STARE DECISIS IN FLORIDA DURING THE CIVIL WAR

By: Judge Robert W. Lee

The robust[1] common law doctrine of *stare decisis* has been part of Florida jurisprudence since its territorial days. Under *stare decisis*, appellate decisions in prior cases are regarded as authoritative in new cases involving similar facts. During the Civil War, however, the Florida Supreme Court faced a conundrum: Which decisions should be viewed as providing precedential value to Florida courts under the Confederacy?

From January 1861 through May 1865, the State of Florida fatefully aligned itself with the Confederate States of America (CSA).[2] The alliance did not bode well for the operation of the state's courts.[3] While the Justices on the Florida Supreme Court remained the same during the transition from the United States of America (USA) to the CSA,[4] the high court itself struggled to operate consistently during the war,[5] issuing far fewer decisions than it had in previous years[6] and looking forward to a time when "peace shall again smile on our land."[7] The high court did not hide its feelings of disdain for those who left Florida for Northern states during the war, referring to one as an "alien enemy and traitor."[8] Nor did the Court have trouble noting that the State of Florida was now "sovereign and independent."[9] Notwithstanding the state's membership in the CSA,

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[1] *See* Knight v. State, 286 So. 3d 147, 154 (Fla. 2019) (referring to the doctrine of *stare decisis* as "strong" but "not unwavering").

[2] *See* Robert W. Lee, *Confederate Courts*, *in* FLORIDA'S OTHER COURTS: UNCONVENTIONAL JUSTICE IN THE SUNSHINE STATE 77, 77, 83 (Robert M. Jarvis, ed., 2018) [hereinafter Lee, *Confederate Courts*].

[3] *See id.* at 81 ("As the fighting continued, the courts began to experience difficulties in conducting day-to-day affairs. In time, these became major headaches.")

[4] The justices of the Supreme Court at that time were Charles H. DuPont, William A. Forward, and David S. Walker, while the judges of the Circuit Courts were B.A. Putnam (Eastern), J.M. Baker (Suwannee), J. Wayles Baker (Middle), Allan H. Bush (Western), and Thomas F. King (Southern).

[5] *See* Towles v. Roundtree, 10 Fla. 299, 307 (1863) (noting that the Court had been unable to refer to law treatises on a legal point because they were "not now accessible to us"); Smith v. Hines, 10 Fla. 258, 291 (1863) (noting again that certain "books are not in the Judicial Library, and we have been unable to obtain them"); Waterson v. Seat & Crawford, 10 Fla. 326, 327-28 (1863) (noting that the Court had been unable to timely address this case, "partly due to the unsettled condition of affairs growing out of the war," and further noting that the parties were not "responsible for the great delay [. . .] as this has been owing to circumstances over which neither [. . .] could have any control").

[6] For example, in the term 1858-59, the Florida Supreme Court issued opinions in 41 cases. In the term 1860-61, the high court issued decisions in 42 cases. However, in the terms held from 1862 through 1864, the court issued opinions in only 14 total cases.

[7] Trustees of the Internal Improvement Fund v. Bailey, 10 Fla. 112, 132 (1862) (*Bailey I*).

[8] Russ v. Mitchell, 11 Fla. 80, 86-89 (1864). In such a case, even an "alien enemy" is entitled under the "rules of justice" to defend a lawsuit, with or without an attorney. *Id.* at 89, 91. Although not indicative of the court's feelings on the subject, the court entertained cases in which the anti-Northern views of the parties were not concealed. *See, e.g.*, McLeod v. Dell, 9 Fla. 427, 432 (1861) (testator declared no legacy would inure to "any man raised North of Mason and Dixon's Line, or tinctured with Abolitionism in the least degree").

[9] Cribb v. State, 9 Fla. 409 (1861).

however, the wartime opinions of the Florida Supreme Court demonstrate that the State's jurisprudence continued to be very much deeply rooted in that of the USA.

Understandably, the early decisions of the Florida Supreme Court under the Confederacy arose out of lower court proceedings that had occurred when Florida acknowledged its tie to the USA. In the first case to be reported by the high court during the war, *Owens v. Love*, the Court faced an issue for which no Florida precedent existed. The Court, without any apparent distress, relied on decisions from New York and Pennsylvania.[10] Moreover, the high tribunal cited approvingly and extensively to Justice Joseph Story,[11] although he had served on the U.S. Supreme Court from 1811 to 1845 and was widely known as working to promote a stronger and "more centralized Union."[12] The same result was reached in the same term in *Baltzell v. Randolph*, in which the Florida Supreme Court adopted Justice Story's treatise "as the true rule" on the controlling issue in the case.[13] In *Magee v. Doe*, the high court specifically cited Chief Justice John Marshall in relying on a case he authored while on the U.S. Supreme Court[14]—and that was not the only reference the Florida Supreme Court would make to Justice Marshall during the war.[15]

As another example of the high court's reliance on USA legal decisions, the Florida Supreme Court wrote in 1862, perhaps incongruously, in a case involving statutory construction: "*In our own country*, the following language is used," and then cited to the U.S. Supreme Court.[16] Two years later, the state's high tribunal referred to "general principles settled by *our* courts," and then cited authorities from Kentucky, Illinois, and Indiana, although these states were clearly not part of the Confederacy.[17] Many other decisions relied for authority on the U.S. Supreme Court[18]

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[10] 9 Fla. 326, 333-34 (1861).
[11] *Id.* This was not the only case in which the Florida Supreme Court used Justice Story's treatise as legal authority. The high court similarly did so in *McLeod*, 9 Fla. at 449-50. It also cited his legal opinions in Brown v. Chamberlain, Miler & Co., 9 Fla. 464, 478 (1861), and his treatise in Chaires v. Bailey, 10 Fla. 133, 135-36 (1862); Stephens v. Orman, 10 Fla. 9, 86, 111 (1862); and Pitts v. Jones, 9 Fla. 519, 522, 524 (1861).
[12] *Joseph Story*, WIKIPEDIA (last visited Mar. 4, 2018).
[13] 9 Fla. 366, 370 (1861).
[14] 9 Fla. 382, 395 (1861).
[15] *See Pitts*, 9 Fla. at 524 (adopting Justice Story's treatment of the issue in the case as the "correct ruling"); *Brown*, 9 Fla. at 478.
[16] Florida Atl. & Gulf Cent. R.R. Co. v. Pensacola & Ga. R.R. Co., 10 Fla. 145, 167 (1862) (emphasis added); *see* Lee, *Confederate Courts*, *supra* note 2, at 82.
[17] Hunt v. Finegan, 11 Fla. 105, 109-10 (1864) (emphasis added).
[18] Yulee v. Canova, 11 Fla. 9, 46-47, 51-52 (1864); *see also Fla. Atl.*, 10 Fla. at 167; Stephens v. Orman, 10 Fla. 9, 100 (1862); *Bailey I*, 10 Fla. at 130; *Brown*, 9 Fla. at 478-79; *Cribb*, 9 Fla. at 418-19 (noting that a decision of the U.S. Supreme Court had "settled the question"); Magee v. Doe, 9 Fla. 382, 392, 395-96 (1861); City of Apalachicola v. Curtis, 9 Fla. 341, 349, 357 (1861); Lee, *Confederate Courts*, *supra* note 2, at 82.

or courts of the Northern states,[19] even well into the war period.[20] During that time, the Florida high court also explained that it had adopted the "rules of equity in the Circuit Courts of the United States," as being applicable in the Florida state courts,[21] and further cited with approval a Northern decision in which the Florida tribunal referred to the New York jurist as "the learned judge."[22] In one decision involving competing acts of legislation passed during the same legislative session, the high court relied on a rule of statutory construction set out by the Indiana Supreme Court.[23]

More telling perhaps is the way the U.S. Supreme Court itself was viewed by both the Florida Supreme Court and attorneys appearing before it. For instance, in *Yulee v. Canova*, the Florida high court "observed, in interpreting a statute enacted by the Confederate Congress, that a particular issue was a 'well settled rule of law,' and cited as authority decisions of the U.S. Supreme Court,"[24] even though the tribunal was determining the rights of an agent to contract for use of provisions for the Confederate government.[25] This statement was even more interesting because the case involved supplies for the Confederate army and whether the Florida courts had jurisdiction to intervene.[26] In reviewing the decisions of the U.S. Supreme Court, the Florida high court concluded that these decisions "laid down the law" on the issue in the case.[27] Similarly, the Florida tribunal concluded, by reviewing U.S. legal authority, that the state court was the proper place to resolve a dispute arising under an act of the Confederate Congress.[28]

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[19] *See, e.g.*, *Ammons*, 9 Fla. at 530, 540 (citing authority from Indiana and Missouri); Ala. & Fla. R.R. Co. v. Rowley, 9 Fla. 508, 513 (1861) (noting that the "only case directly on the point" is one from Indiana); Harrell v. Durrance, 9 Fla. 490, 503, 505 (1861) (New York); *Brown*, 9 Fla. at 475 (New Jersey, Massachusetts); *McLeod*, 9 Fla. at 449 (New York); *see also* Lee, *Confederate Courts*, *supra* note 2, at 82.

[20] *See, e.g.*, *Smith*, 10 Fla. at 287-89, 291 (Vermont, Missouri, Maryland); *Hunt*, 11 Fla. at 109-10 (New York, Indiana, Illinois, Kentucky); Cook v. Fernandez, 11 Fla. 100, 103-04 (1864) (Massachusetts and New Hampshire); Towles, 10 Fla. at 307 (Pennsylvania); Trustees of the Internal Improvement Fund v. Bailey, 10 Fla. 238, 254-55 (1863) (*Bailey II*) (Maryland); Trustees of the Internal Improvement Fund v. Bailey, 10 Fla. 213, 230 (1863) (*Bailey III*) (Connecticut and Massachusetts); Chaires, 10 Fla. at 135 (noting that a particular issue "has been a fruitful source of litigation in the courts of this country, and there has been great diversity and contradiction in the adjudications of the several States constituting the late Union"); *Stephens*, 10 Fla. at 97 (Pennsylvania).

[21] *Bailey II*, 10 Fla. at 252; *see* Lee, *Confederate Courts*, *supra* note 2, at 82.

[22] Chaires v. Chaires, 10 Fla. 308, 310 (1863).

[23] *Fla. Atl.*, 10 Fla. at 160.

[24] *Yulee*, 11 Fla. at 46-47; *see* Lee, *Confederate Courts*, *supra* note 2, at 86 n.56.

[25] 11 Fla. at 46-47.

[26] *Id.* at 42.

[27] *Id.* at 47.

[28] *Id.* at 50-52.

Attorney Thomas Baltzell, who had previously served as a Justice on the Florida Supreme Court,[29] argued before the high court in *Trustees of the Internal Improvement Fund v. Bailey* that most of the legal issues in the case

> have been disposed of in that great forum of intellect, power and ability of the late American Union – the Supreme Court of the United States – after full argument by the most distinguished lawyers of the Bar from different States . . . decided by the Court after mutual consideration . . . – decided not once, but again and again so that the simple duty remains a present reference to these decisions.[30]

And in a case involving the Florida Atlantic & Gulf Coast Railroad, the Florida Supreme Court noted that many different authorities existed on the legal issue presented in the case, but the Court needed merely to look to decisions of the highest courts of England and the United States to render a ruling.[31]

This perhaps should not be surprising, as the common law roots of American jurisprudence recognize the primacy of precedent under the doctrine of *stare decisis*, by which the decisions in prior cases are regarded as authoritative on new cases involving similar facts.[32] Going back to when Florida was merely a U.S. territory, its Legislative Council declared the common law of England as it had existed on July 4, 1776, to be the law of the land, with a few exceptions.[33] Indeed, in two of the earliest cases issued by the Florida Supreme Court as a member of the CSA, the high court recognized the continuing applicability of English common law to legal issues arising in the State.[34] The doctrine of *stare decisis* had long constituted "part of the English common-law tradition accepted in the United States,"[35] and it continued its strong pull in Florida under the Confederacy.

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[29] Walter W. Manley II, ed., THE SUPREME COURT OF FLORIDA AND ITS PREDECESSOR COURTS, 1821 – 1917, 118-23 (1997).
[30] *Bailey II*, 10 Fla. at 240.
[31] *Fla. Atl.*, 10 Fla. at 167, 169.
[32] William L. Reynolds, Judicial Process in a Nutshell §4.11 (1980) [hereinafter Reynolds].
[33] § 2.01, FLA. STAT. (2017) (historical note).
[34] *See* Robert W. Lee, *Florida Legal History: The Courts and Law During the Civil War, Reconstruction and Restoration Eras*, 15 ST. THOMAS L. REV. 485, 485 n.3 (2003) [hereinafter Lee, *Florida Legal History*]. The Florida Supreme Court in several cases pointed out areas in which Florida diverged from the English common law. *See Bailey II*, 10 Fla. at 252 (at common law in England, a motion for rehearing in an appeal in equity is unknown); Ammons v. State, 9 Fla. 530, 558-59 (1861); Bridier v. Yulee, 9 Fla. 481, 484-85 (1861) (appellate review of a ruling on a motion for new trial was a practice not known to the English common law); *Cribb*, 9 Fla. at 418 (the crime of operating a vessel without a license was not an offense known to the common law); Warrock v. State, 9 Fla. 404, 407 (1861) (the crime of assault with intent to kill was not an offense known to the common law of England).
[35] Larry L. Teply, LEGAL WRITING, ANALYSIS, AND ORAL ARGUMENT 156 (1990) [hereinafter Teply].

By the time of the Civil War, the Florida Supreme Court had already relied on the doctrine of *stare decisis* on several occasions.[36] The maxim appears to have been first specifically recognized by the Florida high court in 1855 in the case of *Sealey v. Thomas*,[37] and it continued to be applied throughout the war.[38] In the absence of significant existing Florida case law, a review of the cases at that time reveals that the doctrine had a slightly different meaning than it does today, with today's focus being on the concept of "controlling" precedent.[39] In antebellum Florida, there were few cases that would constitute "controlling" precedent for the state courts.[40] Rather, the courts looked to common law decisions, often of the English courts, to determine whether there was a consistent line of ruling that would warrant application of the doctrine of *stare decisis*.[41] Even if there were some decisional conflict, in the absence of a contrary statute or an absurd result, the majority ruling would be applied.[42] In instances in which the line of decisions was "floating and contradictory," an argument would be made that the doctrine could not be applied to any single decision, and the Florida high court should consider the matter from a fresh start.[43]

In one instance during the war in which the decisions of the U.S. Supreme Court were broader than those of the English courts, the Florida Supreme Court cited with approval the view

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[36] *See* Sealey v. Thomas, 6 Fla. 25, 29-34 (1855); Kilcrease v. White, 6 Fla. 45, 51-52 (1855); Maiben v. Bobe, 6 Fla. 381, 404-05 (1855) (Dupont, J., dissenting); Tyson v. Mattair, 8 Fla. 107, 124-26 (1858).
[37] 6 Fla. at 29-34.
[38] *See supra* notes 10-35 and accompanying text.
[39] *See* John C. Dernbach & Richard V. Singleton II, A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 21 (1981) (The doctrine of "*stare decisis* requires that a court follow its own decisions and the decisions of the higher courts within the same jurisdiction."); Reynolds, *supra* note 32, at §§4.11, 4.20 (referring to a "decision by a higher court . . . in the same judicial system"); BLACK'S LAW DICTIONARY 1414 (7th ed. 1999); Teply, *supra* note 35, at 159.
[40] *See, e.g.*, *Magee*, 9 Fla. at 392 (noting that the legal issue in the case was "not a new question in our courts, although it may not have been decided by" the Florida Supreme Court). Exceptions are the 1861 cases of *Warrock v. State*, 9 Fla. 404, 406-07 (1861), and *Broward v. State*, 9 Fla. 422, 425 (1861), in both of which the Florida Supreme Court cited two of its prior decisions to control the resolution of the case. Similar cases included *E.A. Pearce & Son v. Jordan*, 9 Fla. 526, 529 (1861) (citing one of its prior decisions as precedent), *Watson v. Savell*, 9 Fla. 506, 507 (1861) (citing two prior decisions), and *Bridier*, 9 Fla. at 484, 487-88 (citing four prior decisions).
[41] *See* Smith v. Hines, 10 Fla. 258, 282, 285 (1863) (noting that the law of dower is "now the settled law in England and America"); *Ammons*, 9 Fla. at 558-59 (referring to the law of homicide in Florida as "the very words of the law" of England); *Pitts*, 9 Fla. at 523-26 (citing both English and American authorities, and noting that the cases on point are "very numerous"); *Harrell*, 9 Fla. at 503, 505 (noting the agreement between a decision of a New York court and an English court); *McLeod*, 9 Fla. at 442-43 (referring to decisions of Lord Kenyon); *Magee*, 9 Fla. at 392 (noting the uniform line of cases previously deciding the issue in the case); *Baltzell*, 9 Fla. at 370 (relying solely on Justice Story's treatise); *Tyson*, 8 Fla. at 124-26 (relying heavily on English decisions); *Sealey*, 6 Fla. 29-34 (same, but also relying on decisions from Alabama and Tennessee).
[42] *See Kilcrease*, 6 Fla. at 51-52.
[43] *See Maiben*, 6 Fla. at 404-05 (Dupont, J., dissenting); Powell v. Partridge, 9 Fla. 359, 365 (1861) ("the English adjudications afford us no safe guidance on the subject").

of the U.S. high court, noting that the Georgia courts also followed the broader rule.[44] In another case, the Florida high court considered the conflicting British and American rules on the law of assignments, and it decided to follow the American rule, noting its uniformity throughout the United States.[45] In those instances in which the Court found Florida precedent to be sufficient, however, the Court declined to consider cases from other jurisdictions,[46] unless they could be harmonized with the Florida decision.[47] In essence, the Florida high court treated Northern legal decisions in a similar fashion to those of England, because all honored the common law tradition.

At the end of the war, the Florida state courts were in disarray.[48] The State fell under military rule, and a martial law order suspended the justices of the Florida Supreme Court.[49] It took some time for the Florida Supreme Court to begin to fully function again, issuing only one decision in 1866.[50] The high court's reliance on the common law doctrine of *stare decisis*, however, has continued uninterrupted as it had before and during the war.[51]

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[44] *Yulee*, 11 Fla. at 55 ("[W]e find the Supreme Court of the United States giving more extensive jurisdiction in equity to grant relief by a specific performance in contracts respecting the personal chattels than is exercised in the English courts."); *see also Cribb*, 9 Fla. at 419 (noting that decisions of the U.S. Supreme Court had "settled the question").
[45] *Brown*, 9 Fla. at 476-80 (citing the U.S. Supreme Court, specifically the decision of Justice Story and Justice Marshall).
[46] *See Towles*, 10 Fla. at 307 (declining to consider other "cases cited at the hearing," including one from Pennsylvania); *City of Apalachicola*, 9 Fla. at 348, 354 (noting that the Florida Supreme Court had issued a previous decision on the legal issue).
[47] *See Ammons*, 9 Fla. at 87 (referring to a case earlier issued by the Florida Supreme Court which explained "qualifications" of a general rule set forth in cases from Mississippi).
[48] *See* Lee, *Confederate Courts*, *supra* note 2, at 83; Lee, *Florida Legal History*, *supra* note 34, at 493.
[49] *See* Lee, *Florida Legal History*, *supra* note 34, at 494.
[50] Kimball v. Jenkins, 11 Fla. 111 (1866).
[51] *See Kimball*, 11 Fla. at 122-25 (referring to the common law of England and decisions issued by courts throughout the United States); *Knight*, 286 So. 3d at 154 (noting the importance of "valid reliance interests" underpinning the doctrine of *stare decisis*).