a small child darting under the wheels of his truck while trespassing on a private way does not appear to the writer to be a consequence of the trespass.[41]

Damages. The distinction between punitive damages and substantial damages inferred from proof of injury, is presented in a current case.[42] In a case where punitive damages are not allowable, several elements, such as pain and suffering or disfigurement, may justify an award of substantial damages without specific proof. As in the case of punitive damages, the amount is largely in the discretion of the jury.

WORKMEN'S COMPENSATION. Two cases illustrated the rule, that unless injury is the result of accident, there is no right to compensation.[43] The distinction is basically between injury or illness incurred during, rather than as a consequence of, employment.

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PROCEDURE*

Bond. Ne Exeat. Fla. Stat. § 65.11 (1941) provides that ". . . the court may award a ne exeat . . . and make such order or decree as will secure the wife's alimony to her. . . ." However, the court has decided in a recent case that a ne exeat bond posted by the defendant in a divorce action is not the basis for liability where the defendant violates a final decree to pay alimony and cost.[1] The trial court had, by a final decree, awarded the plaintiff alimony and costs. The trial court had also ordered that ". . . in the event said sum is not paid as directed by this court, the plaintiff may immediately undertake proceedings to collect the same against the . . . Ne Exeat bond posted by the defendant." The reversal of the trial court's order appears to be correct since the purpose of a writ of ne exeat is to restrain the defendant from leaving the limits of the territorial jurisdiction of the court. To construe the statute so as to broaden the coverage of the conditions of such a bond would be inconsistent with the fundamental

*The cases reviewed in this section are found in 44 So.2d advance sheets Nos. 1-4.

39. Summersett v. Linkroum, 44 So.2d 662 (Fla. 1950).

40. Howland v. Cates, 43 So.2d 848 (Fla. 1949).

41. St. Petersburg Coca-Cola Bottling Co. v. Cuccinello, 44 So.2d 670 (Fla. 1950). The court ruled otherwise.

42. Pepsi-Cola Bottling Co. v. Matthews, 44 So.2d 73 (Fla. 1950).

43. Peterson v. City Commission, 44 So.2d 423 (Fla. 1950). Knee "snapped" while workman was in deep knee bend position. *Held*, not compensable. Brooks-Scanlon Inc. v. Lee, 44 So.2d 650 (Fla. 1950). The facts are not stated.

1. Pan American Surety Co. v. Walterson, 44 So.2d 94 (Fla. 1950).

legal purpose of the writ. The only security given the wife under the applicable statute (1941) is to make moneys forfeited by breach of the conditions of the bond available for the payment of alimony.

Form of Action. Mandamus. Mandamus, being a discretionary writ, is issued by the court only if the relator establishes that other remedies are insufficient and that the propriety of the issuance of the writ is clear and free from doubt. Thus, when a taking of testimony is required to establish that a zoning ordinance, valid on its face, had been unconstitutionally applied, mandamus is not the proper action.[2] Rather, such a zoning ordinance should be tested by a suit in equity for an injunction.

Judgments. Full Faith and Credit. A final judgment of a sister state, requiring the payment of money for the support of an illegitimate child, is entitled to full faith and credit in Florida when the amount of past-due and unpaid installments can be neither increased nor decreased. In a suit on a filiation order by a New York court, the Florida Supreme Court[3] construed the New York statute, authorizing the increase or decrease of the amount fixed by an order of filiation,[4] to not apply to past-due payments; so that the order is a final judgment. The construction by the Florida court of the New York act, lacking one by the New York courts, was pursuant to a recent Florida statute which requires the courts of this state to take judicial notice of the statutory law of sister states.[5]

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2. Coral Gables v. State *ex rel.* Worley, 44 So.2d 298 (Fla. 1950).
3. Peterson v. Paoli, 44 So.2d 639 (Fla. 1950).
4. McKinney's Consol. Laws, Domestic Relations, § 131.
5. Fla. Laws, c. 25110 (1949).