

2-1-1950

Quarterly Synopsis of Florida Cases

James A. Burnes

Follow this and additional works at: <http://repository.law.miami.edu/umlr>

Recommended Citation

James A. Burnes, *Quarterly Synopsis of Florida Cases*, 4 U. Miami L. Rev. 208 (1950)

Available at: <http://repository.law.miami.edu/umlr/vol4/iss2/6>

This Report is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

QUARTERLY SYNOPSIS OF FLORIDA CASES

PUBLIC LAW *

LEGISLATION. *Literal interpretation.* One common general approach to the interpretation of statutes may be characterized as the "literal approach." When the court interprets the words of a statute by reference to their "plain meaning" or their "usual and ordinary meaning" it is adopting this approach. Sometimes, however, the approach reduces a problem of meaning of statutory language to a matter of sterile rules of grammar. In a recent case,¹ petitioner asked the court to declare that a permit to operate a dog track issued in 1931 was still valid. Whether the permit was valid depended upon a 1935 statute which provided that all permits issued prior to 1935 to corporations which did not conduct racing meets within twelve months "be and the same shall be cancelled and annulled." No such meet had been held. However, since the State Racing Commission had never taken any action to revoke the permit, the question was whether the statute is self-executing or whether Commission action is necessary for revocation. Stating that the question is "one of grammar more than law," and that the transitive verbs "when given their proper meaning" conveyed the requirement of affirmative action, a majority of the court held the statute was not self-executing and that the permit was valid. Justice Hobson disagreed with this grammatical argument.² The fact of the matter is that the words "shall" and "shall be" have variously been interpreted to refer to the past, the future and the present, as well as to imperative command and to mere permission.³ The solution of the majority phrased solely in terms of grammar—particularly grammar which can be easily challenged—is not satisfying. In other close situations the court has used and stated additional approaches to the problem of interpretation of ambiguous language. Additional techniques of statutory interpretation should have been considered and stated here.

ADMINISTRATIVE LAW. *Pleadings.* In a civil case before a court, the pleadings generally indicate what issues were decided between the parties by a judgment. But in proceedings before administrative tribunals, the "pleadings" often do not limit resulting administrative rulings. This is illustrated in a recent holding that a certificate of public convenience and necessity cannot

* This section of the SYNOPSIS covers cases from 42 So.2d, No. 1 through No. 11.

1. Florida State Racing Commission v. Bourquardez, 42 So.2d 87 (Fla. 1948).

2. Justice Barns also dissented.

3. Sutton, "Use of 'Shall' in Statutes," 4 JOHN MARSHALL L.Q. 204 (1939).

be revoked for violation of conditions or representations in the application for the certificate not included in the certificate itself.⁴ The result in this case is in line with many other cases.⁵

MUNICIPAL CORPORATIONS. Disannexation. Several aspects of the proposition that the inclusion of unimproved land in a municipal corporation may be challenged in the courts have been considered in reviews of several cases in recent issues of the *Miami Law Quarterly*.⁶ In a recent case owners of unimproved land successfully challenged a special act of the legislature which added 361 acres in a municipality with a population of 800.⁷ In holding that the territory covered by the statute would not be benefited immediately or prospectively by inclusion in the limits of the municipality, the court examined in detail the possible benefits that might be derived from annexation. The lands in question were receiving no benefits at the time of annexation and consisted mainly of unoccupied land not fit for agricultural purposes. Since the city's population had increased only 400 in twenty years, it was said that no reliance could be placed on the reasoning of the lower court that the lands were "in direct line of development and are susceptible of urban development and reception of benefits from such development." The case is important because, along with previous cases, it indicates that the court be persuaded to review all the facts and disagree with the legislature.

Employees. A retired city employee was precluded from challenging the validity of a revised pension law when he accepted benefits under it rather than under a previous law for more than 6½ years without complaint.⁸ The practical necessity for such a law was pointed out in the opinion. The actuarial requirements of pension plans are worked out by trial and error and a large number of individuals are involved. Any change required by court decisions may thus work great hardship and the least that can be demanded is that challenges to revised laws be made promptly.⁹

TAXATION. Tax Decds. In a suit to quiet title brought by the holder of a tax deed, defendant denied that the plaintiff was in possession of the disputed portion of the lands and asserted that it was in actual, open, and exclusive possession by having controlled and maintained improvements placed on the land by its predecessor in title. The court held that this answer did not pre-

4. *City of Miami v. S & S Motors, Inc.*, 42 So.2d 173 (Fla. 1949).

5. In *Goldstein v. Sweeny*, 42 So.2d 367 (Fla. 1949), the court held an application for a C.P.A. certificate must be judged by statutes in force at the time the application was made.

6. 3 *MIAMI L.Q.* 579-598 (1949); 2 *MIAMI L.Q.* 434 (1949).

7. *State ex rel. Ervin v. Oakland Park*, 42 So.2d 270 (Fla. 1949).

8. *McNulty v. Blackburn*, 42 So.2d 445 (Fla. 1949).

9. Certificates were issued without a bond election for municipal street, sewer and other improvements and the city pledged the proceeds of a city utilities tax which it covenanted to impose so long as the bonds were outstanding. The court approved the issue on the basis of recent cases. *State v. City of Lakeland*, 42 So.2d 581 (Fla. 1949).

In *Graham v. City of Starke*, 42 So.2d 278 (Fla. 1949), the court rejected a challenge of the power of the city to install parking meters.

clude the chancellor from entering a decree in favor of plaintiff on the bill and answer. The answer was interpreted to state a claim of possession purely as an incident to ownership of the former record title, and not to state a right of possession under the statutes requiring some sort of adverse possession. Thus until or unless the possession of the defendant ripened into an interest sufficient to bar the plaintiff, the defendant could have no defense on this basis. Rather the possession alleged was viewed by the court as a mere trespass. The ruling does not appear inconsistent with other recent cases, and clarifies what is required in the way of possession for defendant to have a defense based on possession in these cases.¹⁰

Unemployment Compensation Taxes. When not performed on the farm in the employ of the owner or tenant of such farm, hauling of citrus fruit is within the Unemployment Compensation Act. This interpretation of the act appears to be well supported, although such hauling of citrus fruit is not specifically included in the act or specifically exempted.¹¹

CRIMINAL LAW. *Larceny.* A conviction for larceny of a pig was reversed on the ground that ownership of the pig as alleged in the indictment was not sufficiently proved. Insofar as the facts are stated in the opinion, it appears the court went out of its way to reconsider the ownership issue. Three judges dissented.¹²

ROBERT MEISENHOLDER
PROFESSOR OF LAW

PRIVATE LAW*

CONTRACTS. *Consideration, usury.* A loan may be consideration for a contract notwithstanding the liability to repay the loan, provided, of course, that the loan and collateral contract are made at the same time. In law, adequacy of consideration is largely left to the parties, and if they agree that making the loan is sufficient to support promises other than the promise to repay principal with interest, their bargain will be enforced. If the total amount of principal, interest and the value of the additional promise exceed the legal

10. *Suddeth v. Hutchison*, 42 So.2d 355 (Fla. 1949).

11. *Square Deal Fruit Co. v. Florida Industrial Comm.*, 42 So.2d 276 (Fla. 1949).

12. *Jones v. State*, 42 So.2d 537 (Fla. 1949).

In *Lee v. Tucker*, 42 So.2d 49 (Fla. 1949) the court upheld an information which charged that defendant with intent to defraud an insurance company willfully caused an insured building to be burned by procuring a go-between to burn the building who in turn caused the burning by counselling with and procuring the person who burned it. The information need not charge the go-between or the person who burned the building with intent to defraud the insurer.

* The cases noted in this section are found in Volume 42, Southern Reporter (Second Series), the advance sheets of which appeared from September 29, 1949, to December 29, 1949. The actual decisions cover a period from July 19, 1949, to November 18, 1949. It will be recalled that none of the cases belonging in this section appearing in Volume 41 have been treated; but considerations of time and space have made it necessary to defer their discussion to a subsequent issue.

rate of interest, the contract would seem to be usurious. That is not the view taken, however, in a current case by the Supreme Court of Florida; but the point is not elaborated.¹ It was held that a loan may be consideration for an option, simultaneously given, to purchase real property.

Meeting of the minds. To constitute a binding contract, acceptance must be responsive to the offer. If not, the purported acceptance is treated as a new offer, in turn to be accepted before there can be a binding contract. Where, pursuant to an offer to purchase a farm, the seller tendered a written contract containing certain reservations not previously treated for, there was no contract.² While the withdrawal of an offer once made is subject to some limitations, the tender of a non-responsive acceptance may be regarded as a rejection of the original offer, and excuse an arbitrary withdrawal.³

QUASI CONTRACTS. Promise to pay fair rental value. A principle of the law of quasi contracts affords a person whose property has been tortiously converted an election between suing in tort to recover his own damages, or in contract to recover the tortfeasor's gain. However, unless a taking is tortious, the quasi-contractual right to recover the fair sale price or the fair rental value, depending on whether the taking is permanent or temporary, does not exist. There is accordingly no implied promise to pay hire when a chattel is the subject of a consensual bailment as distinguished from a tortious one. An actual agreement to pay must be alleged and proved, as illustrated in a recent case.⁴

REAL PROPERTY. Private easements in public ways. A private easement cannot be acquired over a public way by prescription, because no user by an individual member of the public can be objected to by the owner. On the other hand, where at the time of severing the dominant and servient tenements, the only convenient access to the dominant tenement is by a public way crossing the servient, a private easement of necessity may spring into being without being in any way inconsistent with the existence of the public servitude, so that if the latter is abandoned, the former can survive. There is authority to this effect in other states, but a recent decision seems to establish the opposite rule

1. *Legg v. Hill*, 42 So.2d 168 (Fla. 1949). Legg loaned Hill \$230 to enable him to reopen his restaurant, which he desired to sell, and which was more salable as a going concern. At the same time, Hill gave Legg an option to purchase for \$1770 and cancellation of the note, at any time up to the due date of the note. The trial court found that the option was worth far more than the legal rate of interest on the loan; but it may well be that it mistook the consideration stated in the option for its value. The court reversed on other grounds without discussing this point.

2. *Kochle v. Tiller*, 42 So.2d 363 (Fla. 1949).

3. *Id.* Before receiving the non-responsive acceptance, the purchaser attempted to withdraw his offer, giving as his reason that one of his associates was seriously ill. Inasmuch as the seller was notified of this after making the non-responsive acceptance, he could have no right to object.

4. *Peters v. Thompson*, 42 So.2d 91 (Fla. 1949). Held, that the chancellor did not abuse his discretion in refusing to allow an amendment to the effect that defendant loaned and plaintiff borrowed a bulldozer, there being no express promise to pay rent alleged.

in Florida.⁵ A severance from which an easement of necessity could have sprung took place between 1851 and 1887; but at the time of the abandonment of the public way in 1947, the necessity no longer existed. The Supreme Court, doubtless influenced by this latter fact, was naturally reluctant to find an easement *ex necessitate*; but the difficulty could have been avoided by applying an equally well established rule, that easements of necessity are extinguished, unlike easements by adverse user, when the necessity ceases to exist.⁶ In order for a private easement of necessity to exist concurrently with a public way, the way must actually cross, not merely abut, the alleged servient tenement.⁷

Partition of estate by entireties. By the Florida rule, which however is not universal, divorce transforms a tenancy by the entireties into a tenancy in common. It is also established that until parties are divorced, there can be no partition of a tenancy by the entireties in real property. It is now apparent⁸ that this rule is applicable only to estates in real property, and is the result of the rule that husband and wife cannot be tenants in common. Personal property may be so partitioned, but rents of land, which are real property until collected, may not.⁹

Contract to purchase land: description. A contract to purchase land is not enforceable unless it describes the land with sufficient particularity to locate it. An offer, made by telegram, to purchase "the Moore property," was believed¹⁰ by the Supreme Court to be inadequate, although the ruling was *obiter*.

Brokers' authority. Listing a property for sale with a licensed real estate broker does not authorize the broker to accept an offer to purchase in behalf of the owner. Where such authority is specifically conferred, the burden of proving that fact is upon the person asserting the formation of a binding contract to sell.¹¹ The fact that the agent states that the principal has accepted the offer is not, according to a recent case,¹² any proof of agency.

EQUITABLE TITLES. *Equitable mortgages.* A deed absolute on its face, a

5. *Winthrop v. Wadsworth*, 42 So.2d 541 (Fla. 1949). In 1926 the state relocated the highway between Jacksonville and Thomasville. The old road continued to be used in a desultory fashion by abutting owners until the county commissioners closed it in 1947. At time of abandonment, the road was not necessary for access to the land of abutting owners; but title could be deraigned from the Marquis de la Fayette, across whose grant the road was laid out between 1824 and 1851.

6. BURBY, *HANDBOOK OF THE LAW OF REAL PROPERTY* 85 (1943).

7. After the road was laid out, grants in the alleged servient chain were bounded by the public road.

8. *White v. White*, 42 So.2d 710 (Fla. 1949).

9. The court found it unnecessary, however, to decide this point, because the plaintiff wife was actually receiving all the rent received from the land held by entireties.

10. *Koehle v. Tiller*, 42 So.2d 363 (Fla. 1949).

11. Compare *Lee v. Melvin*, 40 So.2d 837 (Fla. 1949), discussed in Stephenson, *Quarterly Synopsis, supra*, p. 47.

12. *Koehle v. Tiller*, 42 So.2d 363 (Fla. 1949). The broker telegraphed purchaser: "offer accepted by Moore." No other proof of agency for Moore, the owner, appears to have been offered. Held, that there was no contract.

lease, or an option, will be treated as a mortgage in equity if in fact it is given to secure repayment of a loan or other indebtedness. In determining the question of fact, the trial court is not bound by the parol evidence rule. As in other cases of reformation, parol evidence is admitted, with proper safeguards, to show that the contract or conveyance is not what it purports to be. This rule appears at first blush to have been disregarded in a recent case in which the chancellor found that an option was given by way of mortgage, and the Supreme Court reversed, basing its decision upon a construction of the contract.¹³ It may well be, however, that the lower court had no parol evidence before it at variance with the written contract. The mere fact that an option to purchase was given to a lender concurrently with, and in consideration of, the making of a loan, does not require a finding, as a matter of law, that the option was given by way of mortgage. When there is evidence, on the other hand, to support the trial court's finding that a deed absolute on its face is intended as a mortgage, a more recent case¹⁴ makes it clear that the findings of the lower court will not be reversed.

Purchaser's lien for restitution. In the ordinary case of sales of real property, after the contract has been entered into but prior to conveyance, it is said that the title has passed in equity but is retained in law by the seller to secure payment of the purchase price. Conversely, it may be said that where, on payment of all or part of the purchase price, the buyer goes into possession, he is entitled to hold possession to secure performance by the seller. This is illustrated in a recent case¹⁵ wherein the purchaser, in possession, brought a bill in equity to rescind. The Florida Supreme Court held that he was entitled to retain possession pending final adjudication. Presumably, the purchaser in possession would be accountable to the seller like a mortgagee in possession, a cognate situation in which possession of land, as distinguished from title, is held by way of security. *Election.* In the principal case, the buyer had made payments on account of the purchase price. This was not treated as a decisive factor, but it doubtless was. A demand for restitution would be inconsistent with a claim for damages for failure to perform, and the only right to retain possession where no payments were recoverable would be to secure payment of damages. Bringing suit to rescind in such case

13. *Legg v. Hill*, 42 So.2d 169 (Fla. 1949). Legg, having been consulted by Hill with respect to the sale of a restaurant which was not in operation, advised that a more advantageous sale could be made if a liquor license were secured and the business reopened. Legg advanced Hill \$230 for this purpose, taking an option to buy the business in consideration of the loan. No evidence of any collateral agreement or understanding that the option was given to secure repayment of the loan is reported.

14. *Smith v. Biscayne Park Estates*, 42 So.2d 442 (Fla. 1949). The evidence is not summarized in the opinion, and a valuable precedent has probably been lost to the bar.

15. *Hilerio v. Barton*, 42 So.2d 275 (Fla. 1949). The chancellor, on motion after purchaser's bill was filed and before seller answered, ordered purchaser to surrender possession. Reversed on certiorari.

would be an election to abandon the claim for damages, and there would no longer be a right to retain possession.

PERSONAL PROPERTY. *Estate by the entirety.* Interesting light is thrown upon the nature of an estate by the entirety in personal property by two current decisions.¹⁶ At common law, such an estate could be an incident only of real property tenure. The husband had such complete control over his wife's personality that no concurrent interest in the wife could be recognized. Unless the husband assigned or appropriated the wife's property during his lifetime, it remained the widow's, not by descent but because some specific act of the husband was required to divest her of title. It is a curious fact, therefore, that the development of the concept of an estate by the entirety in personal property, drawing as it does from the ancient postulate that husband and wife are one person, is a comparatively recent development, coming upon the heels of the emancipation of married women. It is definitely settled in this state that a husband and wife may be tenants in common of personal property as well as tenants by the entirety.¹⁷ In contrast, the rule with respect to real property is that a husband and wife cannot hold concurrent interests in real property except as tenants by the entirety¹⁸ unless the title was acquired before marriage. The cases where a tenancy by the entirety in personal property has been held to exist have been largely confined to cases of a deposit in a bank or purchase of registered securities, where the terms of the contract with the bank, corporation, or other debtor, prove the specific intent. Otherwise, it is presumed that an estate in common was acquired. The first of the recent cases assumes that bearer bonds, purchased with the proceeds of a bank account formerly owned by the entirety, would retain that character; but holds that the mere fact that bearer bonds are kept in a safe deposit box to which either or the survivor have access, does not show ownership *per tout et non per my*.¹⁹ The second case shows that rents arising from land owned by the entirety retain that character.²⁰ It has taken an amendment to the statutes to permit a husband and wife to create an estate by the entirety in land without

16. *Rader v. First National Bank*, 42 So.2d 1 (Fla. 1949), and *White v. White*, 42 So.2d 710 (Fla. 1949).

17. In *White v. White*, *supra*, a mortgage and leasehold were held in common.

18. In *White v. White*, *supra*, the chancellor directed the trustee of a resulting trust in husband and wife to convey real property to husband and wife as tenants in common. The appellate court viewed this with alarm, but withheld action because the point was not urged.

19. Husband and wife withdrew \$10,000 from a "joint" bank account, and each directed the bank to buy \$5,000 in government bonds payable bearer. The bonds were kept in a safety deposit box to which both had access. The husband wrongfully hypothecated all ten bonds and sold them after the wife's death. Held, that the personal representative of the wife was entitled to recover in trover the value of her bonds. The court construed the fact that the parties severally executed orders to purchase, and that they "declared sole ownership" [where and how is not shown, possibly on an intangible property tax return] to show a severance. *Rader v. First National Bank*, 42 So.2d 1 (Fla. 1949).

20. The uncollected rent is real property, and can be owned only by the entirety. The court did not note, however, that collected rent is no longer real property and may be severed. *White v. White*, 42 So.2d 710 (Fla. 1949).

conveyance to a "straw man";²¹ but in the current case, this power is assumed to exist with respect to personal property, which may be converted from ownership by the entireties to ownership in common by consent.²²

Gifts inter vivos. To constitute a gift *inter vivos*, there must be delivery of the property or a formal assignment of title thereto, with the intent immediately to vest title in the donee. A present gift is not made conditional, or testamentary, by the fact that it is defeasible. Power to revoke a gift in whole or in part after it is made, is distinguishable from a stipulation that title will not vest until donor's death, a condition precedent. The exact intent of the donor is primarily a question of fact for the trial court; but where the only evidence of intent lies in the inferences properly drawn from the acts of the parties, the inferences to be drawn from any particular fact pattern become a matter of law. Thus, the savings bank trust is construed, absent any specific expression of intent, as a revocable gift.²³ In like manner, where possession of securities is delivered to the donee but the donor continues to have access thereto and does in fact make a partial retraction, the intent to be inferred, as a matter of law, is an intent to make a present gift subject to revocation. This is illustrated in a recent case.²⁴

Gifts causa mortis. A gift *causa mortis* is in all respects a complete gift *inter vivos*, with the added feature, in the nature of a condition subsequent, that it is revocable at any time before death, and is in fact revoked if the donor survives. In the typical case, the donor does not express the intent to make the gift subject to a condition subsequent, but the intent is implied from the fact that the gift is made when the donor believes himself to be confined by a potentially fatal illness, and belief that he is about to die motivates the gift. Often the donor uses language of condition precedent, as for example, "If I die, you are to have this." If this is accompanied by delivery of the property or an assignment, a present revocable gift results. The reservation of a life estate or an estate for years when a gift is made, however, neither converts an *inter vivos* gift into a gift *causa mortis*, nor prevents a gift *causa mortis* from taking effect as such. This principle is currently recognized.²⁵

21. See Flowers, *Real Property Laws of 1947*, 2 MIAMI L.Q. 22 (1947).

22. Rader v. First National Bank, 42 So.2d 1 (Fla. 1949).

23. The leading case is Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1804). The rule is established by statute in Florida. FLA. STAT. § 653.17 (1941) as amended by c. 21891, Laws of 1943.

24. Lowry v. Florida National Bank, 42 So.2d 368 (Fla. 1949). The alleged donor placed coupon bonds in a safety deposit box, which was rented in the donee's name. The bonds were in an envelope, marked with donee's name. The donor was deputized to enter the box and did so, clipping the coupons including some due after his death. The chancellor, accepting these facts as proved, ruled that the donee had failed to establish intent to make a present gift. The Supreme Court, while recognizing that the burden of proof was upon the donee, and that in view of the donor's death prior to the assertion of the claim, every element of the gift must be proved by clear and satisfactory evidence, reversed the chancellor and held that the donee had proved her title.

25. Day v. Norman, 42 So.2d 273 (Fla. 1948). The statement of facts by the court does not show any way in which the fact that the gift was *causa mortis* would have changed the result, since the donor died without revoking it. It is possible that the court,

PROBATE LAW. *Intent of testator.* It is not enough in offering a will for probate to show that the statutory formalities have been complied with. It must also be shown that the testator had the specific intent to give legal validity to the instrument, although this may be assumed in the absence of some positive challenge. It is therefore impossible to probate a will if the testator lacked testamentary capacity at the time of execution, even if he dictated it while still in possession of his faculties. Probate should also be denied where a testator did not know what was in the will which he signed, although, where a will was prepared in accordance with his instructions, he need not read it or have it read to him. Where testator was not completely possessed of his faculties when he directed a codicil to be prepared, and did not read it or hear it read when he signed it, the probate judge did not err in denying probate.²⁶

The question has often arisen whether subscribing witnesses may be heard to deny proper execution or to assert lack of intent or testamentary capacity. It is usually held that they may testify, but the law is well settled that if they do, the fact that they have subscribed will support a finding that the will was properly executed, even in the face of their positive testimony to the contrary. The fact of subscription may be used in this way not only to impeach the witness, but to contradict him.²⁷ It does not follow, however, that the probate judge may not find the oral evidence persuasive and reject the fact of subscription, as the present case shows. The lawyer who serves as a subscribing witness in such a case, and later represents the contestant, cannot prejudice the rights of his clients by his individual conduct; but his testimony is that of an interested party. There may even be danger that undue weight be given to his testimony because it seems to invite disciplinary action by the bar.²⁸

Lost will containing revocation clause. Florida statutes establish the rules that a will is revoked by the execution of a subsequent will containing an express clause of revocation, and that revocation of the subsequent will, where it expressly revokes prior wills, does not revive the former.²⁹ Where the subsequent will cannot be found and cannot be proved, it is nevertheless possible to prove that it was executed and that it contained a clause expressly revoking prior wills for the purpose of denying probate to a prior will in caveat pro-

following the argument as proposed by counsel, inadvertently used the phrase "gift *causa mortis*" to mean "testamentary gift." A testamentary gift is made upon the condition precedent that the testator die.

26. *Vignes v. Weiskopf*, 42 So.2d 84 (Fla. 1949). Testator, while on his deathbed, already losing consciousness, told his secretary that he wanted a codicil to his will. The secretary called his attorney, who prepared a codicil. The testator's desires were not clearly expressed to the secretary, and the attorney was aware of this fact. The testator executed the codicil in the presence of the attorney and his wife, who subscribed as witnesses, but testator did not read the codicil, and it was not read to him. The witnesses doubted whether testator knew what he was doing. The attorney who thus prepared and witnessed the will appeared for the contestants. Judgment denying probate, affirmed.

27. See ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 297 (1937); REDFERN, *WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA* 100 (2d ed., 1946).

28. The court in the present case found that the attorney acted properly.

29. FLA. STAT. § 731.15 (1945 Supp.).

ceedings. The sufficiency of evidence to show that the subsequent will contained an express clause of revocation is reviewed in a current case.³⁰ Under the Florida statutes, where revocation is by implication only, the second will being wholly or partly inconsistent with the first, destruction of the later will does revive the former.³¹

Descent of homestead property. Homestead property descends only as provided in the statutes, and is not devisable when the owner is survived by widow or children or both.³² An interesting application of this rule is found in a recent decision.³³ A widow devised three parcels of realty of approximately equal value to her three children. One of these parcels was decedent's homestead.³⁴ After the estate was settled, the devisee of the homestead was challenged by her sister, and brought declaratory judgment proceedings to determine her title to the land. The trial court held in favor of the brother and sister who claimed adversely. The Supreme Court affirmed without opinion; but a strong dissent was filed by Barns, J., in which Hobson, J., concurred. The dissenting judges argued that the devisees of the other lots were estopped by equitable doctrines of election to assert their claims in the homestead. The equitable principle which advances equality among the children of a decedent, exemplified in the rules of advancement in cases of intestacy, and satisfaction in cases of testacy, was thought to control. Since the majority filed no opinion, it is necessary to find some valid ground for the decision. It may be that while the court on declaratory judgment proceedings could have held the brother and sister constructive trustees for the plaintiff with respect to the land devised to them, the only question presented on the actual record was the title to the homestead property. To follow the dissenting judges and to hold homestead property devisable in equity would be to proceed in the face of specific statutory prohibitions.

Proof of claims: entry of action. The Florida probate laws require proof of claims to be filed by decedent's creditors within eight months of the first publication of notice of grant of letters. Failure to prove a claim operates as

30. *In re Manney's Estate*, 42 So.2d 535 (Fla. 1949). The draftsman testified that it was his practice to begin all wills with a revocation clause. The principal beneficiary testified that the will began with such a clause, exactly like the one that same draftsman put in her own. A third witness corroborated the second. None of the witnesses could give the exact language. The probate judge found that the will contained an express clause of revocation, but the circuit court reversed. The Supreme Court reinstated the findings of the probate judge, as based on sufficient evidence.

31. REDFEARN, *WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA* 122 (2d ed., 1946).

32. FLA. STAT. §§ 731.05, 731.24 (1945 Supp.).

33. *Jones v. Niebergall*, 42 So.2d 443 (Fla. 1949). The question of an express *in terrorem* clause is discussed in Miller, *Our Legal Chameleon*, 2 U. OF FLA. L.R. 12, 56 (1949).

34. The dissenting opinion states specifically that this was the homestead property of the widow. Since the children were all adults, the possibility is suggested that the property may have acquired the character of homestead in the husband's hands, and that the widow took only a life estate. If that were so, the widow could not devise property vested in the children.

an absolute bar.³⁵ Actual knowledge of the personal representative, that an unfiled claim exists, does not prevent the running of the statute of non-claim, unless in circumstances where the conduct of the executor constitutes fraud on the creditor.³⁶ Prior to 1947, all claims, even those in litigation, were barred unless filed; but in that year the law was amended to permit action to be brought before claims were disallowed, and to dispense with filing of notice where action was brought, and service of process made upon the personal representative, within eight months of the first publication.³⁷ The 1947 amendment³⁸ has now been construed by the Supreme Court of Florida.³⁹ It has been held to apply to all suits, whenever entered, provided service of process sufficient to support a judgment *in personam* against the executor or administrator has been made.⁴⁰ It has also been held constitutional in the face of challenge for the reason that it embraces more than one subject, briefly expressed in its title,⁴¹ and for the reason that it is retrospective in applying to pending suits on claims not yet barred by the statute.⁴²

FAMILY LAW. Divorce: right of wife to counsel fees. Following a decision noted last quarter,⁴³ the Supreme Court reversed a decree in which the circuit court denied the wife's application for counsel fees because she had been found guilty of adultery.⁴⁴

Alimony and property settlements. While a property settlement is not conclusive of the right to alimony, a chancellor may in his discretion deny temporary alimony pending a final determination of the wife's rights where there has been a settlement.⁴⁵

35. Contrasted with the view taken in some other states: Stephenson, *Synopsis of Recent Florida Cases*, 2 *MIAMI L.Q.* 328 (1941); *Sawyer v. Hinton*, 160 Fla. 473, 35 So.2d 294 (1948).

36. *Adams v. Hackensack Trust Co.*, 156 Fla. 20, 22 So.2d 392 (1945).

37. See *Wilson and McGehee, Probate Claims in Florida*, 1 *U. OF FLA. L.R.* 1, 5 (1948).

38. *FLA. STAT.* § 733.16 (1941), as amended by c. 23970, Laws of 1947.

39. *McCord v. Smith*, 42 So.2d 849 (Fla. 1949). *McCord* was injured in an automobile accident occasioned by the negligence of Schmidt, which took place in Iowa on April 9, 1947. Schmidt was apparently killed. On April 18, 1947, Smith, executor of Schmidt, published his first notice to creditors, having been granted letters in Florida. *McCord* entered suit in Iowa on April 27, 1947, and Smith, executor, appeared to defend. Verdict and judgment were not entered until after December 19, 1947. No claim was filed with the county judge until January 12, 1948. The amending act became effective June 16, 1947.

40. Personal service on the executor was apparently based upon an Iowa statute making operation of a motor vehicle on state highways an implied consent to be sued. Compare *Hess v. Pawloski*, 274 U.S. 352 (1927), and *Wuchter v. Pizzutti*, 276 U.S. 13 (1928). Any possible objections to the jurisdiction were waived when the executor appeared, removed to the federal court, and defended.

41. *FLA. CONST.* Art. III, § 16.

42. See Stephenson, *Quarterly Synopsis*, 3 *MIAMI L.Q.* 40, 282 (1948, 1949).

43. *Foreman v. Foreman*, 40 So.2d 560 (Fla. 1949); see Stephenson, *Quarterly Synopsis*, p. 60, *supra*.

44. *Barkley v. Barkley*, 42 So.2d 51 (Fla. 1949).

45. *Gemmell v. Gemmell*, 42 So.2d 80 (Fla. 1949). The chancellor denied an application for temporary alimony because of the property settlement. Certiorari denied. *Barns, J.*, concurring specially, apparently feared that the court's ruling would be construed as holding that there can be no temporary alimony where there has been a property settlement, a fair inference.

Torts. Attractive nuisances. While artificial pools of water are not *per se* attractive nuisances, according to the view recently taken by the Supreme Court of Florida,⁴⁶ there are exceptions. One exists, as a matter of law,⁴⁷ where there is a sloping, white sand bank to the pool. Realizing that to carry the doctrine of the turntable cases to the extreme would be to make all owners of real property the insurers of the safety of their neighbors' children, courts have insisted that there be some concealed hazard or trap, or some special inducement, such as a tempting raft left floating on the surface. From raft to white sand beach is an easy step.⁴⁸

Gross negligence. The problem of defining gross negligence for the purposes of the guest statute⁴⁹ continues to plague the Supreme Court of Florida.⁵⁰ Whether or not the defendant is liable is basically a question of fact for the jury after the standard of care has been defined; but in defining the standard of care lies the difficulty. If the trial court states that the proof must be "convincing" or "conclusive," there is danger that the jury may confuse the rule as to the standard of proof with that as to the standard of care. Proof need only be by a "preponderance of the evidence," as in other tort cases, while this charge tends to lead the jury to believe that it must be "beyond a reasonable doubt." The standard of care is, of course, something *less* than a reasonably prudent man would use. This makes it virtually impossible for a court to direct a verdict for plaintiff or reverse a finding for defendant, which may no longer be done just because the court disagrees with the jury.⁵¹

WORKMEN'S COMPENSATION. Actions by employer against persons causing injury. Some light is thrown on the nature of the employer's right against persons who have tortiously caused compensable injury to a workman by a recent decision.⁵² When injury otherwise compensable has been caused by a third person, the employee has a statutory⁵³ right of election either to sue the tortfeasor or to claim compensation. If he elects the latter, the employer is subrogated to the employee's claim to the extent necessary to reimburse the

46. *Allen v. McDonald Corp.*, 42 So.2d 706 (Fla. 1949).

47. The court reversed an order sustaining a demurrer.

48. Terrellism: "Children are as prone to resort to a sand pile as a mule is to a hay stack, a dog is to a meat house, or bees are to a sugar kettle. It is just as natural for children of tender years to play on a sand pile as it is for their elder brothers to loaf around a sorority house or their grandfathers to respond to a dinner call."

49. FLA. STATS. § 320.59 (1941). See also Stephenson, *Synopsis*, 2 MIAMI L.Q. 331 (1948); Stephenson, *Quarterly Synopsis*, 3 MIAMI L.Q. 439 (1949).

50. *Ayers v. Morgan*, 42 So.2d 2 (Fla. 1949). The car, driven by one of four boys on an outing, overturned at 1:30 a. m. while driven at a rate of speed approaching 50 m. p. h. on a wide, 60° turn. Other passengers testified that the speed was "not excessive" and that the driver was not reckless or stunting. The court charged that plaintiff must show gross negligence "conclusively" by a preponderance of the evidence. Verdict and judgment for defendant. Affirmed.

51. See Stephenson, *Quarterly Synopsis*, 3 MIAMI L.Q. 446 (1949). Cases of this type demonstrate the folly, in the editor's opinion, of refusing to permit the trial court to grant a new trial simply because he disagrees with the verdict.

52. *Newton v. Mitchell*, 42 So.2d 53 (Fla. 1949).

53. FLA. STAT. § 440.39 (1941).

employer, any surplus recovered to go to the employee. The decision holds that if the employer sues the third person in this representative capacity, the third person must assert any claims which he may have against the employer personally, or be forever barred.⁵⁴

Aggravating injury. An injury which, by aggravating previous conditions, causes loss of a member, is compensable.⁵⁵ *Notice to employer.* While the act requires the employee to notify his employer of the injury in writing within thirty days, failure to comply is immaterial if actual notice to the workman's immediate superiors can be shown.⁵⁶

DAMAGES. Landlord withholding leased premises. Where possession of leased premises is wrongfully withheld from the tenant by the landlord for a portion of the term, the tenant is entitled by way of damages to the difference between the actual value of the premises and the agreed rent. If the agreed rent is the full rental value, then the tenant can recover nothing from the landlord but nominal or punitive damages, or both. It is error to give him the rent which he would otherwise have been obligated to pay the lessor. Profits from a business which the tenant expects to conduct on the premises cannot be recovered because they are too speculative. In determining the fair rental value of the property, the opinions of real estate men, and of offers actually made by others, are competent.⁵⁷

Trade-in allowance as determining value of automobile. While the Supreme Court has overthrown the tyranny of statutory price-fixing, it has not entirely disabused itself of habits of thought acquired during the period when price-fixing held sway. Recently it ruled that a trade-in allowance of \$1200 on an automobile fixes, as a matter of law, the value of the old automobile, not the price of the new.⁵⁸

JOHN G. STEPHENSON, III
PROFESSOR OF LAW

ADJECTIVAL LAW *

Res judicata. The petitioner who previously instituted a habeas corpus proceeding to test the sufficiency in law of a criminal information charging

54. Compulsory counterclaim. FLA. STAT. § 52.11(1) (1941). This is further discussed under *Adjectival Law, infra*.

55. *Borden's Dairy v. Zanders*, 42 So.2d 539 (Fla. 1949). Workman had a previously existing case of diabetes. He dropped a milk can on his toe. Because of the aggravating effect of this injury upon the disease, it was necessary to amputate the toe. Evidently compensation was given for the loss of the member, and was not apportioned.

56. *Borden's Dairy v. Zanders, supra*.

57. *Harvey Corp. v. Universal Equipment Co.*, 42 So.2d 577 (Fla. 1949).

58. *Bailey Motor Co. v. Cullison*, 42 So.2d 581 (Fla. 1949). Action to foreclose a mechanic's lien. The defense presented ample testimony that the work done was of poor quality, and the chancellor found for the defendant. The record showed, however, that the automobile, which had a salvage value of \$500 when taken to plaintiff's garage, was traded in shortly thereafter for \$1200. On the basis of this, the Supreme Court reversed.

*The cases noted in this section are found in Volume 42, Southern Reporter (Second Series), through the advance sheets published December 12, 1949.

him with arson¹ was discharged from custody because the information failed to allege a "causal relation between the original felonious intent of the petitioner to defraud . . . and the subsequent [felonious] act" of a third person whom petitioner was charged with procuring to commit the felony.² A second information, which included the aforesaid missing allegation of causal relation, was filed. In this case,³ a habeas corpus proceeding, the second information was held sufficient, and the final judgment of the first proceeding was not res judicata since, the court said, the "facts and conditions appearing in the information under attack are entirely different from the facts and conditions appearing" in the first proceeding in which the "information failed . . . as a matter of law. . . ." It would seem the court was somewhat hyperbolic in stating the facts were "entirely different," but the court relied quite properly upon a familiar principle:

While a discharge in a habeas corpus proceeding will usually terminate a pending proceeding against a petitioner, it will not necessarily prevent the institution of a subsequent prosecution against him under proceedings which are legal and sufficient and which remove illegalities or supplied substantial defects or deficiencies on account of which the order of discharge was granted; an order of discharge in habeas corpus being res judicata only as to the questions presented under the same state of facts as were present in the first proceeding.⁴

In other words, the information in the last proceeding was not tested in the first, and the first order of discharge was not obtained on the merits.

Summary procedure. Upon a hearing on bill and answer in a suit for a declaratory decree, the court entered a final decree. Every fact essential to a final decree favorable to appellee-plaintiff was admitted by the pleadings of appellant-defendant or was established by a proper construction of pertinent exhibits.⁵ The court pointed out that such a procedure is analogous to the summary judgment procedure under the Federal Rules of Civil Procedure, Rule 56,⁶ and should be encouraged in the interest of terminating litigation without unnecessary delay. Undoubtedly having this interest in mind, the drafters of the new equity and common law court rules, which were not in effect when the above case was decided, included therein rules similar to Rule 56.⁷ The newly adopted summary judgment rules, it should be noted, are of much wider scope than that called for in the above situation.

Compulsory Counterclaim. The case of *Newton v. Mitchell*⁸ pointed out

1. FLA. STAT. § 806.06 (1941).

2. *Lee v. Tucker, Sheriff*, 160 Fla. 962, 37 So.2d 582 (1948).

3. *Lee v. Tucker, Sheriff*, 42 So.2d 49 (Fla. 1949).

4. See *State ex rel. Cacciatore v. Drumbright*, 116 Fla. 496, 156 So. 721 (1934); *Johnson v. Lindsey, Sheriff*, 89 Fla. 143, 103 So. 419 (1925).

5. *Day v. Norman*, 42 So.2d 273 (Fla. 1949).

6. 28 U.S.C. (1946).

7. FLORIDA EQUITY RULE 40 and FLORIDA COMMON LAW RULE 43.

8. 42 So.2d 53 (Fla. 1949).

that the statute respecting compulsory counterclaims should be interpreted from a "practical standpoint" toward the ends of "expedition and economy so that claims originating in a single happening may be tried and determined in one action." A compulsory counterclaim—to be contradistinguished from a permissive counterclaim⁹—is "any claim, whether the subject of a pending action or not, which . . . [the defendant] has against the plaintiff, arising out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."¹⁰ In the *Newton* case, the appellees, assignees under the Workmen's Compensation Law¹¹ of a claim arising from the death of their employee-truckdriver, sued the appellant for negligence in the operation of the latter's truck, which collided with appellees' truck. Thereafter, and while the action was pending, the appellant instituted a separate action against the appellees, charging the latter with vicarious liability for the negligence of the appellees' truckdriver in the same collision. The court held that appellant, whose separate action was properly dismissed in the court below, should have proceeded by counterclaim irrespective of the fact that appellees were plaintiffs and defendants in the two actions in different capacities. The importance of recognizing the existence of and filing compulsory counterclaims cannot be overemphasized, since the failure to do so will result in the extinguishment of such claims.

*Appeal. Day v. Norman*¹² reaffirmed the well established principle that where one of several defendants appeals from a non-joint decree for the plaintiff, the court will not consider the position taken in the court below by any one of the other defendants, nor can the appellant assert the rights of any other defendant to a reversal if any should exist.¹³

JAMES A. BURNES
ASSOCIATE PROFESSOR OF LAW

9. FLA. STAT. § 52.11 (2) (1941).

10. FLA. STAT. § 52.11 (1) (1941).

11. FLA. STAT. § 440.39 (1941).

12. 42 So.2d 273 (Fla. 1949).

13. *Rabinowitz v. Hook*, 100 Fla. 44, 129 So. 501 (1930); *Guarantee Trust & Safe Deposit Co. v. Buddington*, 23 Fla. 514, 2 So. 885 (1887).