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Quarterly Synopsis of Florida Cases

QUARTERLY SYNOPSIS OF FLORIDA CASES

An overworked court [1] has continued to render opinions at the rate of nearly two daily during the period covered by this report.[2] More apparent than ever before should be the need of devising a method of screening appeals before the cases reach the Supreme Court. While in a growing jurisprudence, cases are decided on points which have been settled long ago in states whose system is more mature, our study leads us to the conclusion that a large percentage of cases involve points, mostly of procedure, which have been well settled in this state. With a customary apology for the use of titles to show the arrangement of material, we proceed to examine the cases.

PUBLIC LAW

CONSTITUTIONAL LAW. *Special and local laws.* During the preceding quarter, a decision was noted [3] holding that a general law regulating the practice of courts of justice, is unconstitutional unless it is of uniform operation in the several counties of the state. The opinion admitted of no classification by counties according to population, even in cases where there might be a reasonable need to deal with a problem differently in large and small counties. In a current decision,[4] however, it is intimated that classification of counties by size for governmental purposes is permissible if there is a reasonable and just relation between the subject matter affected and the size. Where classification is purely arbitrary, a general statute may nevertheless be treated as a local or special law. This was an action to enjoin sale of liquor at a restaurant located within 2500 feet of an established church or school.[5] A license had been granted pursuant to a recent statute [6] making an exception to the general rule in the case of restaurants capable of accommodating at least 500 persons located within three miles of the boundaries of a city of more than 100,000 persons in all counties of not less than 150,000 nor more than 250,000, according to the last preceding state census. While of potential operation throughout the state, the act affected only one establishment, the "Crystal Ball," located within three miles of the city of Tampa in Hills-

1. For the same conclusions, more modestly stated by a member of the court, see Elwyn Thomas, *Justice Without Delay*, 2 U. OF FLA. L. R. 1 (1949).

2. The cases reported are found in 38 So.2d, pp. 30-440, covering the months of December, 1948, and January, 1949, in part. The quarter has been somewhat arbitrarily shortened.

3. State *ex rel.* York v. Beckham, 36 So.2d 769 (Fla. 1948), noted *supra*, p. 284.

4. Carter v. Norman, 38 So.2d 30 (Fla. 1948).

5. See Fleeman v. Vocelle, 37 So.2d 164 (Fla. 1948), noted *supra*, p. 286.

6. F. S. 1941, § 561.44(2), as amended by c. 23835, LAWS OF FLA., 1947.

borough County. Because of the peculiar peninsular situation of Tampa, the area was more restricted than might otherwise appear. To state the facts is to show that this was arbitrary classification. However, as Mr. Batchelor has pointed out,[7] statutes bracketing counties are more apt to be considered arbitrary than those which distinguish between large and small units. Juxtaposition of the present and preceding cases leads to the conclusion that there is a distinction between local and special laws affecting the practice of courts, and, inferentially, the other subjects enumerated in Section 20, which are wholly prohibited, and other special and local laws, which are qualifiedly permitted in Section 21.[8] It may also be indicated that there is a difference between a statute which grants special privileges[9] and one that is an exercise of the "police power"; since it is frequently said, in construing the equal protection clause of the Federal Constitution, that the legislature may confine its regulation to those classes of cases where the need is deemed to be clearest.[10] The recent case leaves no less doubtful the constitutionality of more than 1500 "population" statutes.[11]

Public property. During previous quarters, cases have been noted[12] in which statutes authorizing the transfer of public property to other governmental agencies, state and federal, were approved. The latest of these held that, if the property were regarded as held in trust for the public, breach of trust could not be prevented under the due process clauses. The opposite view seems to be taken in a current decision.[13] Property which was dedicated to a city for use as a public park, was offered by the city to the federal government

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7. Batchelor, *Population Statutes under the Florida Constitution*, 1 MIAMI L. Q. 97 (1947), and (without footnotes) in 21 FLA. B. J. 48 (1947). The proposed constitution, submitted tentatively by the Florida State Bar Association's committee, D. H. Redfearn, chairman, provides: "Every local law shall be enacted as such and not as a general law with local application. Every law relating to a single county or municipality or other political subdivision shall be enacted as a local law and shall not become effective until approved by a majority of the qualified electors of the political unit affected voting on such law." Art. III, § 25(b).

8. FLA. CONST., ART. III.

9. But *cf.* Hialeah Race Course v. Gulfstream Park, 37 So.2d 692 (Fla. 1948), holding that a lucrative monopoly may be granted to operate a business (race track) which might otherwise be prohibited because of inherent danger to the public. Discussed, *supra*, p. 280.

10. See Radice v. New York, 264 U. S. 292 (1924).

11. For count, see Batchelor, *op. cit.*, note 7, *supra*.

12. Watson v. Caldwell, 35 So.2d 125 (Fla. 1948), noted in *Quarterly Synopsis*, 2 MIAMI L. Q. 318 (1948) (involving gifts of state lands to federal government for the Everglades National Park); Cleary v. Dade County, 37 So.2d 248 (Fla. 1948), discussed in *Quarterly Synopsis*, p. 282, *supra* (sustaining transfer of Jackson Memorial Hospital from Miami to Dade County).

13. Kramer v. Lakeland, 38 So.2d 126 (Fla. 1948). Munn dedicated certain lots in his original plan of Lakeland for use as a public park. Later the city conveyed the lots to a bank, Munn's successor joining in the deed. This conveyance was set aside in 1924 in injunction proceedings. In 1928, Munn's successor conveyed the fee to the city. In 1940, the city leased the park to a civic group, and injunction proceedings followed, a decree being entered on stipulation that the city could offer the property to the federal government. *Held*, that the stipulation was beyond the municipal attorney's power, and that the property could not be conveyed to the federal government without legislative authorization.

by way of gift. No statutory authorization broad enough to cover such a transaction was found, but the court recognized the power of the legislature to authorize such a conveyance. In the previous case, legislative authorization was found in the municipal charter. If the reason is that the municipality holds the property as a trustee and not in a proprietary capacity, it should apply in either case as a limitation on the power of the legislature. It has been noted that in the cases where the gift was authorized, the transferee received the property upon a public trust, although not necessarily the same trust. These cases may well illustrate the survival of prerogative *cy pres* in this country.[14]

MUNICIPAL CORPORATIONS. *Legislative control.* The plenary power of the legislature to create, enlarge, contract or abolish municipal corporations is subject to two constitutional limitations: the first, that to include property which will not be benefited is to take property without due process of law,[15] and the second, that the legislature cannot provide for the abolition of a municipality without providing for the protection of creditors.[16] The first branch of the rule is illustrated in a quo warranto proceeding [17] wherein lands located on keys were held to have been illegally included within the limits of a city some distance removed by land and water and not actually or potentially benefited thereby. Application of the second limitation was avoided due to the fact that no creditors were joined in, and therefore not bound by, the proceeding. Disannexation in the case of smaller communities is specifically permitted by statute; but the test applied by the court is substantially the same.[18] Rural land which is not benefited immediately may be included so as to provide for its development; but where prospective benefits are not apparent, exclusion should be ordered.

Municipal bonds. Limitations found in the state constitution prohibit issuance of bonds by municipalities unless the issue has been approved by vote of the freeholders who are qualified electors.[19] With one express exception in the case of refunding bonds, this prohibition is absolute in its terms, as noted by Mr. Justice Adams, dissenting, in a recent case.[20] The Supreme Court, however, has construed this limitation to be subject to one further exception, that when the credit of the municipality is not pledged, self-liquidating bonds may be authorized without vote of the freeholders. Further developing the excep-

14. The British crown might by sign manual expropriate property conveyed upon a public trust from a disfavored to an approved purpose. Thus, where property was left in trust to maintain a synagogue, the crown ordered it held to support a preacher of the established church in a foundling hospital. DaCosta v. DePas, 1 Amb. 228 (1754); see REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA 354 (2d ed., 1946).

15. FLA. CONST., Declaration of Rights, § 12; *see* State *ex rel.* Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A. L. R. 1307 (1929), holding that it is taking without compensation.

16. FLA. CONST., Art. VIII, § 8.

17. Coral Gables v. State *ex rel.* Watson, 38 So.2d 48 (Fla. 1948).

18. Smith v. Montverde, 38 So.2d 135 (Fla. 1948).

19. FLA. CONST., Art. IX, § 6.

20. Schmeller v. Fort Lauderdale, 38 So.2d 36 (Fla. 1948).

tion, and also skirting a limitation on the power of the state to issue bonds,[21] it was recently held that fees received by a county for performing public, or state, functions could be pledged.[22] Now comes a decision [23] holding that the proceeds of a municipal utilities tax may be pledged, which further enlarges the exception.[24] With proposals for a new state constitution under consideration, it must be borne in mind that this exception will apply to the new constitution if not expressly affirmed or denied.[25]

Municipal officers. The question, whether or not municipal officers who resign may participate in the selection of their successors, was raised by proceedings in mandamus, quo warranto, declaratory judgment, and injunction, consolidated for hearing.[26] The court treated the matter as a subject which might competently be regulated by the legislature in the municipal charter or otherwise; but in the absence of specific regulation ruled that a resigning officer does not have this power. Power to appoint to fill an office usually depends upon a vacancy, and there is no vacancy until after the resignation becomes effective.

ADMINISTRATIVE LAW. *Mandamus to review administrative decisions.* Use of the writ of mandamus to prohibit administrative action, rather than a bill for an injunction, is shown in a recent case.[27] The Supreme Court, in an original proceeding, directed the State Racing Commission to rescind an order which it found to conflict with statutory authority. It is usually held that mandamus may be used to direct legislative action when it is wrongfully withheld; but it cannot be used to direct a particular exercise of legislative power without putting the court across the line of the separation of powers. When the court directs an administrative agency to withdraw a particular regulation, it is not only commanding action but directing a particular result.

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21. FLA. CONST., Art. IX, § 6 (first sentence), § 10.

22. State v. Pinellas County, 36 So.2d 216 (Fla. 1948), discussed in *Synopsis*, 2 MIAMI L. Q. 311 (1948).

23. Schmeller v. Fort Lauderdale, 38 So.2d 36 (Fla. 1948). The city, pursuant to statutory authority, issued bonds to pay for a recreational center and a yacht basin, pledging the revenue derived from this operation and the proceeds of a tax on utilities service. *Held*, on intervenor's motion in validation proceedings, that the bonds could lawfully be issued without a vote of the freeholders.

24. An intermediate step was taken in State v. Daytona Beach, 34 So.2d 309 (Fla. 1948), where sewer bonds to be liquidated by a tax on water consumed, were approved. While in form a utilities service tax, this was actually a service charge for use of the sewer, the amount of water consumed on the premises being a fairly reliable measure of use.

25. The State Bar Association's Committee on a Proposed Florida Constitution proposes to retain the present provision, striking the word "freeholders" and substituting "ad valorem taxpayers." See PROPOSED FLA. CONST. Art. IX, § 4 (1948); 23 FLA. LAW J. 94 (1949). Further study may be indicated as a result of this decision.

26. Williams v. Baker, 38 So.2d 221 (Fla. 1948). Two of the five city commissioners of West Palm Beach, resigning, asserted this power.

27. St. Petersburg Kennel Club v. Baldwin, 38 So.2d 436 (Fla. 1949). Under a statute providing that where only one licensed dog track is located in a county, such track may operate 90 days during the racing season, a regulation prohibiting matinee races on days when horse race meetings were taking place in the vicinity, was in excess of the delegated power of the State Racing Commission.

Where courts rectify administrative action already taken by mandamus, it is usually in connection with a provision in the controlling statute requiring a refund or an adjustment.[28] Doubtless the court would have power to accomplish the same result by enjoining the enforcement of the regulation.

Mandamus to review judicial acts. The writ of mandamus being peculiarly adapted to commanding administrative action wrongfully withheld, but not to review the exercise of quasi-legislative or quasi-judicial functions, the court found mandamus to the circuit court to be a writ unsuited to review judicial action.[29]

CRIMINAL LAW. *Embezzlement.* To prove the crime of embezzlement, it is necessary to show a fiduciary relationship between the person wrongfully misappropriating property and its rightful owner. The embezzler may have title to the property or a mere right of possession, different statutes making different requirements. Where payments have been made in advance to a building contractor, who absconds without performing, the essential fiduciary relationship does not exist,[30] and it may also be said that if the contractor's intent was honorable at the time the payment was received, this cannot constitute obtaining money under false pretenses.

Larceny: Criminal intent. A tortious taking of property is not larceny without the existence of a criminal intent. When one takes hogs in the honest, however mistaken, belief that he is recapturing his own property, he has not committed a criminal offense.[31]

PRIVATE LAW

CONTRACTS. *Excusing nonperformance.* When in a bilateral contract it is contemplated that performance by both parties will take place simultaneously, neither party may recover from the other without showing readiness and ability to perform; but performance or tender may be excused if the other party repudiates the contract. The ordinary contract to convey land upon the payment or securing of the purchase price is such a contract. A recent case [32] involving these points presents some difficulties. The plaintiff, having an option to purchase land, contracted to sell it to the defendant. When the parties met to close, the defendant in bad faith refused to perform his part of the contract. The plaintiff did not exercise his option and the defendant purchased the same land directly from the owner. In an action for breach of

28. See State *ex rel.* Seaboard Air Line v. Gay, 35 So.2d 403 (Fla. 1948), discussed in *Quarterly Synopsis*, 2 MIAMI L. Q. 313 (1948); State *ex rel.* Allen v. Rose, 123 Fla. 544, 167 So. 21 (1936), discussed in *Comment*, 2 MIAMI L. Q. 235 (1948).

29. Harrell v. Black, 38 So.2d 310 (Fla. 1949).

30. Berney v. State, 38 So.2d 55 (Fla. 1948).

31. Maddox v. State, 38 So.2d 58 (Fla. 1948). The evidence showed taking under open dispute as to title. The court charged correctly; but the jury returned a verdict of guilty recommending suspension of sentence. Reversed and remanded.

32. Adams v. Drawdy, 38 So.2d 42 (Fla. 1948).

contract, the court ruled that since the evidence showed that defendant acted in bad faith, he could not set up plaintiff's lack of title in defense. It would seem that the defendant's good or bad faith is immaterial. Either as a matter of law he was entitled to repudiate the contract because the vendor was not able to perform, or, as a matter of law, he repudiated before the time for performance had expired. Interpretation of the contract is ordinarily for the court, although the terms may be a matter of evidence. Doubtless the court found that the purchaser repudiated arbitrarily, refusing to allow the seller a reasonable time in which to perform, as provided actually or impliedly in the contract, and this is what the court described as a finding of bad faith; but to describe the finding as one of fact and not of law is incorrect.

Damages. The same case shows that where a person contracts to sell land which he does not own, the measure of damages on failure of the purchaser is the contract price less the cost of acquiring the land. If the purchaser himself acquires the same property at a lower figure than vendor's option price, that should not increase the amount of damages, because it is plaintiff's loss, not defendant's gain, that is the measure used, unless there is a fiduciary relationship. The facts reported tend to indicate that this distinction was not made.

Brokers' commissions—right to retain hand money. During the preceding quarter, a case was noted [33] in which the Supreme Court stated that a broker's commission for selling real property is not an element of damages recoverable for breach of contract to purchase land. This language caused great alarm to the profession and to real estate brokers, and the court amended its opinion, as it now appears in the bound volume,[34] to hold simply that brokers' commissions, being readily ascertainable, are not properly the subject of a contract to pay liquidated damages. The case arose in a peculiar way. The parties entered into a written contract to convey land, the buyer giving and the seller acknowledging receipt of, a check for hand money. The buyer stopped payment on the check. The seller sued to recover the face amount of the check, asserting that this was a contract to pay liquidated damages.

The Supreme Court, affirming a judgment of dismissal, held that a contract to pay liquidated damages will not be enforced unless damages would otherwise be difficult to ascertain and the stipulated amount is a fair approximation to reality. Damages for refusal to purchase under contract are easily ascertainable, in the opinion of the court, and therefore not the proper subject

33. Pembroke v. Caudill, 37 So.2d 538 (Fla. 1948), noted in *Synopsis*, pp. 290, 293, 294, *supra*.

34. The following changes were made in the bound volume: (1) the last paragraph beginning on page 541 has been substituted, with the exception of the last sentence; (2) a new paragraph has been added at the end of the opinion; and (3) headnotes (West's) 9 and 10 have been replaced by a new headnote 9. We would not have known of the change if several readers had not called it to our attention, there being no reference to that effect in the advance sheets.

of such an agreement. The court refused to say what disposition should be made of the hand money where actually deposited. If this is not a valid contract for liquidated damages, the buyer has an equity of redemption; but the seller has a lien on the fund for his actual damages, which now definitely include the broker's commission.[35]

Specific performance. In an action for specific performance of a contract to sell real property, the purchaser may be entitled, if not placed in possession at the stipulated time, to interest on money deposited; or he may, on the theory that title has passed in equity, require an accounting for rent, issues and profits.[36]

CONDITIONAL SALES. *Equity of redemption.* Where personal property has been sold under a conditional sales contract, the effect of which is to retain title in the vendor until the purchase price has been paid, the adjustment of rights between the parties when the vendor has repossessed, presents problems. If the payments by the purchaser have been substantial, repossession may result in a forfeiture, against which equity grants relief in the case of mortgages of real and personal property. The Uniform Conditional Sales Act [37] would obviate the difficulty by requiring the seller to offer the goods at public sale for the buyer's account if more than fifty per cent has been paid; but the point does not appear to have been developed in the common law of this state. A recent case [38] involved repossession and resale under a contract which provided that in the event of resale, the purchaser should pay any deficiency and receive any surplus. It was held that an action would lie on the common courts for money had and received and on a special count stating the express contract. The expenses of sale, cost of repossession, and other charges are by inference matters to be set up in the answer. The court was unable, because the case was presented on demurrer rather than on motion to strike, to determine whether insurance premiums paid by the purchaser were unearned because the sale was terminated forty or fifty days after its inception. In the absence of an agreement to refund premiums, this would seem to state no cause of action, particularly if the seller is a mere agent of the insurer.

INSURANCE. An insurance contract is a unilateral contract, under which, in consideration of the premium paid, the insurer undertakes for a term to underwrite specific risks. Where, in consideration of annual premiums an insurance policy is made to continue in effect from year to year, it is said that this is an offer to enter into a series of unilateral contracts. The insured is not bound to renew, but the insurer may not be able to withdraw his offer if

35. The court stated that there is some authority for the proposition that a seller may retain hand money deposited with him, or with his agent, as liquidated damages. See MCCORMICK, DAMAGES, 619 (1935).

36. Bradford v. Harris, 38 So.2d 221 (Fla. 1949). Reversed for refusal to allow interest to vendee as recommended by master.

37. § 19. See 47 AM. JUR. § 966.

38. Pardo v. Evans-Lakeland, 38 So.2d 307 (Fla. 1949).

he has received consideration for the agreement to keep it open. Where, therefore, the insurer agrees "during the life of this policy" to assume certain risks. the language is construed as relating separately to each annual contract, unless an intent to provide otherwise clearly appears. The upper and lower courts split on the interpretation of a provision in a fidelity bond, renewable annually, that regardless of the number of years the bond should continue in force, liability on account of any employee would be limited to $5,000. An employee embezzled more than $5,000 in each of two annual periods before the loss was discovered. In overruling the circuit court and holding that the language was "crystal clear," the appellate court seems to have treated the contract as bilateral, not unilateral, and to have overlooked the principles stated, although the result may be correct.[39]

TORTS. *Negligence causing harm through allergic reaction.* If injury results from the application of a beautician's preparation because of an allergic reaction peculiar to the victim, there may be no recovery in tort although the beautician knew, or should have known, that the preparation would cause injury in that way. The substance must be of such nature that it could be inherently harmful, and that fact must be known to the defendant. On this point the court seemed to be in agreement in a recent case,[40] although it was divided on the question whether or not this essential allegation was properly pleaded. It is suggested that the court has unduly extended a rule applicable only in workmen's compensation cases, where occupational diseases are not deemed to be compensable injuries unless specifically included within the terms of the statute. That is because occupational diseases are not "accidents," and are not included in calculating the risk insured under an act which is applicable only to accidental injury. However, an employee might recover from an employer who knew, or should have known, that such injury would occur in a proceeding at law even after the effective date of the workmen's compensation statute, subject of course to the defense of assumption of risk.

Gross negligence. The definition of gross negligence in cases where a guest is suing the driver of an automobile for injuries received, is largely a problem of drawing a line between one type of negligence and another. Drawing from a rule formerly approved with respect to contributory negligence,[41] it has been suggested that wild or negligent conduct is reduced to simple negligence when a driver is placed in sudden peril by the wrongful act of a third person.[42] The trial court refused a request to charge, which is set

39. Indemnity Insurance Co. of North America v. Parkinson, 38 So.2d 53 (Fla. 1948).
40. Collins v. Selighman & Latz, 38 So.2d 132 (Fla. 1948). Lacquer was applied to plaintiff's scalp, causing injury over a prolonged period. It was alleged that defendant knew or should have known, that this would be the result of permitting lacquer to come in contact with plaintiff's scalp; but not that the lacquer was dangerous to the human scalp generally. The plaintiff elected to appeal rather than to amend, indicating that this latter point could not have been proved.
41. Hainlin v. Budge, 56 Fla. 342, 47 So. 825 (1908).
42. Sea Crest Corp. v. Burley, 38 So.2d 434 (Fla. 1949).

out in the opinion, but covered this aspect of the case, according to the Supreme Court, in charges which are not set out. The precise functioning of the rule, when transposed from the field of contributory negligence, is hard to state; since it appears that the evidence of negligence, which it is the function of the rule to excuse, requires the case to be submitted to the jury.

WILLS AND TRUSTS. *Restraints on alienation.* In this country, contrary to the English view, a certain freedom is given testators and settlors to impose restraints on the alienation of property by beneficiaries to whom they have otherwise given an absolute interest. The decisions in this state, particularly in the field of spendthrift trusts, seemed to favor the English rule;[43] but our court has recently aligned itself with the other American courts.[44] Although restraints are permissible, the law does not favor restraints, and in the absence of a clear expression of intent, no restraint should be implied. This was illustrated in a case decided during the quarter,[45] in which the court was required to construe a limitation to remaindermen, not subject to any conditions subsequent, to be held in trust until each should reach the age of 30. The estates were vested within the Rule against Perpetuities, which does not limit restraints on vested interests. The problem was to decide whether the shares were all to continue in trust until the youngest child was 30, or whether the several shares were to be distributed to each in turn as he or she reached the age of 30. The case was decided correctly with reference to the rule against restraints on alienation, and not solely by reference to Webster's dictionary.

Gift inter vivos or bequest? A donor may retain considerable control over property, including the power to revoke, without making a gift testamentary. If he intends death to be a condition precedent to vesting title, the gift is testamentary; but if he simply intends to postpone enjoyment and makes the gift subject to a condition subsequent, it is a gift *inter vivos*, and will be valid if title has been transfered in a manner prescribed by law. In a recent case,[46] the following facts, gathered from the dissenting opinion, had no influence on the majority, who affirmed without opinion a finding of present gift: the subject matter was a bond and mortgage which were assigned to the donor; the assignment was not recorded; the mortgagee clause in insurance policies was not changed; the mortgagor was permitted to continue to pay interest to the mortgagee; the donee was advised of the transaction; and the papers were kept in the donor's personal safety deposit box. The holding is consistent with what is in our opinion the rule of law applicable to such situations when the administrator sues to recover the property from the donee. Tax liability is based on different considerations.

43. See Croom v. Ocala Plumbing & Electric Co., 62 Fla. 460, 57 So. 243 (1911); REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA, 320 (2d ed., 1946).
44. Waterbury v. Munn, 159 Fla. 754, 32 So.2d 603 (1947).
45. Sherley v. Johnson, 38 So.2d 121 (Fla. 1948), three justices dissenting.
46. Harvey v. Hubbard, 38 So.2d 303 (Fla. 1948).

Tenancy by the entireties. When a husband and wife take title to land in Florida as tenants by the entireties, the land forms no part of the husband's estate if he predeceases his wife. The federal estate tax liability is based on an event other than transfer of title. Therefore when the widow agrees with stepchildren to a division of the husband's estate after his death, property which she owns as surviving tenant by the entireties is not included in the agreement unless a clear intent to do so appears; nor is such property to be considered as an advancement or satisfaction of the widow's share under a will. If the widow takes her full interest in the remaining assets, she is under no duty to share this property with other distributees.[47]

Purchase money resulting trusts. Whether or not a trust results when title to property purchased with the funds of one person is placed in the name of another, is a question of intent. It is presumed that a trust results unless it can be shown that a gift was intended; but when title is placed in the name of a child, the father paying the price, or in the name of a wife, the husband paying, there is a rebuttable presumption that a gift was intended. The intent which is material is that which existed when title was acquired: a subsequent change of heart by a donor cannot divest a gift already made. Following this rule, the lower court in a case currently reviewed [48] held that where a husband bought property in name of his wife and on subsequent resale the wife surrendered the proceeds to the husband, this could not be shown to rebut the presumption of a gift. This was doubtless correct; but it did not preclude the use of the same evidence to show that at the later date, the wife returned the gift and thus divested herself of the property.

Extinguishment of equitable interest by transfer. Where property subject to an equitable estate or lien is conveyed to a bona fide purchaser for value without notice, the equitable interest is divested. The purchaser must satisfy both requirements, notice and value; for if he takes with notice, value is no defense, and an innocent donee is not entitled to protection. Legal interests in property are not similarly divested unless a statute requiring liens and conveyances to be recorded is held to have that effect, or unless the particular type of property is endowed by law with the quality of negotiability. Even where a legal lien is not divested by sale to a bona fide purchaser for value without notice, it is possible for the purchaser to acquire an equitable defense to the enforcement of the lien. It is sometimes difficult, as in a current case,[49] to

47. Fletcher v. Fletcher, 38 So.2d 300 (Fla. 1949). The widow, being entitled to one-third of decedent's estate, agreed to a division of Puerto Rican properties under which she received one-third thereof. It was contended that because of valuable property accruing to her as surviving tenant by the entireties in Florida, she had received more than her share in Puerto Rico, and must have intended to bring her Florida property into the agreement. The widow, instead of demurring, pleaded that the agreement was obtained by fraud.

48. Fuller v. Fuller, 38 So.2d 51 (Fla. 1948).

49. Blackburn v. Venice Inlet Co., 38 So.2d 43 (Fla. 1948).

determine whether the court is proceeding upon the theory that an equitable right has been divested, or that an equitable defense has arisen to the enforcement of a legal right, particularly where the court makes alternative decisions. The assignee of a judgment proceeded against persons claiming under the purchaser at a foreclosure sale held twelve years earlier. The plaintiff was an assignee of two judgments, junior to the mortgage, which assignments had not been recorded when foreclosure was begun. The foreclosing party notified the judgment creditor but not the assignee. Later, the assignee discovered [50] that the mortgage was given to defraud creditors, and brought this action to set the foreclosure aside to an extent sufficient to satisfy the judgments. The court intimated that an assignee of a judgment, whose assignment was not recorded, need not be joined in foreclosure proceedings to divest his lien, but did not decide the point.[51] It held that while a judgment creditor might have execution within twenty years, he was barred by the fact that the purchaser had notoriously occupied and improved the premises for twelve years. Acquisition of an equitable defense might well be denied a person having actual notice of the legal right; but the court held that a purchaser at foreclosure sale is not as such charged with notice of matters not appearing on the record, nor is the knowledge of an attorney or a real estate broker imputed to the client.

ADJECTIVAL LAW

EVIDENCE. *Evidence of other crimes.* Evidence in a criminal prosecution showing that the accused has committed other crimes is ordinarily not admissible to prove the commission of a particular crime; but this rule is subject to exceptions where motive, identity of the accused, or a course of conduct are material.[52] Current cases illustrate the rule and its exceptions. In the case [53] of a negro convicted of the murder of a white woman, where the accused admitted the killing but claimed it was accidental, it was not error to admit evidence that he had recently been convicted of writing letters to a white woman. It was also proper to show that he had borrowed his employer's truck on the day of the killing, giving a false reason therefor. Under a similar exception to the germane rule excluding evidence of conduct with other parties at other times or places (*res inter alios acta*), it was proper to show that on the day of the shooting the accused called at other houses in the vicinity, but left without apparently accomplishing the purpose of his call when he found children about.

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50. The assignee brought a creditor's bill previously and succeeded in setting aside other conveyances between mortgagor and mortgagee; but the purchaser at foreclosure was not a party. Wimmers v. Blackburn, 151 Fla. 236, 9 So.2d 505 (1942).

51. The applicable statute does not specifically require an assignment to be recorded in order to protect purchasers who rely on the record. F. S. 1941, § 28.01.

52. For further discussion of the rule and recent cases illustrating it, see *Synopsis*, 2 MIAMI L. Q. 339, and *supra*, pp. 283, 294.

53. Quince v. State, 38 So.2d 33 (Fla. 1948).

It was not proper, in a prosecution for homicide,[54] to admit, over objections, evidence tending to show that the accused unlawfully took certain property from the business which he managed. While this would be reversible error, under the recent holdings of this court,[55] the court did not notice the point, apparently because the evidence would have justified conviction of a higher degree of homicide.

Remote and prejudicial evidence. It is not error to admit in evidence a photograph of the wounds inflicted upon the victim of a homicide, particularly where the number and character of the wounds are relied upon as circumstantial evidence to show that an admitted killing was felonious.[56] Justice Chapman, writing the opinion, voiced personal reservations, but in view of a prior decision [57] felt that the law was so written. If the number and character of the wounds were not material, we would agree with Justice Chapman that such evidence is too remote and prejudicial solely to show the fact of death, if, as would probably be the case, there is other evidence.

Circumstantial evidence. Where in a prosecution for homicide the killing is admitted but the accused claims that it was accidental or in self-defense, it is proper to admit evidence tending to disprove the claims made by the accused as circumstantial evidence to show criminal intent.[58] Where the accused claimed that he shot at a vicious dog and accidentally killed the victim, evidence that there had been a struggle, by disproving the excuse, was competent to prove criminal intent;[59] while in a case where self-defense is relied upon, evidence that there was no struggle is admissible for the same purpose.[60] A confession made after the crime, is admissible on the same basis,[61] and evidence of the extent of the wounds, showing that the accused went beyond the limits of self-defense, is in the same category.[62] When circumstantial evidence is relied upon to obtain a conviction, the trial judge should, if requested, make an appropriate charge; but he need not do so of his own motion.[63] This is recognition that circumstantial evidence is no less competent and probative than any other type, the frequently expressed opinions of "guardhouse lawyers" to the contrary notwithstanding.

The misconception that circumstantial evidence is less reliable than testimony of witnesses is not confined to criminal cases. The contention that it may

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54. Savage v. State, 38 So.2d 47 (Fla. 1948). The court states this to be one of the assignments of error on the appeal, but does not dispose of it.
55. Steese v. State, 36 So.2d 212 (Fla. 1948), discussed 2 MIAMI L. Q. 339; Fields v. State, 37 So.2d 919 (Fla. 1948), noted *supra*, pp. 283, 294.
56. Savage v. State, 38 So.2d 47 (Fla. 1948).
57. See Chapman, J., in Mardorff v. State, 143 Fla. 64, 196 So. 625 (1940).
58. Berry v. State, 36 So.2d 784 (Fla. 1948), discussed, p. 44, *supra*.
59. Quince v. State, 38 So.2d 33 (Fla. 1948).
60. Griffis v. State, 38 So.2d 137 (Fla. 1948).
61. *Supra*.
62. Savage v. State, 38 So.2d 47 (Fla. 1948).
63. Griffis v. State, 38 So.2d 137 (Fla. 1948).

not be admitted to prove negligence, was dismissed in a recent case.[64] In the picturesque language of Justice Terrell, the "eyewitness rule," which is presumably a rule excluding circumstantial evidence in negligence cases, has gone the way of the blunderbuss and certain labor conditions in 1840. Since these events cover a wide period in history, it is difficult to determine whether in the intervening period such a rule had actual acceptance in Florida, or whether it is the offspring of an advocate's zeal. It may now safely be said that circumstantial evidence of any material fact is competent evidence, in this state as elsewhere.

Res gestae. Statements made by the driver of an automobile involved in an accident while awaiting the arrival of an ambulance for an injured passenger are admissible as part of the *res gestae* to prove negligence.[65]

Privileged communications. In order to develop an effective method of accident prevention, it is provided by statute [66] that statements made to police officers investigating causes of accidents are to be privileged. The admission of such statements in evidence when corroborated by the officer's personal observations, and when merely cumulative with other evidence introduced, is not reversible error.[67] While this holding accords with the rule that a case will be reversed only for harmful error, it is greatly to be feared that it will destroy the effectiveness of the statute, and the system of accident reporting and prevention which depends upon it.

Admissions by interrogatory. It is provided by statute [68] that answers to interrogatories shall be evidence against, but not for, the party making them. In a recent case,[69] it was contended that where answers to interrogatories are filed, they must be considered by the chancellor; but the appellate court ruled that the chancellor is not required to consider them unless they are offered in evidence or called to his attention on final hearing. This section was not intended to make evidence admissible which would otherwise be incompetent, such as parole evidence to vary the terms of a written contract; but the court based its answer on the procedural rather than the substantive reason.

CONSTRUCTION OF STATUTES. Even where an earlier law is not in conflict with one of later date, the subsequent statute controls, according to a recent case,[70] which reduces the rule *ad absurdum* in our opinion. In 1917, the legislature enacted a general law determining the salaries of county judges in

64. Dehon v. Heidt, 38 So.2d 39 (Fla. 1948).
65. Sea Crest Corp. v. Burley, 38 So.2d 434 (Fla. 1949).
66. F. S. 1941, § 317.17.
67. Sea Crest Corp. v. Burley, 38 So.2d 434 (Fla. 1949).
68. F. S. 1941, § 63.48(7).
69. Fletcher v. Fletcher, 38 So.2d 300 (Fla. 1949). Answers by a widow showing that she considered property owned in tenancy by the entireties to be included in a written agreement to divide her husband's estate with stepchildren, were excluded because not called to the chancellor's attention; but the agreement being unambiguous, the answers should have been excluded under the parole evidence rule.
70. Ware v. Seminole County, 38 So.2d 432 (Fla. 1949). Action for a declaratory judgment by the county judge to determine amount of his salary.

all counties having a population of more than twenty-two thousand. When a county court was established by special law in Seminole County in 1923, there were fewer than twenty-two thousand persons therein. It was specifically provided that all general laws not in conflict therewith would be deemed applicable. In 1935, Seminole County had grown to contain more than twenty-two thousand; but the court held that the special statute governed. When the statutes were revised in 1941, effective the following July, the general statute was carried into the revision, and was held to supersede the special law at that time.

JUDICIAL ADMINISTRATION. *Control of masters' and attorneys' fees.* The disposition on the part of the state supreme court to review, of its own motion, fees paid to masters,[71] has been extended to cover fees of attorneys. In a recent case,[72] in which it was contended that an award of alimony was excessive, the court went beyond the scope of the appeal to find that the expenses of litigation, including master's and attorneys' fees, were excessive. The power of the courts to control such fees is found in the constitutional provision that justice shall not be sold,[73] and in recognition that attorneys as well as masters perform judicial functions. It has been pointed out in another connection that when a court of its own motion raises an issue not preferred by the parties, it may in the zeal of advocacy exceed impartiality in the use of its power.[74] We have been told, for example, that in one of the cases reported last Fall, in which the court reduced the master's fees on the basis that the case was uncontested, the case was in fact bitterly contested and the attorneys for both parties stipulated as to the master's compensation. When the case came before the Supreme Court, the master was not notified or given an opportunity to be heard, and the court somehow received the impression, from new counsel wholly unfamiliar with the case, that it was uncontested. If attorney's and master's fees are to be fixed, they should be fixed after a hearing, preferably in the county where the litigation took place. The court has made it clear, by a recent decision,[75] that an uncontested case is not only one in which one party defaults, but includes cases in which the contested matters are relatively unimportant. Whether the blame lies upon this branch of the profession, we do not know.[76]

Functions of judge and jury. The principle that the jury, unless dis-

71. See *Synopsis*, 2 MIAMI L. Q. 336 (1948); and *supra*, p. 47. A comment on the subject is being prepared to appear in this issue.
72. Garlick v. Garlick, 38 So.2d 222 (Fla. 1948).
73. FLA. CONST. (1885), Declaration of Rights, § 4.
74. See *Synopsis*, 2 MIAMI L. Q. 337 (1948), discussing Bernstein v. Bernstein, 36 So.2d 191 (Fla. 1948).
75. Rainey v. Rainey, 38 So.2d 60 (Fla. 1948). The only point litigated was a sum of $3,000 given to the wife, which the husband contended should be returned.
76. "Every law course ought to be fortified with sufficient lessons in *noblesse oblige* to point the spiritual responsibility that membership in the bar imposes." Terrell, J., in Rainey v. Rainey, 38 So.2d 60, 61 (Fla. 1948).

pensed with in the manner provided by law, is the sole judge of the facts, was illustrated strikingly in a current case.[77] A jury had failed to agree in a case which was before the court on second trial. The second jury failed to agree and the judge was unable, because of a statutory provision,[78] to require it to continue deliberating. He therefore directed a verdict for defendant, holding that two failures to agree were equivalent to a finding that the plaintiff had not sustained the burden of proof. The appellate court found otherwise, holding that the trial judge could not, without invading fields reserved to the jury, direct a verdict unless the evidence was legally insufficient to go to the jury. It was unnecessary to discuss the "mere scintilla" rule, because the plaintiff's evidence permitted a reasonable inference of defendant's guilt.

Grounds for order granting new trial. As has been previously noted, a trial judge may not direct a new trial simply because he does not agree with the jury as to the probative force of the evidence.[79] A new trial may be granted, however, for the reason that a single juror was incompetent mentally to hear and to weigh the evidence; but there must be competent evidence in the record to support a finding of mental deficiency: the trial judge, in other words, cannot direct a new trial because he so violently disagrees with the jury that, in his opinion, one or all of them are crazy.[80]

PROCEDURE. *Special appearance or plea in abatement.* Where the jurisdiction of a court is not challenged but an immunity from suit is asserted, this is properly brought before the court by special appearance and motion to quash.[81] It has been held that this procedure, which is usually asserted by a nonresident defendant claiming that he has not been brought before the court by service, is appropriately followed in connection with claim of privilege to remove to the federal courts.[82] This would seem to be an exact parallel, because neither the jurisdiction of the court nor the effectiveness of its process is being challenged in either case, but a privilege or immunity is being asserted. The Supreme Court treated the case as presenting two alternatives, either to dispose of the case as a matter of law on the motion to quash, or to try the issue as a question of law and fact on a plea in abatement.[83]

Demurrer or motion to strike. Several pages of the reporter were occupied

77. Dehon v. Heidt, 38 So.2d 39 (Fla. 1948).

78. F. S. 1941, § 54.22, provides that if a jury has failed to agree, it may be instructed anew and sent back to deliberate further; but if it again fails, it may not be sent back unless the jurors consent.

79. See Urga v. State, 36 So.2d 421 (Fla. 1948), noted *supra*, p. 48.

80. Miami Beach v. Silver, 38 So.2d 305 (Fla. 1949). When, however, the Supreme Court says, "it is difficult to disregard the opinion of Dr. . . . ," the impression that the appellate court is reversing because it does not agree with the trial judge as to the probative force of the evidence, which it is the trial judge's function to evaluate, is unavoidable.

81. Harrell v. Black, 38 So.2d 310 (Fla. 1949). A sheriff of the state of South Carolina was served with process while in Florida to return a fugitive. Immunity from suit was admitted.

82. Rorick v. Chancey, 142 Fla. 290, 195 So. 418 (1940).

83. See State v. Civil Court, 137 Fla. 167, 188 So. 96 (1939).

with a review of an order sustaining a demurrer, in which the court ruled that a declaration which is argumentative, prolix, and contains statements of evidence, is not demurrable if it states a cause of action.[84] On the substantive point, there seemed to be little question. The proper procedure in such cases is to move to strike or to move for a compulsory amendment. Certainly this is a rule of the law of pleading well established in this state, and no case turning on a matter so thoroughly settled should be permitted to occupy the time of the Supreme Court. The need of an effective screening process, such as a review at the trial level by a court *en banc* of questions of law, is apparent.

Answer or cross bill. Equitable defenses are properly raised in an answer, not by cross bill, according to a recent case.[85] The test formulated is whether or not the matters of defense relate and go to the equities of the subject matter of plaintiff's bill. The application of the rule presents more difficulties than the rule itself.

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84. Pardo v. Evans-Lakeland, 38 So.2d 307 (Fla. 1949). Action to recover surplus realized on sale of repossessed property under the specific terms of a conditional sales contract.

85. Swarz v. Goolsby, 38 So.2d 312 (Fla. 1949). Plaintiff, claiming under a tax deed, sought to quiet title against the former owner and persons claiming under him. Asserting that payment of the taxes had been tendered seasonably, but had been refused by the Clerk of Court, the defendant offered to do equity. On motion to dismiss cross bill, order of dismissal affirmed.