

University of Miami Law Review

Volume 12
Number 3
Volume 12 Issues 3-4
Third Survey of Florida Law

Article 2

7-1-1958

Constitutional Law

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Recommended Citation

Clifford C. Alloway, *Constitutional Law*, 12 U. Miami L. Rev. 288 (1958)
Available at: <https://repository.law.miami.edu/umlr/vol12/iss3/2>

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CONSTITUTIONAL LAW¹

CLIFFORD C. ALLOWAY²

INTRODUCTION

The author should note that the Florida electorate will have an opportunity to adopt a new state constitution in 1958. This proposed constitution is a vast improvement over the 1885 document in style and organization; however, the basic political deficiencies of the earlier constitution (such as provision for elected cabinet officials and inadequate parliamentary representation for the heavily populated counties) have been continued or enforced.

The language added to the constitution by amendment was unusually significant during the past two years.³

The approach of the writer to decisional constitutional law is realistic and modern in the sense that: (1) judges are assumed as necessarily creating law⁴ in the typical constitutional interpretation problem and (2) government economic policy determination is assumed as the parliamentary prerogative⁴ under separation of powers in representative democracy.

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1. Volumes 81 through 95, Southern Reporter, second series. Former *Survey* statements, still apropos, are incorporated since the *Survey* is a continuous affair.

2. A selected list of amendments to the Florida Constitution is as follows: (1) art X, §§ 1-26, adopted in 1956 (the electorate adopted a modern judicial article). (2) art VIII § 11, the long awaited panacea for Dade County—Miami governmental problems—the state's first county home rule amendment, adopted in 1956.

3. In the first place the constitutional language would generally permit a choice if any real interpretation is necessary, i.e., substantive economic due process means a "reasonable" regulation of property. What is "reasonable" is judicial legislation of necessity; see Braden, *The Search for Objectivity in Constitutional Law*, 57 *YALE L.J.* 571 (1948).

4. Compare CAHN, *SUPREME COURT AND SUPREME LAW* (1954) (the tone of much of which calls for judicial review by policy determination with Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 *HARV. L. REV.* 6 (1924) (indicating that the real problem in economic policy determination by courts is that the judicial technique for factual determination of the "reasonableness" of a law, is appallingly inadequate).

SEPARATION OF POWERS¹

This section will be divided, as are the Florida decisions, into the traditional² fields of power.

I JUDICIAL POWER

A. *Judicial Review*

Study of judicial power in the United States is rewarding.³ There have been periods in our legal history when our judiciary has greatly expanded its office, at times overshadowing the supposedly "equal" executive and legislature. There are some vestiges of that judicial pedestal in our Florida legal scene.

In the effectuation of its review function the Florida Supreme Court again characterized its work as mechanical in nature.⁴ However, in the same year the Court invalidated a legislative endeavor while referring to a Thomistic (perhaps) requirement that legislative power must have the "sanction of natural justice."⁵ Such archaic concepts of the judicial discretion in constitutional decisions disallows reasoning which displays the ever-present "inarticulate premises" embodied in the judicial conclusion.⁶

Necessary Interest to Raise the Constitutional Issue—In *Mayor v. Dade County*,⁷ the Court permitted an attack upon the validity of a zoning regulation that precluded plaintiffs from constructing a hospital although the plaintiffs acquired the property with knowledge of the existing regulation.

The Florida Court has not clarified the difference between a judicial question, to which judicial power extends, and the unique interest one must have to raise constitutional questions.⁸ Recently, in *Ervin v. Collins*,⁹ the Attorney General successfully sought a declaratory decree as to the eligibility of Governor Collins to seek re-election. Because the problem was one of large public interest, and the plaintiff, as the "legal representative of the people," was a proper petitioner, the action was authorized.

1. Read Alloway, *Florida Constitutional Law*, 10 *MIAMI L.Q.* 144-153 (1956) and 8 *MIAMI L.Q.* 158-166 (1954).

2. If any starkly defined separation ever did exist it was in a setting which was not modern. See, generally, Dodd, *Administrative Agencies as Legislators and Judges*, 25 *A.B.A.J.* 923 (1939).

3. See, generally, POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938).

4. *State v. County of Manatee*, 93 So.2d 381, 383 (Fla. 1957) ("We have no power to tamper with . . ." the constitutional language).

5. In *Greenblatt v. Goldin*, 94 So.2d 355, 358 (Fla. 1957).

6. Certainly not a very original suggestion.

7. 82 So.2d 513 (Fla. 1955). *Hartnett v. Austin*, 93 So.2d 86 (Fla. 1956), authorized plaintiff homeowners to attack a zoning ordinance on the basis that they had homes across the street from the affected area and that they relied on existing zoning when they purchased the homes.

8. Alloway, *Florida Constitutional Law*, 10 *MIAMI L.Q.* 144-145 (1956).

9. 85 So.2d 852, 854 (Fla. 1956).

In 1956, the plaintiff, who operated an automobile tax agency, sued a county tax collector for a license to operate. The court located a sufficient interest in the plaintiff to sue on the theory that he was not merely a member of the public who desired to collect taxes, but was a business man in this regard.¹⁰

Review Procedure—To question the validity of a statute the court insisted that the issue be briefed and argued.¹¹

Administrators who wish to determine constitutional fact issues would be well advised to read *Village of Virginia Gardens v. Haven Water Co.*,¹² in this case it was decided that exhaustion of administrative remedies is not necessary when there is no "prescribed administrative procedure available."

Severability Problems—The Court did not require a legislative severability clause in a statute that was partially unconstitutional, to expunge the invalid portion of the statute.¹³ That the legislative intent was not thereby destroyed was the criterion.

In *Greenblatt v. Goldin*,¹⁴ the apparent standard was whether the valid portion of the statute was a "completed and workable statute." The Court believed that the statute, if operated upon, would leave the legislative intent too uncertain.

B. Facets of Judicial Power

Inherent Power.—A 1957 decision¹⁵ explained the inherent power of the circuit judge to discipline a grand jury by expunging legally objectionable material from the jury's report. The Court's language classified the grand jury as one of the circuit court's "appendages." The effect of this decision would seem to curtail sharply the independence of the jury, at least wherein its investigatory and condemnation function is concerned. Juries were ordered to investigate and *indict* rather than to investigate and report when the conduct of public officials and private individuals require action on the part of officialdom. A jury probably will find difficulty in reporting misconduct under the directive that the report may "incidentally" point to an official.

10. *McBride v. Overstreet*, 89 So.2d 672, 674 (Fla. 1956).

11. *State v. Miami Coin Club, Inc.*, 88 So.2d 293, 294 (Fla. 1956).

12. 91 So.2d 181, 182 (Fla. 1956).

13. *State v. Newell*, 85 So.2d 124, 128 (Fla. 1956). In a later case the court was not able to accomplish the same end because the statute would have had to have been re-written by the court to achieve the apparent legislative intent embodied in the statute; *State v. Tindell*, 88 So.2d 123, 125 (Fla. 1956). *Accord*: *State ex rel. McCoy v. Bell*, 91 So.2d 193, 196 (Fla. 1956).

14. 94 So.2d 355, 359 (Fla. 1957).

15. 93 So.2d 99 (Fla. 1957) (In this connection, the lower court was given the power to "preserve the integrity of its records").

The Court, in a very lucid opinion,¹⁶ described the power in connection with civil and criminal contempts as an "integral part of the judicial power" which may be exercised, as to the facts and law in the particular instance, without reference to a jury or other tribunal. Lower courts were cautioned in the exercise of the power since the normal procedural due process requisites are omitted. The classic distinction between civil and criminal contempts was maintained, that is, whether the "nature" of the action inclines more to private or public law. Apparently, the Court also authorized compensatory fines in civil contempt actions to make whole one injured by a violation of the court's decree.

In 1956, the Court evaluated the evidence before the trial judge, in a criminal contempt action, under the "reasonable doubt" standard normal to criminal cases.¹⁷ In this case the county solicitor brought the action against a defendant for violation of an injunction against maintenance of a house of prostitution.

Exclusive Power—In a disbarment action, ¹⁸ the Court stated that "the prescription of ethical standards, the designation of educational and moral requirements, and the exercise of supervisory jurisdiction are all peculiarly judicial functions." Adoption by the electorate of Florida Constitution, Article V, would seem to warrant the declaration of judicial independence in dealing with these concerns of an "officer of the court."

*Florida Constitution, Declaration of Rights, Section 4.*¹⁹ The Court again refused²⁰ to utilize Section 4 as a power grant to legislate judicially; in this case the absence of legislation enabling the plaintiff to sue in tort against a drainage district obviated possibility of a suit.

Postion of a Court Rule and an Earlier Statute.—In *Lundstrum v. Lyon*,²¹ the defendants in a common law action pleaded a two year statute of limitation under which an action was deemed to commence when the summons was delivered to the proper officer for service. Florida Common Law Rule 4 provided for action commencement when the complaint was filed with the clerk. The Court regarded the power of the rule of practice, authorized by statute or through inherent judicial power, as insufficient to "amend or abrogate a right resting in either substantive or adjective law."

16. *South Dade Farms, Inc., v. Peters*, 88 So.2d 891, 897 (Fla. 1956) (written by Justice Thornal). The decision quotes several of the major authorities on contempt. *Demetree v. State ex rel. Marsh*, 89 So.2d 498, 501 (Fla. 1956), similarly describes the contempt activity in terms of inherent power and also similarly describes the different contempts.

17. *Demetree v. State*, *supra* note 16. The court defined the difference between direct and indirect contempts as dependent upon whether the conduct is committed in the presence of the court or not.

18. *State ex rel. The Fla. Bar v. Evans*, 94 So.2d 730, 733-734 (Fla. 1957).

19. "All courts in the state shall be open, so that every person . . . shall have remedy . . ."

20. *Rabin v. Lake Worth Drainage District*, 82 So.2d 353, 354 (Fla. 1955).

21. 86 So.2d 771, 772 (Fla. 1956).

C. Jurisdiction of Courts

County Judge.—An appellant was adjudicated an incompetent in a proceeding initiated in the county judge's court; the order was appealed to the circuit court where a motion to dismiss the appeal was granted. On review, the Supreme Court stated that the county judge in this proceeding acted as a court, not as a "special statutory judicial tribunal." Therefore, the county judge utilized the judicial power and his judgment was appealable to the circuit court.²²

County Judge's Court, sitting as a Court of Probate.—The Florida Supreme Court empowered the county judge's court to determine attorney's fees for services rendered to a legatee or a distributee in an estate proceeding, including the power to award a lien therefor, with payment ordered from funds due the client from the estate.²³

Relation of the Circuit Court to the Juvenile Court.—In *State ex rel Watson v. Rogers*,²⁴ the question whether a circuit court in proceedings supplementary to a divorce and custody cause may exercise jurisdiction over minor children, when the children have been declared dependent by a juvenile court. Florida Constitution, Article V, section 50, authorized the legislature to establish the jurisdiction of juvenile courts. The legislature responded with a statement of "exclusive original jurisdiction of dependent and delinquent children."²⁵ Florida Constitution, Article V, section 11, grants "exclusive original jurisdiction in all cases in equity . . . to the estate and interest of minors." This seeming impasse was neatly resolved by the Court which restricted the juvenile court's jurisdiction to matters of "criminality, delinquency, dependency or other form of parental neglect," while maintaining the traditional circuit court jurisdiction over concerns of "bread and butter and the spiritual." Therefore, Article V, section 50, was limited to jurisdiction over children which does not involve child custody in a divorce case when the "estate and interests of minors" are concerned. The circuit court's custody jurisdiction, in connection with divorce cases, would appear to be complete.

Circuit Court; Appeal Bond Requirement.—In 1957²⁶ the Supreme Court validated a legislative requirement of an appeal bond as a proper condition upon the right of an appellant to appeal to a circuit court from a conviction

22. *In re Freeman's Petition*, 84 So.2d 544 (Fla. 1956) (it is difficult to determine whether the decision was based purely on statutory jurisdictional grounds or on the constitutional grant to the Legislature, affecting county courts, FLA. CONST. art. V, § 17).

23. *In re Baxter's Estate*, 91 So.2d 316, 319 (Fla. 1957) (implied powers). The decision is supported by a contract for the payment of a "reasonable fee" by the client to the attorney.

24. 86 So.2d 645 (Fla. 1956).

25. FLA. STAT. § 39.02(1) (1951).

26. See *Austin v. Town of Oviedo*, 92 So.2d 648 (Fla. 1957).

in a mayor's court. It was indicated that an "unreasonable" legislative burden on one seeking a constitutionally inspired review might not be upheld.

Circuit Court; Petition to Disqualify a Particular Circuit Judge.—An attorney practicing in the Eleventh Circuit alleged that the defendant judge was prejudiced against him to the extent that his clients could not obtain a fair trial. The Supreme Court denied the power in the circuit court to enjoin one of the circuit judges from hearing a case over which the court has jurisdiction.²⁷

Supreme Court; Original Jurisdiction.—A legislative statement conferred on the Supreme Court "original jurisdiction . . . by injunction or other appropriate remedy" to prohibit the maintenance of a suit attacking the validity of a bond validation decree when the suit did not follow the required procedure. A 1956 decision held that the legislature could not confer original jurisdiction upon the Supreme Court which was beyond that delimited in Florida Constitution, Article V, section 5.²⁸ The court likewise indicated that the statute contravened the "exclusive original jurisdiction" of the circuit courts announced in the Florida Constitution, Article V, section 11.

D. Court Review of Legislative Activity—General Considerations

In surveying the Florida Supreme Court's decisions reviewing the constitutionality of legislative action, for the last two years, the author believes that the Court, in large part, has ceased substituting its collective judgment as to what is "best" for Florida for that of the collective judgment of the legislature—with reference to legislation regulating economic concerns in our state. When evaluating economically inspired legislation, the Court has *always* operated under the announced inhibition of the presumption of validity. In the past the presumption has proved fruitless in many instances;²⁹ this anomaly did not appear frequently during the present Survey period. To exemplify this strange situation, one need only refer to *Shiver v. Lee*,³⁰ wherein the Court sustained a legislative conclusion that Florida milk sales demand price administration (the presumption of validity operative) and *Greenblatt v. Golden*,³¹ wherein the Court invalidated a legislative conclusion that the position of creditors under the Mechanics' Lien Law required strengthening (the legislative conclusion did not "find sanction in the dictates of natural justice," whatever that may be defined

27. *Ginsberg v. Holt*, 86 So.2d 650 (Fla. 1956) (likewise, the supreme court could not "interfere in the jurisdiction of the circuit court in any such fashion").

28. *City of Duncedin v. Bense*, 90 So.2d 300 (Fla. 1956) (the court may have held that no legislative statement could change or alter the Art. V, § 5, grant, on the theory that the constitutional grant is complete).

29. See Alloway, *Florida Constitutional Law*, 8 MIAMI L.Q., 158, 161-162, 166-175 (1954); 10 MIAMI L.Q., 143-146-150; 153-165 (1956).

30. 89 So.2d 318 (Fla. 1956).

31. See note 14 *supra*.

to be). The *Greenblatt* decision would seem to be the Court's only recent fall from constitutional grace.³²

*E. Court Review of Administrative and Executive Activity—
General Considerations*

The Supreme Court again accorded a presumption of correctness in favor of a construction of a statute by an appropriate state administrative officer.³³ Clearly the Court will uphold such a construction unless "clearly erroneous."

In a series of decisions the Court has been attempting to discipline administrative action that is not channeled according to at least the basic requisites of procedural due process. For example, in *Coleman v. Watts*,³⁴ the Court reversed a Florida Board of Bar Examiners' denial of a petition to take the bar examination, because of an improper notice of charges and the Board's use of evidence not disclosed to the petitioner.

In general, the Court has retreated from its old judicial supremacy wall³⁵ which was used to frustrate zoning officials. That the "lower court . . . should not substitute its judgment for that of the local zoning authorities" under substantive due process has become almost a constitutional common-place in Florida.³⁶

The remaining problem in court review of zoning necessity judgments is that occasionally the Supreme Court, in reviewing the judgment of a circuit court, that substituted *its* opinion for that of the zoning authorities, assumes the correctness of the circuit court's conclusion.³⁷

II LEGISLATIVE POWER

Delegation of Legislative Power—The question of the validity of delegations is generally included with separation of powers problems since the concept of unconstitutionality here depends on a true separation. Delegation of legislative power as an argument is almost passé in the federal system³⁸ and is not spectacularly strong in Florida.

32. *E.g.*, *Bedenbaugh v. Adams*, 88 So.2d 765 (Fla. 1956) (p. 769, the court refused to insist upon *its* particular economic philosophy). The court, at times confounds the presumption of validity by attempting to substitute, on review, a presumption of correctness in favor of the lower court's position against the validity of the statute; *Miami v. Kayfetz*, 92 So.2d 798, 804 (Fla. 1957).

33. *Green v. Home News Pub. Co. Inc.*, 90 So.2d 295, 296 (Fla. 1956).

34. 81 So.2d 650 (Fla. 1955); *accord*, *Adams v. Lee*, 89 So.2d 217 (Fla. 1956).

35. Alloway, *Florida Constitutional Law*, 8 MIAMI L.Q., 158, 168 (1954).

36. *Miami Beach v. Wiesen*, 86 So.2d 442, 445 (Fla. 1956). The court quite uniformly upheld the conclusions of administrative bodies exercising discretionary judgment under delegated power from the legislature; see *e.g.*, *State v. Florida Turnpike Authority*, 89 So.2d 653 (Fla. 1956).

37. *E.g.*, *Quattrocchi v. MacVicar*, 82 So.2d 873 (Fla. 1955).

38. *Yakus v. United States*, 321 U.S. 414 (1944) (not written as based solely

Delegation of legislative power was upheld under a variety of rationale: (1) that the legislature may "leave the determination of" the time when its power shall become effective;³⁹ (2) "if the legislature defines a pattern to which rules and regulations must conform;"⁴⁰ (3) "the statute sets up and prescribes the standard;"⁴¹ (4) "the legislature has . . . delegated . . . with reasonable clarity a prescribed standard;"⁴² (5) "the power delegated . . . is ministerial or administrative, [not] legislative;"⁴³ (6) and others.⁴⁴

Validated was a statutory standard authorizing a court to make an "equitable distribution" in connection with the Workmen's Compensation Law,⁴⁵ a zoning power delegation to a board of county commissioners,⁴⁶ the delegated power to the milk commission to establish prices for milk sold at wholesale and retail,⁴⁷ the delegated power to the State Turnpike Authority to establish routes,⁴⁸ and the authority to a municipal court to revoke a driver's license.⁴⁹

A. LEGISLATIVE POWER, GENERALLY

Exclusive Legislative Power—In 1956, the question was raised whether the legislature could validly reapportion the representation of the House of Representatives unless the Senate was, likewise, reapportioned. Florida Constitution, Article VII, section 3, declares that both houses shall be apportioned "at the same time." The Florida Supreme Court classified this legislative duty as an exclusively legislation function, a question the answer to which cannot be reviewed by the other departments of government.⁵⁰

on the war power), gave it a death blow; all that case required was that the Congress lay out an area for the agency to work in. The congressional standard can presently be sufficiently indefinite to permit the agency to experiment on the particular socially troubled subject matter.

39. *Mayer v. Dade County* 82 So.2d 513, 517-18 (Fla. 1955).

40. *Id.* at 518 (also, the legislature must delineate the standards and clearly define the "orbit").

41. *The Insurance Co. v. Rainey*, 86 So.2d 447, 448-49 (Fla. 1956). In this case the court realistically related the "standard" ("equitable distribution") to the work of the functionary to effectuate it and found the standard appropriately certain. The case really involved a statutory standard under which judicial power was to be exercised.

42. *Shiver v. Lee*, 89 So.2d 318, 323 (Fla. 1956).

43. *State v. Florida State Turnpike Authority*, 89 So.2d 653, 656 (Fla. 1956).

44. *Smith v. Gainesville*, 93 So.2d 105, 107 (Fla. 1957) ("the municipal judge [in revoking a license] merely follows the mandate of the statute;" the statute "merely imposes . . . an administrative detail.").

As in *Insurance Co. of Texas v. Rainey*, H 21, *supra* note 41, a true delegation of legislative power situation was not involved.

45. See note 41 *supra*.

46. See note 39 *supra*.

47. See note 42 *supra*.

48. See note 43 *supra*.

49. See note 44 *supra*.

50. *Brewer v. Gray*, 86 So.2d 799, 802-803 (Fla. 1956). Justice Roberts, in a statement which dissented from the views of his colleagues in an advisory opinion to the Governor, classified the entire legislative reapportionment area as exclusively legislative in determining that the Governor's veto power should not extend to reapportionment legislation; *In re Advisory Opinion to the Governor*, 81 So.2d 782, 786-87 (Fla. 1955).

The judiciary disabled itself from ordering legislative action, or in this instance, censoring legislative discretion.

Florida Constitution, Article III, section 21, requires that "notice of intention" be published prior to the introduction into the legislature of any local or special law affecting municipal government; the manner of publication is left in the legislative discretion. The legislature has required that the "substance" of such a contemplated law be published.⁵¹ In *Hialeah v. Pfaffendorf*,⁵² the Court refused to inquire into the sufficiency of "notice" when the journal of both houses reflected that the requirements of Article III, section 21, had been observed in the passage of an act abolishing a municipal charter and establishing another.

Inherent Legislative Power—In a 1957 *Advisory Opinion to the Governor*,⁵³ the Governor was advised that the legislature has no inherent power to convene itself; therefore, since Florida Constitution, Article III, section 2, only grants the legislature power to extend the regular sixty day session, there is no constitutional authority "for an extension of an extended session."

Authority to Declare Vacant a Constitutional Office—By reading together a 1955⁵⁴ and a 1956⁵⁵ *Advisory Opinion to the Governor*, it is possible to infer that the Court intends Article IV, section 7, to grant authority to the legislature to regulate the conditions under which a constitutional office becomes vacant. The opinions concerned the unexplained disappearance of Circuit Judge Chillingworth. The second opinion⁵⁶ may be understood as stating that the circumstances surrounding the disappearance, when related to the length of time the judge was absent from his judicial duties, met the statutory "vacancy" condition.

Authorization of suits against the State—Under Article III, section 22, the legislature is given the power to permit suits against the state and its agencies. In *Florida Livestock Board v. Gladden*,⁵⁷ the Court presumed

51. FLA. STAT. § 11.02 (1957).

52. 90 So.2d 596, 598-99 (Fla. 1956) (however, the court did invalidate a similar act subsequently passed during the same session where no notice was given, even though the journal stated that the Florida Constitutional legislative requirement had been observed).

53. 95 So.2d 603, 605 (Fla. 1957).

54. 81 So.2d 778 (Fla. 1955) (in the opinion the court "assumed" the legislative power, but declared the judge's disappearance did not meet the legislative condition; Justice Hobson's separate statement detailed the constitutional and legislative possibilities, but found no authority to authorize a Governor's appointment).

55. 88 So.2d 756 (Fla. 1956). This opinion, by implication (pp. 759-60), suggests a power in the Governor, outside of legislative regulation, to appoint a circuit judge under the circumstances portrayed in the Governor's question. Also mentioned, however, were the constitutional and legislative "vacancy" requirements. Justice Hobson's separate statement was more definite; he related the appointing power action to the legislative requirement, which he found was accommodated.

56. See note 55 *supra*.

57. 86 So.2d 812 (Fla. 1956).

that a legislative permission to recover against the Livestock Board for the destruction of hogs included an award of interest as a "legal incident to the judgment."

Legislative Power to Regulate the Manner in which Appellate Jurisdiction is Acquired—The Supreme Court, "in the absence of constitutional inhibitions," determined that the legislature could impose conditions on the "privilege" of seeking appellate review; in the case an appeal bond requirement was upheld.⁵⁸

III EXECUTIVE POWER

A. Governor

Veto Power—Florida Constitution, Article III, section 28, provides that "Every bill that may have passed the Legislature shall, before becoming a law, be presented to the Governor" for possible executive veto. In a 1955 *Advisory Opinion to the Governor*,¹ the veto power was extended by the Court to apportionment bills.

Convening the Legislature—A 1956 *Advisory Opinion to the Governor*² authorized the Governor to convene the legislature: (1) in special session, pursuant to Article IV, section 8,³ during a recess of a special session previously ordered by him under Article VII, section 3,⁴ and (2) in special session pursuant to Article IV, section 8, when the legislature is already in special session by call of the Governor under Article VII, Section 3. These powers of the Governor were related to the occurrence of an "extraordinary occasion."

Time to Act upon Bills—Florida Constitution, Article III, section 28, provides that if "any bill shall not be returned within five days after it shall have been presented to the Governor . . . the same shall be a law If the Legislature, by its final adjournment prevent such action . . . [the period is 20 days] unless the Governor . . . shall file . . . his objection" The legislature had extended its regular session 7 days (to June 8th). In an *Advisory Opinion to the Governor*⁵ the Court stated that the Governor

58. *Austin v. Town of Oviedo*, 92 So.2d 648 (Fla. 1957) (decision may be only one concerning statutory intention).

1. 81 So.2d 782 (Fla. 1955) (vigorous dissent by Justice Roberts).

2. 88 So.2d 131, 132 (Fla. 1956). A third question of the Governor: "Should the legislature, while in special session under section 3, Article VII . . . extend its recess to a time following closely after the next general election, may I consider such date of reconvening binding . . . without an additional executive call?" The court's answer was negative.

3. The Constitution reads as follows: "The Governor may, on extraordinary occasions, convene the Legislature . . . and shall . . . state the purpose . . . , no legislative business other than that for which it is specially convened . . . [shall be transacted]."

4. The Constitutional statement is as follows: "In the event the Legislature shall fail to reapportion . . . the Governor shall . . . call the Legislature together in extraordinary session"

5. 95 So.2d 603 (Fla. 1957).

had 20 days, after the end of the extended session, to consider and act upon bills presented to him within 5 days prior to June 8, 1957.

Time that the Governor Elect Assumes Office—In a 1955 decision⁶ the Court discussed the problem of when the official term of the Governor commences. Florida Constitution, Article IV, section 2, states that "The Governor . . . shall hold his office . . . from the time of his installation . . ." The Court determined that the incumbent officer continues in office until the formalities of the installation are completed.

Governor's Eligibility for Re-election—Florida Constitution, Article IV, section 2, forbids a Governor elected for a four year term to be eligible for re-election in the next succeeding term. Article IV, section 19, provides for an election to fill the office if it has become vacant and a general election occurs during the vacancy. A governor died and an acting governor assumed the office. Subsequently, a governor was elected, under Article IV, section 19, for a two year term. The court held that Article IV, section 2, did not prohibit a governor, elected under Article IV, section 19, from offering himself for re-election for the normal four year term.⁷

Power to Declare an Office Vacant—Florida Constitution, Article IV, section 6, requires the Governor to execute the law. Article IV, section 7, provides that "when any office, from any cause, shall become vacant, and no mode is provided by the Constitution or by the laws of the State for filling such vacancy, the Governor shall have the power to fill such vacancy" In a 1956 *Advisory Opinion to the Governor*,⁸ the Court may have utilized this language to imply a power in the Governor to declare a vacancy in the office of a circuit court judge who disappeared for over a year, in view of an accumulation of cases on the court docket which the remaining judges could not seasonably dispatch.

Power of Appointment and Removal—The Court advised⁹ the Governor that he could designate a circuit judge to preside at a trial in a civil and criminal court of record of a county when the judge of that court had disqualified himself.

6. *Tappy v. State*, 82 So.2d 161 (Fla. 1955). Justice Terrell dissented, stating that the time of the formal installation is a concern of custom in this state; he preferred the date specified in article XVIII, section 7, (the first Tuesday after the first Monday in January).

7. *Ervin v. Collins*, 85 So.2d 852 (Fla. 1956).

8. 88 So.2d 756, 759-760 (Fla. 1956). The opinion is not clear as to whether the Governor was given *statutory* or *constitutional* authority to act. The power of the Governor to appoint was similarly in issue. See also, *Tappy v. State*, 82 So.2d 161 (Fla. 1955); *In re Advisory Opinion to the Governor*, 81 So.2d 778 (Fla. 1955).

9. *In re Advisory Opinion to the Governor*, 86 So.2d 158 (Fla. 1956). (Opinion may be simply construing a statute authorizing judicial transfer).

10. *Tappy v. State*, see note 8, *supra* (Justice Terrell dissented because he believed that Governor Collins assumed office before the appointment became constitutionally valid; Justice Thomas also dissented).

On January 3, 1955, Acting Governor Johns issued a commission appointing Mr. Tappy county judge. Governor Collins assumed office on January 4, 1955. The court held that Mr. Tappy qualified for his appointment under Article VIII, section 7, which provides that: "All county officers . . . shall before entering upon the duties of their respective offices, be commissioned by the Governor; but no such commission shall issue to any such officer, until he shall have filed with the Secretary of the State a . . . bond . . . approved by the county commissioners . . ." Tappy executed a bond which was filed with the Secretary on January 3, 1955. The Court¹⁰ regarded as unnecessary under the constitution the approval of the county commissioners, who had refused approval; the Court refused to authorize to qualifying officials the power to frustrate an otherwise valid appointment. Therefore, Mr. Tappy was validly appointed to office before Governor Collins assumed the duties of his office. Removal by Governor Collins was, thereafter, geared to existence of the cause for removal stated by law.

B. OFFICERS

Qualification as an Elector—Florida Constitution, Article VI, section 1, requires that a "qualified elector" shall have been a domiciliary in Florida for one year and in a county for 6 months. In *Bloomfield v. St. Petersburg*¹¹ the elector qualifications of a city commissioner were questioned. The Court validated the commissioner's election by reference to traditional domicile requisites.

Compensation of Officer whose Suspension is Revoked—A 1956 decision¹² discussed the constitutional right to full compensation of a constable whose gubernatorial suspension from office had been revoked. The constitutional statement¹³ that "no officer suspended who shall . . . resume the duties of his office, shall suffer any loss of salary or other compensation . . ." was interpreted to mean that the constable had to be reimbursed by the county for net receipts received by an acting constable, including receipts from private individuals.

C. BOARDS AND AGENCIES

Effect of Rule of the Game and Fresh Water Fish Commission—Florida Constitution, Article IV, section 30, was interpreted by the Court¹⁴ as empowering the Commission to promulgate rules which are the "governing

11. 82 So.2d 364 (Fla. 1955). The commissioner in question had been absent from the state, but was found to have had the necessary "intention" of remaining "permanently a citizen." See also, *Tappy v. State*, *supra* note 10 and the text related thereto.

12. *Wright v. MacVicar*, 88 So.2d 541 (Fla. 1956).

13. FLA. CONST., art. IV, § 15.

14. *Bronson v. State*, 83 So.2d 849, 851 (Fla. 1956).

law" in Florida. Again it was stated that the legal effect of such a rule is greater than that of a legislative enactment.

A Pardon and the Operation of the Habitual Offender Law—The 1956 *Fields v. State* decision¹⁵ held that the constitutional¹⁶ and statutory effect of a pardon extended to the felony conviction that the state sought to utilize to validate an adjudication under the Habitual Offender Law.¹⁷

SUBSTANTIVE DUE PROCESS—THE POLICE POWER¹

The denial to government of the power to take or regulate life, liberty or property is a concern of substantive due process—the disagreement is not over the procedure to take, but over the validity of the very taking.² The Supreme Court of Florida apparently does not distinguish between substantive due process and the state police power.³ Probably the Court views the substantive due process as directly related to the constitutionally valid breadth of the police power.⁴ At least in theory,⁵ the state constitution acts as a limitation on the generally broad state police power, and the limitation is to be strictly construed.

The federal government, on the other hand, is theoretically one of constitutionally delegated powers, which powers are to be strictly construed. In fact,⁶ the past course of state and federal constitutional law has been very different. The federal powers have been immensely broadened by a Supreme Court which, until only recently, cooperated with state supreme courts in drastically limiting the state police power.⁷ This severe constitutional corset placed on state governmental power, by two judicial systems,

15. 85 So.2d 609 (Fla. 1956) (pardon was unconditional).

16. FLA. CONST., art. IV, § 12.

17. Also, in *State v. Inter-American Center Authority*, 84 So.2d, 9, 13-14 (Fla. 1955), the court apparently validated a legislative grant of power (it is difficult, in reading the statute and the opinion, to determine whether legislative or executive-administrative power is involved) which was further delegated by the Center Authority. The legislative provision in issue dealt with the employment of various experts and the establishment by the Center of their powers.

1. For recent survey of American due process of law, see WOOD, *DUE PROCESS OF LAW, 1932-1949* (1951); Brockelbank, *Role of Due Process in American Law*, 39 CORN. L.Q. 561 (1954).

2. The writer realizes that these concepts are not clearly distinguishable in fact, but believes this terminology is useful because of overwhelming pragmatic usage.

3. *Garvin v. Baker*, 59 So.2d 360, 364 (Fla. 1952).

4. At least this writer hopes so. A modern outlook would view the police power as limited by only a few basic constitutional limitations—rather than private property as an unlimited concern except for a few valid police power regulations. Life in Florida is no longer agrarian simplicity.

5. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137 (1919).

6. *Ibid.*

7. See, generally, Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

may partially explain the heavy pressure on the federal government to assume activities once thought of as local in nature.⁸

It is convenient to break down the general state police power into the various subject matters which in Florida seem to have the police power thrown around them.⁹

I REGULATION OF BUSINESSES AFFECTED WITH A PUBLIC INTEREST

The Florida Supreme Court, unfortunately, is wedded to terminology that has generally lost its effectiveness elsewhere. The traditional view was that the police power was broad enough only to regulate a "business affected with a public interest." The modern industrial state and its attendant problems have cracked this concept—a valiant protector of private contract and private property.¹⁰ The present Florida Supreme Court is dedicated, theoretically, to a weakened power to review (which mirrors judicial power, generally) the state police power by establishment of an equally strengthened presumption of correctness of legislative exercise of the police power.¹¹ If this presumption of correctness means anything, then the terminology "public interest" carries with it all business, and a heavy burden has to be carried by him who would show otherwise.

A 1956 decision¹² validated state legislation authorizing the removal of communication facilities utilized in violation of the state's gambling laws when the removal affected a hotel. The Court, in sustaining this exercise of police power, referred to the hotel business as "one affected with a public interest." Hotels were classified with the "beverage business," strangely enough, as "a fit subject for special regulation." In view of the procedurally suspect¹³ operation of the removal action, it is difficult to state whether the reference to "public interest" was used by the court to sustain the state police power, or to validate the procedures used under procedural due process.

II ZONING¹⁴

The modern approach¹⁵ to zoning and planning demonstrates a judicial awareness that cities necessitate planned growth. The whole subject is

8. Examples are legion: such as social security, labor relations and education. Witness the demolition of the old "local" "intrastate" area sacred from the federal interstate commerce powers, *e.g.*, *United States v. South Eastern Underwriters Ass'n*, 332 U.S. 533 (1944).

9. The Florida Supreme Court seems to so distinguish. Other states have trouble here, also: McKinnon, *Due Process of Law and Economic Legislation—North Carolina Style*, 1 DUKE B.J. 51 (1951).

10. Hamilton, *Affectionation with a Public Interest*, 39 YALE L.J. 1089 (1930).

11. *E.g.*, *Adams v. Miami Beach Hotel Ass'n*, 77 So.2d 465, 468 (1955).

12. *Southern B. T. & T. Co. v. Nineteen Hundred One Collins Corp.*, 83 So.2d 865, 871 (Fla. 1956).

13. See the materials in this paper on procedural due process.

14. One could argue over inclusion of zoning powers under the general police power.

15. *E.g.*, Comment, *MUNICIPAL ZONING LAW IN CONNECTICUT*, 35 CONN. B.J. 162 (1951). See Johnson, *Constitutional Law and Community Planning*, 20 LAW AND CONT. PROB. 199 (1955).

treated by the courts as expert in nature. Courts are not such experts. This requires a strong presumption of correctness for the findings of a zoning board. The Florida Supreme Court has been remarkable consistent in correctly utilizing the presumption of correctness on the part of the local zoning authorities. Since the 1951 decision, *Miami Shores Village v. Bessemer Properties*,¹⁶ the Court's record in this regard has steadily improved.

During the present Survey period several rules were judicially announced to portray the relationship between the Florida courts and the local zoning authorities: (1) a zoning regulation must not be "unreasonable" as applied to the property in question;¹⁷ (2) a zoning ordinance is "presumptively valid, so that the appellant . . . assumed the 'extraordinary' burden" of proving the ordinance invalid;¹⁸ "the courts do not have the right . . . to substitute their judgment . . . where the question [of reasonableness, undoubtedly] is fairly debatable."¹⁹

Zoning for Economic Considerations—A municipality's ordinance regulated the size and location of advertising signs displayed by gasoline filling stations. The plaintiff dealer handled a somewhat unusual product in that he only sold high test gasoline and at a price competitive to that of the "regular" gasoline sold by other dealers; he proved that his earnings dropped sharply after he complied with the ordinance. The nature of the area indicated that the ordinance was not reasonably related to aesthetic considerations and there was no evidence entered that demonstrated that the ordinance minimized fraudulent practices. Decisional language quoted by the court²⁰ indicates that the decision rejects regulation of advertising designed to prevent "price wars between dealers." The decision would also seem to foreclose zoning regulations that injure competitive advertising unless some relation between the regulation and the public health, safety or morals is entered into evidence by the defendant governmental body. This may prove, particularly during a period of recession or depression, to be an unfortunate court pronounced limitation on the state police power.

*Zoning Based on Aesthetic Considerations*²¹—In *Internatonal Co. v. Miami Beach*,²² a zoning ordinance was violated under which the plaintiff hotel owner was ordered to remove or change the language of a sign displayed near the sidewalk at the entrance to the hotel. Under the ordinance,

16. 54 So.2d 108 (Fla. 1951).

17. *Mayer v. Dade County*, 82 So.2d 513, 519 (Fla. 1955) (perhaps an equal protection issue).

18. *Miami Beach United Lutheran Church v. Miami Beach*, 82 So.2d 880, 882 (Fla. 1955).

19. *Miami Beach v. Wiesen*, 86 So.2d 442 (Fla. 1956) (also, the "courts should be highly respectful of the decision of the [zoning body]; the courts "should tread lightly in this field.")

20. See *Miami Springs v. Scoville*, 81 So.2d 188 (Fla. 1955).

21. *Ibid.*

22. 90 So.2d 906-907 (Fla. 1956) (the sign seemed designed to attract persons who were not guests).

coffee shops and cocktail lounges were permitted in hotels for the use of the guests when the facilities had no entrances from the outside of the hotel. The comprehensive zoning plan restricted the area to various types of hotels and apartment houses. Such a plan was upheld because "the general welfare of the community depended upon preserving its beauty."

Equitable Estoppel—Recently, the Court explained the relationship between equitable estoppel principles and the zoning police power.²³ Evidence before the chancellor sustained his decision that the plaintiffs "had adequate forewarning" of a pending building set-back ordinance when they applied for and received a building permit. The Court compared cases in which an owner was injured by relying upon "good reason to believe before or while acting" that the officials would soon reverse their position.

Contingent Zoning Activity—The City of Coral Gables enacted an ordinance which, under its terms, was dependent upon the observance of a number of conditions by an optionee to purchase the property sought to be re-zoned. The optionee desired to construct a large shopping center and the conditions protected the residential area that would be affected by the activity in the proposed center. Effectuation of the ordinance depended upon contracts to be entered into by the optionee and the City. The Court's decision²⁴ obviated any possibility of zoning conditioned by contract; the rationale was the ordinance must be "definite" in its terms, government may not "legislate by contract" and that the zoning power "must deal with well-defined classes of uses." This decision may not be very pragmatic. In attending zoning authority hearings, one quickly learns that oral statements by petitioners, that certain conditions to protect the interests of protesting property owners will subsequently be observed by the petitioners, are the basis for much of the defacto law of zoning; unfortunately, it is difficult for the authority to enforce such promises after the zoning action becomes effective.

Presentation to the Florida Supreme Court of a zoning situation in which local government is attempting to enforce a comprehensive zoning plan apparently receives more respect from that Court than "spot" zoning activities.²⁵

III EXPENDING POWER

During the *Survey* period the Supreme Court upheld several governmental spending measures: (1) legislation providing compensation for widows of circuit judges whose death occurred before they were eligible to

23. *Sharrow v. Dania*, 83 So.2d 274 (Fla. 1955).

24. See *Hartnett v. Austin*, 93 So.2d 86 (Fla. 1956). The court, however, implied that this decision might not regulate a case in which the application for a variance was sought by a property owner.

25. *E.g.*, *Miami Beach United Lutheran Church v. Miami Beach*, 82 So.2d 880, 882 (1955), should be compared to *Hartnett v. Austin*, *supra* note 24.

retire or after they retired;²⁶ (2) a municipal contract to expend money of the city by "furnishing a utility [water] as an inducement to the "establishment of a university in the city;²⁷ (3) the expenditure of county funds for a hog cholera inoculation program to supplement an expenditure of state funds to accomplish a program which served both a state and county purpose.²⁸ In this latter case the Court, on petition for rehearing, rejected the argument that it had the power to impose its economic philosophy and invalidate the expenditure as "a form of socialized veterinary medicine."

In *Lynn v. Fort Lauderdale*,²⁹ the Court again suggested that government in Florida may not utilize revenue from parking facilities to raise "revenue"; such charges apparently are restricted to "simple regulation" purposes. The author is still curious why this limitation is maintained by the Court.

In 1956,³⁰ the Court upheld a 99 year lease of public land by a municipality to a non-profit corporation (a garden club). Florida Constitution, Article IX, section 10, provides that the credit of the state shall not be loaned to private institutions, nor shall the legislature authorize a governmental unit to similarly appropriate money for, or lend credit to, such institutions. The Court once more sustained the author's former conclusion, that the expending power is valid for "play," but not to enable local government to build for the future.³¹

IV BORROWING AND PLEDGING

The constitutional situation with bond issues is dealt with in another part of the article.

Public Purpose and Borrowing—Under legislative authority the Inter-American Center Authority sought to issue bonds to finance the construction of an inter-American trade center. The Court validated the issue

26. *Green v. Gray*, 87 So.2d 504 (Fla. 1956) (at page 507, the court stated that "the legislature has the power to provide deferred compensation or pensions to officers and employees"). Apparently in issue were FLA. CONST. art. IX, §§ 5, 10. § 5 provides that: "The Legislature shall authorize the several counties . . . to assess and impose taxes for county . . . purposes." § 10 provides that: "The credit of the State shall not be pledged or loaned to any individual . . ." Under the legislation in issue the county was required to pay the entire compensation. See the tax police power section of this article.

27. See *Gainesville v. Board of Control*, 81 So.2d 514, 518 (Fla. 1955) (the contract was construed to operate as "long as the university remained.>").

28. *Bedenbaug v. Adams*, 88 So.2d 765, 768-769 (Fla. 1956).

29. 81 So.2d 511, 513 (Fla. 1955).

30. *Raney v. Lakeland*, 88 So.2d 148 (Fla. 1956) (the Garden Club desired to build a public library, dealing with things horticultural, which apparently would be handsomely landscaped). See also, *State v. Daytona Beach Racing and Recreation Facilities Dist.*, 89 So.2d 34, 37 (Fla. 1956), wherein a lease of public property to a private corporation to operate for public recreation purposes was validated. FLA. CONST., art. IX, § 10 was in issue.

31. Alloway, *Florida Constitutional Law*, 10 MIAMI L.Q. 143, 157 (1956). The decisions referred to in the present case would seem to enforce the author's position.

by characterizing the legislative objective as a "public purpose." Efficaciousness of the Center's tourist attraction possibilities for Florida's economy seemed determinative.³²

Similarly, the Court upheld a legislatively inspired bond issue to construct and operate a racing and recreational facility to be governed by the establishment of a governmental district; here the "purpose" was found to be predominantly a "public" one. The district's desire to lease the facility for six months each year to a private corporation was also classified so that the "private benefit" was "incidental" to the public purpose.³³

V. TAXATION

Taxation for Regulation, not Revenue—In 1955,³⁴ a city was permitted to collect charges from its proposed parking facilities to meet bond obligations assumed to construct the facilities. The Court suggested that the parking revenue could not be used, under the police power, to defray municipal expenses "ordinarily financed by ad valorem taxation"; the fact that the charges would be used for "simple regulations" judicially validated them in some mystical fashion.

Jurisdiction to Tax—The Court³⁵ invalidated a municipal ordinance which required a license fee of solicitors or canvassors operating within the city. The fee was partially geared to a percentage of gross sales. As a regulatory measure the ordinance was upheld; however, the fact that the fees "have no reasonable relation to the cost of issuing the license," combined with the ordinance's application to a salesman from another city who carried samples but made no sales in the taxing city, was sufficient reason for the Court to determine that the tax was an attempt "to confer extraterritorial [taxing] jurisdiction."

Tax Exemption—Florida Constitution, Article X, section 1, provides that the legislature shall prescribe laws to "secure a just valuation of all property . . . excepting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes."

32. *State v. Inter-American Center Authority*, 84 So.2d 9, 12-13 (Fla. 1955) (Particularly in issue was FLA. CONST., art. IX, § 10 which disallows government loans to private institutions).

33. *State v. Daytona Beach Racing and Recreation Facilities Dist.*, 89 So.2d 34, 36-37 (Fla. 1956) (the court mentioned that the tax power also was restricted to a public purpose). See *Lynn v. Fort Lauderdale*, 81 So.2d 511, 513 (Fla. 1955), wherein the court probably limited a city's borrowing power, in connection with a bond issue to pay for off-street parking facilities, so that the money obtained could not be used to operate a "business for gain or profit."

34. *Lynn v. Fort Lauderdale*, 81 So.2d 511, 513 (Fla. 1955); see note 29 *supra*; see note 35, *infra*.

35. *Bozeman v. Brooksville*, 82 So.2d 729, 730 (Fla. 1955) (conviction sustained for other reasons); *State v. City of Melbourne*, 93 So.2d 371 (Fla. 1957), is somewhat analogous; here the city was authorized to extend water and sewer facilities beyond its limits where the territory involved paid for the services and the entire operation was in the general "metropolitan" complex.

The legislature exempted the bonds of, and charges for admission and other excises levied by, the Inter-American Center Authority, which the author discussed earlier.³⁶ The criterion announced by the court as a test for a valid legislative exemption was "the character of the use to which the property is put." The Center's activities were determined to be "educational" and "scientific"; that the Center was legislatively labelled as "an agency of the State" may have been an additional validating factor.

Tax Districts—A 1956 decision, *Fisher v. Board of County Commissioners*,³⁷ obviated a legislative plan to authorize formation of special improvement districts with authority to assess the costs and maintenance, thereafter, of street repairs and lighting against the real property within the district. Apparently, the plan failed because the assessments within the district were not *particularly* related to the "special benefits" accruing to the various properties from the improvements. The improvements were to be financed by a bond issue. If the particularized benefits accruing to the properties within the district had been detailed, and the levies related thereto, the district undoubtedly would have passed its judicial test.

Legislative power to create a special taxing district from a portion of a county to erect within the district a hospital to be financed by a bond issue was upheld by the Court.³⁸ Chief Justice Drew, concurring specially, noted that the present case was distinguishable from prior decisions disallowing an analogous district to be created which had boundaries co-extensive to those of the county.³⁹

VI EMINENT DOMAIN

Procedure—The Supreme Court again authorized an eminent domain procedure which permits efficient judicial determination of the property interests, while maintaining necessary procedural requisites. Under the Court's ruling, the trial judge may postpone controverted title claims until after the jury verdict on the value of the property has been determined.⁴⁰ This decision is discussed under the procedural due process materials in this article.

Time When Value is Determined—The compensation awarded a property owner was geared to the value of the property "at the time of

36. See note 32 *supra*.

37. 84 So.2d 572 (Fla. 1956) (the decision may be strictly a homestead exemption matter under FLA. CONST., art. X, § 7. If so, it has been discussed in the current Florida Property Survey article in this issue. The decision distinguishes, at pages 577-578, the "special assessment" levy properly laid on homestead property and a "tax," not so properly laid, on such property).

38. *State v. Southeastern Palm Beach County Hospital Dist.*, 90 So.2d 809 (Fla. 1956).

39. *Id.* at 811-812. FLA. CONST., art. IX, § 5, has been interpreted to authorize only a county to possess "The general power of taxation" for a county purpose.

40. *Cravero v. Florida State Turnpike Authority*, 91 So.2d 312 (Fla. 1957).

the lawful appropriation."⁴¹ The court stated that evidence may be entered to indicate the uses to which the property "was or might reasonably be applied." However, it was stated not to be "proper to speculate on what could be done . . . to make it [the land] more valuable."

What is a "Taking"?—Three decisions interpreted Florida Constitution, Declaration of Rights, section 12, which states that: "nor shall private property be taken without just compensation."

In *Robin v. Lake Worth Drainage Dist.*,⁴² a constitutional "taking" was not found under the plaintiff's allegations that he had planted peppers on land adjoining a canal maintained by the defendant district and that the district had sprayed the canal with a chemical which had blown upon the plaintiff's land, damaging his crop. The district's activities were classified as a tort.

Likewise,⁴³ governmental removal of lateral support from land upon which a *building had been constructed*, or "interference with ingress, egress and view" resulting from improvement of a public road was determined not to be a constitutional "taking"; the Court limited its pronouncement to cases not involving a "physical invasion" of the land.

Compensation for Restrictive Covenants—In a 1955 decision,⁴⁴ the Court permitted a school board to erect a public school building on land that had been burdened with restrictive covenants, under the general plan of subdivision of lands composing the municipality; the covenants severely restricted the lands to residential type buildings. The restrictions were held not to vest a property right in the owners of other lands in the subdivision for which compensation had to be paid.

Inequality in Zoning and Eminent Domain—The Florida Supreme Court stated that when a set-back regulation is peculiarly applied to a particular parcel of land in a different fashion from property similarly conditioned, the application of the regulation "might amount to an unlawful taking" under eminent domain requirements.⁴⁵

Dedication of Land and Eminent Domain—Statutory proceedings to establish a county road under legislation designating a right-of-way were held not sufficient to demonstrate a "dedication" to public use of the designated road. Until the local government could prove a dedication by

41. *Yoder v. Sarasota County*, 81 So.2d 219, 221 (Fla. 1955) (the "time" is when the government initiates the judicial process by filing the petition required by law).

42. 82 So.2d 353 (Fla. 1955).

43. See *Weir v. Palm Beach County*, 85 So.2d 865 (Fla. 1956) (ingress and egress still possible in this case); accord, *Lewis v. State Road Dep't*, 95 So.2d 248, 254-256 (Fla. 1957) (a change of grade in the highway was proposed).

44. *Board v. Bay Harbor Islands*, 81 So.2d 637 (Fla. 1955).

45. *Mayer v. Dade County*, 82 So.2d 513, 519 (Fla. 1955).

the property owner, the eminent domain requisites demanded compensation to the owner.⁴⁶

Public Purpose—A condemnation to furnish a public way over the plaintiff's property to a lake, the lands surrounding which were also owned by the plaintiff, was determined⁴⁷ not to be a use of the eminent domain power for a "public purpose."⁴⁸ Denial of a fine "fishing hole" to the public by the plaintiff was decreed.

VII THE POLICE POWER—GENERALLY

A. HEALTH

In 1956, the Supreme Court, in a splendid decision that accommodated the regulation realities of modern business problems, greatly strengthened the police power of the state to regulate economic subject matters within the state. *Shiver v. Lee*⁴⁹ authorized the Florida Milk Commission to administer generally the price structure of the Florida milk industry. The Court correctly utilized the presumption that a legislative determination, that a particular economic regulation is necessary, is constitutional under substantive economic due process. Arguments that the milk industry was not a business "affected with a public interest," and that governmental price fixing depends upon an "emergency," were disregarded. The Court properly refused to substitute its judgment for that of the legislature on the question of the necessity of the regulatory scheme; the legislative factual determinations were not avoided by the judicial technique of declaring the legislation "unreasonable," hence, beyond the state police power.

In a quite dissimilar case,⁵⁰ the Court found unconstitutional an act requiring corn products to be labelled with the name and place of business of the miller or manufacturer. As no evidence had been entered in the circuit court to indicate any necessity for the requirement, related to health or any other police power concern, the court properly invalidated. The *Shiver v. Lee* decision, discussed above, would seem to indicate that the legislature (there being no legislative history materials available in Florida) might well consider incorporating a statement in economic regulatory measures which would explain the necessity—hence the "reasonableness"—for the particular law.

B. SAFETY

In two 1957 decisions, the Court upheld the power of the state to revoke the licenses of motor vehicle operators under appropriate conditions,⁵¹

46. See *Pocock v. Town of Medley*, 89 So.2d 162 (Fla. 1956).

47. *Osceola County v. Triple E Development Co.*, 90 So.2d 600 (Fla. 1956).

48. See *Alloway*, *Florida Constitutional Law*, 10 MIAMI L.Q. 143, 160 (1956).

49. 89 So.2d 318 (Fla. 1956). Fortunately, the court's language does not appear to chain price fixing solely to the health police power of the state.

50. *Eelbeck Milling Co. v. Mayo*, 86 So.2d 438 (Fla. 1956).

51. *Smith v. Gainesville*, 93 So.2d 105 (Fla. 1957).

and to regulate passage of trains by requiring the train to stop and be preceded by a flagman over the crossing,⁵² where a crossing was not protected by a flagman or electrical equipment.

The *Sheiner v. State*⁵³ decision discussed the state's power to disbar licensed attorneys who become members of subversive organizations. The state was not permitted to disbar on the basis of the attorney's proper claim of self-incrimination during the disbarment proceedings.

C. MORALS

Fraud—The Florida Citrus Commission promulgated a regulation establishing production standards and labeling requirements for "chilled orange juice;" this product could not contain any additives. The plaintiff desired to produce and market his juice with a sugar added to sweeten the product. No health problem was presented by this additive. On the contrary, the Commission acted to "protect the public against fraud and deception." The Commission's position was sustained by the court as a "reasonable exercise" of the state police power⁵⁴ to protect the Florida citrus industry's standards.

The Court failed to uphold a zoning regulation of the size and location of signs displayed by gasoline filling stations to advertise the price of their product. It was impossible to relate a stringent requirement on the size and position of such signs to a practice of fraud or dishonesty in advertising.⁵⁵

Liquor—Miami adopted an ordinance forbidding female employees or entertainers in places dispensing liquor for consumption on the premises to fraternize with the customers. Also, it was made unlawful for the owner to employ or permit on the premises any person to solicit drinks for any purpose. The City presented evidence which demonstrated the so called "B-girl" evils. Operating under the presumption of validity the Court sustained the ordinance as a "reasonable" exercise of the police power.⁵⁶

52. *Weeks v. Welch*, 92 So.2d 645 (Fla. 1957).

53. 82 So.2d 657, 659 (Fla. 1955). It is difficult to state whether the Court intended to *substantively* prohibit disbarment on the inference of a self-incrimination claim, or whether the court was only concerned with procedural due process.

54. *Florida Citrus Comm'n v. Golden Gift*, 91 So.2d 657 (Fla. 1956).

55. See *Miami Springs v. Scoville*, 81 So.2d 188 (Fla. 1955).

56. *Miami v. Kayfetz*, 92 So.2d 798 (Fla. 1957) (FLA. CONST., DECL. OF RTS., §§ 12, 17, and U.S. CONST., amend. XIV, § 1, were in issue). The last section of the ordinance, prohibiting women from frequenting or loitering in any such establishment to solicit men to purchase drinks, was upheld.

In *Jones v. Sarasota*, 89 So.2d 346 (Fla. 1956), the Court sustained an ordinance, under due process claims, that prohibited operation of a beer and wine establishment, when consumption is permitted on the premises, and where the establishment is less than 500 feet from a church. The argument proceeded along equal protection lines; seven negroes claimed that the ordinance only affected their operations. The appellants were authorized to amend their complaint (if possible) to more particularly allege their factual position.

A section of the ordinance which prohibited any employee or entertainer from drinking on the premises was not upheld. The Court was unable to relate this section to the "evil" sought to be eradicated by the ordinances; hence the section was held "unreasonable."

Gambling—The state legislation regulating communication facilities when utilized for gambling purposes was again validated.⁵⁷ The present decision sustained termination of telephone service of a hotel; the service was being used "in violation of the laws [gambling]."

D. GENERALLY

The *Shiver v. Lee*⁵⁸ case (discussed above) may, perhaps, be partially characterized as a validated exercise of the state's police power to regulate economic matters, not particularly related to the subject matters traditionally regulated at common law—such as health, safety or morals concerns.

Also, a confiscation issue was raised in *Virginia Gardens v. Haven Water Co.*⁵⁹ The Court insisted upon a "reasonable return on capital investment and . . . operating expenses" in failing to sustain the validity of an ordinance establishing rates for a private water company; compensation for officers and employees was included as a legal item of "operating expenses."

PROCEDURAL DUE PROCESS

I ADMINISTRATIVE DUE PROCESS

Notice—The Florida Board of Bar Examiners attempted to disallow a petitioner to take the bar examination. Under the Board's investigatory procedures, certain derogatory information concerning the petitioner's moral character had been obtained. At a hearing before the Board, the petitioner was asked a variety of questions, the answers to which ranged over a number of the petitioner's past activities. All accusatory questions were denied by the petitioner; at no time during (or before) the hearing did the Board state any "acts of malfeasance" which were reported to it. The Board subsequently informed petitioner that he "did not meet the requirements for admission to the Florida Bar." The Supreme Court, in *Coleman v. Watts*,¹ upheld petitioner's argument that the Board could not deny him the right to take the examination "without at least informing him of the *general* nature of the complaints and charges."

57. *Southern Bell Tel. and Tel. Co. v. Nineteen Hundred One Collins Corp.*, 83 So.2d 865, 868 (Fla. 1956). FLA. CONST. DECL. OF RTS., §§ 1, 12, were in issue as was state's police power.

58. See note 49 *supra* and the accompanying text.

59. 91 So.2d 181 (1956) (U.S. Const. amend. XIV, was also in issue—probably the due process clause, although the court also mentioned the equal protection clause).

1. See 81 So.2d 650 (Fla. 1955). A complaint, filed by the Florida Bar against a member for alleged acts of professional misconduct, which was determined to be an adequate notice is related in *State v. Grant*, 85 So.2d 232, 233-234 (Fla. 1956).

A 1957 decision, *Hickey v. Wells*,² stated that procedural due process requires "a procedure for disclosure [bill of particulars or a request for a list of witnesses] . . . or else specific accusations"; the absence of rules of procedure established by the Board of Dental Examiners was held to require in this case a "specific accusation," before the Board could discipline a dentist. Notice sufficient for due process requirements was said to be that which allows "a fair chance to prepare a defense."

Hearing—In *Coleman v. Watts*,³ discussed above, the Court also objected to the use, by the Florida Board of Law Examiners, of evidence which was not disclosed to the petitioner. That the petitioner was deprived of opportunity to "refute any of the charges" by the Board's procedures, or to be confronted by the witnesses against him, was sufficient to invalidate the hearing (if one may dignify such procedures by the nomenclature "hearing"). Apparently, administrative tribunals must base their factual conclusions upon "record evidence."

A 1956 decision⁴ authorized termination of telephone service to a hotel under unusual procedures. In the case the Court held that "at any time before the service is discontinued a person who considers [the action illegal] may proceed in a court of equity to show" the illegality of the telephone company's proposed action, thereby restraining the termination of service. The administrative hearing⁵ by law was to be held *after* the service had been discontinued. However, maintenance of procedural due process requirements was achieved by the Court by the device of eliminating much of the chancellor's traditional discretion inherent in the review of administrative action by injunction. It would seem that the Court demanded a full hearing before the chancellor on the legality of termination of telephone service—an action which certainly could quickly destroy a hotel business.

The various investigatory stages of the Florida Bar's disciplinary procedures were sustained when the court did not require the "constitutional" full hearing to be accorded the accused during this period of the Bar's activity. An opportunity for a "full and adequate hearing" before the "final order becomes effective" was, of course, necessary.⁶

2. See 91 So.2d 206 (Fla. 1957) (the charge was "permitting the . . . practice of dentistry" by an unlicensed individual. The court required a statement of the name of the patient, when the act took place and so on).

3. See note 1 *supra*. Much of the language in *State v. Grant*, *supra* note 1, at pages 237-238, is similar in nature as to the requirement of a hearing. See also, *State v. Evans*, 94 So.2d 730, 735 (Fla. 1957), for a court statement on the hearing necessary to discipline an attorney.

4. *Southern Bell Tel. and Tel. Co. v. Nineteen Hundred One Collins Corp.*, 83 So.2d 865 (Fla. 1956) (Justices Hobson, Roberts and Buford dissented on the theory that injunction proceedings are a matter of "grace" with the chancellor; therefore, the hearing was not a "right" of the petitioner which he could demand before service was discontinued).

5. *Before the Railroad and Public Utilities Commission*.

6. *State v. Grant*, 85 So.2d 232, 237-238 (Fla. 1956).

Judicial Review—In *Coleman v. Watte*,⁷ the Court apparently required the Board of Bar Examiners, which had adversely determined the petitioner's moral fitness to take the bar examination, to provide "record evidence" to sustain its factual conclusions for purposes of judicial review of the Board's action.

Similarly, the Court insisted that the final order of the Board of Dental Examiners, which ordered the suspension of a dentist, contain "findings of fact which will provide a basis for rationally inferring the conclusion which the statute requires."⁸

II JUDICIAL DUE PROCESS (CIVIL)

During the present *Survey* period there were several important decisions involving notice and hearing requirements.

*Sheiner v. State*⁹ involved a judicial proceeding to disbar an attorney. An order of disbarment was entered by the circuit judge after the appellant refused, on self-incrimination grounds, to answer two questions: 1) Have you ever been a member of the Communist Party? 2) Are you now a member of the Communist Party? Apparently the state failed to offer any evidence indicating legal grounds for a disbarment. The Supreme Court refused to characterize the practice of law as a "privilege" and insisted upon the constitutional hearing requisites, including "confrontation" of witnesses, "cross-examination and fair trial." The "faceless informer" type of secret evidence was stated as insufficient as a basis for disbarment. Associate Justice Floyd, concurring specially, classified disbarment proceedings as part of the public criminal law. Associate Justice Jones, dissenting, classified disbarment proceedings as part of the "civil" law, in which the normal constitutional criminal procedures need not be satisfied. The dissent's position also regarded the practice of law as a "privilege," a matter of "grace" from the point of view of government power.

Procedural due process was demanded—in the sense of notice and hearing—before a juvenile court could permanently commit an infant for subsequent adoption by persons other than the natural parents. The juvenile court had reserved jurisdiction, which had already been obtained over the natural parents, to enter further orders. However, the Supreme

7. See note 1 *supra*.

8. See note 2 *supra*.

9. 82 So.2d 657 (Fla. 1955) (the decision has a "substantive" issue, too—the power of the state to disbar on the inference of silence before questions). Cross-examination may have been declared a due process requisite, which was not accorded, in *Thomas Jefferson, Inc. v. Hotel Employees Union*, 84 So.2d 583 (Fla. 1956). Here the court disallowed the chancellor's move to appoint a commissioner to hold a secret ballot election to determine if the employees of a hotel desired a union to represent them. At page 585, the Court stated that this deprived the hotel party of the "right of cross-examination and the confronting of witnesses as well as the compelling of witnesses to testify under oath."

Court stated that due process and legislation required formal notice and hearing before the effectuation of such a drastic, permanent order.¹⁰

The requisite procedures in civil and criminal contempt actions recently were expounded by the Florida Supreme Court in two decisions. The second case, *Alger v. Peters*,¹¹ rejected the possibility of a party being "bound by an injunctive decree regardless of whether the court . . . ever had jurisdiction of the party and without . . . due process in the orderly course of a judicial proceeding," with reference to the property rights of the party. The appellants had acquired a property right before a final decree was entered in a case in which the appellants were not parties by service of process, or otherwise. Therefore, the appellants, who had leased lands from the defendants against whom an injunction, dealing with the land, subsequently issued, could not be held in contempt (apparently either civil or criminal).

In the first contempt case, *South Dade Farms v. Peters*,¹² a civil contempt order was entered against the defendant land owners for violation of an injunction order, which order was entered after the act (leasing of the lands to strangers to the suit) had been completed which was allegedly in violation of the injunction. The Court determined that the contempt proceeding was civil in nature and stated that the requirements of procedural due process had to be observed.

10. *Noeling v. State*, 87 So.2d 593, 597-598 (Fla. 1956) (even a waiver of notice by an attorney was insufficient as a basis for the court's jurisdiction). An analogous case is *Watson v. Watson*, 88 So.2d 133 (Fla. 1956); the issue was whether the circuit court had jurisdiction to modify the provision of a divorce decree which required the father to pay to the mother support money for the children "until the further order of this Court to the contrary." The parties were personally before the court in the original action. A copy of the petition for modification was mailed to the father (the petition sought an increase in support money) who received it. The court held that new service of process was not necessary, merely "adequate notice" and a hearing.

See also *Freidus v. Freidus*, 89 So.2d 604 (Fla. 1956), wherein the court insisted that a corporation, which was not a party to a divorce action in which a money judgment was ordered against the corporation, had to be formally made a party to the cause. The wife was the principal stockholder. The issue was stated to be the due process clause of the U.S. Const. amend. XIV. But see *Codomo v. Emanuel*, 91 So.2d 653, 655 (Fla. 1956), which involved a judgment, following supplemental proceedings by plaintiffs after an execution on a prior judgment, against the husband of the present defendant. The defendant wife was only a party (by service of rule nisi) in the supplemental action. Evidence indicated a fraud on creditors involving the wife and the corporation in which she owned much of the stock. The defendant was "charged with notice" of the fraud, in view of a "comingling of accounts" by all defendants. Notice and hearing were held adequate. However, the judgment against the defendant wife included attorneys' fees, the right to which arose because of a note which was not signed by her. This part of the judgment was invalidated.

11. 88 So.2d 903, 906 (Fla. 1956). The court admitted that entrance of the final decree could have affected the "res" if their property rights had been subsequently acquired. Likewise, the court stated that a person who "knowingly assists a defendant in violating an injunction subjects himself to civil [and] criminal proceedings for contempt." However, in this case, the appellants did not "abet" the defendants, nor were they "legally identified" with them.

12. See 88 So.2d 891, 898 (Fla. 1956) (both civil and criminal contempts).

In a condemnation action,¹³ it was held that procedural due process was denied by entrance of a judgment "upon a matter entirely outside of the issues made by the pleadings" since the party had no "opportunity to be heard."

III JUDICIAL DUE PROCESS (CRIMINAL)

The Fair Trial—In 1956, the Florida Supreme Court determined¹⁴ that the trial judge's reference to a written statement by the accused as a "confession," when the statement was not a confession, did not deprive the accused of a "fair trial." Other evidence, about which there was no legal question, and which was sufficient to sustain the verdict had been introduced by the state.

It was held in *Lloyd v. State*¹⁵ that the accused was denied a "fair trial" when the trial judge adjudicated him guilty before he rested his case; the fact that the trial of the accused was without a jury did not afford the defendant the requisite procedural due process.

An instruction to the jury which contained a statement which inferred that a juror who stubbornly adhered to his views was a "mule or a jackass" was held a denial to the accused of a "fair and impartial trial." That the statement would embarrass a juror who honestly disagreed with his fellow jurors was determinative.¹⁶

The appellant contended that a statement, which was an "admission against interest, if not clearly inculpatory," was involuntarily given. The statement was made after one hour of questioning by an assistant state attorney; the evidence indicated that the questioning was orderly and that "no fear or threats were imposed."¹⁷

Notice—In *Vann v. State*,¹⁸ the Court stated the "particularity" requirements that should be satisfied by a valid subpoena duces tecum issued in a criminal case. The subpoena "must specify with reasonable

13. *Cravero v. Florida State Turnpike Authority*, 91 So.2d 312, 315-316 (Fla. 1957) (the court's judgment had cancelled an option contract). Validated was a condemnation procedure authorizing the trial judge to postpone title questions until after the jury verdict.

14. *Hamilton v. State*, 88 So.2d 606, 607 (Fla. 1956).

15. 90 So.2d 105, 107-108 (Fla. 1956) (the due process clauses of the FLORIDA CONSTITUTION and U.S. CONST. amend. XIV, were pleaded). See the materials under Facets of Constitutional Procedure, in this article, for the discussion of another issue in the case.

16. *Jones v. State*, 92 So.2d 261 (Fla. 1957).

17. *Thomas v. State*, 92 So.2d 621, 623-624 (Fla. 1957) ("the question of voluntariness should be more stringently examined when the party is in custody"). FLA. CONST. DECL. OF RTS., § 12 and U.S. CONST. amend. XIV, were in issue.

18. 85 So.2d 133, 136 (Fla. 1956) (also, the "categories of documents desired . . . along with a reasonable period of time covered by the documents and a statement of the subject matter"). From the court's opinion it is difficult to infer which clause(s) of the Constitution(s) are involved. One might argue over the author's classifying the decision under criminal procedural due process.

particularity the documents sought . . . in order that the witness may be informed what is required of him."

A recent decision¹⁹ characterized a judgment of forfeiture of a bail bond entered against the surety company as a "penal sum." The judgment was entered without provision for notice or hearing the company. This summary procedure was validated, against due process arguments, by the Court.

Attorney—The right to counsel was classified under criminal procedural due process in two decisions. In one,²⁰ a case involving the utterance of a forged instrument, the petitioner did not allege that he asked the judge to "supply him with counsel"; instead, he "asked the court for an additional time . . . to obtain an attorney, but was advised that would cost him money." Due process was held not denied.

The other decision²¹ suggested that the defendant was denied due process, among other things, when the court failed to permit defendant to complete the trial of his case; he "had a right to offer such additional evidence as he wished until he announced he had completed his case. He also had the right to argue his case to the court either personally or through his attorney." Failure to permit argument was stated to be a denial of full benefit of counsel.

*Grand Jury Statement*²²—The decision, *State v. Interim Report of Grand Jury*,²³ stated that the practice of a grand jury in reporting on private and public persons, about activities of "wrongdoing little short of a crime," failed to accord the principals due process. The theory of the Supreme Court, certainly a unique one under traditional due process concepts, was that the report was a "conviction" of the principals in their community.

IV CLARITY

Constitutional clarity in legislative language was dealt with by the Court in four decisions rendered during the *Survey* period; none of these cases involved criminal statutes.

Southern Bell Tel. and Tel. Co. v. Nineteen Hundred One Collins Corp.,²⁴ validated the statutory language which authorized suspension of telephone service when it is determined that a "private wire is being used for the transmission of information . . . for gambling purposes."

19. *Capitol Indemnity Ins. Co. v. State*, 86 So.2d 156 (Fla. 1956).

20. *Hazen v. Mayo*, 90 So.2d 123, 124 (Fla. 1956).

21. See note 15 *supra* at pages 107-108.

22. See the text in the article under the section, Judicial Power.

23. 43 So.2d 99, 102 (Fla. 1957).

24. 83 So.2d 865, 873 (Fla. 1956) (the argument of the appellee hotel owner regarded the legislative scheme as defining a "penal act." However, the sanction applied under the statute appears to be civil in nature).

The court stated that the offense defined was "adequately delineated" by the language of the act.

That statutory language which might normally be determined constitutionally infirm will be upheld in situations where the context in which the standard is applied clarifies the meaning, was indicated recently by the Court. In the decision,²⁵ the standard "equitable distribution" was validated because the equity court's application of it would not be unique in view of the traditional discretion exercised by equity judges.

Two decisions pronounced certainty requirements for zoning law. These opinions²⁶ required a standard sufficiently definite to guide and "control" (probably for the purpose of ultimate judicial review) the building inspector, zoning officials and the municipality.

CONSTITUTIONAL FACETS OF PROCEDURE

I THE JURY REQUIREMENT

Florida Constitution, Declaration of Rights, section 3, requires that the right to trial by jury shall remain inviolate. A 1956² construction of this section authorized the trial judge to order a trial by jury under "sound judicial discretion" even though neither party in a civil cause had demanded a jury trial and one party objected to such a trial.

The Florida constitutional provision regulating the jury trial in criminal cases³ was in issue in a recent case.⁴ The defendant, under advice of counsel, waived his right to a jury trial. Subsequently, another counsel replaced defendant's initial counsel; the defendant moved to withdraw his waiver. The court stated that a valid waiver of jury trial could only be withdrawn "in the discretion of the trial court," which discretion should be "exercised liberally" in favor of granting the trial by jury motion. Factors the court should consider included the following: (1) whether the motion is made seasonably and in good faith; (2) whether it is made to obtain a delay; (3) if some "real harm will be done to the public"—such as inconvenience to the court or additional expense to the state.⁵

25. *Insurance Co. of Texas v. Rainey*, 86 So.2d 447, 449 (Fla. 1956).

26. *North Bay Village v. Blackwell*, 88 So.2d 524, 526 (Fla. 1956). *Accord*: *Hartnett v. Austin*, 93 So.2d 86, 88-89 (Fla. 1956). In this case the rationale for the certainty requirement was that of "notice" to those affected by zoning law. The court invalidated a zoning ordinance that was made operative upon the signing of a contract between the city and the party desiring a zoning change.

1. This assembly of constitutional privilege and rights is as well treated here as not.

2. *Shores v. Murphy*, 88 So.2d 294, 297 (Fla. 1956).

3. FLA. CONSR., DECL. OF RTS., § 11; "the accused shall have the right to . . . an impartial jury."

4. See *Floyd v. State*, 90 So.2d 105 (Fla. 1956).

5. But the fact that a non-jury trial costs less than a jury trial should not be considered.

II THE REQUIREMENT OF COUNSEL

The Florida Supreme Court again stated that in non-capital cases the trial court does not have to furnish the defendant with counsel unless the defendant makes a specific request therefor, or unless the court determines that the accused is unable to represent himself because of his age or mental state.⁶

The decision, *McMahon v. Mayo*,⁷ stated that a presumption will operate, where the trial record is silent, that defendant waived his right to counsel; however, the presumption is rebutted when it is shown that the defendant was "incapable" of representing himself. The mental condition of the defendant was treated as a fact in issue which should be resolved by the trial judge.

The Court decided in another case⁸ that the defendant's request for counsel, to avoid a waiver, must be specific. Lastly, the Court regarded, in *Floyd v. State*,⁹ the lower court's action, in completing a criminal case without permitting the defendant's counsel to argue his case, as a denial of "full benefit of counsel."

III THE BAIL REQUIREMENT

General Considerations—In a 1956 case,¹⁰ the Court stated the general purpose of the constitutional and statutory bail provisions, in this language: "[t]hese provisions relating to release on bail in criminal cases were designed to secure to an accused person the right to be in the custody of a friendly jailer of his own choice [generally a surety company] rather than in the . . . prison cell."

"Where the Proof is Evident or the Presumption Great"—¹¹ This constitutional statement requires bail unless the "proof is evident or the presumption great." In a murder case¹² it was determined that the state must make a "clear showing that appellant was guilty" of the crime to permit the trial judge to deny bail, and that the defendant's version of the situation must be assumed as true unless there is other evidence "legally sufficient" to contradict it.

Subsequently, the Court stated¹³ that the state's necessary degree of proof, in this connection, is greater than that required to convict a defendant in a criminal case.

6. *Sheffield v. State*, 90 So.2d 449, 450 (Fla. 1956).

7. 92 So.2d 806, 809 (Fla. 1957).

8. *Hazen v. Mayo*, 90 So.2d 123, 124 (Fla. 1956) (a due process issue involved).

9. 90 So.2d 105, 108 (Fla. 1956) (From the opinion it is difficult to determine whether state constitutional law, or both state and federal constitutional law, are involved).

10. *See Capitol Indemnity Ins. Co. v. State*, 86 So.2d 156, 157 (Fla. 1956).

11. FLA. CONST., DECL. OF RTS., § 9.

12. *Freeman v. Kelly*, 86 So.2d 166 (Fla. 1956) (defendant claimed self-defense).

13. *State v. Williams*, 87 So.2d 45, 46 (Fla. 1956).

Bail after Conviction—The trial judge's discretion was suggested to be channeled along these lines: (1) whether the appeal is taken merely for delay; (2) whether the appeal grounds are "fairly debatable" legal issues; (3) whether the circumstances indicate the defendant is likely to flee.¹⁴

Evidentiary picture in habeas corpus and bail petitions—In *Kelly v. State*,¹⁵ it was reported that the rule, that a court on habeas corpus proceedings should not inquire into the sufficiency of evidence to support an information or indictment, does not prevent examination of the evidence to determine if, in a capital case, the accused has a right to bail.

IV DOUBLE JEOPARDY

Void Judgment—When a defendant successfully petitioned to have a former judgment of conviction set aside because a procedural due process notice requirement was not satisfied, he could not plead former jeopardy because the prior judgment was "void."¹⁶

Substantive Crime and Conspiracy—The court reiterated its position, that punishment for a conspiracy to commit a crime *and* for the "overt act which is the object of the conspiracy," does not constitute double jeopardy.¹⁷ These were classified as separate and distinct offenses.

When Jeopardy Attaches; Grounds to Discharge a Jury—An accused is placed in jeopardy when he is placed on trial under notice of the charges, sufficient to sustain a conviction, before a court of legal jurisdiction and the jury has been "impaneled and sworn and charged with his deliverance." After jeopardy attaches the judge should discharge the jury only in cases of "manifestly urgent and absolute necessity."¹⁸

Automobile License Revocation and Jeopardy—Petitioner was convicted by a municipal court for driving while intoxicated. A statute authorizes such courts to revoke a defendant's driver's license. The Court held¹⁹ that the statute did not provide a double punishment for a single offense, by classifying the judgment of revocation as a civil sanction.

14. *Younghans v. State*, 90 So.2d 308, 310 (Fla. 1956) (also, whether, when the term of imprisonment is short, the denial of bail would "render nugatory" the right to appeal).

15. See *Kelly v. State*, 92 So.2d 172, 175 (Fla. 1957).

16. *Tilghman v. Mayo*, 82 So.2d 136, 137 (Fla. 1955).

17. *Blackburn v. State*, 83 So.2d 694, 695 (Fla. 1955) (a count for conspiracy to violate the lottery laws and one for violation of the "substantive" lottery provisions).

18. *State v. Grayson*, 90 So.2d 710, 713 (Fla. 1956) (factors to guide the judge in discharging a jury: (1) illness of the judge, or a juror; (2) the inability of a jury to agree; (3) consent of the accused).

19. See *Smith v. Gainesville*, 93 So.2d 105 (Fla. 1957) (the opinion does not specifically classify the license revocation in this manner). Perhaps not a double jeopardy issue.

Waiver of Defense—The Supreme Court consistently²⁰ has held that a defendant waives the double jeopardy privilege if he successfully requests a jury discharge on a ground which is legally insufficient. In *State v. Grayson*,²¹ the Court stated that a waiver does not attach to the defendant if he fails to object when the jury is discharged on such a ground. Under the facts in the case the defendant had moved for a mistrial. Subsequently, the state sought to join in the defendant's similar motions. The defense counsel stated that he had no objection, but qualified his statement by saying that "I wouldn't bind myself" on the question of whether the situation would lead to a valid double jeopardy plea. The Court required an affirmative (express) consent by the defendant to the state's motion before determining the defendant had waived the privilege.

Proper Plea of Double Jeopardy—The Court required information to be reflected in a valid plea of double jeopardy which would show the "necessary matters of record" as to the former charge against the defendant and what occurred to it. The defendant's statement was that "your defendant has heretofore been in jeopardy for commission of the same offense."²²

Failure of Trial Judge to Vacate an Imprisonment Term—A sentence imposed upon the petitioner pursuant to the Habitual Criminal Act was not void as unconstitutionally placing petitioner twice in jeopardy, even though the trial judge did not initially vacate a six year prison term judgment. The Court again refused to characterize the habitual offender statute life imprisonment term as providing a punishment for a separate and distinct offense.²³

V CRUEL AND UNUSUAL PUNISHMENT

In three cases the Court refused to censor the state's power to authorize sanctions under this constitutional provision.²⁴ The court held that a sentence of 15 years in the state prison following a conviction of manslaughter was not an "excessive" sentence;²⁵ likewise a sentence of 20 years for manslaughter was not invalidated.²⁶

20. See Alloway, *Florida Constitutional Law*, 10 MIAMI L.Q. 143, 177 (1956).

21. 90 So.2d 710, 712-714 (Fla. 1956). In *State v. Bentley*, 81 So.2d 750 (Fla. 1955), the appellees moved for a directed verdict on the ground that the evidence produced by the state showed the larceny of a bull, not a cow as charged by the state in the information. The court again held that where the defendant maintained at the first trial that the variance was material, he could not subsequently claim, for purposes of a double jeopardy plea, that the variance was not material (hence the court's action in granting the motion was improper).

22. See *Marshall v. State*, 89 So.2d 1 (Fla. 1956).

23. *Washington v. Mayo*, 91 So.2d 621, 623 (Fla. 1957).

24. FLA. CONST., DECL. OF RTS, § 8: "nor [shall] cruel or unusual punishment . . . be allowed."

25. *Emmett v. State*, 89 So.2d 659 (Fla. 1956).

26. *Hutley v. State*, 94 So.2d 815 (Fla. 1957).

In *Wright v. State*,²⁷ the defendant argued that his conviction under a statute penalizing the concealment of liquor ("moonshine"), upon which a tax had not been paid, led to a cruel and unusual punishment because the definition of "moonshine" infers the non-payment of proper taxes. The Court stated that concealment is one thing and tax payments are another; therefore, the defendant was not required to observe a law "impossible" to obey.²⁸

VI THE COMPULSORY PROCESS REQUIREMENT

One decision²⁹ reported the general purpose of this constitutional necessity.³⁰ A state witness testified before a grand jury prior to the trial of this case. The defendant unsuccessfully attempted to secure a transcript of the witness' earlier testimony. At the trial when the witness was tendered for defendant's cross-examination, the defendants applied to the court for a subpoena duces tecum to be directed to the official court reporter for the grand jury. The application stated that the grand jury testimony was material to, and in conflict with, the witness' testimony on direct examination. The Supreme Court determined that the purpose of the constitutional requirement was to obviate the unfairness resulting from trying a defendant without providing a means of compelling witnesses to testify to material facts; the Court reversed the lower court.

SELF INCRIMINATION

Attorney Privilege in Disbarment Proceedings—Sheiner v. State,¹ has been discussed in the procedural due process materials in this article. However, the decision emphasizes a self-incrimination issue, distinct from due process requisites. The Court authorized attorneys who are involved in disbarment proceedings to plead the privilege on the same basis as any other citizen. To reach this result the Court apparently classified the disbarment sanction as more criminal, than civil, in nature. The only disturbing statements in the opinion, from the point of view of liberal effectuation of the Florida privilege, were those which indicated that the attorney "should have been candid with the court." The practice of law was definitely classified as a "right," not a "privilege" (unlike the "teacher," the police officer, the security risk," etc.) and the state was not permitted to disbar on the slender inferential ground of the privilege claim. Why teachers, and so on, should not be accorded similar constitutional respect was not clarified.

27. 87 So.2d 104, 105 (Fla. 1956).

28. This section could be classified under constitutional provisions which deny to the state government the power to accomplish some objective.

29. *Traffican v. State*, 92 So.2d 811, 814-815 (Fla. 1957).

30. FLA. CONST., DECL. OF RTS., § 11: in all criminal cases the accused "shall . . . have compulsory process for the attendance of witnesses in his favor." The defendants also argued the federal constitutional law on this issue.

1. See 82 So.2d 657 (Fla. 1955) (a vehement dissent was written by Associate Justice Jones). Federal and state constitutional law were not distinguished.

Corporate Privilege—*Vann v. State*² involved a subpoena duces tecum directed by the state against a non-party insurance company for certain documents in a criminal prosecution of the insured for culpable negligence. Both the United States Constitution's Fifth Amendment and the Florida constitutional provision on self-incrimination were pleaded. The Court again stated that a corporation may not plead these privileges, for itself or for another.

Judicial Comment on the Defendant's Failure to Take the Stand—A trial judge's comment to the defendant, preliminary to the sentencing, which indicated that the judge believed the defendant guilty because he did not testify, was criticized by the Court in a 1956 case.³

Summary Judgment and a Defendant's Affidavit Plea—A trial judge struck defendant's counter-affidavit because the defendant refused to testify on the plaintiff's taking of his deposition on the ground of self-incrimination. The defendant had denied the allegations of the complaint in the plaintiff's paternity suit. The plaintiff filed a motion for summary judgment asserting that there were no factual issues to be tried. The defendant's affidavit, in opposition to the motion, denied paternity and the allegations of intimate relations with the plaintiff. The plaintiff then attempted to take the defendant's deposition and questioned him in connection with these factual issues. The defendant avoided the questions by pleading the self-incrimination clauses of the federal and state constitutions.

The Supreme Court⁴ noted that the questions that the defendant refused to answer were such as would justify the constitutional plea and that he was not questioned as to whether he could support his affidavit allegations by witnesses *other* than himself. The court failed to find a waiver of the privilege from a denial of the allegations of the plaintiff. If the defendant had no testimony to support his affidavit, other than his own, it was indicated that summary judgment would follow.

*Confessions*⁵—The Court suggested that trial judges, before allowing an admission or confession to go to the jury, should first hear all the evidence offered on the manner in which the statement was obtained.⁶ The fact that a confession is made while the accused is in custody was stated not to be "determinative" as to whether the statement is voluntary.

2. See 85 So.2d 133 (Fla. 1956). The court's references to federal constitutional law are inaccurate; the U.S. CONST., amend XIV, does not (through the due process clause) apply the U. S. constitutional inhibition on self-incrimination, or searches and seizures, to the states.

3. *Davis v. State*, 90 So.2d 629, 632 (Fla. 1956).

4. See *Jones v. Stoutenburgh*, 91 So.2d 299 (Fla. 1957) (the court also considered the fact that the lower court could discipline, in other ways, the filing of an affidavit in bad faith).

5. It is difficult to state whether or not the Florida court treats the entrance of confession into evidence as a facet of self-incrimination; see FLA. CONST., DECL. OF RTS., § 12: "No person shall be . . . compelled in any criminal case to be a witness against himself."

6. *Graham v. State*, 91 So.2d 662, 663 (Fla. 1956).

SEARCH AND SEIZURE

I ARREST SITUATIONS

Automobile Cases—The Florida constitutional law validating government searches associated with valid arrests is becoming settled.¹ Unpredictability remains only for the new variations of basic fact situations which, in general, have been dealt with by the Court in recent years.

Several decisions involved arrests for illegal driving actions, followed by a search and seizure. In *State v. Simmons*,² there was a valid arrest by officers for reckless driving. This was followed by a valid arrest of the defendant for possessing bolita tickets, which were in plain view on the seat of his car. The search and seizure following their arrest was held "reasonable." It was not necessary to formally charge the defendant with a violation of the gambling laws before commencing the search. Perhaps the validity ("reasonableness") of the search was weakened by the fact that the officers had information from "an unknown source" that the defendant was violating the gambling laws and were following him because of that information.

A similar case,³ involving a traffic violation arrest, authorized officers to search after they noticed and smelled a liquid escaping from the car. When they approached the car the defendant was attempting to smash a jug of "moonshine" against the dashboard. One of the officers testified that from "experience" he could identify the smell and taste of "moonshine."

One decision⁴ detailed the law of valid arrest and search of a parked truck; the truck was located close to a dark intersection, without lights, and was unattended. It was also parked in a fashion which constituted a traffic hazard. The officers looked inside the vehicle and located under the seat some "bolita pay slips" and money. Upon his arrival the defendant was arrested for illegal parking. The Court held that the search, even though it preceded the arrest, was "reasonable" under the circumstances.

Other cases—The arresting officer had been advised that a "moonshine" still was in operation on the defendant's premises; the officer testified that he was able to smell the odor of fermenting mash after his arrival and

1. See Alloway, *Florida Constitutional Law*, 10 MIAMI L.Q., 143, 182-185 (Fla. 1956).

2. 85 So.2d 897 (Fla. 1956). *Accord*: *Brown v. State*, 91 So.2d 175 (Fla. 1956). In this case the defendant's car weaved back and forth. Officers had had a "tip" to "look out" for the car. When stopped, the defendant told the officer that he had been drinking and a bottle was on the seat beside him. He was arrested for reckless driving. The position of the car indicated that the back of it was heavily loaded; the officer then used a flashlight and observed jugs on the floor. The defendant admitted that he was carrying "moonshine." The search was validated by the court.

3. See *Wright v. State*, 87 So.2d 104 (Fla. 1956).

4. *Gaskins v. State*, 89 So.2d 867 (Fla. 1956).

5. See *Pegueno v. State*, 85 So.2d 600 (Fla. 1956).

that he was an expert on this subject matter (smelling mash). The defendant admitted he had over 100 barrels of illegal liquor and consented to a search. The arrest without a warrant was upheld as was the search made incidental thereto.⁵ The dissenting Justice⁶ took the view that the search was invalid because the search was accomplished by the officer under a search warrant that was apparently illegal. The Justice believed that the officer was motivated, not by the odor, but by the authority of the search warrant. Likewise, the consent to search was obtained from the defendant because of the supposed authority of the warrant.

*Davis v. State*⁷ detailed the power of arresting officers to search a car and trailer. The car was owned by the defendant and driven by an accomplice. Officers had the trailer under surveillance when the accomplice drove to it with the car. They arrested the accomplice, and the defendant, as he emerged from the trailer. The defendant consented to a search of the trailer, but not, apparently the car. The Court held that the search was "an incident to the arrest."

In another case,⁸ officers stopped the defendant's car under unusual circumstances. A series of filling station robberies had occurred and the officers were informed by a passing motorist that a man was walking toward a station with a crowbar. The officers stopped the defendant as he was driving off and, thereafter, saw an adding machine (several of which had been reported stolen that night) on the back seat of the car. An arrest and search of the car followed. The Supreme Court validated both.

The Court again determined that an arrest based upon a "tip" does not validate a search made without a search warrant.⁹

II SEARCH WARRANTS

Information Necessary Before a Search Warrant Issues—The Court clarified its position on the legal sufficiency of the information contained in the affidavit which forms the basis for issuance of the search warrant. The facts related in the affidavit do not have to be admissible as evidence in a criminal trial. However, the facts must demonstrate "probable cause," "reasonable belief" or "trustworthy information." In this case,¹⁰ the affiant saw a confidential informant dial the defendant's telephone number

6. Justice Thomas, at pages 602-604. The Justice, however, did deny that "an absolute rule" could be adopted that when a search warrant has been stricken and the evidence produced under it has been suppressed, the prosecution ends.

7. 87 So.2d 416, 418-419 (Fla. 1956) (charge was breaking and entering with intent to commit a misdemeanor). The facts of this case were very sparsely detailed.

8. *Pfleigl v. State*, 93 So.2d 75 (Fla. 1957). Justices O'Connell, Thomas and Hobson dissented. This opinion reflects an inaccurate picture of federal constitutional law; the dissenting justices assumed that the U.S. CONST. Amend. IV, applies to state governmental activities. It does not.

9. *Sagonias v. State*, 89 So.2d 252, 253 (Fla. 1956).

10. *Perez v. State*, 81 So.2d 201, 203-204 (Fla. 1955). *Accord*: *Quince v. State*, 91 So.2d 633 (Fla. 1956) (similar standard for affidavit information).

and heard a woman who answered to the name of Teresa sell a lottery ticket. The defendants were Eloy Perez and his wife, Teresa. The search warrant, predicated upon this information, was validated.

The defendant argued that his home was illegally searched because a statement in the affidavit described the property as "a one-story block building to which a frame structure was attached." The defendant operated a store in the "block building" and lived in the frame building; he claimed that the two buildings were separate. However, the affiant had stated that defendant occupied and controlled the premises and that he had purchased a lottery ticket in the store from a woman who immediately carried a record of the transaction into the living area. The court "linked" the premises through this transaction.¹¹

In *Joyner v. Lakeland*,¹² the defendant, who was convicted of possessing lottery material, entered several unsuccessful arguments regarding the language contained in a search warrant. The court stated that the description of the place to be searched must be such as to lead, on inquiry, "the officers unerringly to it"; that the word "premises" is sufficient if further defined; that whether a lapse of eight days between issuance and execution of the warrant is invalid was within the discretion of the judge, who did not abuse his discretion; and that officers, in the course of a search under a valid warrant, who discover unlawful articles not mentioned in the warrant may seize such articles.

III MISCELLANEOUS DECISIONS

Two decisions discussed the search and seizure law in connection with a consent or waiver of the accused to the search. The Court stated in *Sagonias v. State*¹³ that the state's evidence of consent to a search must be "clear and convincing." The fact that the accused did not actively resist the search was not adequate, nor did the accused's voluntary act of unlocking the trunk of his car (to demonstrate that it was empty) for the officers amount to a consent that the entire car be searched.

11. See *Espinola v. State*, 82 So.2d 601 (Fla. 1955).

12. See 90 So.2d 118 (Fla. 1956).

In *Pfleigl v. State*, 93 So.2d 75, 77 (Fla. 1957), Justice O'Connell wrote a dissenting opinion in which he raised the question whether a search warrant, based on information which was obtained, as the justice believed, from an invalid arrest and search, could legally be used as the basis for a search.

Also, in *Perez v. State*, 81 So.2d 201, 204 (Fla. 1955), the court construed the Florida legislation providing a punishment for the tapping of telephones "without the consent of the owner," so that information obtained by the affiant (who petitioned for the search warrant), by listening on an extension of a telephone which was used by a "confidential informant" to call the defendant's home, was not illegally used as a basis for establishing a "probable cause." The federal legislation was similarly mentioned in the defendant's argument.

13. 89 So.2d 252, 254 (Fla. 1956) (the accused voluntarily opened the glove compartment; when the officer entered the front of the car he noticed sacks containing bolita tickets and money).

A waiver of the privilege against unreasonable searches and seizures was found by the Court in another 1956 case.¹³ The reasoning of the court was that the trial judge, who determined that the defendant consented to the search, was authorized to discredit the testimony of the defendant whose position conflicted with that of the officers. The officer's testimony showed that the defendant stated that he did "not mind if the officers looked in the car" and that he personally unlocked the trunk, wherein the lottery materials were found.

The Court also determined that a corporation may not utilize the searches and seizures privilege on behalf of a defendant in a criminal case,¹⁵ and that a Florida court of equity does not have jurisdiction to enjoin state officers from testifying in a federal court as to evidence secured by the officers in violation of the Florida law concerning searches and seizures.¹⁶

EQUAL PROTECTION SITUATION¹

The strength of the equal protection limitation on governmental power to a greater or lesser degree depends upon the relative strength of the governmental police power.² Probably no law is applied to all persons at one and the same time. Children, the insane, women, men, the unhealthy, corporations and wage earners, to name a few, have been the basis of classification in the operation of law. So the basic premise we start with is that *some* classifications, in the application of law, are legally possible. That vague statement is made even more ephemeral by the test,³ that a classification is valid unless demonstrated to be not "reasonable." It would probably be impossible to draw a line between the "reasonable" of police power exercise and the "reasonable" of equal protection.

I THE NON-NEGRO DECISIONS⁴

Validated Legislation—In *Southern Bell Telephone and Telegraph Co. v. Nineteen Hundred One Collins Corp.*,⁵ the Court stated that in "its

14. *Slater v. State*, 90 So.2d 453, 454 (Fla. 1956).

15. *Vann v. State*, 85 So.2d 133, 137 (Fla. 1956). The court, in this opinion, is in error in its evaluation of federal constitutional law; the U.S. CONST. amend. IV, does not inhibit state action, alone or through U.S. CONST. amend. XIV.

16. *Weiner v. Kelly*, 82 So.2d 155, 157 (Fla. 1955) (the opinion is not too clear as to whether *some* circumstances might authorize such an injunction).

1. The statement in FLA. CONST. DECL. OF RIGHTS, § 1, is that "all men are equal before the law . . ." The federal equal protection clause, applicable to state action, is found in U. S. CONST. amend. XIV, § 1.

2. An impressive article on the federal concept can be found in Tussman and TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

3. E.g., *Rodriguez v. Jones*, 64 So.2d 278 (Fla. 1953). Whether a law is "reasonable" is still the test for economic due process, see Note, 53 COL. L. REV. 6 (1953); *Fuller v. Watts*, 74 So.2d 676, 678 (Fla. 1954).

4. This classification is convenient in Florida.

5. 83 So.2d 865, 872 (Fla. 1956) (a U.S. CONST. amend. XIV, equal protection case).

wisdom the Legislature" had distinguished between private wire service and customary telephone service for purposes of regulation of the use of communication facilities by gambling interests. The classification was sustained in view of the nature of the utilities and the subject regulated. Thus the Court effectuated the legislative presumption of validity.

A 1957 decision⁶ validated the construction of water distribution facilities by a municipality within the corporate limits of two other municipalities. The Court stated that there would be no increase in cost to the residents of the first city, which was the center of a large and growing metropolitan area which included the other cities.

Likewise, workmen's compensation legislation was sustained against an equal protection argument.⁷ The law provided for an "equitable distribution" to compensation carriers by a court of equity. The fact that the award would be different under the various situations arising under the law (which provided a right to subrogation) did not deter the Court. That equal protection "demands only" that the rights of all persons must rest upon the same rule under similar circumstances, was the decisional standard.

Invalidated Legislation—Legislation which distinguished the regulation powers of the Florida State Racing Commission to license fronton operators was invalidated by the Court in a 1955 decision.⁸ The legislature provided for an annual approval by the electorate in Palm Beach County before the Commission could issue an operating license within that county. The standard utilized to invalidate was as follows: "the attempted classification must rest upon some difference which bears a reasonable . . . relation to the act." That the classification affected *all* applicants in the one county was held not sufficient.

The Supreme Court's approach to the substantive due process and equal protection issues, when both arguments were directed against legislation, failed to distinguish between the issues; that is to say, the rationale of the Court treated the "reasonableness" of the police power and the "reasonableness" of the equal protection classification, alike. *Miami v. Kayfetz*,⁹ exemplified this. A city ordinance was invalidated under both constitutional inhibitions, the Court using its factual conclusions on the unreasonableness of the municipal activity, in a police power sense, to justify invalidation under equal protection. The ordinance in question

6. *State v. City of Melbourne*, 93 So.2d 371, 373 (Fla. 1957) (FLA. CONST. DECL. OF RIGHTS, § 1, was the issue).

7. *Insurance Co. of Texas v. Rainey*, 86 So.2d 447, 448 (Fla. 1956) (From the opinion it is difficult to determine which constitution is in issue).

8. See *Fronton, Inc. v. Florida State Racing Commission*, 82 So.2d 520 (Fla. 1955) (both constitutions were in issue). Accord: *Hollenbeck v. State*, 91 So.2d 177 (Fla. 1956); in this case the legislation required certain conditions to be satisfied by an applicant for a real estate license to be a salesman in Sarasota County; the U.S. CONST. amend. XIV, equal protection clause, was in issue.

9. 92 So.2d 798, 804 (1957) (both constitutions were in issue; U.S. CONST. amend. XIV, and FLA. CONST. DECL. OF RIGHTS, § 1).

prohibited the sale of alcoholic beverages by owners of premises, wherein liquor was consumed by employees.

Also invalidated was the most recent attempt by the legislature to draft a constitutional¹⁰ blue law. The Court again insisted upon a "rational . . . relationship" between the purpose of the Sunday Closing Law and the businesses excluded from its operation.¹¹

II THE NEGRO DECISIONS¹²

In the last two Surveys¹³ this writer stated that in this limited field one can say that Florida constitutional law and federal constitutional law separate. The march of the United States Supreme Court up the broad equal protection of the law's avenue, with reference to equal treatment for citizens regardless of color, has not been matched by the Florida Supreme Court. The United States Supreme Court has been slowly crushing the once wide discretionary segregation fields within the states' police power. The recent Florida decisions cannot be characterized as particularly sympathetic to the aspirations of colored citizens to weaken the legal and social segregation framework presently existent in Florida.

However the United States Constitution,¹⁴ requires that the members of the Florida judiciary interpret and apply the law of the United States Constitution as it is determined in the decisions of the United States Supreme Court. And one can scarcely justify, at least since the Civil War, state court discretion as to which portion of the federal constitution shall or shall not be effectuated within a state.¹⁵

The most recent attempts of the tireless Hr. Hawkins, a negro, to enter the University of Florida College of Law were again frustrated by the Florida Court. In 1955,¹⁶ the Florida Court stated that it was controlled by the initial *Brown* decision, as modified by the United States Supreme Court in *Brown v. Board of Education*.¹⁷ The Florida Court, therefore, took a step toward constitutional legality in relation to equal protection, education and the negro. In the remainder of the decision the Florida Court tip-toed, perhaps, in the opposite direction by interpreting the *Brown* implementation decision to apply to a *graduate law school*. This writer believed that the United States Supreme Court, in implementing *Brown*,

10. From the opinion, and the decisions cited therein, it is not possible to determine which equal protection clause—state or federal—was in issue.

11. See *Kelly v. Blackburn*, 95 So.2d 260 (Fla. 1957).

12. With few exceptions, and this is one, this paper does not discuss the Florida Supreme Court's determination of federal constitutional law.

13. See Alloway, *Florida Constitutional Law*, 8 *MIAMI L.Q.*, 185 (1954) and 10 *MIAMI L.Q.*, 180 (1946).

14. U.S. CONST., art. VI, cl. 2 (the Supremacy clause).

15. E.g., the language in *Martin v. Hunter's Lessee*, 1 Wheat, 304, 335 (1816).

16. *State v. Board of Control*, 83 So.2d 20 (Fla. 1955); Justices Thomas and Sebring concurred in part and dissented in part.

17. 349 U.S. 294 (1955).

did not intend to inter *Sweatt v. Painter*,¹⁸ and *McLaurin v. Oklahoma State Regents*.¹⁹ Notwithstanding the legal inferences from the *Sweatt* and *McLaurin* opinions, and a specific mandate from the United States Supreme Court,²⁰ the Florida Supreme Court appointed a court commissioner to take testimony of Mr. Hawkins, the Board of Control and such witnesses as they desired to produce, with a view of determining "all questions as to time and manner of establishing new order." The Court adopted the procedure under the supposed authority of the *Brown* implementation decree.

The finale of the action to assert a federal constitutional right in the Florida court system approached with the 1957 version of *State v. Board of Control*,²¹ in which the Florida Supreme Court refused to grant Mr. Hawkins' motion for a peremptory writ of mandamus to admit him to the University. This opinion recognized the federal constitutional right, but determined that the Florida Court had "a sound judicial discretion as to the date of the issuance of its process in order to prevent a serious public mischief." The laconic answer of the United States Supreme Court was a denial of the petition for writ of certiorari "without prejudice to the petitioner seeking relief in an appropriate United States District Court."²²

No denial of "due process or equal protection" was found by the Florida Supreme Court in *Thomas v. State*,²³ a case in which a negro had been sentenced to death for rape because a majority of the jury failed to recommend mercy. A statistical survey that demonstrated that in a 20 year period 23 negroes were executed for a crime, while only one white defendant was executed, was not an adequate ground to invalidate the death sentence.

An unusual argument to invalidate a school bond issue was presented in 1956.²⁴ The Court held that "the segregation question" had no connection with the constitutionality of the issue; therefore, Florida Constitution, Article XII, section 12, which provides that white and colored children shall not be taught in the same school, did not have to be *specifically* followed. The argument would seem to create a situation which would be the antithesis of the *Brown* desegregation cases.

18. 339 U.S. 629 (1950).

19. 339 U.S. 637 (1950). See Alloway, *Florida Constitutional Law*, 10 MIAMI L.Q., 182 (1956).

20. 347 U.S. 971 (1954).

21. 93 So.2d 354 (Fla. 1957). The 1955 Florida decision, see note 12 *supra*, was reviewed by the United States Supreme Court in *Florida v. Board*, 350 U.S. 413 (1956), the opinion stated that "[Mr. Hawkins] is entitled to prompt admission under the rules . . . applicable to other qualified candidates." Justices Thomas and Drew dissented.

22. 26 LAW WEEK, 3118 (1957).

23. 92 So.2d 621, 625 (1957); *accord*: *State v. Mayo*, 87 So.2d 501, 503 (1956) (the arguments were held to have been waived by the defendant, however, the Court discussed the law involved—here the equal protection clauses of both constitutions).

24. *State v. Special Tax School District No. 1*, 86 So.2d 419, 421 (Fla. 1956).

TRADITIONAL CIVIL RIGHTS (SPEECH,
ASSEMBLY, RELIGION AND PRESS)¹

In *Sheiner v. State*² the Court indicated that "no lawyer . . . can become a member of the Communist Party or other subversive organization without forfeiting his privilege to practice law." This would seem to eliminate in such disbarment cases possible freedoms of speech or assemblage arguments.³

The constitutional status of organizational picketing in Florida was securely anchored in the troubled waters of the Miami Beach hotel industry. Chief Justice Terrell, while admitting⁴ that organizational picketing is an "aspect" of freedom of speech, enacted a harsh, judicially-imposed procedural obstacle course for a union attempting to enjoy some of that freedom. For example, the union cannot indulge in the following practices: 1) institution of a picket line before the "showing of any lawful grievance" against the employer, 2) negotiation with the employer before a showing by "evidence of a substantial character" that the union is the authorized bargaining agent of the employees by their choice, 3) use of a picket line not made up of the employer's employees. Employer "bad faith" and "lack of respect" for the union apparently does not alleviate the union's procedural requisites.⁵

The Court, in 1956,⁶ voided a circuit court's equity fashioned remedy to deal with the representation problem. The lower court had appointed a commissioner to hold a secret election in which the hotel's employees could vote whether or not they desired the union to represent them. The Court brushed aside the union's argument that "black-listing" would be the penalty for employees whose names were produced in court and insisted on traditional proof. The union's record of lost decisions would seem nearly to equal that of the famous Mr. Hawkins.

1. The Florida Court's activities in this field, from volume 49 through 80, Southern Reporter, second series, were discussed in Alloway, *Florida Constitutional Law*, 8 MIAAMI L.Q. 173, 175 (1954) and 10 MIAAMI L.Q. 165 (1956).

2. 82 So.2d 657 (Fla. 1955), Associate Justice Jones dissenting.

3. However, the Supreme Court also stated that if the attorney "shows panance, that he was duped or misled . . ." he should not be disbarred; see *Sheiner v. State*, 82 So.2d 657, 662 (Fla. 1955).

4. *Fontainebleau Hotel Corp. v. Hotel Employees Union*, 92 So.2d 414, 418 (Fla. 1957).

5. *Boca Raton Club v. Hotel Employees Union*, 83 So.2d 11 (Fla. 1955), describes in some detail the steps a union must follow in negotiating with the employer before a picket line is thrown up. None of the Florida decisions require a majority of the employees to choose a bargaining agent, before picketing.

6. *Thomas Jefferson, Inc. v. Hotel Employees Union*, 84 So.2d 583 (Fla. 1956).

BILL OF ATTAINDER; RETROACTIVE LAW; IMPAIRMENT OF CONTRACT AND EX POST FACTO DECISIONS

Bill of Attainder—A statute was upheld, against the claim that it was a bill of attainder, that authorized municipal courts to revoke drivers' licenses under certain conditions.¹ The court classified the use of the state's roads as a "privilege," rather than a "right."

Retroactive Laws—The decision, *Sharrow v. City of Dania*,² was difficult to classify because the plaintiff's claim under the Florida Constitution³ was not pleaded with particularity. The case involved an action by property owners to prevent the revocation of a building permit issued by the city. The permit was issued after the first reading of an ordinance requiring a six foot building set-back, and the permit authorized a building based upon plans not providing for a set-back. After the ordinance was adopted, the city sought to revoke the permit. In the interval, the plaintiffs had commenced work on the building. The Court stated that "if rights to the permit became vested, such vesting was subject to the warning evidenced" by the ordinance's first reading.

*Impairment of Contract*⁴—The Court stated⁵ that a legislative pension commitment made to a judge, who accepted by surrendering the unexpired portion of a term and retiring, "could not be impinged upon by a subsequent legislature."

Once again,⁶ the Court refused to apply the "obligation of contracts" clause to legislation affecting the "remedy." Involved in the case was a statute that increased the period during which a workmen's compensation award might be modified.

Ex Post Facto Laws—Associate Justice Gillis dissented in *State v. Evans*,⁷ arguing that an ex post facto situation was created by the disbarment of an attorney for the commission of a federal crime. The Court upheld the disbarment ground under the bar integration rules, which had not been adopted until after the attorney had committed the act that was the basis for the federal conviction.

1. *Smith v. Gainesville*, 93 So.2d 105, 107 (Fla. 1957). See *Southern Bell Telephone and Telegraph Co. v. Nineteen Hundred One Collins Corp.*, 83 So.2d 865, 867, 873 (Fla. 1956).

2. 83 So.2d 274, 275 (Fla. 1955).

3. FLA. CONST. DECL. OF RTS., § 1. The U.S. CONST. Amend. XIV, was also pleaded.

4. FLA. CONST. DECL. OF RTS., § 17. The U.S. CONST. art. I, § 10 may also have been an issue. *Newport Manor v. Carmen Land Co.*, 82 So.2d 127 (Fla. 1955), may have involved the "obligation of contracts" provision (the Court failed to mention any specific constitutional phraseology). The language of the chancellor was adopted by the Court: "the right to construct a private sewer [under a public street] may be so granted as to give the owner a vested right therein." Therefore, the sewer builder had "exclusive use" of his facility.

5. Advisory Opinion to the Governor, 82 So.2d 494, 497 (Fla. 1955).

6. See *Walter Denson & Son v. Nelson*, 88 So.2d 120 (Fla. 1956).

7. 94 So.2d 730, 737 (Fla. 1957).

LEGISLATION AND THE CONSTITUTION

I ARTICLE III, SECTION 16

This section states that "Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be amended or revised by reference to its title only" There were several cases, in the last two years, interpreting these words.

In a 1957 decision,¹ the Court recognized several factors which were within the range of the purpose of this constitutional requirement: (1) to prevent "log rolling," or the practice of stating two unrelated matters on one bill; (2) to prevent "surprise or fraud" by notice in the title; (3) to "fairly apprise the people" of the legislation's subject so that "they may have an opportunity to be heard." The standard of the Court on review under Article III, section 16, remained static; if the subject is "reasonably connected" with the title language, the act will be upheld. In this connection, all provisions of the body of the act that are incidental to, or promote the purpose of, the title subject will be validated. The Court again stated that the "objects" of the act need not be reflected in the title, only the "subject," and that the presumption of validity operates in review under the constitutional requirement.

The constitutional argument against the validity of the statute, in this decision, was that the title stated that the statute regulated pharmacy, while the statute also regulated drug stores. The Court refused to invalidate simply because the legislature, in the past, had treated these concerns as independent subjects, and held that the regulations of the sales of medicines prepared by pharmacists was a subject "closely related" to the broad abstraction "Pharmacy."

Also upheld by the Court was a statute, the title to which authorized an airport board to condemn land without restricting the acquisition of land to the area of the municipality. The body of the statute restricted the acquisition of property by the board to the city's limits and fifteen miles beyond those limits. The Court reasoned that the appellees were not injured by a lack of notice in the title concerning the limitation, in the body, on the power of eminent domain, and that the title could not have misled appellees into believing that the board's power was restricted to the city limits.²

In one case,³ the Court reiterated its position that the body of an act cannot be "broader" in coverage than the title language indicates.

1. See *State v. Canova*, 94 So.2d 181 (Fla. 1957).

2. *Panama City Airport Board v. Laird*, 90 So.2d 616, 619 (Fla. 1956).

3. *State v. Tindell*, 88 So.2d 123, 124-125 (Fla. 1956). The title referred to "all counties having a population of . . . (490,000) or more, . . . in each judicial circuit." The body stated that: each judicial circuit . . . which embraces . . . a population of more than . . . (490,000)."

II ARTICLE III, SECTION 20

This section states that: "The Legislature shall not pass special or local laws in any of the following . . . cases: . . . regulating the jurisdiction and duties of . . . officers, . . . punishment of crime . . . , regulating the practice of courts . . . , for . . . conducting elections"

The legislature provided, in a population act applicable to counties having a population of not less than 113,000 and not more than 150,000 persons, a longer time for candidates for county officers between the qualifying date and the primary election date. The Court stated that if the larger counties, generally, had been included, the act would have had a "reasonable" basis for classification, since in such counties more time to canvass the electors would be needed.⁴

The Court validated⁵ a population act providing pensions for the widows of circuit judges in any judicial circuit embracing two or more counties, where one has a population of more than 300,000 persons; the largest county was required to pay the entire amount. The act was characterized as a "general law," to which Article III, section 20, did not apply. That judges have more to do in large counties apparently made the act not "unreasonable." A county population act, geared to a population ratio that can be entered "reasonably" by other counties, was declared a "general act."

In *Hollenbeck v. State*,⁶ the Court held unconstitutional an act, applying only to Sarasota County, which demanded a residence condition for real estate salesmen desiring to register that was not required in other counties.

III ARTICLE III, SECTION 21

The section states that: "In all cases enumerated in the preceding Section, all laws shall be general and of uniform operation . . . , but in all cases not enumerated . . . the Legislature may pass special or local laws, . . . PROVIDED that no local or special law shall be passed . . . unless notice of intention to apply therefor shall have been published in the manner provided"

It was decided, in *Hialeah v. Pfaffendorf*,⁷ that the "substance" of the contemplated act, under Article III, section 21, need not be published

4. *State v. Newell*, 85 So.2d 124, 127 (Fla. 1956) (the word "elections" in art. III, § 20, was held to include "primary" elections). Art. III, § 21, was also in issue;

5. See *Greene v. Gray*, 87 So.2d 504 (Fla. 1956) (art. III, § 21, was also in issue); accord, *Board v. County Budget Comm.*, 90 So.2d 707 (Fla. 1956). The factors: the court determined the basis of classification "reasonably related to the purposes to be effected, based on differences in population;" and the act was "potentially applicable to other counties." art. III, § 21, was in issue, also.

6. 91 So.2d 177, 178 (Fla. 1956) (no reason was given by the court on this issue; however, U.S. CONST. amend. XIV was referred to, in connection with equal protection of the laws).

7. 90 So.2d 596, 598-599 (Fla. 1956).

in the required "notice." However, the constitutional "notice" could not be avoided by the Legislature by a recitation in the journals that the "notice" requirement was satisfied.

Article III, section 21, provides an alternative method by which the legislature may enact special or local laws; the second procedure requires a "referendum election to be called and held in the territory affected." The Court stated that legislative compliance with the "notice" procedure obviated the necessity of compliance with the "referendum" method.⁸

BONDS AND THE CONSTITUTION

I ARTICLE IX, SECTION 6

This constitutional section reads as follows: "The Legislature shall have power to provide for issuing state bonds only for . . . repelling invasion . . . and the Counties, Districts, or Municipalities . . . shall . . . issue bonds only after the same shall have been approved by a majority of the votes cast . . . in such Counties, Districts, or Municipalities . . . [by freeholders]."

Bonds or Certificates Payable from Improvement Revenues, or from other than Ad Valorem Taxation Sources.—This judicially inspired exception to the vote requisites of Article IX, section 6, was consistently adhered to by the Court during this Survey period.¹ From the number of cases decided, it would appear that much of Florida improvement financing is avoiding the censorship of the local electorates.

In *Fisher v. Dade County*,² the Court invalidated a bond issue to finance public improvements in a "Special Improvement Service District." Under the statutory arrangement, annual ad valorem taxes, to support the bond issue, were to be levied within the district. The Court indicated that

8. *Pinellas County v. Laumer*, 94 So.2d 827, 839-840 (Fla. 1957) (the court construed the words "territory affected," anyway). Section 20 was also in issue; the court determined that a zoning law affecting a county was not regulated by section 20; therefore, a special or local law on this subject was valid.

1. See *State v. North Broward Hospital Dist.*, 95 So.2d 434, 436 (Fla. 1957) (question raised as to whether the project was economically feasible); *State v. City of Melbourne*, 93 So.2d 371 (Fla. 1957) (also, due process and equal protection issues under the state constitution); *State v. City of Cocoa*, 92 So.2d 537 (Fla. 1957) (economic feasibility of project was questioned); *State v. Florida State Turnpike Authority*, 89 So.2d 653 (Fla. 1956) (FLA. CONST. art. IX, §§ 4, 10, were also in issue); *State v. North Miami*, 89 So.2d 8 (Fla. 1956); *State v. Florida Development Commission*, 84 So.2d 707 (Fla. 1956); *State v. Inter-American Center Authority*, 84 So.2d 9 (Fla. 1955) (FLA. CONST. art. IX, §§ 10, 1, were also in issue, as were FLA. CONST. DECL. OF RTS. §§ 1, 12); *State v. Monroe County*, 81 So.2d 522 (Fla. 1955); *Lynn v. Fort Lauderdale*, 81 So.2d 511 (Fla. 1955) (the police power of the state was also in issue).

2. See 84 So.2d 572 (Fla. 1956). A referendum was held within the district; the Court, at page 579, stated that the arrangement would be invalid, under art. IX, § 6, without such a vote. The apparent basis for the invalidation was FLA. CONST. art. X, § 7 (the homestead provision).

such a plan would be constitutionally feasible only if the taxes were particularly related to the lands "specially benefited" by the improvements.

Financing on the "Necessity" Basis—This judicial exception to the vote requirement in Article IX, section 6, means that compliance with Section 6 is not necessary when a government desires to finance an improvement that is a "necessity," in something of a vital sense, to the government.³ In 1957⁴ the Court concluded that operation of a hospital was not "an essential function of government" because "the county government would [not] cease to exist" without it; a much more liberal approach to the "necessity" exception can be found in a 1956 decision,⁵ wherein a county office building, a children's home and improvements to the county courthouse were apparently characterized as a governmental "necessity."⁶

DECISIONS CONCERNING MISCELLANEOUS CONSTITUTIONAL INHIBITIONS

The Secret Ballot—One decision¹ contained a statement describing the "constitutional privilege" that "knowledge of [the voter's] decision at the polls remains his own." Having classified the constitutional guaranty as a privilege, the Court naturally authorized the voter to waive the guaranty by permitting someone else to learn for whom he voted.

Amending the Constitution—The legislature adopted a resolution proposing an amendment to Florida Constitution, Article VIII, section 11,² which provided "home rule" for Dade County in local affairs. A declaratory action was commenced to determine the validity of the proposed amendment before it was submitted to the state electorate.³

Florida Constitution, Article XVIII, section 1, provides a method for amending the constitution: "Either branch of the Legislature . . . may propose the revision or amendment of any portion or portions of this Constitution. Any such revision or amendment may relate to one subject or any number of subjects, but no amendment shall consist of more than one revised article of the Constitution." The Court held that the proposed amendment was limited to one "subject" (home rule for the county); however, the chancellor had determined that the words "one revised article" meant that "no amendment of a single article [could] limit, restrict or modify the provisions of any other article." The Court disagreed with the chancellor's construction of the words "one revised article," and stated that

3. See Alloway, *Florida Constitutional Law*, 8 MIAMI L.Q., 158, 194 (1954).

4. *State v. County of Manatee*, 93 So.2d 381, 383 (Fla. 1957).

5. See *State v. County of Palm Beach*, 89 So.2d 607 (Fla. 1956) (Justices Thomal and Drew concurred specially; Justice Thomas dissented).

6. The Court also construed FLA. CONST. art. XII, § 18 (which provides for public school financing), in *State v. State Board*, 89 So.2d 31, 33 (Fla. 1956).

1. *McDonald v. Miller*, 90 So.2d 124, 127 (Fla. 1956).

2. See the introductory materials in this paper.

3. See *Gray v. Golden*, 89 So.2d 785 (Fla. 1956).

as long as the proposed amendment was limited to one subject, it could "accomplish that subject even though it affects other provisions of the Constitution."

Secondly, the chancellor had held that the provisions of the proposed amendment were "inconsistent, conflicting and contradictory." The Court found no such apparent problem in the proposed amendment language and stated that if the electorate in Dade County, subsequent to the adoption by the state electorate of the amendment, approved a local home rule charter which transcended the amendment, or proved unworkable, then the Court would permit such an assault. Thus the genesis of Florida's initial experiment, in local home rule, was not strangled in the constitutional verbiage of Article XVII, section 1.