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IN THE SUPREME COURT OF FLORIDA

CASE NO. 39,667

WILLIAM C. HOLBEIN and :  
EDWARD RAY HOLBEIN, :

Appellants :

vs. :

RAY J. RIGOT, :

Appellee :

BRIEF OF APPELLANT

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and

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STATEMENT OF THE CASE

Plaintiffs, WILLIAM C. HOLBEIN and EDWARD RAY HOLBEIN, appeal from the decision of the District Court of Appeal, Third District, which held that a portion of a foreign judgment awarding punitive damages obtained by them against Defendant, RAY J. RIGOT, was not entitled to full faith and credit under the Constitution of the United States. (R 225-227).

POINT INVOLVED

THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ERRED IN HOLDING THAT THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION OF THE UNITED STATES WAS INAPPLICABLE TO A FOREIGN JUDGMENT AWARDING PUNITIVE DAMAGES WHERE THE PUNITIVE DAMAGES WERE AWARDED IN ORDER TO AFFORD PLAINTIFFS A PRIVATE REMEDY FOR INJURY FROM A WRONGFUL ACT RATHER THAN A FIXED PENALTY PROVIDED BY STATUTE TO PUNISH AN OFFENSE COMMITTED AGAINST THE STATE. (Raised by Plaintiffs' Assignments of Error No. 1, 2, 3, 4, and 5).

STATEMENT OF FACTS

Plaintiffs William C. Holbein and Edward Ray Holbein filed suit against Defendant Ray J. Rigot in the District Court, 73rd District, Bexar County, Texas, for cancellation and rescission of a contract and for damages for false, fraudulent and malicious misrepresentations which induced Plaintiffs to enter into a franchising agreement. The complaint sought compensatory and

punitive damages. (R 25 - 34)

A default judgment was entered against Rigot after he had been served with a citation in the manner prescribed by the laws of Texas where defendant was doing business pursuant to Article 2031-b, Vernon's Annotated Civil Statutes of Texas. (R. 226). A final judgment was entered in favor of plaintiffs against defendant in the sum of \$36,613.03 as compensatory damages and \$25,000 punitive damages. (R. 225, 226).

Plaintiffs then brought suit against Defendant in the Circuit Court of Dade County, Florida, on the foreign judgment. (R. 1-12). Defendant admitted he had received notice of the Texas proceedings by receipt of the citation by mail pursuant to the applicable Texas Statute.\*

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\* This was the only notice Defendant received and the only notice required. Rule 243 of the Texas Rules of Civil Procedure, pertaining to Unliquidated Demands, provides that where a default has been entered in a cause of action for unliquidated damages, the Court shall hear evidence as to damages and shall render a judgment therefore, unless the Defendant shall demand or be entitled to a trial by jury. In the case at bar, Defendant never demanded a jury trial. Texas law also provides that after a default judgment has been entered, plaintiff is not required to seek defendant and notify him that testimony will be heard in the case because defendant should inform himself when evidence will be heard. Failure to notify defendant does not affect the judgment. Western Union Telegraph Co. v. Skinner, 60 Tex. Civ. App. 477, 128 S.W. 715.

Defendant did not allege or assert that the Texas Court did not have jurisdiction over him and did not present any evidence to prove he had never transacted business in the state of Texas. (R. 226).

After hearing the testimony and considering the documentary evidence, the trial court entered a final judgment in favor of Plaintiffs for the full amount of the foreign judgment plus interest and costs. (R. 219, 220).

Defendant appealed to the District Court of Appeal, Third District, which affirmed the portion of judgment in favor of Plaintiffs for compensatory damages but reversed the portion of the judgment awarding them punitive damages. The District Court of Appeal held that the final judgment was entitled to full faith and credit for actual damages but was not entitled to full faith and credit for punitive damages based on the following decisions: Silitronic Chemical Corp. v. R.K.M. Enterprises, Fla. App. 1967, 197 So. 2d 33; Clay v. Atchison, T. & S. F. Ry. Co., Texas, 201 S.W. 1072 affirmed, 228 S. W. 907; Farmers & Merchants Trust Co. v. Madeira, 68 Cal. Reports 184; F. E. C. Ry. Co. v. McRoberts, 149 So. 631, 111 Fla. 278.

Plaintiffs have appealed to this Honorable Court on the ground that the decision of the District Court of Appeal is erroneous and that the decision constitutes an initial

construction or interpretation of the Federal Constitution. Armstrong v. City of Tampa, Fla. 1958, 106 So.2d 407, In Re Kionka's Estate, Fla. 1960, 121 So.2d 644 and Judd v. Schooley, Fla. 1963, 158 So. 2d 514. A Petition for Writ of Certiorari based on conflict jurisdiction simultaneously filed was denied by this Honorable Court by Order dated July 6, 1970 (Case No. 39,662).

#### POINT INVOLVED

THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ERRED IN HOLDING THAT THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION OF THE UNITED STATES WAS INAPPLICABLE TO A FOREIGN JUDGMENT AWARDING PUNITIVE DAMAGES WHERE THE PUNITIVE DAMAGES WERE AWARDED IN ORDER TO AFFORD PLAINTIFFS A PRIVATE REMEDY FOR INJURY FROM A WRONGFUL ACT RATHER THAN A FIXED PENALTY PROVIDED BY STATUTE TO PUNISH AN OFFENSE COMMITTED AGAINST THE STATE.

(Raised by Plaintiffs' Assignments of Error No. 1, 2, 3, 4, and 5).

#### ARGUMENT

The entire Texas Final Judgment awarding Plaintiffs compensatory and punitive damages is entitled to full faith and credit in the Florida courts. The Final Judgment was not based on a Texas penal statute or law but rather based on common law liability for false, fraudulent and malicious representations which induced Plaintiffs to enter into a franchising agreement with Defendant. The lawsuit in Texas is similar to a lawsuit in a Florida court based on fraud, malice or deliberate violence or oppression. Winn & Lovett Grocery Co. v.



Archer, 126 Fla. 308, 171 So. 214; Associated Heavy Equipment Schools v. Masiello, Fla.App. 1969, 219 So.2d 465.

Therefore the enforcement of the Texas judgment in a Florida court does not violate the principle that penal laws of one state are not enforceable in another state because the award of punitive damages was not to punish Defendant for an offense against the state but to give Plaintiffs redress by way of punitive damages for a private wrong.

Article IV, Section 1 of the Constitution of the United States provides that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. Irving Trust Co. v. Kaplan, 155 Fla. 120, 20 So.2d 351. The only exception to this constitutional guarantee is that penal statutes of one state do not have extraterritorial effect. The type of statute that qualifies as a penal statute as contrasted to a remedial statute was discussed in the leading case of Huntington v. Attrill, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123. In that case a Maryland court refused to take jurisdiction of a bill to set aside stock transfers filed by a creditor who had recovered a judgment in New York. The New York judgment was based on a New York statute which made the director of the corporation liable for all corporate debts if he signed a false certificate concerning assets. The Maryland court

refused jurisdiction on the basis that the statute was a penalty and Maryland did not have to enforce the penal laws of New York.

The Supreme Court of the United States reversed on the ground that the New York statute was not a penal law in the international sense and that the Maryland court had denied full faith and credit to the New York judgment. In so holding the Supreme Court set down the following guidelines for determining whether a law is penal or remedial and whether it should be given full faith and credit in other states:

Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.

\* \* \*

The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community;

and are distinguished by the harsher appellation of crimes and misdemeanors." 3 Bl.Com.2.)

\* \* \*

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The question whether a statute of one State, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in Den-  
nick v. Central R. Co. of N.J., 103 U.S. 11 [26: 439].

In that case, it was held that, by virtue of a statute of New Jersey making a person or corporation, whose wrongful act, neglect or default should cause the death of any person, liable to an action by his administrator, for the benefit of his widow and next of kin, to recover damages for the pecuniary injury resulting to them from his death, such an action, where the neglect and the death took place in New Jersey, might, upon general principles of law, be maintained in a circuit court of the United States held in the State of New York by an administrator of the deceased, appointed in that State.

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Mr. Justice Miller, in delivering judgment, said: "It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offense was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is, indeed, a right dependent solely on the statute of the State; but when the Act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see

why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common law right. Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." Dennick v. Central R. Co. of N.J., 103 U.S. 17, 18 [26: 441].

This principle was again applied in James-Dickinson Farm Mortg. Co. v. Harry, 273 U.S. 119, 47 S.Ct. 308, 71 L.Ed. 569 where Mrs. Harry, a citizen of Illinois, sued Dickinson, a citizen of Texas, and James-Dickinson Farm Mortgage Company, a Missouri corporation, in an Illinois court for damages resulting from false representations by which Plaintiff was induced to purchase a tract of land in Texas. The complaint was based on common law liability and a Texas statute. Plaintiff recovered a judgment and defendants filed a writ of error to the Supreme Court on the ground that their rights guaranteed under the 14th Amendment had been denied.

The Supreme Court in affirming the judgment against Dickinson rejected the argument that the Illinois judgment had in effect enforced the Texas penal law. In so holding Justice Brandeis said inter alia:

Fourth. It is urged that a federal court for Illinois should not enforce the liability under the Texas statute, because Illinois has not enacted a statute of similar import. The general rule is that one state will enforce a cause of action arising under the laws of another; that a federal court of any district will enforce a cause of action arising under the law of any state; but that ordinarily the courts of one government will not enforce the penal laws of another. The argument is that the Texas statute is a penal law, because it provides: "All persons knowingly and wilfully making such false representations or promises or knowingly taking advantage of such fraud shall be liable in exemplary damages to the person defrauded in such amount as shall be assessed by the jury not to exceed double the amount of the actual damages suffered."

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Exemplary damages are recoverable at common law in many states. A statute providing for their recovery by and for injured party is not a penal law. Huntington v. Attrill, 146 U.S. 657, 666-683, 36 L.Ed. 1123, 1127-1133, 13 Sup.Ct.Rep. 224. Compare Atchison, T.&S.F. R. Co. v. Nichols, 264 U.S. 348, 350-351, 68 L.Ed. 720, 727, 44 Sup. Ct. Rep. 353, 23 N.C.C.A. 549. No reason appears why the cause of action arising under the Texas statute should not be enforced in Illinois. The Texas statute as applied in this case does not add any extraordinary feature to the common law liability for fraudulent representations. There is nothing in the public policy of Illinois with which the statutory cause of action is inconsistent. It is not shown that substantial justice between the parties cannot be done consistently with the forms of procedure and the practice of the federal courts for Illinois. [Emphasis supplied]

The reasoning in the above decisions illustrates with crystal clarity the error in the decision of the District Court and the fact that the Final Judgment is entitled to

the Constitutional guarantee of full faith and credit. Not only was Plaintiffs' lawsuit and judgment in Texas based on common law liability [as opposed to statutory liability] but the award of punitive damages was not penal in the international sense in that it punished Defendant for an offense against the public justice of the State of Texas. Rather, it merely afforded a private remedy to Plaintiffs who were injured by Defendant's wrongful acts.

Other jurisdictions have also followed the mandatory guidelines set forth in Huntington v. Attrill, supra, and James-Dickinson Farm Mortg. Co. v. Harry, supra:

Loucks v. Standard Oil Co., 224 NY 99, 120 NE 198 involved an action brought in New York to recover damages for injuries resulting in death arising out of an accident in Massachusetts.

The Massachusetts statute provided for the assessment of damages in the sum of not less than \$500 nor more than \$10,000 against a person whose negligence caused the death of another. The damages were to be assessed with reference to the degree of culpability.

Justice Cardozo in holding that the Massachusetts statute was not penal in nature, and therefore could be enforced in a New York court, said:

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"The courts of no country execute the penal laws of another." *The Antelope*, 10 Wheat, 66, 123, 6 L.Ed. 268. The defendant invokes that principle as applicable here. Penal in one sense the statute indisputably is. The damages are not limited to compensation; they are proportioned to the offender's guilt. A minimum recovery of \$500 is allowed in every case. But the question is not whether the statute is penal in some sense. The question is whether it is penal within the rules of private international law. A statute penal in that sense is one that awards a penalty to the state, or to a public officer in its behalf, or to a member of the public, suing in the interest of the whole community to redress a public wrong. *Huntington v. Attrill*, 146 U.S. 657, 668, 13 Sup.Ct. 224, 36 L.Ed. 1123; *Huntington v. Attrill*, [1903] A.C. 150, 156; *Brady v. Daly*, 175 U.S. 148, 154, 157, 20 Sup.Ct. 62, 44 L.Ed. 109; *Rauling v. Fischer*, [1911] 2 K.B. 93; *Dicey, Conflict of Laws*, p. 209. The purpose must be, not reparation to one aggrieved, but vindication of the public justice. *Huntington v. Attrill*, 146 U.S. 668, 13 Sup. Ct. 224, 36 L.Ed. 1123; *Brady v. Daly*, supra....

\* \* \*

We think the better reason is with those cases which hold that the statute is not penal in the international sense. On that branch of the controversy, indeed, there is no division of opinion among us. It is true that the offender is punished, but the purpose of the punishment is reparation to those aggrieved by his offense....

\* \* \*

Through all this legislation there runs a common purpose. *Boott Mills v. B.&M.R.R. Co.*, supra, 218 Mass. 586, 106 N.E. 680; *Brown v. Thayer*, 212 Mass. 392, 99 N.E. 237. It is penal in one element and one only; the damages are punitive. The Courts

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of Massachusetts do not give punitive damages even for malicious torts except by force of statute. Boott Mills v. B.&M.R.R. Co., supra, 218 Mass. 588, 106 N.E. 680; Ellis v. Brockton Pub. Co., 198 Mass. 538, 84 N.E. 1018, 126 Am.St.Rep. 454, 15 Ann.Cas. 83. That may have led them to emphasize unduly the penal element in such recoveries. But the punishment of the wrongdoer is not designed as atonement for a crime; it is solace to the individual who has suffered a private wrong. This is seen in many tokens. The employer may be innocent himself. Smart money will still be due in proportion to his servant's negligence. That is a distribution of burdens more characteristic of torts than crimes. But even more significant is the distribution of benefits....

In Interstate Savings & Trust Co. v. Wyatt, 63 Colo. 1, 164 P. 506 plaintiff recovered a judgment against defendants in the State of Texas based on a Texas statute which gave to a person paying more than the legal rate of interest the right to recover double the amount of the interest so paid. Plaintiff then brought suit in Colorado based on the Texas judgment and recovered a judgment which was affirmed on appeal.

In affirming the Court said that while the Texas statute in a sense was penal as to the party exacting the usurious interest, it was remedial as to the party paying it, and therefore the Texas judgment was entitled to full faith and credit in Colorado on the basis of Huntington v. Attrill, supra.

In Landum v. Livingston, Mo.App. 1965, 394 SW 2d 573, Plaintiff recovered a judgment of \$488.50 actual damages and



\$1000 punitive damages for wrongful repossession of his automobile. The issue on appeal was whether an award of punitive damages was beyond the jurisdiction of the Magistrate Court. The pertinent statute provided that the Magistrate Court shall have original jurisdiction of all civil actions for the recovery of money, whether such action be founded upon contract or a tort, or for a penalty or forfeiture when the sum demanded does not exceed \$2000.

The Court, in holding that the Magistrate Court had jurisdiction based on Huntington v. Attrill, supra, to award punitive damages, said:

(1) Punitive damages, while having the function of punishing the defendant and deterring others, do not constitute a penalty as that word is used in the jurisdictional statute.

(2) The mere fact that plaintiff may be allowed to recover more than would be ordinarily embraced in the concept of compensatory damages does not necessarily mean that a penalty is involved.

(3) Punitive damages do not constitute an independent cause of action but can only be an incident of another cause of action where there is malice or fraud. Therefore before punitive damages can be recovered there must be a cause of action for compensatory damages.

(4) Punitive damages do not constitute penalties but are a part of the basic cause of action in tort and therefore the punitive damages are an integral part of plaintiff's action for the recovery of money within the specific grant of jurisdiction found in the Missouri statute in question.

It is therefore submitted that the decision of the District Court of Appeal which refused to give full faith and credit to the entire Texas judgment denied Plaintiffs a right secured by the Constitution. The Texas judgment awarding compensatory and punitive damages was not based on a penal statute or law of Texas but was rather based on common law liability similar to a right of action in Florida for malice and fraud long recognized by the Florida courts.

The following decisions relied upon by the District Court to support its opinion are easily distinguishable:

Florida East Coast Railway Co. v. McRoberts, 111 Fla. 278, 149 So. 631, involved an action for wrongful death brought under the Florida Statute where the railroad withdrew its pleas to the complaint and asked the Court to enter a default against it as to the merits. At trial the Court allowed plaintiff to read to the jury his third count relating solely to the recovery of punitive damages and instructed the jury that they were authorized to return a verdict for punitive damages if they found that defendant was guilty of gross negligence.

Defendant's objection based on the ground that punitive damages could not be recovered for wrongful death under the Florida statute was overruled.

On appeal, this Honorable Court ordered a new trial on damages because punitive damages are not recoverable in an action for wrongful death. In so holding this Honorable Court said that the default admitted the cause of action but not the damages claimed in the punitive damage count of the declaration, citing St. Lucie Estates v. Palm Beach Plumbing Supply Co., 101 Fla. 205, 133 So. 841, which held that a default judgment entitles plaintiff to relief if the proper predicate has been laid in the complaint.

This decision does not support the determination that the Texas judgment for punitive damages is not entitled to full faith and credit. It is true that a default was entered against Defendant in Texas but the distinguishing factor is that there was no Texas statute which precluded Plaintiffs from recovering a judgment against Defendant for punitive damages based on fraud as there was in the McRoberts case. Therefore the rule set forth in McRoberts, i.e., that a default judgment does not create a cause of action for punitive damages where none exists, is inapplicable to this case.

In Clay v. Atchison, T.&S.F. Ry. Co., Tex. 201 SW 1072, affirmed 228 SW 907, Clay was killed in New Mexico as

a result of a collision with Defendant's locomotive. His widow brought suit in District Court, El Paso County, Texas for \$5000 damages alleging that her husband's death was caused by the negligence of the railroad's employee.

Plaintiff based her law suit on Section 1820 of the laws of New Mexico, which provided that whenever any person shall die resulting from negligence, unskillfulness or criminal intent of any officer, agent, servant or employee while running, conducting or managing any locomotive car or train of cars, the corporation or individual employing the former shall forfeit and pay for every passenger dying the sum of \$5000.

The Court held that the language of Section 1820 of the New Mexico statute clearly disclosed that the recoverable sum was allowed as a penalty and that it was not a compensatory statute and therefore the trial court did not err in sustaining the exception to Mrs. Clay's petition. This decision was based on the fact that the recovery provided by Section 1820 was inflexible and aimed at the culpability of the railroad employees rather than based upon the extent of injury, thus partaking more of the nature of a penalty than a right created. Therefore the New Mexico statute was penal and Mrs. Clay could not enforce her cause of action in Texas.

The Clay decision is clearly inapplicable to the case at bar. The basis of Mrs. Clay's action was a New Mexico

statute as contrasted with common law liability for malice, misrepresentation and fraud, which was the basis of Plaintiffs' cause of action in Texas. Secondly, regardless of the absence of a Texas statute in the case at bar there was no fixed sum set for punitive damages as present in Clay, and the amount of punitive damages was based on the particular wrongful act of Defendant.

In addition, the Clay case was not followed by the Supreme Court in Atchison, T.&.S.F. Ry. Co. v. Nichols, 264 U.S. 348, 6 L.Ed. 720, 44 S.Ct. 353, where plaintiff brought suit in California based on the same New Mexico statute for the death of his wife while a passenger on a train in New Mexico. The trial court entered a judgment in favor of the railroad which was reversed with directions to enter a judgment for plaintiff in the sum of \$5000. 9 Cir. 1923, 286 F. 1.

On appeal to the Supreme Court the railroad contended that the New Mexico statute was in conflict with the policy of the State of California. The Supreme Court in affirming the decision of the Court of Appeal said that the New Mexico statute was within the principle and description of Huntington v. Attrill, supra. It was in reparation of a private injury and not in punishment of an offense against the public justice of the State, and although its reparation was in a fixed

amount it was set by a consideration of the determining factors which necessarily have a certain similarity in all cases. The motive and effect of the law was not punishment in the sense of a penal law but remuneration or damages for a civil injury.

Finally, any reliance upon Farmers & Merchants Trust Co. v. Madeira, 261 Cal.Ap.2d 503, 68 Cal.Rptr. 184, is also erroneous because the California court concluded that the Pennsylvania support order based on a Pennsylvania statute was primarily civil in nature and enforceable in California because its purpose was to protect wives and children rather than to punish a defendant. The decision was based on Huntington v. Attrill.

#### CONCLUSION

The Texas Final Judgment awarding punitive damages is entitled to full faith and credit in the Florida courts because the cause of action was not based on any Texas penal law or statute but rather was based on common law or civil liability arising out of false, fraudulent and malicious misrepresentations. As such, it was entitled to the privilege guaranteed to it by the Constitution of the United States.

It is therefore submitted that the opinion of the District Court of Appeal, which has held that it was not entitled to full faith and credit, is erroneous. The punitive

damage award in the Texas court was not to punish defendant for an offense committed against the State of Texas but rather to afford plaintiff a private remedy for an injury from defendant's wrongful act.

WHEREFORE, Appellants-Plaintiffs, WILLIAM C. HOLBEIN and EDWARD RAY HOLBEIN, respectfully request this Honorable Court to quash the portion of the decision of the District Court of Appeal, Third District, which refused to give full faith and credit to the portion of the Texas judgment awarding punitive damages.

Respectfully submitted,

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CERTIFICATE OF MAILING

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellants was furnished by mail to HORTON & SCHWARTZ, ESQS., Attorneys for Appellee, 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130 and DENNIS I. HOLOBER, ESQ., Attorney for Appellee, 200 Greater Miami Federal Building, Miami, Florida 33131 on this 19<sup>th</sup> day of August, 1970.

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