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A Synopsis of Recent Florida Cases

A SYNOPSIS OF RECENT FLORIDA CASES

A BRIEF review of the decisions of the Supreme Court of Florida published during the quarter ending September first, is proposed in this note.[1] In the editorial process of selecting cases for comment, it is necessary to prepare preliminary studies of all of the decisions of this court, among others; but the process of selecting for comment only those cases which present matters of the greatest novelty and importance, tends to obscure the fact that, in a growing jurisprudence like Florida's, the great majority of cases establish noteworthy precedents. It is also possible that many cases should never have been permitted to occupy the time of an overburdened court. A general study of the court's business may uncover the conditions which make that situation possible. Accordingly, an attempt has been made to bring together preliminary studies of all the decisions published during the last quarter, imitating for that purpose the general pattern of the invaluable "Annual Survey of American Law.[2]"

In the present issue, the plan to examine all decisions on matters of pleading and procedure was not carried out; but it is hoped in future issues to increase the scope of the survey in that direction, and to include the federal courts. In the interest of brevity, dependence has been placed on the use of titles to introduce topics as well as to indicate the framework of the analysis. The basic division is into three topics: Public Law, Private Law, and Adjectival Law.

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1 This comment covers the decisions appearing in the advance sheets from May 27, 1948, to and including August 26, 1948. This includes all of Volume 35 and pages 1 through 392, Volume 36, Southern Reporter (Second Series).

2 New York University School of Law, New York, N. Y. The first volume appeared in 1942, and the series is now complete through the 1947 annual volume.

PUBLIC LAW

CONSTITUTIONAL LAW. A number of novel and important applications of settled rules of Constitutional Law were made during this period. Some of them deal with the basic definition of state power and the broad general limitations thereon found in the doctrine of the separation of powers and the concept of due process. Others construe the special limitations on governmental power found in the state constitution upon the legislative process and upon certain classes of legislation.

Power of the state. The view is generally taken that, while the federal government is one of enumerated powers, and all governmental action which does not stem from some express or implied aspect of these powers, is *ultra vires*, the power of the state is complete unless it is limited, expressly or impliedly, by the state or federal constitution. In other words, the state may do whatsoever is not prohibited. This rule was applied in a case[3] where a statute authorizing the state to convey public lands to the federal government free of charge, was challenged. The court found that no constitutional mandate specifically prohibited the authorized acts and sustained the statute. The rule seems to have been misapplied in another case[4] in which the court said that "since the decision in *McCulloch v. Maryland*, the doctrine of implied powers has been as much a part of the law of this country as the written law itself." The rule of *McCulloch v. Maryland*[5] was invoked to justify a reasonable extension of federal power beyond those specifically enumerated, and has no application to a case of state power, which is plenary. Again, in an action[6] to enjoin the submission of the issue of city-county consolidation

[3] Watson v. Caldwell, 35 So. 2d 125 (Fla., 1948). The Attorney General instituted suit to cancel deeds between the Trustees of the Internal Improvement Fund and the State Board of Education exchanging lands so as to vest title to those lying within the designated park area in the Trustees, who alone had powed to convey to the United States.

[4] *In re* Warner's Estate, 35 So. 2d 296 (Fla., 1948). A county judge sitting in probate adjudicated a lien for attorneys' fees in favor of local counsel upon the distributive share of a non-resident legatee.

[5] 4 Wheat. 316 (U. S., 1819).

[6] City of Miami Beach v. Crandon, 35 So. 2d 285 (Fla., 1948).

to the voters of Dade County, in which the contestants urged that county officials would be required to perform unauthorized acts, the court ruled that in the absence of a specific constitutional prohibition on the exercise of legislative powers, it must be assumed that the power exists.

Separation of powers. The rule that the legislature may not impose administrative or legislative functions on the judicial branch, was exemplified in the test of the new statute[7] authorizing actions *in rem* to quiet title to land. Pursuant thereto, a person in possession of land, deraigning a good title of record, sought to confirm his title by removing unknown clouds against unknown claimants. The Supreme Court ruled[8] that the circuit court could not take jurisdiction, as there was no controversy presented for adjudication. Grave doubts were expressed[9] as to the constitutionality of a statute which would require the court in criminal cases to instruct the jury as to the penalty fixed by law for the offense charged, on the theory that this would interefere with the proper discharge of the judicial function; but the question was properly avoided by recourse to a rule of construction which treated the statute as directory and not mandatory. The court also found, in another case,[10] that there is inherent in the courts, as an incident of the judicial power, the power to regulate matters of procedure, at least where the legislature has not acted. This inherent power (the court denominated it "implied") was deemed sufficient to permit a county judge sitting in probate proceedings, to adjudicate an attorney's lien for fees against the distributive share of a nonresident claimant. The proposition is startling, and the logic of the court's opinion is none too clear. The unwillingness of the judicial branch to interefere with the conduct of legislative processes, found expression in a case[11] where the court refused to join the Florida Citrus Commission, a purely rule-making

[7] C. 24099, Laws of 1947; F.S.A. §§ 66.28 *et seq.* For comments upon the statute, with historical analysis, see J. M. FLOWERS, *Real Property Laws of* 1947, 2 Miami L. Q. 21, 22.

[8] Key v. All Persons Claiming Any Estate, 36 So. 2d 366 (Fla., 1948).

[9] Simmons v. State, 36 So. 2d 207 (Fla., 1948).

[10] In re Warner's Estate, 35 So. 2d 296 (Fla., 1948). This case is also discussed above. *See* note 4.

[11] State *ex rel.* Stewart v. Mayo, 35 So. 2d 13 (Fla., 1948).

body, in an action of *mandamus* against the Commissioner of Agriculture, whose duty it was to enforce those rules.

Delegation of power. The question whether the legislature, in proposing a constitutional amendment, may make approval by the electorate of a particular county a condition precedent to the submission of the amendment to the general electorate, which is in effect a delegation to the electorate of a single county of the power to submit an amendment, was involved in the consolidation case[12] noted above. The court found that this did not violate any specific limitation of the Constitution but overlooked the specific limitations of the Second Article; and found the measure to be in accord with provisions[13] requiring certain types of local laws affecting counties to be submitted to a vote of the electorate in such county.

Rules of construction. Certain rules of construction applied in cases in Constitutional Law, grow out of an appreciation of the basic function of the court, to which is given no veto power, in passing upon the constitutionality of statutes. The application of one of these, the rule that of alternative constructions, the one which will avoid grave doubts of constitutionality is to be preferred, has already been noted.[14] In another case,[15] the Supreme Court disapproved a holding by the circuit court that a statute was unconstitutional when there was an alternative ground for reaching the same decision. In the city-county consolidation case,[16] the court refused to pass upon issues which would not arise until after the county electorate approved submission of the amendment. Subsequent events have proved the issue moot.

Due process. The general limitations of due process were applied in a case[17] involving jurisdiction to tax, in which

12 City of Miami Beach v. Crandon, 35 So. 2d 285 (Fla., 1948). For a general discussion of the statute, see JOHN F. WILMOTT, *The Truth About City-County Consolidation*, 2 Miami L. Q. 127.

13 Fla. Const. Art. III, § 21.

14 See note 9 *supra*.

15 Frink v. State *ex rel.* Turk, 35 So .2d 10 (Fla., 1948).

16 See note 12 *supra*.

17 State *ex rel.* Seaboard Air Line v. Gay, 35 So. 2d 403 (Fla., 1948). The court did not specifically refer to the due process clause of either

it was held that the state could not tax nonresident bondholders of a railroad corporation, whose bonds were secured in part by a mortgage on Florida properties, under the statutes imposing an intangible personal property tax. It was assumed that the privilege of recording the mortgage might be taxed, but the court asserted that taxes can be lawfully levied only in the express method pointed out by statute. The court also recognized[18] that a resident might be assessed an intangible personal property tax on an interest in trust funds established and administered in another state by nonresident trustees. The due process clause of the federal constitution was invoked in the case,[19] previously mentioned, holding the cumulative method to quiet title to land unconstitutional in certain aspects. The court held, in an alternative decision, that the notice published did not conform to standards of due process. This point of the case is not developed, however, and in view of the fact that substituted service of a like character has been approved in cases[20] where the court did have a controversy and jurisdiction of the *res*, as for example where a known cloud is to be removed but the claimant is unknown, it would be unfortunate if a precedent has been established on this point.

Freedom of speech. In recent years the federal supreme court has broadened the concept of the freedom of speech to include peaceful picketing. That this advances the interest of the individual at the expense of society further than previous concepts of free speech, has been noted, since "the picketer's audience is frequently an importuned one; and when it is, the picketer's right is an interference with the rights of other people, not a complement thereof, as is the right of persons addressing those who come to hear

State or Federal Constitution, but it should be noted that parallel federal cases turn upon that point. McLeod v. Dilworth Co., 322 U. S. 327 (1944).

18 Mahan v. Lummus, 35 So. 2d 725 (Fla., 1948).

19 See note 8 *supra*.

20 For authorities holding like service in proceedings *in rem* to comply with the requirements of due process, see J. M. FLOWERS, *Real Property* Laws of 1947, 2 Miami L. Q. 21.

them.[21]" The Supreme Court bowed to federal rulings, by a divided court, in a case[22] which illustrates the importunity of picketing nicely. Persons not employed in a laundry at the time, picketed the establishment and advertised by press and radio, stating that employees of the laundry were on strike. A few employees were afraid to return to work, some customers hesitated to risk their shirts, and general annoyance was caused tending to interefere with the regular operation of the plant. It was shown that a labor organizer had engineered this "strike" in order to unionize the plant and to become collective bargaining agent for its employees, who were then not members of the union. The circuit court granted an injunction; but the Supreme Court reversed. It must be remembered that nothing in these decisions deprives the plaintiff of an action for damages; prior restraints alone are curbed in the interest of preserving democratic processes. The fact that the injunction was granted only after the court found legal remedies to be inadequate, does not alter the picture. The court avoided a determination of the constitutionality of certain Florida labor statutes,[23] by holding them inapplicable when no employees were involved in the strike. The challenged section condemned participation in a strike not authorized by a majority vote of the employees to be governed thereby. The ultimate decision will require the courts to decide whether the non-striking employees' right to work must yield in the interest of preserving free institutions, to the striking minority's freedom of speech.

Special limitations in the state constitution: *One subject, clearly expressed in the title.* The requirement[24] that each law shall embrace but one subject, clearly expressed in the title, was applied in two cases. In the first,[25] taxes were imposed by municipal ordinance on sales of fuel oil under a statute which authorized municipalities to tax sales of electricity, gas, or any competing service. Because there

21 CORWIN, *The Constitution and What it Means To-day* (Princeton, 10th ed., 1948), p. 197.

22 Whitehead v. Miami Laundry Co., 36 So. 2d 382 (Fla., 1948).

23 C. 21968, Laws of Florida, 1943, F.S.A. §§ 481.01 *et seq.*

24 Fla. Const. Art. III, § 16.

25 City of Orlando v. Johnson, 36 So. 2d 209 (Fla., 1948).

was no reference in the title to fuel oil or competing services, the ordinance was disapproved in declaratory judgment proceedings. In the second case,[26] a statute authorizing a county to erect an office building outside the county seat, providing for a bond issue, and prescribing the duties of public officers with respect to the new offices, was held not to be legislation on more than one subject.

Income tax. The prohibition on income taxes was held[27] to preclude the assessment of an intangible personal property tax on a life estate held in trust. A life estate in a trust is in fact a mere right to receive income. In view of the settled rule that a gift of income for life creates a life estate, the decision seems to be sound. It is indicated, however, that a power to revoke, if vested in the income beneficiary, would destroy the immunity; but where the trustee in his sole discretion may apply the *corpus* to sustain the income beneficiary in want, the beneficiary's interest in the *corpus* is a contingent remainder, not subject to taxation.

Creating municipal indebtedness without vote of the freeholders. The state constitution prohibits[28] counties, districts and municipalities from issuing bonds unless the issue has been approved in an election in which a majority of the freeholders who are qualified electors, vote. This limitation has been narrowly construed so as to permit free issue of bonds which are not to be serviced by the imposition of taxes. As the result of a current decision,[29] it does not require an election to approve bonds which are to be serviced from excess fees resulting from services rendered by county officials. These services are governmental in character, not local or municipal. Likewise moneys appropriated by the state may be used to service such an issue. Other provisions which might have been construed as violative of the constitutional limitation were stricken by the court below, and this phase of the order was not appealed. However, in another case[30] the freeholders approved

26 State v. Pinellas County, 36 So. 2d 216 (Fla., 1948).

27 Mahan v. Lummus, 35 So. 2d 725 (Fla., 1948).

28 Fla. Const. Art. IX, § 6.

29 State v. Pinellas County, 36 So. 2d 216 (Fla., 1948).

30 Fletcher v. Board of Public Instruction, 35 So. 2d 121 (Fla., 1948).

a resolution which violated other constitutional limitations[31] as to date of maturity. The resolution was amended to conform with the constitution after the vote of approval, and this was held to cure the defect. The court reasoned that the vote of the freeholders was required only for the purpose of approving the amount of the issue, and that the maturity date could be fixed by the school district in its discretion. This reasoning appears to be as illogical as to say that a debtor need not be concerned when his debts become due, so long as he knows the total amount.

Jurisdiction of county judge sitting in probate. Over the contention that constitutional provisions[32] giving the county judge jurisdiction to discharge the duties usually pertaining to courts of probate, did not permit the court to take jurisdiction of the claim of a distributee's attorney against his client for fees and to adjudicate a lien on the distributive share, the court ruled[33] that the court had "implied power" (under the rule of *McCulloch v. Maryland*) to do so. While exception has been taken to the reasons assigned by the court, it is not unusual to find courts of probate exercising broad powers of a court of equity in all matters connected with the settlement of estates.[34]

Other limitations. In proceedings[35] to validate bonds of Pinellas County, an attack was made on a statute which permitted the county to erect a public building and conduct branch offices at St. Petersburg, which is not the county seat, in order to accommodate the large concentration of population at that point. The attack was based on so many constitutional issues that one may suspect passion to have outweighed judgment. As a result it has been held that such a statute does not violate the following constitutional limitations: duties and fees of county officers may not be fixed by local law;[36] mandatory requirements for the pass-

31 Fla. Const. Art. XII, § 17.

32 Fla. Const. Art. X, § 17.

33 See note 10 *supra.*

34 For the modern concept of the jurisdiction of probate courts, see Model Probate Code of the Probate Law Division, American Bar Association, published in SIMES and BASYE, *Problems in Probate Law*, Ann Arbor, 1946.

35 State v. Pinellas County, 36 So. 2d 216 (Fla., 1948).

36 Fla. Const. Art. III, § 20.

age of legislation when the legislative journal does not disclose irregularities;[37] a prohibition on the removal of county seats;[38] and a requirement that all county officers shall hold their respective offices and keep their official books at the county seat.[39]

ADMINISTRATIVE LAW. The cases decided during this quarter manifest the development of a well defined concept of the means, purposes and scope of the judicial review of administrative action. In the last analysis, this is the foundation of a system of administrative law. This development has taken place by common law processes, as is usually the case, through the statement of the rules which govern the issuance of the writs of *mandamus* and *certiorari* against executive and administrative agencies;[40] but the Supreme Court with increasing frequency bases its decisions on broad principles of administrative law rather than on the rules governing the use of the particular writ.

Mandamus. The use of the writ of *mandamus* to determine *bona fide* disputes between citizen and state over the interpretation of acts of the legislature, is illustrated in two cases. In the first of these,[41] taxes were paid under protest. *Mandamus* was held to be the proper means of securing a judicial determination of the controversy and securing refund. It should be noted that the statute authorized taxes to be paid under protest and also authorized refunds of taxes found to have been overpaid. Without the first of these, the taxpayer might have been treated as a mere volunteer, and without the second, there might have been a problem of immunity from suit. Where the legislature made state lands liable for local taxes, the proper means to enforce payment was held[42] to be *mandamus*,

37 Fla. Const. Art. III, § 17.

38 Fla. Const. Art. VIII, § 4.

39 Fla. Const. Art. XVI, § 4.

40 The development of administrative law in Florida through the use of the extraordinary common-law writs, has been the subject of a series of comments appearing in this volume. See pp. 181, 229, 233, and *post.*

41 State *ex rel.* Seaboard Air Line v. Gay, 35 So. 2d 403 (Fla., 1948).

42 State *ex rel.* South Florida Conservancy District v. Caldwell, 35 So. 2d 642 (Fla., 1948).

since the ordinary processes would have been ineffectual against the state.

Limits on power to issue mandamus. Judicial control of administrative action is subject to two broad limitations in constitutional law: first, that the court cannot thereby direct or interdict legislative action; and second, that the court cannot interfere with executive action which involves discretion and is not simply ministerial. The first rule was illustrated in a case[43] against the state Commissioner of Agriculture, already noted, to compel the employment of certain tests in the inspection of citrus fruit. The commissioner moved to quash the alternative writ asserting that the Florida Citrus Commission, which had power to make the rules governing inspections, was the proper party. The court refused to quash on this ground. The second rule was illustrated[44] in a refusal to issue an alternative writ against an election commissioner who refused to change registration of party affiliation on presentation of a written proxy. No regulation other than the *ad hoc* ruling in the case appears to have been made. The legislature had given the commissioner power to adopt methods of procedure not inconsistent with the statute. The court refused *mandamus*, holding that the reasonableness of a rule cannot be tried on that writ; but the case may be treated as one of executive discretion. While the writ of *mandamus* may not be used to review the propriety of the exercise of legislative or executive discretion, it may be used to determine whether or not that discretion exists. In another case,[45] the writ of *mandamus* was used to restore an employee retired because of age under regulations of a state administrative agency, the court finding that the agency had no power to formulate such a rule. The distinction between this case and the previous one lies in the fact that the authority to make rules, rather than the wisdom of the rule, was challenged. In a parallel case,[46] where administrative

[43] State *ex rel.* Stewart v. Mayo, 35 So. 2d 13 (Fla., 1948).

[44] State *ex rel.* Norman v. Holmer, 35 So. 2d 396. The court treated this as a case of quasi-legislative power vested in a commission.

[45] State *ex rel.* Hathaway v. Smith, 35 So. 2d 650 (Fla., 1948).

[46] State *ex rel.* Stone's Liquor Stores v. Vocelle, 35 So. 2d 650 (Fla., 1948).

discretion to issue a liquor license was challenged, the court determined that the function was purely ministerial, and directed the license to be issued.

Jurisdiction to issue mandamus. In one case,[47] the court indicated that *mandamus* could issue only at the suit of a party having a personal or property interest to protect; but said that a citrus grower resident in the state has a sufficient interest to challenge the way in which maturity tests were conducted by the Commissioner of Agriculture. It found however, that the statutes permitted the test being used to be substituted where no complaint was made, and therefore held that the suit was prematurely brought because no demand on the commissioner was shown. In another case[48] it was ruled that injunction proceedings, which are in effect the complement of *mandamus*, can be brought against a state administrative body in any county where an invasion of personal or property rights is threatened. In cases of *mandamus*, however, where performance of duty rather than prevention of official acts, is the end of litigation, suit must be brought where the administrative body is seated. The court makes what appears to be a useless distinction between actions commenced chiefly to secure interpretation of rules and those brought primarily to secure judicial protection from threatened invasion. The injunction could be sought just as well at the seat of government.

Certiorari to review quasi-judicial action. The use of the writ of *certiorari* to review administrative acts of a judicial character was shown in a case[49] involving the revocation of a liquor license. The court reviewed the record and found that the evidence supported the decision to revoke. In such cases it is generally held that the court may reverse for errors in law, among which is included the sufficiency in law of evidence to support the findings of fact. In this

[47] State *ex rel.* Stewart v. Mayo, 35 So. 2d 13 (Fla., 1948). The court read the several sections of the statute as permitting the use of an alternative method until challenged by the grower and dismissed the writ because such a challenge was not shown.

[48] Smith et al. v. Williams, 35 So. 2d 844 (Fla., 1948). Prohibition to challenge the jurisdiction of the circuit court.

[49] Marino v. Vocelle, 36 So. 2d 375 (Fla., 1948).

case, one judge dissented, saying that evidence tending to show adulteration did not prove a case of illegally refilling bottles.

MUNICIPAL CORPORATIONS. *Legislative control: consolidation.* The plenary character of the control which the legislature exercises over municipal corporations is illustrated in three recent cases. In one,[50] the legislature having proposed a constitutional amendment to consolidate Dade County with certain municipalities therein, an attack was made on the legislative power. The court declared the power of the state legislature to be plenary unless specifically limited by some constitutional provision. The act was also challenged on the narrower ground that it would require the county commissioners to perform an illegal act; but it appears from the court's answer that county officers perform such duties as the legislature assigns. In another case,[51] the legislature was found to have power to authorize a county to establish branch offices at a place other than the county seat without violating the specific constitutional prohibition on removal of the county seat. In still another case,[52] where the legislature consolidated school districts after bonds of one had been validated but before delivery, the court held that the bonds might be delivered and would constitute an obligation of the consolidated district.

Municipal indebtedness. The power of a municipality to borrow money is subject to constitutional limitations.[53] Two cases dealing with the necessity of a vote of the freeholders, and the extent to which it may be avoided, are discussed above.[54] Apparently the increase of indebtedness through consolidation, as in the case last discussed, does not violate this constitutional prohibition. *Other powers.* The several counties and school districts are not necessarily limited by county lines in the performance of their func-

50 City of Miami Beach v. Crandon, 35 So. 2d 285 (Fla., 1948). For the advantages which sponsors of the bill had hoped to gain, see JOHN F. WILMOTT, *The Truth about City-County Consolidation,* 2 Miami L. Q. 127.

51 State v. Pinellas County, 36 So. 2d 216 (Fla., 1948).

52 Fletcher v. Board of Public Instruction, 35 So. 2d 121 (Fla., 1948).

53 Fla. Const. Art. IX, § 6.

54 See notes 29, 30 *supra.*

tions. It was found[55] that a school district could acquire a campsite in an adjoining county for recreational purposes. The case also approves of a much broader view of the scope of the school program, in which "training the character and emotions is as important as training the mind" (per Terrell, J.). The charter powers of a city do not include power to levy taxes on the purchasers of the services of public utilities, although a tax on the seller might be permissible.[56]

Tort liability of municipalities. Two cases involve the tort liability of municipalities. In the first,[57] a boy was injured while operating a defective printing press during the manual training program at a public school. In the other, a person was injured by a falling coconut frond while sitting on a bench in a public park. In the first case, the court ruled that since the school district was performing governmental functions, it enjoyed sovereign immunity from suit; while in the second case, it was assumed that the city would be liable if negligence could be shown. The court refused to apply the rule of *res ipsa loquitur* to the behavior of coconut fronds, and in the absence of some proof that the city knew, or should have known, of the particular dangerous frond, dismissed the action. While the basis of distinction between the two cases is not entirely clear, it appears to rest on the peculiar character of each type of municipal body, those at the county level enjoying sovereign immunity because they perform "governmental" functions, and those at a lower level, not. If cases on charitable trust furnish any standard, the operation of schools and parks are both in the public interest. Neither is a proprietry interest, such as exists when a state owns, bottles and sells the medicinal waters of a famous spring.[59] The distinction must therefore lie in the character of the tortfeasor, not in the par-

55 Scott v. Board of Public Instruction of Alachua County, 35 So. 2d 579 (Fla., 1948).

56 City of Orlando v. Johnson, 36 So. 2d 209 (Fla., 1948); *cf.* Smith v. City of Miami, 34 So. 2d 544 (Fla., 1948).

57 Bragg v. Board of Public Instruction of Duval County, 36 So. 2d 222 (Fla., 1948).

58 Lisk v. City of West Palm Beach, 36 So. 2d 197 (Fla., 1948).

59 *See* State of New York v. U. S., 326 U. S. 572 (1946). New York must pay federal tax on mineral waters with respect to bottled product

ticular function being performed. In the school district case, the court expressed an opinion that the public and not the individual should bear the loss, but deferred to the legislature on this question.

PUBLIC LANDS. A decision[60] has already been noted to the effect that the state, by act of legislature, may waive the exemption of public lands from local taxation. A surprising decision was rendered in a case[61] where a county sought a mandatory injunction against a landowner to remove barricades across a road which had been used by the public for more than fifty years. During that period, the county had never taken official cognizance of the road, and the evidence showed that the use was merely permissive. The evidence is not summarized in the opinion, but it would seem that the court has failed to recognize that the county sues not in its own right but in that of the public, and furthermore, that adverse possession is to a certain extent permissive, otherwise a lost grant cannot be presumed.

LICENSES. The problem whether a license is a mere privilege, revocable in the discretion of the issuing authority, or whether the licensee has such a personal or property interest in his license that courts will intervene to determine whether or not it has been properly revoked, seems to have been settled last year in the *Paoli case.*[62] Two cases were decided during the current quarter involving liquor licenses, a class of license formerly regarded as conferring a mere privilege, in which the court's action was based on the theory that the licensee has a property interest. In the first of these cases,[63] the court found that the state Beverage Department had not acted in accord with the commands of the legislature, and granted an alternative *mandamus* directing renewal. A licensed liquor store sought to move next

of state-owned Saratoga Springs, because not a governmental but rather a proprietary function.

60 Watson v. Caldwell, 35 So. 2d 125 (Fla., 1948).

61 Pinellas County v. Roach, 36 So. 2d 364 (Fla., 1948).

62 State *ex rel.* Paoli v. Baldwin, 31 So. 2d 627 (Fla., 1947). The case was noted, with different conclusions, in 2 Miami L. Q. 54, and 1 U. of Fla. L. R. 296.

63 State *ex rel.* Stone's Liquor Stores v. Vocelle, 35 So. 2d 649 (Fla., 1948).

door. There were more licenses outstanding than the law allowed, and the department refused. The statute restricting the number, however, permitted the renewal at the same location of licenses previously granted. In the second case,[64] the department was authorized to revoke the license of a dealer for refilling bottles. The evidence tended to show adulteration. While the court split on the legal sufficiency of the evidence, the significant fact about the case is the assumption of jurisdiction to review based upon the theory that the department performed a quasi-judicial function.

TAXATION. In the field of taxation, two cases already noted for their constitutional law aspects, held that the state may not levy an intangible personal property tax on mortgages of Florida real property held by nonresidents, although it might tax the privilege of recording;[65] and that the state may not levy an intangible personal property tax on the owner of a life estate in trust funds.[66] Land dedicated to public use is exempt from taxation, and may be exonerated in a suit to cancel.[67] This exemption is one which the legislature is privileged to waive with respect to lands owned by the state, according to another holding.[68] In a suit to cancel taxes,[69] it was alleged that there were irregularities in the assessment and that the power was exercised in an arbitrary manner. The court approved an order of the chancellor dismissing the bill, in effect ruling that irregularities and arbitrary action are not the subject of a collateral attack where the power to tax is acknowledged.

CIVIL SERVICE. Two cases of interest to civil servants

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64 Marino v. Vocelle, 36 So. 2d 375 (Fla., 1948).

65 State *ex rel.* Seaboard Air Line v. Gay, 35 So. 2d 403 (Fla., 1948).

66 *In re* Warner's Estate, 35 So. 2d 296 (Fla., 1948).

67 McCaskill v. City of Homestead, 36 So. 2d 272 (Fla., 1948).

68 Watson v. Caldwell, 35 So. 2d 125 (Fla.. 1948).

69 McCaskill v. City of Homestead, 36 So. 2d 272 (Fla., 1948). On this point, there is no intimation as to the reason of the court for sustaining the action of the lower court in dismissing, after hearing, the amended bill. It is possible that the effect of the ruling is simply that whether or not the assessment was arbitrary, was a question of fact for the chancellor.

were decided during the quarter. In the first of these,[70] the court ruled that where an administrative agency of the state was given power by statute to establish regulations governing appointments, promotions, and demotions based upon efficiency and fitness, and terminations for cause, it did not have power to make a rule retiring all employees at seventy. Old age is not inefficiency *per se*, Terrell, J., ruled in an opinion remarkable for its restraint. The legislature may, of course, grant authority to make such rules. In another case,[71] the legislature had directed local school districts to pay teachers rehired after previous service, in twelve equal installments. The statute was construed to require that payments begin with the fiscal year, although the school sessions did not begin until two months later. Prior to the passage of the statute, teachers had already signed contracts for pay to begin with the school session. The case turned entirely on questions of construing the legislative intent; but two rules of civil service law are illustrated: first, that entitlement to public pay is an incident of the office vesting on appointment, and it does not depend on the performance of services; and second, that lawful entitlement cannot be waived by contract.

LABOR-MANAGEMENT RELATIONS. The right of organized labor to force an election upon the employees of a nonunion industry by means of a fictitious strike, seems to have been established in a recent case[72] as incidental to the freedom of speech protected under the Fourteenth Amendment. The limitation upon the power of the courts to protect the unorganized worker and management is only upon the power to enjoin the strike or the false advertising; but since the injunction is predicated upon a finding that the remedy at law is inadequate, it would seem that the injured party is given a Hobson's choice. The case is discussed above for its Constitutional Law aspects.

ELECTIONS. Two cases involving the interpretation of election laws should be noted. A statute which gives absen-

70 State *ex rel.* Hathaway v. Smith, 35 So. 2d 650 (Fla., 1948).

71 Weiss v. Leonardy, 36 So. 2d 184 (Fla., 1948).

72 Whitehead v. Miami Laundry Co., 36 So. 2d 382 (Fla., 1948).

tees a right to vote, being in derogation of the common law, must be strictly complied with. This rule was involved in the refusal to honor absentee ballots for a municipal election where the elector's affidavit did not correspond exactly with the language of the statute.[73] Election officials having been given power to make rules to carry into effect the purposes of the election laws, an *ad hoc* ruling that a person must appear in person to change party registration, was held to be beyond judicial scrutiny.[74] This last decision ended the hope of the so-called "Progressives" to have their candidate appear on the ballot without recourse to the state legislature.

CRIMES AND OFFENCES. In the field of criminal law, there were several cases construing the statutory definition of certain crimes, which will be described herein, and several raising points in the law of evidence, which will be discussed below. It was noted that, while the crime of obtaining money under false pretences was not embraced within the common law definition of larceny, the Florida statute on larceny[75] is so drawn that it comprehends that offense.[76] Accordingly, the offense may be charged either as larceny or false pretences under different statutes. An information charging that the accused "burned" and "procured to be burned" a dwelling house does not charge two inconsistent offences so as to be duplicitous.[77] Conviction under a municipal ordinance making it an offense to maintain a gambling device, cannot be based on evidence which showed that the accused took and paid bets on horse races actually being run at various tracks.[78] Evidence showing that accused manufactured moonshine whiskey is legally sufficient to support a conviction for evading taxes under the state beverage laws, provided the information charges that the beverage is one upon which a tax would be imposed if it had been manufactured in accordance with the provisions

73 Frink v. State *ex rel.* Turk, 35 So. 2d 10 (Fla., 1948). The statute required an affidavit that the voter expected to be absent from the *county,* while the one submitted stated only absence from the *city.*

74 State *ex rel,* Norman v. Holmer, 35 So. 2d 396 (Fla., 1948).

75 F. S. 1941, § 811.01.

76 McDowell v. State, 36 So. 2d 180 (Fla., 1948).

77 Miles v. State, 36 So. 2d 182 (Fla., 1948).

78 Cooper v. City of Miami, 36 So. 2d 195 (Fla., 1948).

of the law.[79] Because of the use of this peculiar phrasing, prior inconsistent holdings were distinguished. It would also seem that evidence of adulteration is legally sufficient to sustain a conviction for refilling liquor bottles.[80] In one case the defendant was convicted of receiving money knowing it to have been embezzled. Defendant called daily at the place of employment of the embezzler, and over a period of years received $95,000 to be played on Bolita. All winnings were played back. The court ruled that this evidence was not sufficient to show that defendant knew,[81] that the money was embezzled. With so much gold are the streets of this brave, new world paved! Each of the above cases seems to be treated as one of defining the statute under which the information is laid, without any attempt to state and apply rules of construction of general utility.

PRIVATE LAW

CONTRACTS AND COMMERCIAL LAW. In the field of commercial law, there were two cases involving brokers' commissions for obtaining purchasers for real property. Both cases turned principally on questions of pleading; but both illustrate the rule that the terms of the broker's contract are largely a question of fact for the jury, the customer's liability depending upon the precise undertaking.[82] The second case involved the liability of an incompetent not under guardianship.[83] While such a contract may be voidable, it is necessary to restore the *status quo* in order to avoid it. Since, in a case of this type, the broker has performed his part of the contract, that cannot be done. The court assumed that the contract was beneficial to the incompetent; but this appears to be on the theory that since the incompetent has had the benefit of the broker's services, the contract was beneficial. Suppose the price for which the property was offered was so inadequate as to evidence incompetency? It is suggested that this case may stand for the proposition that even if the contract to sell be voidable, the broker has earned his commission. The

79 Harris v. State, 36 So. 2d 372 (Fla., 1948).
80 See Marino v. Vocelle, 36 So. 2d 375 (Fla., 1948).
81 Monteresi v. State, 35 So. 2d 582 (Fla., 1948).
82 Sater v. Stenor, Inc., 35 So. 2d 584 (Fla., 1948).
83 Perper v. Edell, 35 So. 2d 387 (Fla., 1948).

broker need not effect a sale: he must simply produce a purchaser ready, willing and able to purchase on the terms specified, if the seller prevents completion. Financial ability does not mean that the purchaser have cash in hand, but sufficient credit. The use of reports by a credit rating agency to prove financial ability was approved in this case.

EQUITY. During the last quarter, the rule that specific performance of a contract to convey or lease real property cannot be awarded where the contract is indefinite, was illustrated in a case where the evidence, construed most favorably to the plaintiff, showed an agreement to lease at a rent "to be agreed upon by the parties."[84] Where the terms of a contract can be proved with certainty, and that which is entered into does not comply with the agreement of the parties, equity will order reformation; but this is not possible with respect to contracts to convey real property unless the preliminary agreement has been reduced to writing. An exception to this rule is made where there has been part performance. This may occur when the purchaser has taken possession of the land and made expenditures. This exception was illustrated in a recent case where the operator of a gasoline service station entered and made expenditures on a property controlled by a distributing company.[85] The general manager of the lessor made promises to the new tenant which were not authorized. In such a case, the principal is bound by the apparent authority of the general manager. In another case,[86] the court seems to have assumed that a contract by a builder and developer to build a house on his land and sell the land so improved, reserving to the purchaser three days after completion of the house to reject it, would not be specifically enforceable.

Constructive Trusts. A constructive trust may be enforced in equity whenever a person standing in a fiduciary relationship to another, uses his position to make a profit. As a general rule, the beneficiary of such a trust does not need to show a loss; but has an election to affirm the trans-

[84] Topper v. Alcazar Operating Co., 35 So. 2d 392 (Fla., 1948).
[85] Orange State Oil Co. v. Crosby, 36 So. 2d 273 (Fla., 1948).
[86] Lehman v. Goldin, 36 So. 2d 259 (Fla., 1948).

action and claim the profit, or to disaffirm and receive restitution. The extent to which the beneficiary may affirm and take the profits is examined in a recent case.[87] Having been engaged to purchase Blackacre, and having received earnest money from his customer, a real estate broker found that Blackacre could be purchased only as a part of Whiteacre. He bought Whiteacre, but finding an opportunity to sell the entire tract at a profit, he did so and returned the earnest money. The lower court held that he must account for the profit on the whole transaction; but the Supreme Court was of opinion that he need only account for so much of the profit as could be attributed to a sale of Blackacre. In these cases, there is no *res* until property is acquired in breach of fiduciary duty. Whether or not there was breach of fiduciary duty as to all of Whiteacre should depend on whether or not its acquisition resulted from the execution of the original engagement, which was largely a question of fact to be decided by the court below.

In recent divorce cases, a doctrine has been developed that property held in the sole name of husband or wife may be impressed with a trust and be taken into account in directing a settlement, if it can be shown that the other party has contributed to the acquisition or enhancement in value of the property. In this way, it has appeared possible for courts of equity to declare and enforce a principal of community property, treating all property acquired by either member of the family team during coverture as the property of both. If there has been a movement in that direction, it has been halted by a recent case.[88] It must be shown specifically wherein the wife has contributed to the acquisition or enhancement of the property: theories of "division of labor" within the family are not enough. In the particular case, the husband owned a drug store at the beginning of the ill-fated marital venture. The wife worked about the store, sold ham sandiches and cosmetics; but the chancellor did not find that this had contributed to the enhancement of the value of the business. Possibly the case was decided according to the common law principle, that a woman's place is in the home.

[87] Tucker v. Lacey, 35 So. 2d 724 (Fla., 1948).

Resulting Trusts. When property is purchased in the name of one person with money furnished by another, there is a resulting trust to the person who furnished the money. This is a matter of presumption, which may be rebutted by showing that a gift was intended, or that the money was furnished in discharge of an obligation, or was loaned. A gift is presumed where title is placed in the name of the wife of the person furnishing the price. That this presumption is rebuttable is shown in a recent case;[89] but what evidence is sufficient in law to support the finding of a chancellor that it has been rebutted is not indicated. This case and many others demonstrate the futility of reviewing the record to determine whether or not the findings of fact are supported by sufficient evidence without stating, at least "epigrammatically,"[90] the effect of the evidence. As it stands, the case is valueless as a precedent. In another case, where a daughter to whom property had been conveyed without consideration by her father, disclaimed any personal interest therein but said that she held it in trust, this was regarded as sufficient to rebut the presumption of a gift.[91]

REAL PROPERTY. Important cases involving rights in land will be found under the preceeding heading. Two other cases, already discussed for public law features, should be reviewed here. In the first of these, it was held that where a county had never taken official cognizance of a road used by the public for more than fifty years, it would not enjoin the owner from erecting a barrier.[92] Some language in the opinion is disturbing. It is said that the evidence showed "permissive" rather than "adverse" user. If there was other evidence than the fact that the public had used the road, the court did not summarize it. If the court means to say that when an owner of land stands back and does not protest for fifty years, user is not adverse, the court is overlooking the fact that title by

88 Welsh v. Welsh, 35 So. 2d 6 (Fla., 1948).

89 Lovejoy v. Lovejoy, 36 So. 2d 192 (Fla., 1948).

90 *See* Terrell, J., in M. J. Carroll Construction Co. v. Smith, 35 So. 2d 385, where the expression "stated in epigram" is used.

91 Kirk v. Kirk, 36 So. 2d 171 (Fla., 1948).

92 Pinellas County v. Roach, 36 So. 2d 364 (Fla., 1948).

prescription is based upon a presumed grant: that if there were no right, the owner would have protested. Adverse possession is therefor always permissive in fact, and it is only by proving an express license less than the grant of a fee simple that the presumption of a complete license can be rebutted. If the case means that the county cannot sue in the right of the public to assert an easement acquired by the public, then this criticism is unfounded; but the language of the court is consistent only with the first alternative. The second case holds that the cumulative method of quieting title to land, provided by the last legislature, does not provide a means of removing unknown clouds against unknown claimants.[93] The new statute was passed upon the theory that the old did not provide a procedure *in rem* whereby this very thing could be done;[94] but it has now been found that the limitation is constitutional. It is now apparent that the security of titles which this act was designed to achieve can now be attained only by adopting a full registry system, or in the alternative, by requiring private enterprise to offer that security in such a way that the public will be protected. In other states, title insurance companies are required to maintain reserves subject to the supervision of the insurance commissioner or a similar administrative agency, and where the abstract system is in use, abstracting companies are required to be bonded and are made liable by law to any person relying on the abstract, whether or not there is privity of contract.[95]

TRUSTS. Resulting and constructive trusts, which arise by operation of law, were discussed above.[96] An important decision holding that a life tenant or income beneficiary of a trust may not be required to pay an intangible personal property tax, discussed above for its constitutional and tax law implications, deserves note here.[97] While it is generally held that a settlor may not create a valid spend-

93 Key v. All Persons Claiming any Estate, 36 So. 2d 366 (Fla., 1948).

94 See J. M. FLOWERS, *Real Property Laws of* 1947, 2 Miami L. Q. 21, 25 (1947).

95 See TRUSLER, *Extension of Liability of Abstracters,* 18 Mich. L. R. 127 (1919) and Note, 1 U. of Fla. L. R. 70 (1948).

96 See under "Equity: Constructive Trusts."

97 Mahan v. Lummus, 35 So. 2d 725 (Fla., 1948).

thrift trust for himself, and may not, as statutes are now written, avoid taxes by reserving a right to revoke or a power to appoint, the principal case shows that, where a simple life estate is reserved, it is no different in the hands of the settlor than it would be in the hands of any donee. In the particular case, the trustee was required to invade *corpus;* but the court pointed out that since the exercise of this power depended upon a future contingency, this was a contingent remainder, and therefore not taxable. We note with pleasure the court's definition of a contingent remainder in view of the earlier case of *Krissoff v. First National Bank of Tampa,*[98] which we have criticized elsewhere.[99] The decision holding a school district immune from suit where a student was injured while operating a printing press in the course of instruction,[100] calls attention to the fact that there is yet no holding on the tort liability of charitable trusts, such as schools and hospitals, endowed and not operated for profit. There is a division of authority both as to result and reasoning in the cases on this point in other jurisdictions, but the older view accorded these public enterprises the same immunity that is given the school district. Language used by the court, reflecting hostility to the immunity of the school district, may forecast a view that the trust will be liable: a view which will be unpopular with those who solicit annually for community chests.

DECEDENTS' ESTATES. A single case involving the interpretation of the Probate Law is replete with historical references.[101] Where a family allowance of one year's support is paid to the widow as a Class four claim,[102] the amounts received are not to be charged against dower. The court found that this allowance supplements the quarantine, which the widow enjoyed at common law. While this allowance is treated as an expense of administration, and the law provides that the widow's dower shall be free of all ex-

98 32 So. 2d 315 (Fla., 1948).

99 See note, 2 Miami L. Q. 240 (1948).

100 Bragg v. Board of Public Instruction of Duval County, 36 So. 2d 222 (Fla., 1948).

101 In re Gilbert's Estate, 36 So. 2d 213 (Fla., 1948).

102 F. S. 1941, § 733.20.

penses of administration,[103] the court held that it would be inequitable to charge the entire amount against the other beneficiaries. The decision thus affords construction of the dower provisions which might not be apparent from the language used. *Statute of non-claim.* The statute of non-claim in Florida operates to bar all claims which are not filed within the prescribed period, and, if disallowed, are not litigated promptly. In this respect, it differs from the statutes of many states, which permit claims not barred by the general statute of limitations to be asserted at any time before final distribution.[104] The operation of the Florida statute is illustrated by a recent case in which it was held that where there is a substantial difference between the claim as filed and the claim as proven, and the time to file and litigate has expired, the claimant must suffer nonsuit.[105]

MORTGAGES. With boom-time conditions prevailing once again in Florida, mortgagees who were thought to have lost their security in the Great Hurricane, are now found before the courts in two suits to foreclose. In both cases, possession of the property was in the holder of a tax deed. In one case, the tax deed was invalid, but the purchaser had occupied for fifteen years, had made extensive improvements, and had paid much in taxes.[106] The mortgage was given in 1916 and came due in 1923, seventeen years before the commencement of the suit to foreclose. While the statute of limitations did not bar the claim, the court held that *laches* did. In the other case, the tax deed was found to be valid, but the purchaser had made doubly certain by taking a quit-claim deed from the mortgagor.[107] This fact was alleged to evidence fraud and to vitiate the protection of the tax title; but the court held that there must be specific proof of collusion at the tax sale in order to permit the tax deed to be set aside as against the mortgagee. In another case, two mortgages given by the same mortgagor

103 F. S. 1941, § 731.34.

104 See SIMES and BASYE, *Problems in Probate Law* (Ann Arbor, 1946) p. 325; Model Probate Code, § 285.

105 Sawyer v. Hinton, 35 So. 2d 294 (Fla., 1948).

106 Sims v. Palmer, 35 So. 2d 841 (Fla., 1948).

107 Travis v. Mayes, 36 So. 2d 264 (Fla., 1948).

to the same mortgagee, were foreclosed in a single suit.[108] Each contained provisions for an attorney's fee of $100 plus ten per cent of the recovery. The court below held that the sum of $100 plus ten per cent must be taken for both mortgages, but the Supreme Court added the other $100.

CORPORATIONS. One case involving a problem in corporation law, illustrates the common law rule, incorporated into the Florida code, that stockholders have a preemptive right to subscribe to unissued stock unless the corporate charter provides otherwise.[109] A division of opinion having arisen between majority and minority stockholders, the latter, who had a majority on the board of directors, sold unissued stock to one of their number and changed the balance of power. The former majority stockholder brought a bill in equity to cancel the stock. The defendants charged plaintiff with using his power as a majority stockholder to advance his own interests at the expense of the corporation. The court ruled that this was no defense to an order directing cancellation, although it might at a later stage of the litigation justify other orders against plaintiff.

TORTS. Except for a case recognizing, apparently for the first time in Florida, an action for slander of title, the cases for the current quarter illustrate applications of established principles. *Owner of property to business invitee.* Two cases dealt with the duty of the person in control of real property to persons coming upon the premises in the occupant's interest. While a very high duty of care is provided safe premises is imposed, the owner is not an insurer. If he knows, or should have known, of a dangerous condition and has not taken steps to correct it, he may be liable for resulting injury. Thus, where the operator of a dog racing track which was crowded, on the occasion of races, with patrons to whom bottled goods were sold in quantity, made no provision to collect empty bottles, it was error to direct a verdict for the operator in an action for personal injuries, sustained when a patron tripped upon

108 Franceschini v. Sigmond, 36 So. 2d 371 (Fla., 1948).

109 Rowland v. Times Publishing Co., 35 So. 2d 399 (Fla., 1948).

an empty bottle lying on the floor.[110] The court below held that the patron must show that the specific bottle had been there long enough for the operator to have found and removed it. On the other hand, the mere falling of a coconut frond, not shown to have been in a dangerous condition for an appreciable time before the accident, was not sufficient to charge a municipality with liability to a person sitting on a bench in a public park when it fell, and a verdict was properly directed in favor of the city.[111]

Causation. In cases of negligence, it is necessary to show that the injury upon which action is brought, was the proximate result of the negligent act. Except where the rule *of res ipsa loquitur* applies, failure to show causal connection is fatal to plaintiff's claim. Where a contractor building a public road cut a cattleman's fence and negligently failed to repair it, and some of the cattleman's stock was found dead upon the highway, recovery could be had, not for the total number of cattle found on inventory to be missing from the herd, but only for the cattle specifically accounted for.[112]

Trespass by user of public way. The case last mentioned also illustrates the rule that the privilege of the public to use a way does not immunize persons from liability for damage caused adjoining or subjacent owners by a negligent or excessive use of the privilege. The contractor's plea of privilege, in that he was constructing a public highway, was not a defense to an action based on negligent failure to replace or repair the fence. Similarly, the owner of a successful restaurant business, which attracts large crowds of patrons, may not use the sidewalk in front of his competitor's premises as a waiting-room for those who cannot be seated promptly. On second appeal,[113] a former holding that the restauranteur must provide space upon his own premises, was modified to permit him to control the crowds on the sidewalk in such a way as to leave his competitor's entrance open. While the court entered this order upon the consent of the parties, it is apparent from the dis-

110 Wells v. Palm Beach Kennel Club, 35 So. 2d 720 (Fla., 1948).

111 Lisk v. City of West Palm Beach, 36 So. 2d 197 (Fla., 1948).

112 M. J. Carroll Contracting Co. v. Smith, 35 So. 2d 385 (Fla., 1948).

113 Morrison Cafeteria Co. v. Shamhart, 35 So. 2d 842 (Fla., 1948).

senting opinion that the court actually repealed its former holding, which was much criticized.[114]

Liability of motorist to guest: assumption of risk. A Florida statute bars actions for ordinary negligence by a non-paying guest transported in a motor vehicle,[115] but this statute does not apply to school children on their way to and from school. This exception was found to be applicable in a current case;[116] but in another, the effect of the statute seems to have been completely overlooked.[117] The trial court, having charged that the guest assumes the risk unless he protests the negligent operation of the vehicle, reconsidered and awarded a new trial. This was approved by the Supreme Court, holding that it must appear that the guest had reason to know that the car was being operated in a dangerous manner. Certainly the defense of assumption of risk cannot be applied in a case of gross negligence.

Survival of actions. The statute which provides that all actions for personal injuries shall die with the person,[118] applies to death of the injured person, not of the tortfeasor. This was established in a case in which the tortfeasor, having severely injured and disfigured his victim in an attempt to murder her, turned his pistol upon himself and committed suicide.[119]

Master and servant. Notwithstanding the general substitution of workmens' compensation for the common law actions in cases where an employee is injured in the course of his employment, cases still arise in which the old-time defenses of assumption of risk and contributory negligence are applicable. One case, based entirely on the common law, drew nice distinctions as to the extent of the risk assumed.[120] A workman whose employer was engaged by a public utility to repair electric power lines damaged in a hurricane, was severely injured when he came in contact with an energized wire. The utility contended that since the workman was sent to repair equipment known to have been

114 See note, 1 U. of Fla. L. R. 316 (1948).

115 F. S. 1941, § 320.59.

116 Schwenck v. Jacobs, 35 So. 2d 123 (Fla., 1948).

117 Knudsen v. Hanlan, 36 So. 2d 192 (Fla., 1948).

118 F. S. 1941, § 45.11.

119 Necker v. Gallinger, 35 So. 2d 647 (Fla., 1948).

120 Florida Power & Light Co. v. Hargrove, 35 So. 2d 1 (Fla., 1948).

damaged in the storm, he assumed the risk, and the case was not one for the jury. The Supreme Court found, however, that the evidence permitted an inference that the workman was injured, not because of trouble caused by the hurricane, but because of faulty rigging when the line was originally constructed. The Federal Employers' Liability Act has made contributory negligence a factor to be weighed toward mitigation of damages, not a complete defense as it was at common law. On this basis, the court sustained a very substantial award of damages to the widow of a railroader killed in a yarding accident.[121] The evidence showed that the workman was negligent as well as the crew of the engine that struck him. In the workmen's compensation cases of the quarter, the court ruled that to benefit by the extension of time which is accorded persons found to be "mentally incompetent," a claimant may show that following a head injury, he was unable to manage his ordinary business affairs and to provide for his family as formerly.[122] The father, brothers, and sisters of a deceased deaf mute, a minor, who turned back half his earnings to his mother to share the expenses of the home in which he lived, failed to show an obligation of the decedent, voluntarily or otherwise assumed, to support them, and thus did not prove a case of dependency.[123] The mother had already been allowed to claim as a dependent. When all the medical testimony is to the effect that the claimant has recovered, but the claimant himself testifies that that is not the case, there is evidence to support a finding of the deputy commissioner that the disability is continuing.[124]

Damages in tort cases. Verdicts of $25,000[125] to the widow of a railroad yard worker and $50,000[126] to an electric lineman, who lost his right arm below the elbow, were held not to be excessive, although based on inflated earnings. Justice

121 Loftin v. Saxon, 35 So. 2d 716 (1948).

122 Thomas v. Westinghouse Electric & Manufacturing Co., 36 So. 2d 377 (Fla., 1948).

123 Sherman v. Florida Tar & Creosote Co., 36 So. 2d 267 (Fla., 1948).

124 Florence Citrus Growers Association v. Parrish, 36 So. 2d 369 (Fla., 1948).

125 Loftin v. Saxon, 35 So. 2d 716 (Fla., 1948).

126 Florida Power & Light Co. v. Hargrove, 35 So. 2d 1 (Fla., 1948).

Terrell, finding that the lineman, who had not been educated beyond the fourth grade and had no training which would be adaptable in any other field, was earning $6500 annually, said wisely: "The Judge who overlooks the fact that the lineman, the yard man, the plumber and the cook, are made of the same common clay that he is, is not equipped to do so."

Slander of title. One case decided during this period deserves extensive study.[127] The plaintiff, a builder and developer, contracted to build a house on a certain lot of land which he owned, and thereafter to convey the land to one of the defendants. The defendants added their names to the writing as witnesses and caused it to be recorded, although this was not contemplated by the plaintiff, who brought an action for damages. The lower court sustained a demurrer; but the Supreme Court remanded the case, holding that a cause of action for false statements tending to disparage the quality or title of land, had been stated. The false statement in suit was the contract actually signed by the contractor, and the recording was the act which constituted publication. It is hard to see where any falsity enters the picture, and the next appeal will be eagerly awaited.

THE FAMILY. *Divorce.* No quarter would be complete without a number of divorce cases; but it appears that novel and important questions of law in that field remain undecided. A valuable restatement of the distinction between the award of alimony and property settlements is made in one case,[128] which has been discussed in detail above.[129] The existence of a decree for separate maintenance in another state does not deprive a court of jurisdiction to award a divorce; but dismissal of the petition may be justified by the existence of such a decree. A recent case, in which a husband petitioned for divorce in Florida after his wife had secured a decree for separate maintenance in New York, settles some controversial points of great importance.[130] The wife did not appear, but wrote

127 Lehman v. Goldin, 36 So. 2d 259 (Fla., 1948).

128 Welsh v. Welsh, 35 So. 2d 6 (Fla., 1948).

129 See above under title "Equity: Constructive Trusts."

130 Bernstein v. Bernstein, 36 So. 2d 190 (Fla., 1948).

to the circuit judge in Florida, through her attorneys in New York, apprising him of the facts. The circuit judge issued writ of *ne exeat* against the husband, adjudicated him in contempt, and dismissed the petition with prejudice! The Supreme Court found that the circuit judge had power to act on the wife's letter without an appearance, but quashed the contempt order and reinstated the petition, holding that since the prior proceedings were matters of defense, the husband was under no duty to the court to disclose them in his petition. In another case it was shown that a husband had brought an action for divorce in 1926, at which time an order for temporary alimony was entered.[131] In 1946, the wife appeared, asserting that the husband, now residing in another state, had been in default since 1926, and seeking a judgment for the payments in default. The court ordered publication of notice in the newspapers, and entered judgment in default of an appearance. On application of the husband, the Supreme Court applied the rule that a decree for alimony cannot be entered where service on the other party is by publication only, treating this case as one of original process; but it avoided deciding whether or not it was original process by holding the notice insufficient for other purposes in that it did not state the time and place of hearing in violation of a rule requiring parties to be notified.

Cancellation of antenuptial contract for fraud. While sterility of the wife is not a ground for divorce or annulment, the concealment of the fact that a woman is sterile at time of marriage, if it is known to the wife, and if the procurement of issue is of the essence of the contract, may constitute such fraud as would justify annulment of the marriage and recission of an antenuptial settlement. Whether or not the wife knew she was sterile is a question of fact for the chancellor or master, and if there is legally sufficient evidence to support his finding, it is conclusive.[132]

Custody of children. In one case, the Supreme Court reviewed the record made below in an *habeas corpus* proceeding, wherein a widowed mother who had left her child

131 Peacock v. Peacock, 36 So. 2d 206 (Fla., 1948).
132 Ball v. Ball, 36 So. 2d 172 (Fla., 1948).

with her first husband's parents, sought to recover custody from them.[133] This is not, however, a holding that custody cannot be awarded to the mother if that would be in the best interest of the child, as the headnote would seem to indicate. This was not a case of custody following divorce, but the problem is the same.[134]

Adoption. Some interesting problems were raised and answered rather inconclusively in an adoption case.[135] After a home was found for the child with the consent of the natural parent and the state welfare board had made a favorable report, the adopting mother died pending the final decree. The court below believing that adoption by a single man would be improper, dismissed the case, and the husband appealed. The Supreme Court was sympathetic, but it had the advantage of hindsight, for the husband remarried pending the appeal! It remanded the case with instructions to investigate the suitability of the new home. Meanwhile the natural mother had withdrawn her consent; so this case constitutes a holding that once consent has been filed, it may not be withdrawn.

ADJECTIVAL LAW

CONFLICTS OF LAW. While the courts of one state are bound by the federal constitution to accord full faith and credit to decrees in divorce rendered by another, provided it has acquired jurisdiction over one of the parties, there is no corresponding prohibition against a collateral attack on a separate maintenance decree. The Supreme Court has recognized this, holding that a circuit judge may consider the existence of such a decree as a matter of defense, but not as depriving him of jurisdiction.[136] In a case involving jurisdiction to administer an estate, in which the states of California and Florida intervened to preserve their relative tax interests, the record showed that the deceased, a long time resident of Florida, had gone to California on a visit shortly before his death, which occurred in California.[137]

133 State *ex rel.* Hicks v. Cain, 36 So. 2d 275 (Fla., 1948).

134 See Leo M. and LOUISE A. ALPERT, *Custody Incident to Divorce in Florida,* 2 Miami L. Q. 32, and Note, 2 Miami L. Q. 184.

135 *In re* McDaniel, 35 So. 2d 585 (Fla., 1948).

136 Bernstein v. Bernstein, 36 So. 2d 190 (Fla., 1948).

137 Miller v. Nelson, 35 So. 2d 288 (Fla., 1948).

His will, which was admitted to probate, described him as a resident of California. Testator was an aged man, subject to considerable influence on the part of his housekeeper. The Supreme Court stated the rule of law to be, that where an established domicile is shown, there is a presumption that it continues. This places the burden of proof upon one asserting change to show the intent to change, including the mental capacity to entertain that intent. In the light of this rule, it found that the county judge's findings were supported by competent evidence, with the result that the record displays one of those nice paradoxes, understandable only by the initiate: that testator had the capacity to make the will in which he described himself as a resident of California; but that at the same time, he did not have the capacity to decide where to make his home. In any event, determination of domicile is largely a matter of resolving conflicts in testimony, and if there is evidence to support the findings of the trier of facts, the findings should be sustained on appeal. A similar question is presented when there is a dispute within the state as to the county in which the estate should be administered.[138]

JUDICIAL ADMINISTRATION. Two interesting decisions were rendered during the quarter in which the court examined the nature and character of the judicial function. One of these involved the compensation of masters in chancery.[139] The court held that in some cases, the master is entitled to receive more than the statutory rate[140] of compensation, but that it is not proper to consider the financial ability of the parties, or duties assumed by the master over and beyond those required by law. In an uncontested divorce, the master, a man of considerable age and experience, was allowed a fee of $750, his report showing that there had been several hearings, innumerable conferences with the parties and their counsel, a settlement reached through the master's patient and untiring efforts, and that the defendant, a physician, enjoyed a large income. The court not only held $750 excessive, but said that the case justified

138 *In re* Lorenzo's Estate, 35 So. 2d 587 (Fla., 1948).

139 Cohn v. Cohn, 36 So. 2d 199 (Fla., 1948).

140 F. S. 1941, § 62.07.

nothing more than the statutory rate. We estimate that this would be about $5.00, based on the above statment, and treating some of the conferences as hearings. The situation would be different in the case of a guardian *ad litem*, who is responsible for the value of the amount in litigation, and whose function is not judicial; but the master in chancery is performing a judicial function, and it is fundamental that justice shall not be sold. The case does call attention, however, to the fact that there is considerable disparity between the value placed upon a lawyer's services by the legislature and that placed upon a physician's by the public. If it is too much to ask the parties to pay the master what his time is worth, the state should assume the expense.

In another case it was ruled that where no answer is filed in a divorce proceeding, but the court was informed by letter that there was an outstanding decree for separate maintenance in another state in favor of petitioner's wife, a nonresident, the court had power of its own motion, without an appearance, to require further evidence and to consider this defense.[141] It thus appears that a court is not limited in its powers because a case is not defended, even where a decree based upon default would be unassailable. This ruling is made of the same stuff that permits the court to summon witnesses, rule on the admissibility of testimony, and direct a verdict, all of its own motion. The record in the particular case illustrates a danger which is always present when the court exercises this power: the line between judge and advocate is too easily crossed. The court below in the zeal of advocacy found the petitioner guilty of contempt. When this situation arises, the appointment of a guardian *ad litem* would offer a more practical solution. The power of a court to protect the members of its own bar against the machinations of ungrateful, nonresident clients, is asserted to be "implied" in another case.[142] Viewed however as a holding that a court of equity, having through control of a trustee the practical custody of a fund in one proceeding, may consolidate *in rem* and *quasi in rem* proceedings against that particular fund in the same proceeding, the holding is more plausible.

[141] Bernstein v. Bernstein, 36 So. 2d 191 (Fla., 1948).

[142] *In re* Warner's Estate, 35 So. 2d 296 (Fla., 1948).

EVIDENCE. *Presumptions and burden of proof.* One case in the field of evidence involved the use of presumptions to establish the burden of proof.[143] It involved the determination of the domicile of a long time resident of Florida who had gone to California and declared himself to be a resident thereof. The court ruled, that when an established domicile has been shown, the burden is upon the party asserting change to show the requisite intent. This burden was held to include proof of the requisite capacity to form such an intent. It would seem, however, that the existence of the intent was shown, and the real issue was whether or not the capacity existed, and on that issue, the presumption of sanity would place the burden of proof on the party challenging capacity. It was entirely unnecessary to enter upon this speculation, because there was evidence on each issue to support a finding in favor of either party by the county judge. *Judicial notice.* The raising of cattle being an important industry in this state, the court knows judicially that range cattle do not leave the range unless they are driven away.[144]

Admissibility dependent on findings of court. Where the admissibility of evidence depends on the determination of facts not material to the issue, it is the function of the trial judge to make that determination, and his ruling, if based on competent evidence, must be sustained. Where the state attorney prepared a written statement to be signed by a dying witness, victim of the alleged crime, and included a statement that there was knowledge of impending death, this was competent, when supported by the testimony of a physician that the witness was *in extremis* and did die shortly thereafter, to admit the statement as a dying declaration.[145] *Confessions.* The use of a confession is not sufficient to support a conviction unless there is other proof of the *corpus delicti;* but when in addition to confessions of arson, the fire chief testified that he found evidence of the use of kerosene to start the fire and saw the accused at the scene during the fire, this requirement was held to

143 Miller v. Nelson, 35 So. 2d 288 (Fla., 1948).

144 M. J. Carroll Contracting Co. v. Smith, 35 So. 2d 385 (Fla., 1948).

145 Simmons v. State, 36 So. 2d 262 (Fla., 1948).

be satisfied.[146] The confessions of an accomplice cannot be admitted to prove the guilt of the principal unless made in his presence; but failure of counsel to object seasonably will result in a waiver.[147] In a case where the principal and his accessories were tried jointly, such confessions were offered. They could not be excluded when offered, because they were competent as to some of the defendants; therefore counsel had recourse only to a request to charge that they could not be considered as against the principal. He failed to do this, and was held to have waived his right.

Evidence of other crimes. Evidence that the accused has committed other crimes is ordinarily not admissible to prove that he has committed a particular crime; but this rule admits of exceptions where motive, identity of the accused, or a course of conduct are material. In one case, the court admitted evidence to show that within a few days immediately preceding and following an alleged rape, accused attacked or attempted to rape four other women in the area, and that his method of approach in each case was the same.[148] This case is to be contrasted with another in which it was alleged that the defendant in a prosecution for bigamy, had forged a certified copy of a decree of divorce offered in evidence.[149] On cross examination of the defendant, the state over objection brought out that he had been convicted of forgery. The court ruled that while a defendant may be asked if he has ever been convicted of crime, he may not be asked of what crime unless it is perjury. Taken together, these two cases illustrate the rule and its exceptions.

Entries made in the course of a business. The admission of the reports of a credit rating agency to prove that a prospective purchaser of real property was able to purchase, was approved in another case.[150] The evidence is clearly hearsay, since the persons who compiled the report are not present, and they have only compiled data which

146 Miles v. State, 36 So. 2d 182 (Fla., 1948).

147 McDowell v. State, 36 So. 2d 180 (Fla., 1948).

148 Talley v. State, 36 So. 2d 201 (Fla., 1948).

149 Steese v. State, 36 So. 2d 212 (Fla., 1948).

150 Perper v. Edell, 35 So. 2d 387 (Fla., 1948).

they have obtained by hearsay; but as a new departure in the law, courts have admitted similar reports in the belief that the regularity of the course of business in which they are compiled gives some measure of credibility to them. This case may be regarded as a big step forward in the law of evidence.