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PART FOUR

Procedural Law

CIVIL PROCEDURE

JAMES A. BURNES*

The following summary of civil procedure† covers the more important and interesting Florida cases in volumes 66 to 80 inclusive of the Southern Reporter, Second Series. This summary does not include the law of evidence or appellate procedure, both of which are treated elsewhere.

JURISDICTION

Non-Exclusiveness Where Concurrent

Where two courts have concurrent jurisdiction of both the subject matter and the parties, it is a general rule that the tribunal first exercising jurisdiction in the cause retains jurisdiction to the exclusion of the other. The second tribunal, however, may exercise jurisdiction as well where there is failure to raise timely objection. In *State v. Hunt*,[1] the Circuit Court, in granting a divorce, awarded custody of the children to the mother, retaining jurisdiction, it was contended, to make further orders relative to statutes governing dependency and delinquency of the children. Subsequently, the Juvenile and Domestic Relations Court, under its jurisdiction of "dependent children," ordered the children, as wards of the state, placed with certain guardians. Without deciding the question of concurrency or exclusiveness of jurisdiction, the Supreme Court found no error in the latter order because of the absence of timely objection before the Juvenile and Domestic Relations Court to the exercise of its jurisdiction.[2]

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†Extremely significant, but not within the scope of this summary, were the Florida Rules of Civil Procedure, which were adopted on March 1, 1954. See Arnow and Brown, *Florida's 1954 Rules of Civil Procedure*, 7 FLA. L. REV. 125 (1954) and Laws of Fla. c. 29737 (1955), which integrated the Florida Statutes with the new Rules by repealing sections completely superseded or obsolete and amending sections requiring change in language or content; about 180 sections of the Florida Statutes were affected thereby.

1. 70 So.2d 301 (Fla. 1954).

2. *Cf.* Martinez v. Martinez, 15 So.2d 842 (Fla. 1943), where the court indicated that in an intra-Florida situation, as that above (unlike an interstate problem where comity is involved), the second tribunal lacks jurisdiction from the commencement of the action.

Termination—Action Dismissed—Lack of Prosecution

Where a pending action is dismissed for want of prosecution for one year or more and a petition to reinstate the action is not made within one month after the order of dismissal, the court's jurisdiction of the cause terminates. Hence, where the one-month period had expired, the chancellor allowed a motion to quash and vacate the order of dismissal and to strike the motion to dismiss; this was error, the chancellor lacking power to permit reinstatement.[3]

Subject Matter—Title of Real Estate

Under the Florida Constitution the Circuit Courts have exclusive jurisdiction of all cases involving the titles of real estate.[4] While this provision does not preclude a County Judge from determining the title of real estate as between two adverse parties claiming as beneficiaries of an estate, he lacks jurisdiction of such actions between the estate (or beneficiaries) and third persons. Thus where claimants to real estate under a testamentary trust sought to have declared a resulting trust of such real estate, the matter, it was held, was within the exclusive domain of the Circuit Courts.[5]

Person—Service Upon Minors

To effect proper service of process upon an infant-defendant, not only must the summons or a copy thereof either be read or delivered to the infant and his guardian (or such persons who have custody of him), but it is also necessary to serve the writ upon the guardian *ad litem* who is thereafter appointed by the court.[6] These statutory requirements must be met strictly. Where service was made upon a minor by serving a writ of summons and a copy of the complaint upon the minor's mother, as guardian, such service was held to be insufficient.[7]

Person—Consent In Advance

A party may submit himself by contract to the jurisdiction of a court in all actions arising from the contract. Where, however, an agent acting without authority purports to bind his principal to such a contract, on a simple principle of agency the court lacks jurisdiction of the principal. In *State v. Maxie*[8] the defendant, a bond company, was allegedly surety on an appearance bond in which the company waived notice and submitted to the jurisdiction of the court. The company's agent acted beyond the scope of his authority in putting up the bond. Therefore, although the statutory time for attacking a forfeiture judgment on the bond had expired,

3. Bowyer v. Cannon, 68 So.2d 564 (Fla. 1953).
4. FLA. CONST., Art. V, § 17.
5. Zinnser v. Gregory, 77 So.2d 611 (Fla. 1955).
6. FLA. STAT. § 47.23 (1953).
7. Gissen v. Goodwill, 74 So.2d 86 (Fla. 1954).
8. 66 So.2d 670 (Fla. 1953); State v. Powell, 66 So.2d 672 (Fla. 1953) was a sister case.

the judgment was subject to direct attack, the jurisdictional basis for such judgment against the company being absent.

Person—Constructive—Nonresidents In "Business Venture"

In a very significant decision (the constitutional implications of which are discussed elsewhere[9]) an attack upon the constitutionality of the 1951 statutory amendments dealing with service of process upon nonresidents by substituted service upon the Secretary of State[10] failed. In *State v. Register*,[11] the court held that when a nonresident individual purchased an orange grove in the state and listed it for sale, he engaged in a "business venture" within contemplation of the statute and thereby appointed the Secretary of State as his agent to accept service of process in any action "arising out of any transaction or operation connected with or incidental to such . . . 'business venture.'"

Person—Constructive—Foreign Corporation "Doing Business"

Under the same statute, which also permits service upon a business agent of a foreign corporation carrying on business in Florida, the court in another important decision bypassed the question of "doing business" and held that the relationship between the corporation and its alleged "business agent" was such that notice served upon the latter could not be deemed fairly to be notice to the corporation.[12] The foreign corporation had engaged a commission salesman, the alleged "business agent," to solicit orders. His compensation was the down payment which he collected from the customer and retained. Orders were subject to the corporation's acceptance, and merchandise was sent to the customers C.O.D. Additional facts, strongly influencing the court, were: the salesman was regularly employed by another employer; he was a stranger to the defendant, who hired him by correspondence; and he had solicited very few orders for the defendant.[13]

Person—Constructive—"Reasonable Diligence"

Reiterating its earlier pronouncement as to what constitutes "reasonable diligence" under the constructive service statute, the court stated that the test is met if one

> reasonably employed knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances, to acquire the information necessary to enable him to effect personal service on the defendant.[14]

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9. See "Florida Constitutional Law," p. 143, supra.
10. FLA. STAT. § 47.16 (1953).
11. 67 So.2d 619 (Fla. 1953).
12. Mason v. Mason Products Co., 67 So.2d 762 (Fla. 1953).
13. *Cf.* George A. Hormel & Co. v. Ackman, 158 So. 171 (Fla. 1934), which the court cites and distinguishes on the basis that the trial court found the person to be the corporation's "business agent", whereas in the present case it did not.
14. Grammer v. Grammer, 80 So.2d 457 (Fla. 1955); FLA. STAT. §§ 48.04 and 48.05 (1953) require search and inquiry to discover, *inter alia*, the name and address of the defendants.

VENUE

Privilege—State Agency as Defendant

A few cases involving the privilege of venue of state administrative agencies came before the court, which repeated its established rule that such an agency has a privilege of being sued at its governmental seat unless the plaintiff charges that the defendant has challenged the plaintiff's constitutional rights or has attempted to seize his property.[15] It is stated further—and it may be regarded now as a corollary—that where the primary purpose of a suit is to secure a judicial interpretation of an agency's rule or for a declaration of the plaintiff's rights thereunder, the agency, as a party defendant, may claim a privilege of being sued at its official residence.[16] In the absence of a specific legislative designation of an agency's official residence, its actual headquarters is deemed to be its official residence.[17]

Claiming Privilege—Manner and Time

Several recent cases illustrate the practical importance of claiming privilege of venue properly and timely. As under the former plea of privilege of venue, a defendant, whether claiming the privilege by way of motion to dismiss or answer, has the burden of pleading and proving the absence of all facts which would support the propriety of the venue as laid; in addition he must plead his privilege at an early stage of the proceedings. *Inverness Coca-Cola Bottling Company v. McDaniel*[18] demonstrates the errors into which a careless defendant may fall easily. Two Florida corporations, X and Y, were sued jointly in Hillsborough County on a cause of action for personal injuries presumably accruing elsewhere. X and Y were joined as defendants upon the basis of an agency relationship between them, such being alleged in the complaint. Y maintained a business office in Hillsborough County; X did not. X filed a motion to dismiss, stating that the complaint "on its face" showed a misjoinder of parties-defendant and that venue was improper, the correct place for an action against X being Citrus County (where X had its principal place of business). The lower court properly denied the motion for two reasons: 1) "on its face" the complaint alleged a sound basis for joinder, and it is settled that no privilege of venue may be claimed where an action is brought against several properly joined corporations, where one of them has a branch office in the county of the forum;[19] 2) the defendant, while

15. Florida Real Estate Comm'n v. State, 75 So.2d 290 (Fla. 1954); Dowey v. Lawton, 72 So.2d 50 (Fla. 1954); McCarty v. Lichtenberg, 67 So.2d 655 (Fla. 1953).

16. Larson v. Cooper, 75 So.2d 757 (Fla. 1954). It may be explained that the "cause accrued" where the rule was issued, *i.e.*, at the agency's official headquarters.

17. Florida Real Estate Comm'n v. State, 75 So.2d 290 (Fla. 1954); McCarty v. Lichtenberg, 67 So.2d 655 (Fla. 1953).

18. 78 So.2d 100 (Fla. 1955).

19. FLA. STAT., §§ 46.02, 46.04 (1953). The extent to which joinder may be attacked in contesting venue has been settled fully; see L. B. McLeod Const. Co. v. State, 143 So. 594 (Fla. 1932). In the Inverness case the question was not raised properly.

admitting the plaintiff's averment that it had its principal place of business in Citrus County, did not negative the possibility that it had a branch office in Hillsborough County, and if such a branch office were maintained, under the venue statute X had no privilege against being sued there.[20] Subsequently, the defendant corporation filed a second motion to dismiss, again raising the questions of misjoinder and venue, and properly negativing that X carried on business in Hillsborough County. The motion was denied because the claim of privilege was made too late.[21]

JUDGE

Disqualification for Prejudice

A party seeking to disqualify a presiding judge for prejudice must file pursuant to statute an affidavit stating "the facts and the reasons for the belief" that prejudice exists; the affidavit must "be supported in substance by affidavit of at least two reputable citizens . . . ."[22] Disqualifying a judge for prejudice has not been easy of accomplishment. And as the Supreme Court has construed the applicable statute in Hahn v. Frederick[23] it appears even more difficult. The applicant's affidavit was supported by the affidavit of two reputable citizens who swore that "the matters therein contained are true to the best of his knowledge and belief and he . . . believes . . . [the judge] is prejudiced . . . ." The court said that to support the facts in substance, as the statute requires, is to have knowledge of the facts and know them to be true; the supporting affidavits were therefore inadequate. In a dissenting opinion Justice Terrell disagreed sharply with the majority whom he believed require by their construction too much and thereby defeat the manifest statutory purpose.

DECLARATORY JUDGMENT

"Justiciable Controversy" Nonextant

Coming to the court were a number of cases involving the presence of a "justiciable controversy"—a jurisdictional requisite to declaratory relief.

20. In Kreuger v. Coral Gables Supply Company, 78 So.2d 704 (Fla. 1955), where the defendant presumably pleaded and proved that it neither did business nor had an office in the county of the forum, and testimony before the trial court was not produced for review, the allowance of a motion to dismiss was affirmed.

21. C.L.R. (1950), r. 13 (h); now FLA. R.C.P. (1954), r. 1, 11 (h).

Defendant's motion to dismiss failed for the same reason in City of Kissimmee v. Patterson, 67 So.2d 223 (Fla. 1953). The action was brought, however, where the cause of action accrued, and an affidavit of good faith was filed (FLA. STAT. § 46.01 (1953); it therefore appears that the defendant did not possess an exercisable privilege. This question was not raised.

Quaere: Instead of a second motion to dismiss, if the defendant had sought to amend his original motion, would the amendment have been allowed? Certainly it would have been within the trial court's sound discretion to have permitted it.

It appears, unfortunately, that asserting a privilege of venue is still foundering on the technicality which sought in yesteryear to discourage pleas in abatement. Unquestionably our procedure should be altered to allow a simpler exercise of the privilege. That venue is the subject for a number of appeals appears to border on absurdity.

22. FLA. STAT. § 38.10 (1953).

23. 66 So.2d 823 (Fla. 1953).

The court, therefore, had occasion to restate the several necessary elements in every justiciable controversy: 1) a bona fide present practical need for a declaration; 2) a present ascertained or ascertainable state of facts or present controversy as to a state of facts; 3) a person or persons who have, or who reasonably may have, an actual, present, adverse and antagonistic interest in the subject matter; 4) a seeking of relief which is not merely legal advice nor an answer to satisfy curiosity.[24] The number of cases failing to contain these elements is surprising and indicates a serious misunderstanding on the part of the bar of the scope of the remedy for a declaratory judgment.

In *Bryant v. Gray*[25] a petitioner sought a declaration of his right or eligibility under the Florida Constitution to be reelected governor in 1956 if he were elected governor to fill the unexpired term of the recently deceased chief executive; the petitioner neither alleged that he was presently a candidate for governor nor that he would be a candidate for that office in 1956. Finding the facts to be hypothetical, the proceeding not to be adversary, and the purpose of the suit to be merely for legal advice, the court accordingly determined that no justiciable controversy was present. In another case, where several cities requested a declaration as to the applicability to federal highways within city limits of city ordinances regulating the speed of vehicles, the court refused relief on the basis that no actual controversy was present and merely an advisory opinion was sought.[26] For the same reasons and also because of the absence of an adverse party a decree was denied where several law enforcement officers who were also attorneys sought a declaration that a statute prohibiting them from practicing law was unconstitutional.[27] Also, a petition by a clerk of court seeking the construction of a law setting pecuniary allowances to jurors for transportation was deemed to be a suit merely for legal advice; there was no genuine party-defendant.[28] Relief was denied in *Brautigam v. MacVicar*[29] where the Dade County Port Authority, which had contracted with Miami for the construction of a seaport, applied for

24. May v. Holley, 59 So.2d 636, 639 (Fla. 1952).
25. 70 So.2d 581 (Fla. 1954).
26. Ervin v. City of North Miami Beach, 66 So.2d 235 (Fla. 1953). It is of no small significance, however, that the court intimated that under a similar set of facts where in addition great public interest is involved, it might be proper to grant declaratory relief. But see also Brautigam v. MacVicar, 73 So.2d 863, 864 (Fla. 1954) where the court suggested otherwise.
27. Ervin v. Taylor, 66 So.2d 816 (Fla. 1953). Since the issue of the constitutionality of a statute was raised, the Attorney General was made a party pursuant to FLA. STAT. § 87.10 (1953); but he was deemed not to be an adversary. Terrell, J. vigorously dissented, arguing the presence of an actual controversy.
28. State v. Lewis, 72 So.2d 823 (Fla. 1954). The court pointed out that without the comptroller as a party, the decree would not bind the state or its funds.
29. 73 So.2d 863 (Fla. 1954). At p. 866 the court said:
> It was not the intent of the declaratory judgment statute to confer jurisdiction on the courts to be legal advisers for all of the political subdivisions of the state and to approve all contemplated contracts which such political subdivisions believe to be legal but about which there may be some doubt.

a declaration as to the authority of the parties to contract and for approval of a future bond issue which under the contract was to be marketed by the Port Authority to finance the undertaking. Since all of the parties contended that they had authority to contract, the court found the four above-mentioned elements of a justiciable controversy lacking; with respect to an approval of the future bond issue, it deemed the proceeding to be premature. Again on the basis of prematurity the court refused a declaration to a petitioner who requested construction of a 1953 statute[30] dealing with the qualifications of applicants to practice pharmacy. The petitioner, who had, it appeared, not applied for admission to practice in Florida either by way of examination[31] or reciprocity[32] had not exhausted his administrative remedies before seeking judicial aid.[33] Upon the ground that hypothetical questions as to future events do not constitute a justiciable controversy, the court held there could be no declaration as to the rights of an adopted child of a life tenant under the terms of an existing testamentary trust which provided that upon the termination of the trust the surviving "children" of life tenants were to become remaindermen.[34] In another case petitioners were airplane pilots who, it was alleged, were refused reinstatement discriminatorily after a strike. While they had not elected between their remedy under the Railway Labor Act and that at law for breach of contract, they desired a declaration as to their status as "employees" under the act. Relief was denied because a declaration would be merely advisory and would serve no useful purpose.[35]

A declaratory judgment will not be rendered where there is an appropriate remedy at law, for there is, therefore, no practical need for a declaration. In a suit for a declaratory decree to establish a disputed boundary line and to have the defendants return to the plaintiff that part of the lot of which the defendants were possessed, the court held ejectment to be an appropriate remedy and denied relief.[36] Ejectment was again deemed appropriate where the petitioner at a judicial sale had purchased bona fide land recorded in the name of the judgment debtor but in the possession of the defendant who claimed title under an unrecorded deed.[37]

Similar to the principle that an illegal contract may not be the basis of an action at law or a suit in equity is the rule that a declaration of rights under such a contract does not present a justiciable controversy. So the court held where an employer sought to have its right determined under an illegal closed shop agreement; the court added that there could be no

30. FLA. STAT. § 465.071 (1) (1953).
31. *Ibid.*
32. FLA. STAT. § 465.081 (1953).
33. Morrison v. Plotkin, 77 So.2d 254 (Fla. 1955).
34. Anderson v. Dimick, 77 So.2d 867 (Fla. 1955).
35. Mountain v. National Airlines, 75 So.2d 574 (Fla. 1954).
36. Stark v. Marshall, 67 So.2d 235 (Fla. 1953).
37. Cape Sable Corporation v. McClurg, 74 So.2d 883 (Fla. 1954).

valid doubt as to the existence of a right, privilege, power or immunity under such a contract.[38]

"Justiciable Controversy" Extant

On the other hand in several cases declaratory relief was held proper. A justiciable controversy was presented where a petitioner sought a determination of his right to function as chairman of the executive committee of a political party, the defendant also claiming such right.[39] In *Riviere v. Orlando Parking Commission* where a municipality contracted to acquire land from the defendant to establish off-street parking facilities to be financed by a bond issue and petitioned for a declaration of its authority, the court, basing its opinion upon *Ready v. Safeway Rock Co.*,[40] held that sufficient doubts as to the equities and rights of the parties were present to constitute a case for relief under Florida Statutes, Chapter 87.[41] In another decision, which was also based on the *Ready* case, a tenant whose lease had been cancelled by agreement of the parties sought the return of a security deposit which was to be forfeited only in the event of the tenant's default. It was held that the case fell within Chapter 87 and presented as well an equitable cause independent of the act.[42]

Following a rule set forth in a number of its previous decisions, the court in *North Shore Bank v. Town of Surfside*[43] permitted a town to sue for a declaration of the validity of its public improvement certificates which the defendant had agreed to buy "upon the condition that a decree of a court . . . [adjudicate] such certificates to be legal obligations." The town, it was held, need not proceed under Florida Statutes, Chapter 75.[44] The court discussed at length the limitations of proceeding under Chapter 87 rather than Chapter 75. During the following month in *Bessemer Properties, Inc. v. City of Opa-Locka*[45] such limitations became real where on a virtually similar set of facts the court denied a city declaratory relief, forcing it to proceed under Chapter 75. Whereas in the Surfside case the mayor of the town intervened as a "property owner, taxpayer and citizen," in the Opa-Locka case no such party was present, and the decree of validity bound only the city and the purchaser of the certificates. Since the latter suit had been brought to declare the "certificates to be legal obligations of the city," a decree was of little more use than an advisory opinion. Further, since both parties obtained in the Circuit Court the

38. Local No. 234, v. Henley & Beckwith, Inc., 66 So.2d 818 (Fla. 1953).
39. Shelly v. Brewer, 68 So.2d 573 (Fla 1953).
40. 24 So.2d 808 (Fla. 1946). (This was a very early case under the Florida act, which stressed the act's purposes).
41. 74 So.2d 694 (Fla. 1954). *Cf.* Brautigam v. MacVicar, supra, where the parties made no pretense at being adverse or having a bona fide dispute, but on the contrary each had prayed for the same declaration and agreed to seek a court adjudication of its contractual authority before marketing the bonds.
42. Hyman v. Cohen, 73 So.2d 393 (Fla. 1954).
43. 72 So.2d 659 (Fla. 1954).
44. "Validation of Bonds: Procedure."
45. 74 So.2d 296 (Fla. 1954).

relief they sought, there was no basis for an appeal to the Supreme Court; if the city had proceeded under Chapter 75, an appeal could have been prosecuted.

PARTIES

Joinder

Drawing an analogy from the law relating to guardians and wards, the court held that the nonjoinder of a curator as a party to a suit instituted by his ward is not a jurisdictional defect; and where the ward recovers a judgment and no prejudice results from the nonjoinder, the judgment will not be disturbed on review.[46]

Substitution

Generally substitution of a party-plaintiff should be allowed where prejudice to the defendant will not result. In *Griffin v. Workman*,[47] an action under the wrongful death statute, the plaintiff, the deceased's father, sued "as administrator" before he was qualified to act as such. Upon a motion to dismiss for want of plaintiff's capacity, the deceased's sister, who had qualified as administratrix in the meantime, moved for her substitution as party-plaintiff. The motion was denied, and the motion to dismiss was sustained. In reversing the trial court as to both motions the Supreme Court stated that allowing the substitution would not deny the defendant a substantial right; no fraud or inequity was present; no new claim was asserted; and the period of limitations on the remedy had not passed.

Indispensable and Necessary

Where a person obtains by alleged fraud a material interest in property which another seeks to affect by a suit in equity, the former is an indispensable party to the suit. *Martinez v. Balbin*[48] was a suit in which the plaintiff, a judgment creditor, sued an insolvent judgment debtor, who was the executor and a legatee of an estate. The purpose of the suit was to impress with a trust the defendant's share of the estate, the defendant having allegedly transferred it to others after judgment in fraud of the plaintiff. The court reasoned that since the transferees were charged with participation in the fraud and have a beneficial interest in the property transferred, they are indispensable parties. Since they had not been joined as defendants, the chancellor properly dismissed the suit.

In suits concerning the title of real property brought against an estate for the recovery of the property, devisees of the property are indispensable and necessary parties.[49] Hence, where a person sued to set aside deeds allegedly procured through fraud and the deceased transferee's estate was

46. Marquette v. Hathaway, 76 So.2d 648 (Fla. 1954).
47. 73 So.2d 844 (Fla. 1954).
48. 76 So.2d 488 (Fla. 1954).
49. FLA. STAT. § 733.02 (1953).

a party-defendant, the court reversed a judgment for the plaintiff for failure to join the devisees of the real property as parties to the suit.[50]

Class Suit

In a class suit the parties representing the class must be fairly representative of the group. In a suit against a church society of 900 members where three of its governing officers who were active in its administrative affairs were named as the sole parties-defendant, the defendants were held to be truly representative—particularly in view of a special master's finding that the defendants " 'did fairly, fully, honestly and diligently defend in behalf of the whole membership of the church.' "[51]

Disqualification of Corporation to Maintain or Defend

By statute corporations may not maintain or defend actions where they are delinquent in filing their annual reports with the Secretary of State or paying their annual capital stock taxes; the statute does not preclude the institution of actions for delinquency.[52] The disqualification is removed when the delinquency has been cured, the case lying dormant in the meantime unless a motion to dismiss has been sustained. In 1825 *Collins Ave. Corp. v. Rudnick*,[53] the plaintiff corporation was delinquent in filing its report and paying its taxes, and the defendant filed an answer and motion for summary judgment setting up such delinquency. Before the motion was heard, the plaintiff's delinquency was cured, and the lower court properly did not dismiss the action.[54]

PLEADING

Many recent cases serve as reminders that compliance with the rules of pleading is still of great practical importance. While inartistically drawn pleadings are seldom fatal to the result of a case, they frequently cause considerable inconvenience and embarrassment. The court recently in commenting on prolixity advised:

> Liberal though they are . . . the new rules both at law and in equity forbid prolixity in pleading, and counsel will find that time spent setting out a case briefly and in readily comprehensible form will pay dividends at every stage of the litigation and will ease and accelerate the judicial process. It should be remembered that not only opposing counsel but the trial court of its own motion may take the initiative in striking irrelevant matter.[55]

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50. Marquette v. Hathaway, 76 So.2d 648 (Fla. 1954).
51. Ross v. Gerung, 69 So.2d 650 (Fla. 1954).
52. FLA. STAT. § 610.11 (1949), repealed by Laws of Fla. c. 28170, § 2 (1953) and succeeded by FLA. STAT. § 608.35 (1953).
53. 67 So.2d 424 (Fla. 1953).
54. Oddly enough, on appeal it was the plaintiff who insisted on dismissal, for judgment had been entered against it on the motion for summary judgment.
55. Hotel & Restaurant Employees v. Boca Raton Club, 73 So.2d 867 (Fla. 1954).

Ultimate Facts and Conclusions of Law

Requiring the pleading of ultimate facts as distinguished from conclusions of law is simple in theory but difficult, at times, in application. In a suit to foreclose a mortgage on land, the defendants counterclaimed, alleging by ultimate facts a lease between the plaintiffs and the defendants whereby the latter were to operate a golf range on the land for their gain with a portion of the profits therefrom to be paid to the plaintiffs as rent. The defendants next proceeded to allege baldly that a partnership existed between all of the parties and prayed for an accounting. The court quite properly characterized the allegation of partnership as a conclusion of law, and reasoned that since the ultimate facts pleaded did not support such conclusion, the defendant had not stated a cause for relief; "in a suit in equity between partners concerning their interstitial rights and liabilities the pleading should allege the names of the partners, the term of the partnership and the rights and interest of the partners."[56] In another case, a suit for the declaration of a resulting trust of property where the funds used for its purchase were allegedly the plaintiff's, it was held that an averment that the plaintiff "never made any gift of said . . . property to" the transferee constituted ultimate facts and sufficed to state the plaintiff's intention not to make a gift of the property.[57] Again the problem was raised in *Anderson v. Murwell Motor Co.*[58] in determining whether the requisite jurisdictional amount for bringing an action in the Circuit Court was present. The plaintiff's complaint sought recovery for the conversion of his automobile, which he alleged to be worth less than the jurisdictional minimum. Allegations in the complaint that the defendants "wilfully, wantonly and maliciously converting the said automobile" were deemed to be mere conclusions of law, and hence in effect the plaintiff had failed to claim punitive damages, without which the jurisdictional requirement was patently lacking.

Foreign Law

A related question involves recognition of foreign law. Under former Florida procedure foreign law was regarded as fact, not law, and therefore it was necessary that it be pleaded and proved. The Uniform Judicial Notice of Foreign Law Act, which Florida adopted in 1949, permits the court to regard foreign law as law and to take judicial notice of it. In a recent case, *Kingston v. Quimby*,[59] the court pointed out that the act does not operate automatically, so that where a party intends to rely upon foreign law, he must give notice of his intention to his adversary by pleading or otherwise.[60]

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56. Phelps v. Gilbreth, 68 So.2d 360 (Fla. 1953).
57. Medary v. Dalman, 69 So.2d 888 (Fla. 1954).
58. 73 So.2d 822 (Fla. 1954).
59. 80 So.2d 455 (Fla. 1955).
60. FLA. STAT. § 92.031 (4) (1953) specifically provides for it.

Factual and Certain

Pleaders, in stating grounds upon which relief can be granted or in stating a defense, should be mindful always of the requirements that pleadings be factual and certain and that sufficient material facts be alleged. In a suit to enjoin a public nuisance, *viz.*, a house of ill-repute, the averment that it was plaintiff's "firm conviction" that such a house was being operated was deemed insufficient. In another count of the same bill the plaintiff alleged the purpose for which the house was set up, but did not aver that the purpose was fulfilled, thus failing to allege that a house of prostitution was being operated and thereby not stating a cause of action. The court quoted approvingly:

> [Generally the purpose of suing] to enjoin a nuisance should be clearly indicated and *facts alleged showing the existence of the alleged* nuisance and the character and extent of the danger or damage occasioned thereby.

The court said that while maintenance of a house of prostitution is a public nuisance *per se* and the "character and extent of the danger or damage" need not be alleged, nevertheless it is necessary to aver "the existence of the alleged nuisance."[61]

Defamation Per Se—Extrinsic Facts

Words that are not defamatory on their face but require extrinsic facts and circumstances to show their defamatory nature may nevertheless be defamatory *per se*;[62] if there was any doubt of this, it has been removed expressly by the court. In *Campbell v. Jacksonville Kennel Club*,[63] an action for slander, the plaintiff charged the defendant with calling him a "stoop." The defendant claimed that the alleged defamatory words were not slanderous *per se*, and since the plaintiff had not alleged special damages in his complaint, he had failed to state a cause of action. Although "stoop" is not a defamatory word on its face, the court looked to the complaint to ascertain its alleged meaning and determine whether an action for slander *per se* had been stated. "Stoop" was alleged to mean "a person who picks up race tickets off the ground and attempts to cash them in as his own purchased ticket." *Held*: defendant's contentions were correct.[64]

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61. Ellis v. State, 73 So.2d 853 (Fla. 1954). The nuisance—the cause of action—for which the county solicitor may sue is defined by FLA. STAT. § 823.05 (1953).

62. To recover for slander *per se* no special damage need be alleged or proved, whereas the contrary is true of slander *per quod*. Words are slanderous *per se* if they impute to another "(a) a criminal offense amounting to a felony, or (b) a presently existing venereal or other loathsome and communicable disease, or (c) conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession, or office, or (d) the other being a woman, acts of unchastity." Campbell v. Jacksonville Kennel Club, 66 So.2d 495 (Fla. 1953).

63. 66 So.2d 495 (Fla. 1953).

64. The principal case shows the need for the modern pleader in pleading an action for defamation to know the functions of the inducement, colloquium and innuendo.

Decree on Bill and Answer—Expiration of Time for Testimony

With a few exceptions a cause is at issue ten days (under the former equity rules)[65] after filing the answer.[66] Unless the court orders or the parties stipulate otherwise, a period of two months is allowed for taking testimony after a cause is at issue.[67] In *Muller v. Maxcy*[68] an interesting situation arose. The plaintiff sued to cancel a tax deed, and the defendant[69] answered by denying all material allegations in the complaint and also by challenging its legal adequacy. More than two months and ten days thereafter the defendant set the cause down to be heard on the pleadings. At the hearing the plaintiff moved to extend the time for taking testimony; the motion was denied, and a decree on the pleadings was entered for the defendant. *Held*: this was not error. The motion to extend the time for taking testimony was not timely, since more than two months had passed after reaching issue; the defendant was entitled to a "ruling of the merits."[70] Since the material allegations of the bill, of which the plaintiff had the burden of proof, were denied, and since the plaintiff had not sought nor obtained a ruling by the chancellor on the defendant's defense in law, a decree on bill and answer was entered properly for the defendant.

DEFENSES

Res Judicata—Identicalness

Several cases indicate that the conditions necessary to the application of the doctrine of res judicata are much misunderstood or ignored. The court restated, as it has many times before, four requisites of this defense: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the person for or against whom the claim is made.[71] *Donahue v. Davis*[72] illustrates the necessity that the things sued for and the causes of action be identical. Two of the four shareholders of a corporation sued the other two for fraud involved in purchasing land for the corporation. A prior suit by one of the two defendants against the other three shareholders charging conversion of stock certificates and praying for equitable relief was not a bar to the present suit. In another obvious case, A, a

65. E.R. 1950, r. 39; now 20 days, FLA. R.C.P., r. 3.8.

66. Where there are multiple parties-defendant, the suit is not at issue as to all plaintiffs who have not filed answers merely because others have done so. Rountree v. Rountree, 72 So.2d 794 (Fla. 1954).

67. E.R., r. 46; now FLA. R.C.P. r. 3.13.

68. 74 So.2d 879 (Fla. 1954).

69. Actually there were two defendants but to explain the case with respect to both is to no advantage.

70. It appears from the court's language that such a decree is res judicata. Also, the decree stated that defendant's "denials are to be taken as true in the absence of proof to the contrary."

71. Donahue v. Davis, 68 So.2d 163, 169 (Fla. 1953). Even the Supreme Court admitted it confused the doctrine of res judicata with the principle of collateral estoppel. See Universal Const. Co. v. Fort Lauderdale, 68 So.2d 366, 369 (Fla. 1953).

72. Donahue v. Davis, 68 So.2d 163 (Fla. 1953).

railroad company, sued B, an electric company, to recover indemnity for payment of a judgment obtained in a federal court against A by C, A's employee. C had been injured when a flat car ran into a wire which had been strung across A's tracks by B with A's permission; C's recovery was based upon failure to provide a safe place to work. The court brushed aside B's defense of res judicata as inadequate in law upon the ground that the causes of action in the two actions were different.[73]

Res Judicata—Matter Not Litigated

Res judicata is a defense to all matters which were or should have been litigated in the prior action. Accordingly, a final decree in a suit for divorce settles all the property rights of the parties and bars any suit brought thereafter to determine such matters.[74] Res judicata, therefore, was a defense in a suit by a woman against her divorced husband where she sought to set aside a property settlement made in contemplation of divorce upon the grounds that the settlement was unfair and was made under duress; the fact that such matters were not litigated in the suit for divorce was of no moment.[75] Also, where, on the basis of her divorced spouse's alleged fraud in not making a full disclosure of his assets, a former wife sought to set aside a property settlement incorporated in the divorce decree, res judicata was a good defense.[76]

Res Judicata—Merits

Res judicata is not a bar to a cause of action formerly adjudicated upon other than its merits. Hence, where a suit in equity was dismissed because of "unclean hands," the plaintiff was not barred from suing at law, the dismissal being merely an expression that the court was unwilling to aid the plaintiff.[77]

Res Judicata—Distinguished

Two interesting cases arose which illustrate nice distinctions between res judicata, estoppel of a different nature, and *stare decisis*. In *Kautzmann v. James*[78] the plaintiff sought damages for a peptic ulcer caused from his consumption of improper medicine negligently mislabelled by the defendant, a druggist. Previously the plaintiff had sued the defendant for such negligence, but the complaint was insufficient in law, for its averments assigned as the proximate cause of the plaintiff's injury the

73. Suwanee Valley E. Co-op. v. Live Oak Perry & G.R. Co., 73 So.2d 820 (Fla. 1954). In addition the parties were different. B wanted to establish thereby that A was contributorily or concurringly negligent or *in pari delicto* with B. Since the parties were not identical or in privity, even the principle of collateral estoppel was inapplicable.

74. It is assumed, of course, that the court has jurisdiction *in personam* of the parties.

75. Cooper v. Cooper, 69 So.2d 881 (Fla. 1954).

76. Cohen v. Cohen, 70 So.2d 362 (Fla. 1954).

77. Hauer v. Thum, 67 So.2d 643 (Fla. 1953).

78. 66 So.2d 66 (Fla. 1953).

defendant's disclosure to the plaintiff that the bottles had been mislabelled, an act which was not alleged to be negligent; upon an order of dismissal with leave to amend, the plaintiff chose to stand on his complaint, and from an adverse final judgment subsequently lost an appeal to the Supreme Court. The complaint in the present action stated a good cause for relief, the plaintiff purposely eschewing any reference to the defendant's disclosure of mislabelling and assigning the negligent mislabelling as the proximate cause of injury. The trial court, upon the defendant pleading res judicata, rendered a summary judgment against the plaintiff. The Supreme Court affirmed the judgment basing its *rationale* not upon " 'the estoppel arising from the judgment as res judicata but rather that arising where a party litigant attempts to assume inconsistent and contradictory positions with respect to the same matter.' "[79] In another case, *Drawdy Investment Company v. Leonard*,[80] the plaintiff sued to quiet title. Formerly he had sued the same defendant in ejectment where, after filing at least five successive bills of particulars in an attempt to state a cause of action, his action was dismissed for failure to state a ground upon which relief could be granted. He did not avail himself of leave to amend which had been given in the order of dismissal. The substance of the bill in the present suit was not at variance with the bill of particulars in the former action. In affirming the judgment dismissing the present suit, the court held that it was unnecessary to discuss the doctrine of res judicata since the simple rule of stare decisis applied.[81]

Res Judicata—Invocation Withheld

While the policy of res judicata is to bring litigation to a timely end, under exceptional circumstances the doctrine may be withheld so as not to defeat justice. In *Universal Construction Co. v. City of Fort Lauderdale*,[82] the question arose whether the defendant-city could raise the defense of res judicata in an action in quantum meruit for "additional improvements" which the plaintiff-company had made incident to but not within the terms of its contract to construct a special fund project for the city. In a former suit which the city had instituted against the company for a declaratory decree and other relief and in which the company sought by counterclaim to recover on the express contract for the improvements, the court determined that the company was obligated

79. *Quaere*: Does this type of case differ from inserting contradictory facts by amendment in the first action? The complaint had not been verified.

The court could have based its decision upon plaintiff's failure to amend his complaint in the first action, having been given the opportunity to do so. See, *e.g.*, Elfman v. Glaser, 313 Mass. 370, 47 N.E.2d 925 (1943). If the plaintiff's second action had charged the defendant with negligently making the disclosure, it appears from the court's opinion that he would not have been prevented from doing so. It is submitted that the suggestion as to failure to amend is a better rule.

80. 77 So.2d 855 (Fla. 1955).

81. Here again the court could have based its decision upon plaintiff's failure to amend his complaint in the first action.

82. 68 So.2d 366 (Fla. 1953).

to construct "additional buildings" under the contract, and that although during the construction of such buildings the plaintiff constructed "additional improvements" which were approved and accepted by resolution of the city as performance of the obligation to build "additional buildings," the agreement and acceptance were *ultra vires;* therefore, a decree for damages was entered against the company for failure to construct "additional buildings." It was also held that the company's counterclaim on the express contract failed as a matter of law. The Supreme Court stated that the cause of action on quantum meruit in the present action was identical with the cause of action in the former suit, and that although the doctrine of res judicata would prevent the company from raising any issue which might have been presented in the former action, the court would not permit that defense to be invoked since the parties had acted in good faith and unjust enrichment would otherwise result.

Collateral Estoppel

> The court defined again the principle of collateral estoppel:
> . . . where a later suit between the same parties as were involved in a prior litigation is upon a different claim or demand . . . the judgment in the prior action will not operate as an estoppel except as to those matters "actually litigated and determined in the initial action", (case cited), or those "rights or questions * * * necessarily involved in the conclusions reached". (cases cited)[83]

Illustrative of this principle was a quo warranto proceeding to annul the charter of a corporation wherein a woman, named as a party thereto, filed a cross-bill against her divorced husband and the corporation contesting the validity of the property settlement determined in the divorce suit. Since the property settlement involved assets of the corporation, the woman by attacking its validity sought to have her rights in such assets adjudicated. The court held that she was estopped by the decree to raise the question.[84] Also, in *Donahue v. Davis,*[85] *supra,* stockholders sued other stockholders for fraud incident to the purchase of an asset for the corporation; it was held that although the fraud was disclosed in a prior action between the same parties for conversion of stock certificates, it did not bar the present suit, since the fraud was not necessarily involved in the conclusions reached in the previous action nor was it in fact a litigated issue. In the interesting case of *Avant v. Hammond Jones, Inc.,*[86] the court decided that A, a plaintiff-vendee, was estopped to maintain an action against B, a vendor, for the conversion of spreaders welded by A to trucks which had been sold to A by B on a conditional sale contract and which had been replevied by B. The court reasoned that in the replevin

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83. Donahue v. Davis, 68 So.2d 163 (Fla. 1953).
84. Reed v. Reed, 70 So.2d 236 (Fla. 1954).
85. 68 So.2d 163 (Fla. 1953).
86. 79 So.2d 423 (Fla. 1955).

action, in which B prevailed by default, the rights to possession of the spreaders as well as the trucks were adjudicated.[87]

Statute of Limitations—Applicability

A few cases set at rest the applicability of several enactments limiting actions. In a case of first impression the court, swayed by the great weight of American authority, held that the two-year statute of limitations which is expressly applicable to "an action for libel [and] slander"[88] embraces too an action for slander of title.[89] And the same two-year statute, which also governs "an action by another than the state upon a statute for a penalty or forfeiture,"[90] was held to constitute a defense to a suit to cancel a mortgage and a note on grounds of usuary.[91] In another case the court decided that actions arising under the Bastardy Acts of 1828 and 1951 are governed by the three-year statute, since such actions fall within the definition of "an action upon a liability created by statute, other than a penalty or forfeiture";[92] in such cases under the acts a court of equity will give the statute substantially the same effect as it would receive in a court of law.[93]

Statute of Limitations—Accrual of Cause of Action

The court answered some difficult questions relative to when a cause of action accrues for purposes of ascertaining expiration of the period of limitation. It was held that the right of recovery on a husband's express contractual obligation to pay weekly instalments to his former wife for the support of their minor child accrued against each payment as it fell due.[94] In another case the court decided that a right of action for slander of title is not a continuing one but accrues at the time the tortious act occurs, *e.g.*, wrongfully and maliciously filing a notice of lien.[95] Drawing a nice distinction between notice of a negligent act and notice of its consequences, the court in *City of Miami v. Brooks*[96] held that a cause

87. . . . or should have been adjudicated. The decision could have been based upon failure to file a compulsory counterclaim in the replevin action. FLA. STAT. § 52.11 (1) (1953).

88. FLA. STAT. § 95.11 (6) (1953).

89. Old Plantation Corp. v. Maule Industries, 68 So.2d 180 (Fla. 1953). Otherwise the four-year period applicable to actions for relief not specifically provided for in Chapter 95 would have governed. FLA. STAT. § 95.11(4) (1953).

90. It is commonly employed as a defense to an action to recover on a promissory note exacting usurious interest under FLA. STAT. §§ 687.03, 687.04.

91. Young v. Wilder, 77 So.2d 604 (Fla. 1955).

92. FLA. STAT. § 95.11(5)(a) (1953).

93. Wall v. Johnson, 78 So.2d 371 (Fla. 1955). In the absence of compelling considerations, a court of equity will give the statute of limitations the same effect as will a court of law; this well settled rule was reiterated in H. K. L. Realty Corp. v. Kirtley, 74 So.2d 876 (Fla. 1954).

94. Isaacs v. Deutsch, 80 So.2d (Fla. 1955). Justice Terrell, writing a dissenting opinion, urged that the husband's obligation "to furnish labor and rations," as he put it, was a continuing one and therefore accrued upon the maturity of the obligation, *i.e.*, when the minor child reached majority.

95. Old Plantation Corp. v. Maule Industries, 68 So.2d 180 (Fla. 1953).

96. 70 So.2d 306 (Fla. 1954).

of action for personal injuries arising from negligently overexposing the plaintiff to X-rays during medical treatment accrued, not necessarily when the overexposure took place, but when the plaintiff knew or had reason to know of the violation of her right. And in *South Hastings Drainage District v. Wright*[97] the court decided that a cause of action for payment of bonds payable out of a special fund, such as those of a drainage district, does not accrue if the particular fund has not been established.[98]

Statute of Limitations—Tolling

In accordance with the general rule that there is no tolling of a statute of limitations unless statutory provision is made therefor, it was held that the insanity of the plaintiff will not toll the running of the statute in an action for slander of title.[99] It was also held that where a common law action was perpetually enjoined incident to a suit in equity, the statute of limitations on a debt which was the subject of a counterclaim in the common law action tolled until the debt was asserted as a counterclaim in the suit.[100]

PRETRIAL MOTIONS

Motion to Dismiss—Res Judicata

Although the rules make no mention of raising res judicata as a defense by way of motion to dismiss, in *Cohen v. Cohen*[101] the court held that it was permissible to raise it by such a motion where the complaint on its face contains the facts of the defense.

Motion for Summary Judgment—Test

A substantial number of appeals came to the court involving summary judgments.[102] A motion for a summary judgment or decree should be allowed:

> If the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law.[103]

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97. 72 So.2d 826 (Fla. 1954).

98. Obviously, it is based on the theory that establishment of the fund is a condition precedent to obtaining satisfaction thereon.

99. Carey v. Beyer, 75 So.2d 217 (Fla. 1954); FLA. STAT. § 95.11(6). *Cf.* FLA. STAT. § 92.20 (1953) which provides for tolling the statute in actions involving adverse possession of real property during the disseisee's insanity.

100. Schwartz v. Zaconick, 74 So.2d 108 (Fla. 1954).

101. 70 So.2d 362 (Fla. 1954). The Federal Rules of Civil Procedure are similarly interpreted. 2 MOORE, FEDERAL PRACTICE (2d ed. 1948) par. 8. 28.

102. More than 20 appeals wholly or almost wholly involved the allowance or disallowance of a summary judgment. The motion for summary judgment has not only resulted in a great savings of time and expense at the trial level, but it has also brought a net advantage to the Supreme Court, which, if the procedure for summary judgment had not been instituted, would be hearing many more appeals on motions for a new trial, etc.

103. FLA. R.C.P. (1954), r. 1.35(c); substantially unchanged from C.L.R. (1950), r. 43 and E.R. (1950), r. 40.

Hence, the test for allowing such a motion is "no genuine issue as to any material fact," and not the absence of merely a "substantial controversy."[104] Doubts as to the existence of a genuine issue of a material fact must be resolved against granting the motion.[105] The accepted practice, furthermore, is to "accord the chancellor reasonable latitude in determining whether there is in fact a case to be tried."[106]

Motion for Summary Judgment—Matter Considered for Decision

A few miscellaneous questions arose as to the kind and relative weight of matter which the trial judge may consider in determining the absence of a genuine issue as to material facts. Upon the retrial of a case the court may consider material excerpts from testimony in the first trial.[107] Further, a judge may "pierce the shield of the pleadings in search of a genuine issue."[108] Also, on defendant's motion for a summary judgment a verified complaint should be accorded dignity equal to that of defendant's affidavits, *i.e.* counter-affidavits,[109] In another case the court held that an affidavit of "belief" of an ultimate fact is insufficient to support the truth of such fact.[110] Moreover, without an adequate explanation, a party contesting a motion may not create a genuine issue of a material fact by repudiating in his affidavit facts set out in his antecedent deposition, such deposition

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104. Cannon v. Putnam County, 75 So.2d 577 (Fla. 1954).

105. Johnson v. Studstill, 71 So.2d 251 (Fla. 1954); Manning v. Clark, 71 So.2d 508 (Fla. 1954). In the former case, at p. 252, the court quoted the following with approval:

> '(1) Factual issues are not to be tried or resolved by summary judgment procedure; only the existence of a genuine and material factual issue is to be determined. Once it is determined that there is such an issue summary judgment may not be granted;
>
> (2) In making this determination doubts (of course the doubts are not fanciful) are to be resolved against the granting of summary judgment;
>
> (3) There may be no genuine issue even though there is a formal issue. Neither a purely formal denial nor, in every case, general allegations, defeat summary judgment. On this point the cases decided by this court must rest on their own facts rather than upon a rigid rule that an assertion and a denial always preclude the granting of summary judgment. Those cases stand for the proposition that formalism is not a substitute for the necessity of a real or genuine issue. Whether the situation falls into the category of formalism or genuineness cannot be decided in the abstract;
>
> (4) If conflict appears as to a material fact the summary procedure does not apply unless the evidence on one or the other hand is too incredible to be accepted by reasonable minds or is without legal probative force even if true;
>
> (5) To support summary judgment the situation must justify a directed verdict insofar as the facts are concerned.'

106. Lewis v. Lewis, 73 So.2d 72 (Fla. 1954).

107. Bradley v. Associates Discount Corp., 67 So.2d 913 (Fla. 1953).

108. Lewis v. Lewis, 73 So.2d 72 (Fla. 1954).

109. Booth v. Board of Public Instruction, 67 So.2d 690 (Fla. 1953).

110. Waldo v. United States Ramie Corp., 74 So.2d 106 (Fla. 1954).

being filed by the movant in support of the motion.[111] And where facts are admitted, such facts should be ultimate facts as contradistinguished from evidentiary facts, for where several inferences of ultimate facts may be drawn reasonably from admitted evidentiary facts, the court in granting the motion would invade the province of the jury.[112]

Motion for Summary Judgment—Judgment for Movee

Following the construction given to the federal rule, the court held that upon plaintiff's motion for a summary judgment where there is no genuine issue as to any material fact, the trial judge may grant a summary judgment for the defendant.[113]

Motion for Summary Judgment—Order of Hearing Several Motions

Where both a motion for a summary judgment and a motion to strike a pleading are concurrently before the trial judge, determining the order in which he hears them falls within the judge's discretion to control his docket.[114]

AMENDMENTS

Liberally Allowed—Discretion

Generally amendments should be allowed "in furtherance of justice."[115] The court has followed a liberal policy towards this end; and on a number of occasions trial judges have been reversed for improperly refusing leave to amend.[116] In a recent case, for example, the trial court was reversed where it refused to permit the plaintiff to amend his complaint after his original and two amended complaints were dismissed for failure to state a cause for relief and leave to amend was withheld. Upon additional counsel being retained, the plaintiff sought to amend his complaint a third time. The amendment was considered by the court and refused, probably on the ground of inadequacy in law. Mainly because of this and also because of a lack of dilatoriness in the case, the Supreme Court concluded the trial court should have allowed the amendment and should have subsequently passed upon its adequacy in law.[117]

It appears that where a complaint is insufficient in law, and there is *some* expectation that the plaintiff actually has a cause of action, he

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111. Ellison v. Anderson, 74 So.2d 680 (Fla. 1954).
112. National Airlines v. Florida Equipment Co., 71 So.2d 741 (Fla. 1954). The court implied that the facts admitted should always be ultimate facts. Yet its language should be restricted to the case. Where but one inference can be drawn reasonably from admitted evidentiary facts, the reason for requiring admissions of only ultimate facts fails.
113. Carpineta v. Shields, 70 So.2d 573 (Fla. 1954).
114. Lewis v. Lewis, 73 So.2d 72 (Fla. 1954).
115. FLA. R.C.P. (1954) r. 1.15(e).
116. Twyman v. Livingston, 58 So.2d 518 (Fla. 1952). Garview v. Cloverleaf, Inc., 136 Fla. 899, 187 So. 360 (1939).
117. Wilensky v. Perell, 72 So.2d 278 (Fla. 1954).

should be given an opportunity to amend. In *Slavin v. McCann Plumbing Co.*,[118] the plaintiff, a guest in a motel, received injuries from a wash basin located in his room. He joined the plumbing contractor as a defendant and charged it with negligence. Although it is a well settled rule that such a contractor is neither liable for ordinary negligence nor comes within the rule as to dangerous instrumentalities, the court held that in view of the many exceptions to the rule, the plaintiff should have been given leave to amend.

While justice may be furthered through liberality of amendment, such liberality can promote a contrary effect where it encourages unreasonable violation of rules of procedure or leads to dilatoriness. *Pearson v. Sindelar*[119] is illustrative of this point. In that case the defendant amended his defense three times and was given leave to amend it a fourth time. His original answer and the first amendment, being obscure and prolix, were stricken on motion; his answer as amended a second and third time were shams. The defendant stood on his answer as amended a third time and went to the Supreme Court on appeal where the action of the lower court was affirmed. "Justice delayed is justice denied."

Stage of Proceedings When Made

Amendments may be permitted during or after trial where they do not prejudice the opposing party. Hence, it was held proper where there was no surprise to allow during the trial an oral motion to add special damages (funeral expenses) to the complaint.[120] But in *Seltzer v. Brine*[121] the opposite result was reached where a similar amendment was moved and allowed after the defendants' closing argument and before the plaintiff's rebuttal; not having litigated the matter and having had no notice of the claim and no opportunity to meet it at the trial or comment on it thereafter, permitting the amendment was deemed prejudicial error. In another case[122] the principle of the statute of jeofailes and amendments[123] was applied after judgment and on appeal to amend the defendant's answer. In that case the defendant adduced evidence of a judgment of a sister state, as an estoppel, at the final hearing without having pleaded it.[124] To correct harmless error and to satisfy the basic rule that *allegata* and *probata*

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118. 73 So.2d 902 (Fla. 1954).
119. 75 So.2d 295 (Fla. 1954).
120. Smollin v. Wilson, 74 So.2d 685 (Fla. 1954).
121. 79 So.2d 688 (Fla. 1955).
122. Overly v. Overly, 66 So.2d 706 (Fla. 1953).
123. FLA. STAT. § 54.26 (1953). The court does not cite this statute, but instead cites an early case based upon it.
124. The principal case held that a party may adduce evidence of estoppel at the final hearing—after the pleadings are closed and testimony before the master is completed—where he has no prior opportunity to plead an estoppel.

must correspond, the court presumed the answer to be amended so as to include the defense of estoppel.[125]

Changing "Cause of Action"

A plaintiff may not change his "cause of action" by amendment. This ancient rule becomes of vital importance where a plaintiff, in order to recover, must amend his complaint and if forced to institute a new action would be put to a serious disadvantage, e.g., great difficulty in obtaining service of process upon the defendant. In applying the rule, determining what constitutes changing a cause of action becomes pertinent. The problem arose in *Lopez v. Avery*,[126] where a wife brought suit against her husband for the supersession[126a] of a Missouri decree for the future support of their minor child on the basis of changed circumstances. The husband, a non-resident of Florida, was served with process in Florida. Upon allowing a motion to dismiss for failure to state a claim upon which relief could be granted, the plaintiff was given leave to amend. Her amended complaint was dismissed on motion on the basis that it changed her cause of action, although as amended her complaint was essentially the same as the original complaint as to facts alleged and relief sought save that the amendment added a prayer for the establishment of the Missouri decree in Florida as a local decree and for alteration of the latter decree. The original complaint was defective, it appears, because it sought modification of the Missouri decree directly. In reversing the trial court and rejecting the contention that the amendment substantially and, therefore, improperly departed from the original pleading, the court applied the test:

> . . . whether the matter introduced by way of amendment requires a different character of evidence for its support than would be required for proof of the antecedent pleading and whether proof of additional facts will be required to sustain the late pleading.[126b]

Also putting it another way, it said:

> . . . where an amended pleading asserts rights or claims arising out of the same transaction, act, agreement or obligation in which the original pleading is founded, and the parties in interest and the essential elements of the controversy remain the same, the amendment will not be regarded as a new cause of action . . . .

Discovery

Interrogatories—Decision on Objections—Delay

Discovery obtained through interrogatories may obviate the need for the entire trial or a part thereof. It is, therefore, important that such a

125. Incidentally, this decision obviated the need to decide whether a letter from defndant's counsel presumably to plaintiff's counsel constituted an express amendment to defendant's answer.

126. 66 So.2d 689.

126a. The suit was not brought to modify the Missouri decree, but to supersede its terms.

126b. Gerstel v. William Curry's Sons Co., 20 So.2d 802, 804 (Fla. 1945).

valuable procedural tool be administered properly. In *Lilli Ann Corp. v. Wilck*[127] the plaintiff sought damages for piracy of trade-names used on garments sold by the defendant. The defendant objected to the plaintiff's interrogatories which sought to discover the defendant's source of supply; the defendant claimed that to answer would reveal a trade secret. Although the only issue of fact in the case was whether the plaintiff manufactured the garments sold by the defendant or whether such garments were imitations of those manufactured by the plaintiff, the chancellor reserved his decision until the hearing on the merits. On certiorari such reservation was held to be an abuse of discreton.

TRIAL

Several Claims

Although the modern tendency is to permit several claims to be tried together in order to effect economy of time and money, where claims are unrelated and trying them at the same time will result in great confusion, separate trials should be ordered. In *Nash v. Walker*[128] the plaintiff sued the defendant on an account and garnished a bank of which defendant was a depositor; the defendant counterclaimed for damages allegedly caused by the plaintiff's abusive employment of the writ of garnishment. The court held error was committed where such unrelated claims in contract and tort were tried together.

Right to trial by jury—Proceedings Supplementary to Execution

There is no right to trial by jury in statutory proceedings supplementary to execution whereby fraudulent conveyances made by the defendant may be set aside.[129] In *Dezen v. Slatcoff*[130] the defendant had transferred his title to an automobile to his wife, W, the day he was served with process. In an answer to a rule to show cause why the transfer should not be declared fraudulent and set aside, W contested the allegations as to the transfer and claimed trial by jury. Upon examination of affidavits and documentary evidence, and after a hearing, the trial court set aside the transfer. The Supreme Court concluded that Common Law Rule 31 ("Demand for Jury Trial—Waiver")[131] had no application to such a proceeding, and further that no constitutional right to trial by jury was involved. The court pointed out that after the sheriff levies upon such property—the automobile in this case—W, pursuant to the statute, may file a claim to the property and in that proceeding demand a trial by jury.[132]

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127. 79 So.2d 677 (Fla. 1955).
128. 78 So.2d 685 (Fla. 1955).
129. Such proceedings are provided for by FLA. STAT. § 55.57 (1953).
130. 66 So.2d 485 (Fla. 1953).
131. Now FLA. R.C.P. (1954) r. 2.1.
132. FLA. STAT. § 55.57 (1953) provides for filing a bond with the claim in the manner required in other cases where a third person claims property taken under levy.

Peremptory Challenges—Partners

The court has interpreted Section 54.11 of the Florida Statutes, which provides that in a civil cause "each party shall be entitled to three peremptory challenges," to mean that where partners are sued as such in tort, the partnership in effect being the "real" party, the partners collectively, not severally, are entitled to three challenges.[133]

Directed Verdict—Opening Statement

Unlike the rule in several jurisdictions, in Florida a directed verdict may not be granted upon the legal inadequacy of plaintiff's opening statement, the purpose of the statement being merely to disclose the plaintiff's theory of recovery and what he intends to prove. Hence, where the trial court directed a verdict for the defendant "on the ground that the facts of the opening statement, if proved, would not be sufficient for a jury verdict under the guest statute," the Supreme Court reversed the direction.[134]

Admitting Facts—In Open Court

Where counsel admits facts and neither he nor his client understands the legal effect of the facts admitted, the client is not bound by the admission. Employing this dubious general principle in order to effect a just result, the Supreme Court concluded that an admission by counsel in open court that the only issue in the case was that of damages was not wholly binding on the client since neither counsel nor client realized that thereby counsel was admitting the legal validity of the plaintiff's cause of action.[135]

Recess—Discretion

Seldom does the court find an abuse of the trial court's discretion in the latter's calling or failing to call a recess. In *Herbert v. Garner*[136] such an abuse was found. It was a personal injury action in which the defendant requested a recess until the following morning so that a doctor who attended the plaintiff could testify; the time was 3:30 P.M.; it was the last day of trial; the doctor was engaged elsewhere treating a patient requiring his attention; counsel for defendant had done all the law required to have the doctor present.

Continuance—Discretion

In another case the trial judge was held not to have abused his discretion where plaintiff's counsel was refused a continuance. The suit was commenced in 1949, was at issue in January, 1952, was noticed for trial by defendant in September, 1952, and was set for trial one month

133. Loftin v. Wilson, 67 So.2d 185 (Fla. 1953).
134. Van Hoven v. Burk, 71 So.2d 158 (Fla. 1954).
135. Love v. Hannah, 72 So.2d 39 (Fla. 1954). It is very doubtful that the general principle will be employed other than in rare instances.
136. 78 So.2d 727 (Fla. 1955).

thereafter. The plaintiff's counsel sought a continuance because depositions of the plaintiff, who was in Mississippi, had not been received, although arrangements had been made with associate counsel in Mississippi to get them. Emphasizing that until the day of trial plaintiff's counsel lacked information as to whether the depositions had been taken and implying thereby that assiduous effort to secure the depositions had not been made, the court held that it was not error for the trial judge to deny a continuance and to order dismissal.[137]

Conference Prior to Charge—Not Held

Although a trial judge's failure to hold a conference at the conclusion of evidence in order to settle instructions is a violation of the rules of court,[138] it is not prejudicial error where counsel sits idly by and does not request the court to hold such a conference. Further, a request for such a conference after the jury has retired may be refused for tardiness.[139]

Charge—Misleading

In charging the jury the judge must not assume the truth of controverted facts or instruct the jury as to duties owed by the defendant which are not supported by evidence. In *Bessett v. Hackett*[140] the trial judge instructed, "If a motorist is driving on a race track, he is excused in pulling the throttle wide open to see just how fast he can make her go, but that is not the rule when driving through a populous community;" and "in many rural communities it is not necessary to bring one's car down to the speed required in passing schools and through the cities." At the trial evidence as to the speed of the automobile was in serious conflict, and the only evidence as to the type of community in which the locus in quo was situated was that it was rural. The charge was prejudicial error, since the jury might have assumed readily that the judge had concluded that the defendant was speeding recklessly through a populous community.

Jury Retired—Review of Evidence

Florida Power and Light Co. v. Robinson[141] illustrates the wide discretion reposed in the trial judge in his conduct of a trial. It was held that it is not an abuse of discretion to deny a jury's request to have portions of the evidence read to them during their deliberations; further, the judge may refuse to repeat part of his charge, if it was explicit, for repetition of a part tends towards unfair emphasis.

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137. Rainey v. Roesall Corp., 71 So.2d 160 (Fla. 1954).
138. C.L.R.,(1950) r. 39 (b); now FLA. R.C.P. (1954) r. 2.6(b).
139. Luster v. Moore, 78 So.2d 87 (Fla. 1955).
140. 66 So.2d 694 (Fla. 1953).
141. 68 So.2d 406 (Fla. 1953).

Verdict—Avoidance by Juror's Affidavit

A verdict may be avoided after rendition by affidavits of jurors disclosing improprieties occurring during the trial or in the jury room which do not inhere in the verdict, *e.g.*, reaching a verdict by a quotient.[142] Such impropriety, however, where it is brought to the attention of the trial judge who inquires properly into the matter and determines the issue prior to discharge of the jury, may not be raised later by affidavit. Where, therefore, a judge suspected a verdict was a quotient verdict and explained to the jurors the meaning of a quotient verdict, inquired into the manner in which the verdict was reached, polled the jurors as to whether the verdict was that of each individual juror and determined that the verdict was not a quotient verdict, it was proper to refuse a subsequent affidavit signed by a juror indicating that the verdict was a quotient verdict.[143]

Verdict—Formal Defect

Formal defects in a verdict are waived if not objected to timely. Hence, where a jury rendered a verdict in favor of two of three plaintiffs in different sums and as to a third plaintiff found "for the plaintiff . . . and against the defendant . . . , and assess her damages in the sum of None Dollars . . . ;" and also found "for the defendant . . . in the case of *Carolyn R. Higbee* [the third plaintiff] *v. Werner Dorigo* [the defendant]," a clear intention to deny the third plaintiff any recovery was manifested; such defect was merely formal and was waived by failure to object earlier.[144]

MOTION FOR NEW TRIAL

Prejudice of Juror Withheld on Voir Dire

Where a prospective juror on his voir dire examination withholds information which if disclosed would have indicated his animosity towards a party and the party knew such information, the party does not have grounds for a new trial. Where, however, such information pertains to animosity against one of two alleged concurrent tortfeasors, the other tortfeasor, if he lacked the information, is prejudiced. In such an action, therefore, the court held that the juror's withholding of such information was grounds for a new trial.[145]

Prejudicial Remarks by Judge

Where a judge in the course of a trial announces to the jury that the parties are attempting to settle the case, such remarks, although

142. Jackson Grain Co. v. Hoskins, 75 So.2d 306 (Fla. 1954).
143. Marks v. State Road Dep't, 69 So.2d 771 (Fla. 1954). The court reasoned (p. 776) that to do otherwise "would result in unnecessarily harrassing jurors and hampering the effectual administration of justice. Moreover, we can imagine no better time and place to decide the question with greatest accuracy than at a time when all events are fresh in the minds of the jury and all interested parties are present." Does not the case demonstrate the practical invalidity of the latter reason?
144. Higbee v. Dorigo, 66 So.2d 684 (Fla. 1953).
145. Loftin v. Wilson, 67 So.2d 185 (Fla. 1953).

ill-advised, are not sufficiently prejudicial to compel the trial judge to declare a mistrial.[146]

Newly Discovered Evidence

In *Springer v. Morris*[147] the court had occasion to repeat the six restrictions on granting a new trial for newly discovered evidence. They are worthy of reiteration:

> (1) The evidence must have been discovered since the former trial; (2) the party must have used due diligence to procure it on the former trial; (3) it must be material to the issue; (4) it must go to the merits of the cause, and not merely to impeach the character of the witness; (5) It must not be merely cumulative; (6) it must be such as ought to produce on another trial an opposite result on the merits.[148]

On Some Issues

Since 1951 the Circuit Court has had power to grant a new trial on all or less than all of the issues in a case. Power to grant a new trial on less than all issues may be exercised only where the issues in the case are severable.[149] In an action against a railroad company for personal injuries the jury awarded excessive damages to the plaintiff. The court said that ordering a new trial on the issue of damages alone was proper; it was convinced that both the plaintiff and defendant were negligent; the jury although it had been instructed on the doctrine of comparative negligence either failed to apply the doctrine properly or disregarded the evidence.[150]

ORDER, JUDGMENT AND DECREE

Reinstating Action Dismissed for Lack of Prosecution—"Good Cause"

Pending actions may be dismissed where they have not been prosecuted for a year or more; within one month of dismissal application for reinstatement may be made and allowed for "good cause shown to the court."[151] The mere fact that the parties were seeking to settle the case at the time of dismissal is not good cause.[152] Nor is the fact that to commence an action anew will result in additional cost—at least where such cost is not substantial.[153]

Judgment by Default—Opening Default

A default judgment for failure to plead may be removed for good cause if such removal is applied for within 60 days from entry of default

146. Martin v. Johns, 78 So.2d 308 (Fla. 1955).
147. 74 So.2d 781, 785 (Fla. 1954).
148. Howard v. State, 17 So. 84, 85 (Fla. 1895).
149. Brinson v. Howard, 71 So.2d 172 (Fla. 1954).
150. Martin v. Johns, 78 So.2d 398 (Fla. 1955).
151. FLA. STAT. § 45.19 (1953).
152. Atlantic Coast Line R.R. v. Hill, 76 So.2d 861 (Fla. 1955).
153. Early v. Sarasota-Fruitville Drainage Dist., 67 So.2d 441 (Fla. 1953).

or if a term of court intervenes, during the intervening term.[154] Hence, where the defendant negligently failed to plead to the complaint and applied more than 85 days after entry of default to have the default removed, the trial court was without power to allow the application. Further, the clerk's failure to enter default in the proper docket did not affect the 60-day period since 1) recordation of the default was unnecessary by statute[155] and 2) application was made 75 days after entry of final judgment.[156]

Reopening—Further Testimony

Reopening a case for the introduction of further testimony lies within the sound discretion of the judge. Therefore, where such a motion was made about seven weeks after trial and about five weeks after final hearing and the findings and the decree had been announced but not reduced to writing, the chancellor did not err in denying the motion. Opportunity to introduce the "further testimony" at the trial had been present.[157]

Injunction—Bond

To secure a temporary injunction a plaintiff must post a bond of indemnity or other security, unless he is unable to do so.[158] Therefore, where no such security was given and inability to post security was not shown, it was held error to enter an injunction and continue it in force after taking testimony on a motion to dissolve.[159] In another case a bond was given and a temporary injunction was issued. Subsequently the order was dissolved with leave to amend the bill. Thereupon the plaintiff amended his bill and a new temporary restraining order was issued without a further bond or security. The court held that the chancellor was in error in issuing the injunction without new security, since the obligation of the surety on the bond was confined to the original bill and could not be enlarged by order of the court.[160]

Injunction—Definiteness and Certainty

Injunctions should be definite and certain so that the persons at whom they are directed can know what is required of them. In *Pizio v. Babcock*[161] an injunction was held defective where it enjoined the defendants "from . . . 10:00 p.m. until . . . 7:00 p.m." doing a number of acts, one of which was "emptying garbage during the late hours of the

154. FLA. STAT. § 50.10 (1953).
155. FLA. STAT. § 28.89 (1953).
156. State v. Hefferman, 71 So.2d 745 (Fla. 1954).
157. Reading v. Blakeman, 66 So.2d 682 (Fla. 1953).
158. FLA. STAT. § 64.03 (1953). Lewis v. Lewis, 66 So.2d 260 (Fla. 1953).
159. International Brotherhood v. Miami Retail Groc., 76 So.2d 491 (Fla 1954).
160. Hall v. Hanford, 66 So.2d 474 (Fla. 1953).
161. 76 So.2d 654 (Fla. 1954).

night and early hours of the morning . . . ." In addition to this inconsistency the court considered "late hours" and "early hours" to be uncertain.

Injunction—Mandatory

Mandatory injunctions should not be issued prior to the final hearing except "where the right is clear and free from reasonable doubt." So the court said in *Kline v. State Beverage Department of Florida*[162] where the chancellor refused a petition by a liquor licensee for a mandatory injunction to require the Beverage Department to restore to him beverages it had confiscated; he also sought to enjoin it from interfering with his liquor license. The beverages had been seized when the licensee continued to dispense intoxicants after the department had revoked his license on grounds of illegal issuance. Although the Supreme Court in this case held the department's action to be improper because the licensee had not been given notice and an opportunity to be heard in the revocation proceedings, the law on this point prior to this decision had not been "clear and free from reasonable doubt." For this reason and also because the final hearing had been set soon thereafter—23 days after the preliminary hearing—the court held the refusals of temporary and mandatory injunctions were not an abuse of discretion.

Modification of Decree—Notice—Procedural Due Process

In *Attaway v. Attaway*[163] upon the wife's application the circuit court sentenced the defendant-husband to jail for failure to pay past due alimony, giving him the opportunity to purge himself by payment. Without notice to the wife and without affording her an opportunity to be heard the order was modified, and the husband was released upon his promise to pay past due alimony, and in addition he was relieved from his obligation to pay future alimony. *Held*: it was error to enter the order without notice to the wife or affording her an opportunity to be heard.

In *Moore v. Lee*,[164] an action for custody of a child, a petition was filed to modify the final decree which awarded custody to the defendant. Notice of the proceeding was not given to the defendants and hence it was error under such circumstances to have modified the decree.

GARNISHMENT

Equity Decree as Debt

Are garnishment proceedings available where a plaintiff has a final decree in equity providing for the payment of money alone? By answering in the affirmative the court put the doubts of many years at rest.[165]

162. 77 So.2d 872 (Fla. 1955).
163. 80 So.2d 352 (Fla. 1955).
164. 72 So.2d 281 (Fla. 1954).
165. Gordman Corporation v. Bethel Construction Co., 77 So.2d 449 (Fla. 1955).

Amending Bond

Although there is no specific statute permitting the amendment of a garnishment bond (as in the case of an attachment bond),[166] nevertheless, a garnishment bond may be amended on the basis of the statutory provision generally permitting amendments. In *Corbin v. St. Lucie River Co.*[167] the plaintiff filed an affidavit in garnishment accompanied by a garnishment bond. When the defendant moved to dissolve and quash the writ, presumably on the ground that the bond was not "in at least double the debt or sum demanded,"[168] the plaintiff filed a new bond sufficient in sum, but the trial court allowed the defendant's motion nevertheless. This was held to be error.[169]

Abuse of Writ

After considering various provisions of Florida Statutes, Chapter 77, relating to garnishment, the court concluded that the defendant's giving a bond in discharge of a writ of garnishment does not constitute a waiver of liability incurred from abusive employment of the writ.[170] Worthy of great consideration is the court's opinion that the law of garnishment is "complex and confusing" owing to deficiencies in our garnishment statutes; these statutes need "a thorough legislative overhauling."[171]

CONTEMPT

Opportunity to be Heard

Rule 3.15 ("Enforcement of Final Decree"), formerly Equity Rule 67, provides that upon the plaintiff's filing an affidavit the clerk of court shall issue a writ of attachment against a person who has allegedly violated a decree ordering him to perform a specific act within a stated time. The court has held that this rule can have no application to the violation of support decrees providing for periodic payments. Amongst several objections to its application, it would violate the defendant's constitutional right to an opportunity to meet a charge prior to imprisonment.[172] In another case counsel who failed to attend a pretrial conference, although notified by the court to be present, was fined summarily by the trial judge without being given an opportunity to be heard. The court, although emphasizing the importance of the pretrial conference in expediting litigation and the

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166. FLA. STAT. § 76.29 (1953).
167. 78 So.2d 396 (Fla. 1955).
168. FLA. STAT. § 77.18 (1953).
169. It is respectfully submitted that the court was in error. The court cited FLA. STAT. § 50.20 (1953) which refers to amending pleadings. This statute, however, was repealed by Laws of Fla. c. 26962, § 1 (1951). The principal case was commenced in 1954. One must, however, agree with the court's result.
170. Nash v. Walker, 78 So.2d 685 (Fla. 1955).
171. All who have studied Florida's garnishment statutes must concur with the court. Our statutes relating to attachment are likewise in need of repair.
172. Atkinson v. Atkinson, 80 So.2d 464 (Fla. 1955).

need for cooperation of attorneys in that proceeding, concluded that the case is not one warranting summary discipline.[173]

Intention

Where a defendant unintentionally violates a restraining order, he should not be found in contempt. In *Florida Ventilated Awning Co. v. Dickson*,[174] where the defendants were restrained from using a certain trade name, the court reversed the contempt order of the chancellor since the violation of the order was unintentional. Significant facts: the order was complex and comprehensive; the violation was not of "great importance"; the defendants were laymen of good repute; the violation ceased when the defendants were apprised of it.

MASTERS

Objection to Appointment

An extremely significant opinion relating indirectly to the expense of litigation and the character of the chancery judicature is that in *Slatcoff v. Dezen*[175] wherein the question arose whether a chancellor, over the objection of a party, is empowered to refer a case to a master with instructions to hear witnesses, make findings of fact and report his findings and his determinations as to the applicable law. After a scholarly historical exposition on the authority of judges to appoint quasi-judicial assistants to determine litigation and after a definitive review of the weight and conclusiveness to be accorded to masters' findings, the court concluded that the chancellor in the principal case lacked power to appoint a special master. The court said that on the one hand a chancellor has authority to appoint a special master to serve ministerially to perform a "particular service"—even over the protestations of the parties—and on the other hand he has no power to delegate to a special master authority to hear and determine an entire case without the parties' consent. The present case lay between these extremes.

Weight of Findings

In *Frank v. Frank*,[176] a divorce suit, the weight to be accorded to a master's findings was brought into focus. With the consent of the parties a special master had been appointed to make findings of fact, conclusions of law and recommendations. Contrary to such findings the chancellor denied a divorce decree, concluding that the plaintiff had not sustained the burden of proving that she established a Florida domicile, a jurisdictional fact. Applying the rule that a master's findings should be adopted unless clearly erroneous, the Supreme Court reviewed the evidence and reversed the chancellor.

173. Lee v. Bauer, 72 So.2d 792 (Fla. 1954).
174. 67 So.2d 218 (Fla. 1953).
175. 74 So.2d 59 (Fla. 1954).
176. 75 So.2d 282 (Fla. 1954).

Costs and Fees

Costs—Unused Depositions

Taxable costs include the expense of reasonable and necessary experiments, photographs and depositions. Ordinarily, however, they do not embrace the cost of materials which neither are used nor serve a useful purpose. Illustrative of this rule is *Loftin v. Anderson*[177] where the Supreme Court reversed the trial court and cancelled as costs the expense of 78 pages of an 81 page deposition, only three pages having been used at the trial. More decisions of this sort would have a salutary effect on the cost of litigation.

Costs—Against the State

Generally, in the absence of a statutory provision, the state and its agencies are not liable for costs in actions to which they are parties. At times this rule results in great hardship to the private litigant. Such a case was *State v. Colonial Acceptance*[178] where the court held that costs, including a receiver's fee, in an action brought by the Comptroller and the Attorney General in their official capacities against a loan company for an alleged violation of the Small Loan Company Act were not taxable against the plaintiffs although the action had been dismissed in the defendant's favor. The court intimated, however, that it might have held otherwise if the plaintiff's investigation had been arbitrary and unreasonable. In another case, a quo warranto proceeding, costs against the Attorney General in his official capacity were allowed, the court construing a statute to permit the allowance of such costs. The statute involved was Section 618.09, which requires the Attorney General to secure from a person complaining that a corporation is used as a cover to evade a criminal law sufficient money to cover court costs and expenses before bringing proceedings to annul the corporation's franchise. The court concluded the object of the statute was to reimburse a successful defendant of his costs.[179]

Fees—Master

In *Miami v. Hollis*[180] the court reduced a master's fee from $3,500 to $1,500 and sharply disapproved of paying advances on account of masters' fees without a stipulation of the parties or without an order of the chancellor.

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177. 66 So.2d 470 (Fla. 1953).
178. 80 So.2d 681 (Fla. 1955).
179. Miami Retreat Foundation v. Ervin, 66 So.2d 667 (Fla. 1953).
180. 77 So.2d 834 (Fla. 1955).

Fees—Expert Witness

Pursuant to the 1949 statute which sets a maximum fee of $10 per hour for expert witnesses,[181] in a recent case the court directed the lower court to reduce the fee for such testimony from $791 to $140.[182]

Fees—Attorneys

Where a party sought to substitute counsel, the court, to protect original counsel, invoked a well-established rule that requires two conditions for such substitution: 1) paying original counsel's fee or posting sufficient security in lieu thereof, and 2) procuring the court's consent.[183]

181 FLA. STAT. § 90.231(2) (1953).
182. H. J. Granger & Sons v. Clay County Farms, 77 So.2d 427 (Fla. 1955).
183. D'Agostino v. Peoples Water and Gas Company, 78 So.2d 739 (Fla. 1955).