Quarterly Synopsis of Florida Cases

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CONSTITUTIONAL LAW. Equal protection of the laws. A statute delegating public utility rate regulation powers to a public utility board with county-wide jurisdiction was challenged on several constitutional grounds by a power company. Without discussion of the reasonableness of the classification, the court rejected an argument that this delegation involved an arbitrary geographical classification denying the company equal protection of the laws. Thus as to classification challenges, county-wide utility regulation is placed on a par with city-wide regulation. This holding will also be of importance in connection with delegations of other types of regulatory functions to boards with county-wide jurisdiction. The court also rejected an argument that imposition of regulation after the grant of a franchise was unconstitutional.

County purposes. In the above case the court held that expenditure of county tax monies for board operations was for a county purpose within Article 9, Section 5 of the Florida Constitution.

LEGISLATION. Title. Can the title of an original unconstitutional act be referred to in considering the validity of the title of an act which purports to be an amendatory statute? A recent decision answers this question in the negative. In 1935 the legislature passed a statute with this title: “An Act Creating the Office of County Attorney in all Counties Having a Population of not less than 9,000 and not more than 9,300 According to the Federal Census of 1930; Fixing his Compensation and Prescribing his Duties.” In 1943 a special or local law was enacted with this title: “An Act to Amend Chapter 16882 Laws of Florida, 1935, by Making the Same Definitely Applicable to the Election, Compensation and Duties of the Office of County Attorney in Highlands County, Florida, and Validating Elections Held Under

*This section of the Synopsis covers cases from 39 So.2d 557 through 41 So.2d. Beginning with this issue the Quarterly Synopsis of Florida Cases will comprise a symposium of the faculty of the School of Law. The Public Law section has been prepared by Prof. Meisenholder and the Private Law section by Prof. Stephenson.

2. Exclusion of females from jury service is not contrary to due process. Bacon v. State, 39 So.2d 794 (Fla. 1949). (Of course, women may now serve as jurors under specified conditions).
The court first held that the 1935 statute was an unconstitutional local law. It then held that the title of the 1943 statute did not meet the requirements of Article III, Section 16 of the Florida Constitution, since the subject and real purpose was to create the office of County Attorney, and thereby enact a new and completely independent piece of legislation, whereas the title assumed that the office was existent and showed a clear intention to amend the 1935 statute.

The Act of 1943 could be considered an amendatory act. If it is, then apparently it is invalid because an act which amends an unconstitutional act is void. However, if the act is to be considered a new independent act, as the court apparently considered it, then the above rule does not apply but the title considered independently is not sufficient as the court ruled. However the title of the statute, even if the statute is to be considered an independent act, refers to the 1935 act and purpose to amend it. The title of the 1935 act appears sufficient to cover the subject matter. It might have been argued that the 1943 title is good since by reference to the title of the 1935 act notice of the subject matter is given although the latter act is unconstitutional. The rule is that the title of an amendatory act is sufficient if it refers to the act amended and the title of that act covers the subject matter of the amendatory act. Under the above suggestion the unconstitutionality of the first act would not be material in applying this rule. Since the court considers this act independent of the 1935 act in judging the title, will it also take that attitude and uphold an amendment to an unconstitutional act, if that is possible, in view of its subject matter and if the title of the amendatory act alone is substantially satisfactory?

Special and local acts. In the case just discussed the court merely states that the 1935 statute is a local law and clearly unconstitutional since requisite steps for enactment of local laws were not taken. The statute is not potentially applicable to any county nor is there any reason to believe it embodies a reasonable classification.

But an act which authorized counties having a population of over 275,000 according to the last or any future census to construct and maintain bridges and other projects and issue bonds therefor was said to be a general law classifying counties on the basis of population for governmental purposes. As in various previous cases, the court did not discuss the basis for its conclusion that the classification was reasonable. On the basis of past cases

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6. Williams v. Dormany, 99 Fla. 496, 126 So. 117 (1930). It can be argued, however, that this case and cases cited do not support the rule. There is contrary authority in other states.
7. A similar case is Wall v. Garrison, 11 Colo. 515, 19 Pac. 469 (1888).
it does not appear that population statutes potentially applicable to all counties or cities (as in this case) are valid merely because the classification is for governmental purposes. A similar law authorizing bond elections on the same date as other elections in counties having a population of more than 210,000 according to the last preceding census was held valid in this case on the same grounds. Both of these statutes can be justified by strong argument for the reasonableness of the classifications adopted.

Administrative Law. Notice and hearing. In the case noted above, involving delegation of regulatory power to a county utility board, the court refused to consider the fact that the statute did not provide for a hearing before promulgation of rules and regulations by the Board. Since the Board had not made any effort to issue regulations, this constitutional challenge was rightfully held to be premature. Other questions were also said to be prematurely raised.

Revocation of licenses. A section of the former statute regulating the citrus industry provided that complaints against citrus dealers charging violations of the provisions of the statute could be filed with the Commissioner of Agriculture. After notice and hearing he was to determine the damage suffered by the complainant and order payment. If the dealer did not comply with the order, the section authorized a court suit and provided that the Commissioner's order should be prima facie evidence of the facts therein stated. Such a complaint was filed with the Commissioner. It charged that a citrus dealer had failed to account in a purchase of fruit from complainant as required by the statute. In review of the Commissioner's order to the dealer to pay the account or have his license revoked, the court upheld the view that the statutory requirement of accounting included payment and approved the order of payment with a condition of license revocation in the event of non-payment. Justice Barns dissented because the proceeding was conducted pursuant to the section mentioned above and the dealer had not been given a hearing upon proceedings brought against it for the purpose of revoking its license. The succeeding section of the statute provided that the Commissioner could revoke the license of a fruit dealer when he was satisfied that such dealer had violated any of the provisions of the statute. This section did not mention notice and hearing, but apparently after the proceedings in this case, an amendment was enacted in 1947 providing for notice and hearing.

13. Mayo v. Market Fruit Co. of Sanford, 40 So.2d 555 (Fla. 1948). Mayo v. New, 40 So.2d 365 (Fla. 1949) is a similar case.
Still a third section provided for revocation of licenses after notice and hearing. If the statute as it read before 1947 is interpreted to require notice and hearing before a license can be revoked, then the dealer in this case should have had notice that revocation of his license was at issue, or at least this question of revocation should have been tried at the hearing. Justice Barns' opinion appears to indicate that the dealer did not have such notice.

**Jurisdiction of state and municipal regulatory bodies.** The relationship between the powers of the Florida Railroad and Public Utilities Commission and those of the Miami City Commission in the regulation of intra-city traffic was considered in an important case. A state statute provides that the state commission may make rules and regulations concerning bus companies under its jurisdiction and such rules shall prevail over conflicting municipal ordinances and permits. Another section of the statute provides that "persons operating motor vehicles" within the limits of a municipality or between cities and towns whose boundaries adjoin shall be exempt from the control and jurisdiction of the state commission. Finally the Code of Miami requires that a certificate be held by those engaged in transportation in the city, but exempts any motor vehicle operated under the supervision and regulation of the state commission. The court held that a carrier certified by the state commission could not carry intra-city passengers because of procedural defects in the adoption of a resolution by the city commission permitting such carriage. A dissent interpreted the statute to mean that the state certificated carrier could carry intra-city passengers under its state certificate. Under this view the resolution of the city commission was not a factor in the case. Thus the majority opinion appears to proceed on the basis that the governing law divides jurisdiction of the state and city commission on a territorial basis with respect to intra-city traffic, whereas the dissent interprets the statute to mean that the state commission controls the inauguration of such service as to any individual carriers over which it otherwise has jurisdiction. The language of the statute and the city code may possibly favor the latter view, but this view would result in two independent bodies having control of intra-city bus transportation whenever there are both inter-city and intra-city bus systems in a community. The majority view looks to the control of intra-city service by one regulatory body. This situation appears preferable from a practical standpoint.

The court further defined the jurisdiction of the commission over local municipal transportation in a case holding that the commission had no statutory authority to regulate a municipally owned street railway which operated in two cities whose boundaries adjoined. In the opinion it is said

15. Coast Cities Coaches, Inc. v. Miami Transit Co., 41 So.2d 664 (Fla. 1949).
16. FLA. STAT. § 323.07 (1941).
17. FLA. STAT. § 323.29 (1941).
without any limitation that municipally owned operations are not within the chapter of the statute which authorizes the commission to regulate railroads.\textsuperscript{18}

\textbf{Labor Relations. Right-to-work restrictions.} In a case which apparently is the first of its kind, the court decided that a labor union has no rights under Section 12 of the Declaration of Rights of the Florida Constitution as amended by the so-called right-to-work amendment of 1944 or under Sections 481.03 and 481.09, Florida Statutes.\textsuperscript{19} The court stated that a union could bring a bill in a proper case to restrain an employer from doing various acts, but not to restrain acts claimed to be in violation of the above right-to-work provisions. The entire background as well as the express language of these provisions supports the court's conclusion. While the matter now seems settled, it is conceivable that in various situations the provisions as interpreted in this decision will not be effective as a practical matter to insure individuals the guaranteed right to work unless unions are also given enforceable secondary rights by implication. In this respect the Constitution and the statute ignore the practical realities of labor relations.

\textbf{Municipal Corporations. Validity of Organization.} Except as otherwise provided by statute\textsuperscript{20} the general rule has been that individual attacks on the validity of a municipal government must be by information in the nature of quo warranto with the consent of the Attorney-General. However, if the organization of a municipality or the annexation of new territory is void because the enabling statute is unconstitutional or because constitutional rights of owners of property have been invaded, individuals subject to municipal burdens have successfully challenged the municipal existence by a bill in equity.\textsuperscript{21} The court recently extended these cases to allow an equity suit challenging corporate existence on the ground that "mandatory" "statutory conditions" "precedent to the valid effectuation of such a political subdivision" had not been complied with.\textsuperscript{22} The ruling is limited to cases in which the corporation has no de facto existence and the suit is not barred by estoppel, laches or acquiescence. The statutory provision held mandatory in this case required that two-thirds of the freeholders and registered voters who are to be included within the municipality attend an organizational meeting. It is evident that the court went a long way in relaxing the rule that aside from suits permitted by statute, a quo warranto proceeding at the discretion of the Attorney General is the sole method of challenging municipal

\begin{footnotesize}
\begin{enumerate}
\item City of St. Petersburg v. Carter, 39 So.2d 804 (Fla. 1949).

\item In another case in this field mandamus was sought to require license revocation. State \textit{ex rel.} Bigler v. City of Miami, 40 So.2d 207 (Fla. 1949).

\item Miami Laundry Co. v. Laundry, Linen, Dry Cleaning Drivers, Salesmen & Helpers Union No. 935, 41 So.2d 305 (Fla. 1949).

\item FLA. STAT. § 80.01 (1941).

\item Chavous v. Goodbread, 156 Fla. 599, 23 So.2d 761 (1945) and cases cited. For cases in other states see 129 A.L.R. 255 (1940).

\item Farrington v. Flood, 40 So.2d 462 (Fla. 1949); Bass v. Addison, 40 So.2d 466 (Fla. 1949), was decided on the authority of Farrington v. Flood.
\end{enumerate}
\end{footnotesize}
existence. In line with other states, the legislature has also met the pressure for individual challenge regardless of permission of the state by enacting a statute which allows a quo warranto proceeding to challenge municipal existence without consent of the Attorney General.  

**Municipal bonds.** The court held that proceeds of a municipal utilities tax could be used in the payment of paving certificates issued to finance improvement in paving of streets without a vote of freeholders even though it stated that under the financing plan the municipality would have no power to repeal or rescind the ordinance levying the tax. The court also validated certificates of indebtedness to be issued without a vote of freeholders to build a municipal library. The financing called for the certificates to be paid from a fund derived solely from a tax levy authorized by state statute on real and personal property. The court required the plan be modified to make clear that the city would not be legally obligated to continue the tax in force. These cases serve to emphasize previous comment concerning the encroachment on the absolute voting condition contained in the Florida Constitution. 

**Public Contracts.** *Award.* When contracts are to be let by a public authority to the "lowest responsible bidder," it is usually held that the authority has a broad discretion within the limits of good faith and business practice to choose such bidder. Judicial review of the award cannot be secured unless the action of the authority is an arbitrary abuse of this discretion. There is an indication that this rule may not be followed in Florida and that judicial review will not be limited by such a broad statement. The court upheld an award of a construction contract by a school board, but a majority opinion states that the award by the public authority must be based on "facts reasonably tending to support its conclusions." The opinion then reviews the facts relied on by the school board to support the award to the second lowest bidder. This general approach certainly opens up possibilities of obtaining complete court reviews of awards under such statute. Should the courts go this far in interfering with this type of duty of administrative officials or bodies? Award of contracts under such statutes appears to involve

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23. F.S.A. § 165.30 (1949 Supp.).  
24. State v. City of Pensacola, 40 So.2d 569 (Fla. 1949); State v. City of Pensacola, 40 So.2d 574 (Fla. 1949) is a similar case.  
26. 3 Miami L. Q. 432 and 435 (1949). See also State v. City of Miami, 41 So.2d 545 (Fla. 1949). Three cases dealt with the mechanics of bond elections. In Town of Baldwin v. State, 40 So.2d 348 (Fla. 1949) the court considered a question concerning the date for determining the eligibility of freeholders to vote. In State v. Dade County, 39 So.2d 807 (Fla. 1949) and State v. Dade County, 39 So.2d 810 (Fla. 1949), the court held that a proposal to issue bonds for five different bridges and a proposal for improvement of three county parks were each single propositions. The respective proposals did not consist of separate and distinct propositions which must be submitted for vote separately. Tort liability of municipalities was considered in two routine cases. Bray v. City of Winter Garden, 40 So.2d 459 (Fla. 1949). City of Jacksonville v. Foster, 41 So.2d 548 (Fla. 1949).  
27. Culpepper v. Moore, 40 So.2d 366 (Fla. 1949).
executive duties and little in the way of private right. Since no hearing is required and the procedure authorized in the award of bids cannot be compared to court procedure in trials, is it desirable to impart the requirement founded in court procedure as stated in the opinion? In a concurring opinion Justice Chapman stated the rule first mentioned.

Taxation. Statutes of Limitations. Two different statutes of limitations were applied in recent cases. In the first case an heir of the former owner of land brought suit to cancel tax deeds held by another. The original owners or heirs of the owners had remained in possession of the land from the date of the tax deeds to the date of the master's report in this case, a period of ten years. Over nine years after the date of the tax deed the tax deed holder filed his counterclaim in this suit praying for a decree quieting title in him. On these facts the court reversed a trial court order dismissing the plaintiff's bill. The basis for its holding is a statute which provides that a tax deed holder should not be entitled to possession under the tax deed where the real estate is in actual adverse possession, unless he brings suit for recovery within four years from the date of the tax deed. In another case the court pointed out that under the Florida cases special statutes of limitations for suits to recover land which has passed to another under tax foreclosure proceedings do not protect tax titles based on insufficient description. But the court refused to apply this rule in a suit of a former owner barred by statute, where he had knowledge that his property was being sold at public auction, attended the sale, and failed to bring suit during the statutory period while the successful bidder obtained the tax title, entered possession, and made substantial improvements.

Intangibles Tax. Bonds which are secured by Florida property, but are issued to citizens of other states and held in other states are not taxable. The court also held that certain claims against the Comptroller for refunds of taxes paid on such bonds were barred by statute.

Documentary Stamp Tax. The question of whether leases come within the documentary stamp tax statute has again been considered by the court. In 1945, the court held that a 99 year lease was taxable under the documentary stamp tax statute as a written obligation to pay money. In a 1947 case, the court reversed a decree of a lower court dismissing a bill for a declaration of plaintiff's liability to documentary stamp tax on short term leases. In a majority opinion in that case it was said the leases were not

29. Saddler v. Smith, 54 Fla. 671, 45 So. 718 (1908); Day v. Benesh 104 Fla. 58, 139 So. 448 (1932).
33. Dundee Corp. v. Lee, 24 So.2d 234 (Fla. 1945).
34. DeVore v. Lee, 158 Fla. 608, 30 So.2d 924 (1947).
taxable as written obligations to pay money, but rather were taxable under the section covering "deeds, instruments or writings whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser. . . ." In a per curiam opinion stating the views of two judges on rehearing it was further said the taxability of such documents depends on whether the considerations for such instruments are actual monetary considerations or considerations which have a reasonably determinable monetary value. It was stated the considerations for the leases in this case did not meet this requirement since they were the lessees promises to pay rent in the future for future uses. No rent was due or owing when the leases were executed. After this 1947 appeal, the chancellor then entered a decree for defendant and on a recent appeal the court reversed this decree, repeating the statements in the per curiam opinion. Under this decision taxability will apparently depend on whether there is any payment made or owing at the time of execution of the lease. Nothing was decided concerning the measure of tax if there is such consideration.

Criminal Law and Procedure. Right to Counsel. A Florida statute provides that counsel must be furnished to insolvent defendants in criminal prosecutions for capital offenses. But in all other criminal cases the Florida Constitution and the Florida statutes do not require the court to furnish counsel. In these cases the Fourteenth Amendment of the Federal Constitution requires counsel to be furnished where the accused is incapable of representing himself adequately at the trial on account of age, ignorance, lack of capacity, or any other reason. This incapacity is purely personal and is to be judged on the basis of the facts in each case. In a habeas corpus proceeding a circuit court held that petitioner had been capable of adequately representing himself at two previous trials. The court reviewed the facts and approved the decision of the circuit court on the ground that it was supported by competent credible evidence. The opinion states the petitioner was 30 years of age. He had a formal education of only seven grades, but had experience as a salesman and as a group director of Civilian Concentration Camp laborers. He had four previous convictions. His defenses were fully and completely presented by him in the two Florida trials. In Wade v. Mayo, on the other hand, petitioner was 18 years old and the Federal District Court found that he was an inexperienced youth unfamiliar with court procedure and not capable of adequately representing himself.

40. See note 38 supra.
Presence of defendant at trial. A defendant on bail in a criminal trial (for a crime not a capital offense) was absent the second day of a two day trial for some reason not appearing on the record. Notwithstanding his absence, the trial proceeded to judgment. Applying a statute which clearly covers the case, the court affirmed the judgment and sentence.

Reasonable doubt. In an appeal from a criminal conviction, a defendant complained of the failure of the court to instruct the jury that "the defendant in this case is presumed to be innocent and the presumption remains with him through every stage of the case until such presumption is removed by credible evidence, until you are satisfied beyond a reasonable doubt that he is guilty." The judge had said in effect that defendant's guilt and every element of guilt must be proved by evidence which would convince the jury beyond reasonable doubt that defendant had a presumption of innocence in his favor, and that he was presumed to be innocent until his guilt was established by evidence beyond a reasonable doubt. Reasonable doubt, he said, meant substantial doubt in the sense that the jury could not say they had an abiding conviction to a moral certainty of the truth of the charge. Since this charge covered the subject, the court held it was not error to reject the requested charge. After all, reasonable doubt is just that—reasonable doubt. The addition of the requested charge to the charge given would have emphasized more strongly the presumption of innocence. This would not have clarified the concept of reasonable doubt which is difficult to define in any event.

Verdict. A verdict that defendant "is guilty as charged in the information" is usually considered responsive to the charge. However, such a verdict was not considered sufficient by the court in a recent case involving a charge of violation of the beverage law. A section of this law provides that a person who has previously been convicted of a violation (a misdemeanor) will be deemed guilty of a felony upon conviction of a second violation. In this case involving a second charge the court reversed the judgment of conviction because the jury must expressly determine the historical fact of the defendant's former conviction as alleged in the information. In a dissenting opinion, Justice Barns suggested that the judgment of guilt of the second offense be affirmed, but that the case be remanded for a separate determination of the fact of prior conviction—the determination to be by the same jury, another jury, or by the court. The least technical solution would have been to follow Justice Hobson's inclination to hold the verdict sufficient and affirm the judgment. However, he concurred to avoid a dissent in a case when he felt no one was harmed by the majority ruling. His opinion suggests this is a

41. FLA. STAT. § 914.01 (1941).
case where the old cliché applies: it is better to have a definite rule than to be concerned with the correctness of the rule.

Sentence. Following language in an early case, the court held that a defendant in a criminal case could not be fined and also put on probation for five years with the condition that probation might be vacated at any time and a sentence imposed which might have been imposed in the first instance. The governing statute provided for fine or imprisonment. The sentence was said to impose two distinct punishments. As the court also pointed out the probation statute did not specifically authorize the sentence. This ruling follows cases in other states where there is no statutory authorization for such a sentence.

Extradition. Both Federal and Florida extradition statutes provide that requisition for extradition be supported by indictment, information or copy of a warrant supported by an affidavit made before a committing magistrate of the demanding state. In a habeas corpus proceeding brought by a prisoner being held for extradition, the record showed that a warrant was issued and an affidavit made before a "clerk" of a district court of Massachusetts. Neither the documents nor the Massachusetts statutes examined by the court indicated the clerk was a committing magistrate and the requisition was held to be insufficient. Thus either the requisition documents alone or the documents by reference to statutes of the demanding state must indicate that the person by whom the warrant is issued and before whom the affidavit is made is a committing magistrate.

Return of evidence to defendant. The court held it was without jurisdiction to entertain an appeal from an order of a Criminal Court of Record denying a petition of defendant after acquittal for return of money taken from the defendant on his arrest and offered in evidence at his trial. This result appears to be consistent with cases in other states although three judges dissented.

Search warrants were properly issued by a circuit court judge for search and seizure of intoxicating liquors, and return was made to the circuit court. An attempt to recover the liquor seized by a petition for the return of the property in the county judges court was held not permissible under an applicable statute. In response to the petition the county court judge had entered judgment that unless criminal proceedings were instituted as a result of the evidence obtained under the warrants he would order the return of

44. Ex parte Williams, 26 Fla. 310, 8 So. 425 (1890).
45. Ex parte Bosso, 41 So.2d 322 (1949).
46. FLA. STAT. § 949.01-949.03 (1941).
47. FLA. STAT. § 941.03, 18 U. S. C. § 3182 (1946 Supp.).
49. Jenkins v. State, 41 So.2d 554 (Fla. 1949).
50. Note, 73 L. Ed. 275 at 278-280.
51. Harvey v. Drake, 40 So.2d 214 (Fla. 1949); FLA. STAT. § 933.14 (1941).
the property. A circuit court order denied a writ of prohibition addressed to
the county judge. On appeal the circuit court order was reversed on the
ground that under the statutes governing search warrants and seizure of
intoxicants the property was properly in the custody of the circuit court and
could be disposed of without criminal prosecution unless certain conditions
for return of the property not appearing in this case were met.\textsuperscript{52}

\textbf{Private Law}

The opinions of the Supreme Court of Florida published during the
summer show a pattern considerably at variance with the normal one, in
which questions of public law and procedure predominate. Because of the
greater number of private law cases, and because it was necessary for reasons
of space and time to eliminate this section from the last installment of the
\textit{Quarterly Synopsis}, the cases presented here cover a period beginning
and ending at an earlier date than that covered in the previous section, leaving
a number to be carried over to the February issue.\textsuperscript{1}

\textbf{Contracts. Specialties.} In an action on a specialty, such as a construc-
tion bond, it is necessary to prove not only the terms of the obligation, but
also that it has been duly executed. Proof of execution in the case of a specialty
supplies the usual proof of consideration in the case of a less formal contract.
This may be done prima facie by proof of the signature; but such a contract
does not prove itself, as demonstrated in a recent case.\textsuperscript{2} Where the contract has
been executed by an agent, proof of the authority of the agent must be
offered. In an action on a construction bond, the owner proved that the
bond had been delivered to him by the contractor and offered it in evidence;
but this was held insufficient.

\textit{Substantial performance.} The rule applicable in building contracts, that,
where there has been substantial completion but the work is not entirely in
compliance with the specifications, the builder may recover the contract price
less damages for his breach, was illustrated in a current case.\textsuperscript{3} The owner
of the property is entitled to withhold payment of the contract price until the
amount of the damages has been ascertained by agreement or by judicial

\textsuperscript{52} In \textit{Austin v. State}, note 42 \textit{supra} the court held that a trial court had not erred
in denying a motion that the state be required to elect between two counts of the in-
dictment it relied on for a conviction. The motion was made after all the evidence was
in. The counts charged the same offense in different forms.

\textsuperscript{1} The cases covered are found in Volumes 39 and 40, Southern Reporter (Second
Series), published from March 31, 1949, to July 7, 1949, and representing decisions
entered during February, March, April and May 1949.

\textsuperscript{2} \textit{Lee v. Melvin}, 40 So.2d 837 (Fla. 1949).

\textsuperscript{3} \textit{Rivers v. Amara}, 40 So.2d 364 (Fla. 1949). The owner brought a bill to cancel
the mortgage, and the builder filed a cross-bill to foreclose. The circuit court adjusted
the amount which the owner was entitled to withhold offset and ordered foreclosure for
the balance, with costs and attorneys' fees. The supreme court held that the owner was
entitled to a reasonable time after the determination of the balance due in which to
bring his payments current.
action. In the meantime, he is not in default. In a case where the owner of land gave the builder a mortgage, it was held that the builder could not foreclose so long as he had not completed the building in accordance with the contract and the amount of damages had not been adjusted by agreement.

The equitable policy that a breach of contract must be substantial to excuse nonperformance also finds expression in the rule that where one party has an option to terminate a contract for any default on the part of the other, the conditions under which the option may be exercised will be strictly construed. In a contract to purchase fruit on the tree, the buyer reserved an option to terminate if any part of the crop should be materially damaged by storm. The supreme court sustained a charge that the buyer must show that such a substantial amount of the whole crop had been damaged as to render the entire crop unmerchantable or impractical to handle. The ruling in this case, as well as the ruling in the previous one, shows applications in law of the equitable policy to prevent penalties and forfeitures.

In another case the court reviewed the sufficiency of the evidence to support proof of an oral contract of sale.

**Implied warranty that food is safe.** It was also established during the quarter that a restaurateur, who does not sell food but service, or "utters victuals" in the language of the common law, impliedly warrants that the food is safe for human consumption. The case has already received extended comment in this publication. It should be noted that as a result of this case and other recent authority, persons sustaining injury as the result of impure food products may, if there is privity of contract with the maker, mediate or immediately through a retailer, have an election to sue in contract for breach of implied warranty or in tort for negligence. Persons unable to show a contractual relationship must have recourse to an action based upon negligence. This distinction proves to be one of form only, because, through invocation of the rule of *res ipsa loquitur*, the happening of the injury is

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4. Purpura Bros., Inc. v. Oxner, 40 So.2d 890 (Fla. 1949). The facts are found in a dissenting opinion. The evidence showed that the first day's picking was unmerchantable, which was some evidence to show that the entire crop was unmerchantable; but the burden of proof was properly on the buyer.

5. White v. E. Levy & Sons, 40 So.2d 142 (Fla. 1949). Showcases were leased by landlord to tenant of a store upon an oral contract in which the landlord reserved the right to sell the cases and refund unearned rent. There was evidence to show that the price was established and that the tenant agreed to pay it. There was also contradictory evidence on each particular. Held, that since the evidence supported the verdict, it was error to grant a new trial.


7. 3 *MIAMI L. Q.* 638 (1949).

8. Starke Coca-Cola Bottling Co. v. Carlington, 159 Fla. 718, 32 So.2d 583 (1947), noted 1 U. of FLA. L. Rev. 470 (1948). It is possible that this last case rests on some fine distinction between injury from glass or other foreign substance in the beverage and injury from an exploding container. The implied warranty would thus extend to the wholesomeness of the food, but not to the suitability of the package for preparation or service. The cases make no such distinction. See generally, Comment, 3 *MIAMI L. Q.* 613 (1949).
prima facie proof of negligence. Specific proof to rebut the presumption of negligence may be offered in tort cases, while no similar defense is available when the injured party elects to sue in contract.

Some considerable confusion has occurred in the application of the doctrine of res ipsa loquitur to these cases. If the process of preparing the food is exclusively within the control of the producer, it would seem to satisfy the rule, as it was originally applied in cases of the operation of machinery, that the instrumentality must be in the sole control of the defendant; but the Supreme Court of Florida had apparently transferred the rule from the process of production to the product itself, stating that it must be shown that the product has not been handled by others since it left the hands of the manufacturer.\(^9\) It would be more correct to say that in any case where the product is no longer in the hands of the manufacturer, the evidence must reasonably exclude the possibility of some intervening cause. If it meets this test, then res ipsa loquitur applies to the manufacturing process. That rule finds expression in a current case in which a bottled carbonated beverage exploded while being handled by a retailer’s servant.\(^10\)

**Waiving the tort.** In an action to recover for the conversion of personal property, the owner may elect to waive the tort and sue in assumpsit for goods bargained and sold. If he fails to prove his case in assumpsit, he cannot try his luck again in tort: he has made his election and the matter is res judicata. A recent decision\(^11\) makes it clear that where there is no final decision on the merits, the plaintiff will not be treated as having made a binding election. In a contract case the court entered a directed verdict because it found that the plaintiff had mistaken his remedy. Presumably this ruling would have been reversed on appeal, but plaintiff chose instead to follow the circuit judge’s advice and sue in tort. Defendant’s contention that the case was res judicata was overruled in both courts.

**Real Property.** Surface water. An upper riparian owner is privileged

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\(^9\) Compare Comment, 3 MIAMI L. Q. 613, 619 (1949) with Case Comment, 1 U. of FLA. L. REV. 470 (1948). The editor in the latter classifies the rule in Starke Bottling Co. v. Carlington, 159 Fla. 718, 32 So.2d 583 (1947), as the “non-possessory extension” of the res ipsa loquitur rule.

\(^10\) Groves v. Florida Coca-Cola Bottling Co., 40 So.2d 128, 130 (Fla. 1949).

\(^11\) Kent v. Sutker, 40 So.2d 145 (Fla. 1949). Sutker delivered jewelry to Kent upon a memorandum receipt showing that the transaction was “for examination and inspection only.” The jewelry was not returned, and Sutker instituted an action for goods bargained and sold. In the subsequent case there were counts both in contract and in tort. As to the counts in contract, it would seem that the matter was adjudicated in the first case and not subject to collateral attack; but this was at least harmless error
to discharge surface water accumulating on his premises into a stream which normally drains them. This privilege must be distinguished from that which an owner has to drain surface water over the land of neighbors where it follows the slope of the land but does not course through a well-defined stream. The law has grown around this distinction, permitting acceleration of the flow of surface water through ditches and sewers when it is discharged into a natural stream, but holding the higher owner liable in damages for an unreasonable discharge where there is no stream. Frequently courts confuse the two lines of authority and hold an upper riparian owner liable for an unreasonably heavy discharge into an existing watercourse. That Florida makes the orthodox distinction is illustrated by a current case in which the decisions under both rules are reviewed and distinguished. It is also made clear that a municipal corporation is regarded as a riparian owner with rights and duties like those of an individual.

Right to possession. The state constitution preserves the right to trial by jury and vests in the circuit courts exclusive original jurisdiction in ejectment proceedings. As a result, while a bill to quiet title may be brought in equity in situations which were not within the jurisdiction of equity before it was enlarged by statute, there must be a trial by jury of the question of title whenever rights are asserted against a person in possession of land. A recent case makes it clear that this applies not only where the equity in the bill is exclusively quia timet, but also where it is based on some independent equity, such as that possession was obtained by fraud. According to another case, the same rule applies where a cross bill is filed or equitable defense asserted against a plaintiff in possession, although title is not in dispute.

Landlord and tenant. Prior to the development of the writ of ejectment in the reign of Henry III, the law regarded a term for years as a personal contract between the landlord and tenant, and not as an interest in property. If ejected by a third party, the tenant's only remedy was an action of covenant for damages. Under the writ of ejectment, he could assert rights in rem, and therefore a leasehold has become an interest in land,

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13. Bray v. Winter Garden, 40 So.2d 459 (Fla. 1949). The plaintiff also alleged pollution, but the evidence failed to prove the allegation.
14. FLA. CONST. DECLARATION OF RIGHTS, § 3; Art. V, § 11.
15. For history of statutes regulating proceedings to quiet title to land, see J. M. Flowers, Florida Real Property Laws of 1947, 2 MIAMI L. Q. 21, 22 (1947).
17. Hull v. Topino, 40 So.2d 137 (Fla. 1949). A landlord, having obtained possession of leased premises, sued to hold his dispossessed tenant as trustee of the liquor license. The tenant filed a cross bill, challenging the landlord's right to possession. This was transferred to the law side. A defense challenging illegal use of process was dismissed, apparently under the rule of res judicata.
18. Id. The court directed that the case be transferred to the law side, and that the issues in ejectment be framed and submitted to a jury.
although said to be less than freehold, and a lease is regarded as a conveyance. Likewise the agreement to pay rent became an incident of the reversion, and might be enforced against an assignee without a specific assumption since it was a charge on the land. This is no longer true in Florida, according to a recent decision. While a lease is a conveyance, the covenant to pay rent is a mere executory contract, having no present value. The decision is explained by special considerations in tax cases, but we have already noted a similar holding where taxes were not involved. For other purposes, a lease remains an executory contract only until possession is taken, which may be accomplished by the attornment of a tenant in possession.

PERSONAL PROPERTY. Replevin. So much of the law of personal property is explained by the history of the development of the possessory writs that it is often impossible to distinguish between substantive and procedural questions in dealing with possessory actions. In accord with centuries of tradition, the plaintiff in replevin receives possession of the property summarily, and the action is one in which the nominal defendant is for all practical purposes an actual plaintiff in an action for tortious taking. The statutes afford the defendant an opportunity to avoid summary restitution to the plaintiff by posting a counter bond; but where he does not do so, the very judicial decision that the defendant was entitled to possession defeats his actual possession. This is demonstrated in a recent case, which also shows that it is the right to possess, not ownership, that is litigated. Where personal property is seized in the hands of a sheriff, who holds possession under a writ of execution, the judgment on the replevin bond should run in favor of the sheriff, not the judgment creditor, presumably leaving the sheriff liable to the latter on his bond. It is not surprising, therefore, that in another current case, discussed below, the court held that these cumbersome proceedings could not be deemed an adequate remedy at law.

SECURITY TRANSACTIONS. Pledges. Where a pledgee converts the security by transferring it to a third party, the pledgor may recover the pledge in an action of replevin if he tenders the amount which he owes, or he may recover the net value of the pledge in an action for damages. In a recent case involving replevin of a ring pledged to one, Watson, and by him transferred

21. Barns, J.: "Laws imposing taxes should be liberally construed for the taxpayers." Id. at 797.
23. Taradash v. Supreme Development Corp., 40 So.2d 577 (Fla. 1949). Tenant reserved the express right to terminate the lease if possession could not be given within a fixed period, the landlord's right to recover possession being abridged by wartime rent controls. Thereafter tenant received rent from the person in possession and continued to do so for almost a year before bringing a bill to cancel.
to one, Gourlie, evidence of actual notice of the pledge given Gourlie at the
time by the owner was excluded under the rule excluding testimony of a
party where the other is dead. In reversing a directed verdict for defendant,
the higher court ruled that the pledgor's title was not defeasible by transfer,
even to a purchaser for value without notice. It should be noted, however,
that a pledge usually carries authority to sell if the debt is not paid when due,
the pledgor recovering any surplus realized in an action against the pledgee;
but the pledge in this case was transferred "shortly thereafter."

In another case, a bill was brought in equity to prevent the sale of shares
of corporate stock, assigned to a bank to secure payment of a note, which
the plaintiff alleged was paid. The bill contained no allegation that the stock
was unique. A motion to dismiss was grounded on the inadequacy of the
remedy at law. With respect to pledges of personal property, the common
law afforded two remedies: specific restitution on tender of the amount due
in replevin, and damages for the value of the equity of redemption in trover.
It is believed that the Supreme Court of Florida has now given concurrent
jurisdiction to equity over a field formerly served adequately by law.

Mortgages. The right to foreclose may not be asserted by a mortgagor
who is himself in default, the proceeding being in equity. If the mortgagor's
default bears no relation to the mortgagor's, the court may make such orders
as are consistent with the equities and proceed with foreclosure; but when
the mortgagor's default excuses nonperformance by the mortgagor, it is
necessary after making appropriate orders with respect to the mortgagor's
default, to give the mortgagor a reasonable time in which to perform his
part of the agreement. It is not necessary to dismiss the proceeding; the
court will retain jurisdiction until that time has passed.

Another case makes it clear that the emergency legislation which

26. Richardson v. Gourlie, 40 So.2d 553 (Fla. 1949). Richardson pledged a diamond
ring with Watson, an attorney, for an unpaid fee. With Richardson's knowledge, Watson
gave the ring to Gourlie, who gave it to his wife. More than ten years elapsed before
Richardson brought suit against Mrs. Gourlie, paying the principal sum, but not interest,
into the registry of the court. This latter factor was not discussed. Dissenting judges
expressed the opinion that the error was immaterial since the statute of limitations had
run; but on that issue, the burden was with the defendant and the order reviewed was
a directed verdict for the defendant. Accordingly, that issue could be retried on the
remand.

27. The court characterized this as the rule of caveat emptor, which we think app-
licable only to implied warranties of quality.

28. Sec Pardo v. Evans-Lakeland, 38 So.2d 307 (Fla. 1949), discussed in Synopsis,
3 MIAMI L. Q. 438 (1949).

29. Miami Beach First National Bank v. Harney, 39 So.2d 789 (Fla. 1949). The
facts are taken from the dissenting opinion of Sebring, J.

30. Rivers v. Amara, 40 So.2d 364 (Fla. 1949). A builder, who failed to complete
a building in accordance with the contract, asked foreclosure of a construction mortgage.
The circuit court deducted the amount of the owner's damages and ordered foreclosure
with costs.

31. Buckland v. Lewis State Bank, 39 So.2d 919 (Fla. 1949). The bank took a
second mortgage for $1900, scaling down the indebtedness to that extent. Whether or
not the scaling down was without consideration, was not raised by the bank.
established the Home Owners' Loan Corporation was not enacted as an exemption statute to protect home owners as a class, but rather to protect the public interest in a sound banking system. It enabled banks, building and loan associations, insurance companies and other lending agencies to exchange undersecured mortgages for more liquid assets. The defendant in foreclosure asserted that when a state bank received a guaranteed first mortgage for $4,000 in exchange for one of $6,000, a second mortgage for the balance was exacted in violation of the policy of the federal statute and was void. Another of the myths upon which Statism has traded so long for popular support has thus been exploded.

Equity. Reformation. It is often stated that equity will not reform a contract or conveyance to correct a mistake of law, however mutual; but the fallacy of such a conclusion is illustrated in one line of cases. In the construction of a deed, the parol evidence rule excludes evidence of the intent of the parties, and looks only to the terms of the instrument, unless there is an ambiguity. Often the court, as in a recent case, finds an ambiguity and admits parol evidence for the sole purpose of carrying out the intent of the parties which they have failed to express, and in effect relieves them from a mistake of law as to the interpretation of their contract. In the principal case the court found and enforced the grant of an easement on parol evidence of the intent of the parties.

In another case, the court insisted, apparently for the purpose of distinguishing between mistakes of fact and mistakes of law, that the evidence must show specifically wherein the mistake lay. The buyer opened the negotiations, representing that the seller had acquired at a tax sale certain land which separated the buyer's home from a street, and the seller, as an accommodation, conveyed the land acquired at the tax sale to the buyer. The buyer obtained title to more than was contemplated. It was not shown, however, whether the seller was mistaken as to the content of the deed which he signed believing the description to be different from that which the deed actually contained, which would be a mistake of fact, or whether he was mistaken as

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32. Any other interpretation of the federal statute would be unconstitutional as class legislation according to the principles announced in Liquor Store, Inc. v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949), discussed in Synopsis, 3 Miami L. Q. 593.

33. Boothby v. Gulf Properties of Alabama, 40 So.2d 117 (Fla. 1949). Plaintiffs claimed an easement in beach frontage lying between lots and the gulf which they purchased of the defendant. This was based on the words "Beach Reserved" appearing on the plat, and the oral declarations of the agents of the seller that that meant (i.e., in law) that this area was reserved for all the purchasers of lots as a public beach, or common. "Reserved" as a word of art means that an interest is not included in a conveyance, and is inappropriate to convey an interest to a grantee.

34. Robertson v. Capital Finance Corp., 40 So.2d 771 (Fla. 1949). The buyer shocked the court by taking oppressive action against the other landowners, poor negroes, whose title he thus acquired. It is safe to predict that some way will be found to protect their interests.
to the effect of both his deed and the tax deed, which would be a mistake of law. Actually it should not make any difference.

To justify reformation of a contract, mistake should be mutual; but where one party is mistaken and the other party knows of the mistake but intentionally takes advantage of it, mutuality is dispensed with. It is not necessary to show actual misrepresentation amounting to fraud: mere silence is sufficient, as shown in a recent case.85

Enforcement of legal rights in equity. When an instrument has been reformed, equity will enforce it although there may be an adequate remedy at law, because equity does not do justice by halves. The distinction is preserved, however, between those rights which are equitable and those which are legal. In a current case86 a bill was brought to reform certain notes which were the obligation of a dissolved corporation, but which had been represented to be the notes of an individual. The plaintiff asserted the defendant's fraud to show that the claim was not barred by laches; but the court held that since action on the notes as reformed would be barred by the statute of limitations, it would not reform the notes.

Fraudulent conveyances. There is a traditional confusion between a creditor's bill to reach equitable assets and a creditor's bill to set aside fraudulent conveyances, both of which are commonly called "creditors' bills."37 The first may be prosecuted only when the claim has been reduced to judgment.88 The latter, resting upon an independent equity, is not subject to this limitation. A recent case shows that Florida recognizes the distinction.39 A corporation, planning dissolution, contracted to sell its principal asset, a cafeteria. Instead of taking title to the business, the purchasers acquired the outstanding stock, agreeing to pay the broker's commission. The broker brought a creditor's bill against the corporation and its stockholders, which was dismissed because it was not alleged that suit had been instituted in law. This order was reversed. Unless the supreme court disregards the corporate fiction in all cases where there is a voluntary liquidation, the case broadens the scope of fraudulent transfers to include all transfers made with intent to defraud the creditors of another, in this case, the corporation.

Resulting and constructive trusts. There is a presumption that a trust does not result to a husband who purchases real property and takes title in the name of his wife, the act of the husband being more consistent with an

35. Robertson v. Capital Finance Corp., 40 So.2d 771 (Fla. 1949). In a bill to cancel a deed, it was shown that the purchaser and seller negotiated for the purchase of a single tract but the deed when delivered covered more. From the purchaser's conduct immediately after receiving the deed, knowledge throughout of the seller's mistake might have been inferred.
37. CLARK, SUMMARY OF AMERICAN LAW 391 (1947).
38. By statute, Florida permits the suit to be filed, but requires judgment to be entered at law before there are further proceedings. FLA. STAT. § 62.37 (1941).
intent to make a gift than an intent to reserve a beneficial interest. It was conten-
tended in a recent case\(^{40}\) that this rule should not apply when, at the time of
the purchase, the wife had sued the husband for divorce and had dismissed the
suit upon a property settlement. The presumption of gift is said to be re-
buttable, but what evidence would be sufficient to rebut it is not shown. The
presumption does not apply when a wife purchases real property in the hus-
band's name, but a current case\(^ {41}\) tends the other way. A woman delivered
merchandise to her former husband to establish him in a business similar to
her own, in which he had helped her prior to the end of their joint venture.
The court ruled that in the absence of a specific contract to pay, the law
would not imply one in view of the relationship of the parties.

We have formerly noted the existence of a fiduciary relationship between
tenants in common, which causes one purchasing at a tax sale to hold the title
acquired upon constructive trust for the others.\(^ {42}\) Whether or not that right
may be asserted by a cotenant who refuses when solicited to pay his share of
the taxes was avoided in a recent case.\(^ {43}\) After the sale the defaulting cot-
tenant quitclaimed to the purchasing cotenant. This was held sufficient to
determine his right to enforce a constructive trust.

**Equal equities.** The recording statutes do not protect equitable titles.
One who purchases from a person who does not have legal title acquires
a mere equitable right subject to prior equities. A cotenant whose title to
land had been divested by a tax sale was entitled to proceed in equity against
a cotenant who purchased at the tax sale. This equity he released by a deed
of quitclaim. Before the deed was recorded, he quitclaimed to another who
brought a bill to enforce the constructive trust. The court held that the subse-
quint purchaser of the equity, although first to record, took nothing.\(^ {44}\)

**Wills.** **Probate proceedings.** Every attorney whose practice includes the
frequent drafting of wills dreams of the will, executed in his office with all
the formality that a prosperous client could afford, which turns up after
testator's death without a signature. It happens occasionally; but when it
does, the will cannot be admitted to probate, even if three subscribing wit-
nesses testify that the testator declared it to be his will in their presence and
that they were all under the impression that he had signed it.\(^ {45}\) An old prob-
lem, whether a bill to probate one will may be joined with a petition to revoke
probate of another, has been answered in the affirmative, two judges hesi-

\(^{40}\) Lieber v. Lieber, 40 So.2d 111 (Fla. 1949). The husband failed to prove, al-
though he alleged, an express oral agreement to rebut the presumption. As to this
point, see *Synopsis*, 2 Miami L. Q. 325 (1948), and 3 Miami L. Q. 441 (1949).
\(^{41}\) Parker v. Priestley, 39 So.2d 210 (Fla. 1949).
\(^{42}\) See *Synopsis*, 3 Miami L. Q. 47 (1948).
\(^{43}\) Nelson v. Sullivan, 40 So.2d 114 (Fla. 1949).
\(^{44}\) Ibid.
\(^{45}\) In re Neil's Estate, 39 So.2d 801 (Fla. 1949). What actually happened is left
to the reader's imagination by the opinion.
Probate of a will later in date has the effect of revoking an earlier will already probated, at least to the extent of inconsistencies; but an earlier will cannot be admitted to probate until a later, already probated, has been successfully contested. It is therefore often held in the latter type of case that petitions cannot be joined, but this view fails to take advantage of the flexibility of proceedings in equity. Another troublesome question has been settled by a holding that an executor named in an earlier will does not have a sufficient interest to contest the probate of a later will. That duty devolves upon the legatees, unless the executor must serve as a trustee to represent some future interests.

An administrator de bonis non cum testamento annexo, however, has a sufficient interest to demand an accounting by a retiring executor. It is sometimes forgotten, as it was by the circuit judge in the same case, that a trustee or executor has a duty to inform the beneficiaries of the status of his trust at all times, and a bill for an accounting is based on this duty and not on a showing that the fiduciary has committed a breach of trust. Furthermore, the circuit courts have concurrent jurisdiction with the county judges in actions for an accounting by an administrator de bonis non against his predecessor.

Claims. The decisive measure of proof required to establish a claim against a decedent's estate is discussed in a current case. It was proved beyond question that his divorced former wife delivered merchandise to decedent to help him start a business similar to one in which she was engaged. The proof failed to show a promise to pay. Because of the relationship, the court found it impossible to say that a promise to pay was implied, and ruled that the evidence did not support a finding in favor of the claimant.

The statute which excludes testimony of a party to an action against the personal representative, descendant or other successor of a decedent, concerning any transaction or communication with the decedent, was construed not to apply to an action of replevin against one claiming by an inter vivos gift from a person now deceased.

Construction: misnomer and cy pres. Where testator leaves property to a charitable corporation, and the corporation is dissolved before his death, there is considerable disagreement in the cases whether the gift lapses or may be preserved under cy pres. Where the gift is made to a charitable corporation in trust for certain purposes within its corporate powers, and the

46. In re Barret's Estate, 40 So.2d 125 (Fla. 1949).
47. The difficulty is usually to determine whether a later will may be offered for probate after it is too late to contest probate of the former. Simes, Problems in Probate Law (1946), p. 101.
48. In re Barret's Estate, 40 So.2d 125 (Fla. 1949).
49. Koelliker v. Jenkins, 40 So.2d 358 (Fla. 1949).
51. Richardson v. Gourlie, 40 So.2d 553 (Fla. 1949). Two judges dissented.
corporation is dissolved prior to testator's death, a new trustee will be appointed under the rule that equity will not permit a trust to fail for want of a trustee. If the selection of charitable purposes was left to the corporation, the courts will permit the successor to suggest other purposes in the exercise of the cy pres power. The cases which hold that a gift to a charitable corporation lapses are based on the theory that no trust is intended, while those which support it are based upon a view that, since a charitable corporation is a trust in a specialized form, all gifts to the corporation are gifts to the trustees for the corporate purposes. Cases of the first type draw from New York where, prior to the Tilden Act, gifts in trust for charity were held void for want of definite beneficiaries, but gifts to charitable corporations, if not specifically in trust, were held valid. Florida has chosen to recognize the gift to a corporation as one in trust, which enables the courts to appoint a successor and to define the charitable purposes under cy pres, according to a recent case. The case might have been disposed of much more easily as one of misnomer, as the court recognized in a concluding sentence.

Family Law. Children. The question as to whether or not the presence of a child within the jurisdiction is necessary to enable a court to make an order awarding custody was raised in a recent case. The parents were divorced in Alabama, but the child was, and had been for some time, in the custody of maternal grandparents in Florida. The father, having obtained a decree awarding custody to him, petitioned in Florida for habeas corpus. By applying the rule that a custody decree rendered elsewhere is subject to modification in this state, the court was able to dispose of the case without discussing the validity of the original decree.

The factors to be considered in awarding custody of children were discussed in two cases. In each, a parent sought to obtain custody from grandparents on the side of the other spouse. In one, the court preferred the mother to the paternal grandmother where the mother’s home offered certain advantages; but in the other, the father, a nonresident who scarcely knew the child, lost to a grandmother who had had seven years' custody continuing almost from birth, the relative homes being more or less equal. Each case is thus apparently made to stand on its own merits, with the welfare of the child controlling.

The right to visit children should never be denied in a divorce decree

54. Little v. Franklin, 40 So.2d 768 (Fla. 1949).
56. Dobbs v. Kelly, 39 So.2d 479 (Fla. 1949). The child was actually in the custody of the father, but he was required while working to leave the child with grandparents. The child, a boy, was only four.
57. Little v. Franklin, 40 So.2d 768 (Fla. 1949).
so long as the parent does not prejudice the morals or welfare of the children by improper conduct in their presence.58

The threat to the future welfare of children which the broken home betokens was poignantly brought to the court's attention in another case.59 It was necessary to sustain a conviction for murder, with a death sentence, in the case of a youth of eighteen whose childhood had been blighted by parental neglect. The court took time to reflect, not without some remarkable Terrellisms,60 how much more appropriate it might be to visit punishment upon the parents, who were safely beyond the jurisdiction of the court.

*Married women's emancipation.* In a current decision,61 the Supreme Court of Florida construed the Emancipation Act of 194362 to permit a married woman to become jointly liable with her husband as surety for the debts of a third person. Husband and wife executed a written contract of guarantee for a corporation in which the family appears to have been interested. The wife pleaded the constitutional prohibition against subjecting a married woman's separate property to the payment of her husband's debts; 63 but the court pointed out that it was the corporation's, not the husband's, debt which was guaranteed. Since the corporation bore the husband's surname, one wonders whether the defense was not based on identity of the corporation and the husband; but the case arose on a certified question and the whole record was not before the court.

*Homestead property.* Homestead property may be conveyed away by the head of the family during his life. Since deeds may now be made between husband and wife, it is possible that a husband may defeat the statute relating to descent of homestead property by a conveyance to his wife. It has now been established 64 that a conveyance made prior to marriage will defeat the claims of children by a former marriage. The homestead character of real property may also be destroyed by a divorce decree, ordering a sale and division of the proceeds.65

*Infancy.* The right of an infant to repudiate a contract to purchase items not necessary for his maintenance is recognized in this state; but, according

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58. Yandell v. Yandell, 39 So.2d 554 (Fla. 1949).
60. "Society has evolved a code of ethics that those who travel roughshod over others be required to stew in their own juice." Hatton v. State, 39 So.2d 713, 714 (Fla. 1949).
62. C. 21939, Acts of 1943; FLA. STAT. § 708.08 (1943 Supp.).
63. FLA. CONST. ART. XI, § 1.
64. Scoville v. Scoville, 40 So.2d 840 (Fla. 1949). The case is of especial interest to the editor because it is the first in which the court has noticed judicially, actually in advance of publication, one of the Florida law reviews. The kydos goes to our rival.
65. Olsen v. Simpson, 39 So.2d 801 (Fla. 1949). On divorce, the parties, who had held as tenants by the entireties, were decreed tenants in common. The property was sold on partition proceedings instituted by the wife, who attached the husband's share of the proceeds as a creditor. It was held that the husband, being still the head of a family, was entitled to assert the personal property exemption.
to a current case, the right may be lost if the minor has misrepresented his age. We have already noted a tendency to apply equitable defenses when personal incapacity is asserted by a married woman, enforcing a defective contract on the equity of part performance. In going against the “weight of authority” in the current case, the supreme court recognizes the fact that these statutes are intended to protect minors from designing persons, and not to increase the danger to the public of designing minors.

**Grounds for divorce.** Those who look with horror upon “easy Florida divorces” will find something to ponder in recent cases which demonstrate extensively that nagging is not a ground for divorce in this state, unless so persistent that the husband’s health is impaired. Loss of thirty pounds is no proof of impaired health when the residual weight exceeds two hundred, nor does it help to show that the husband was forced to take up his abode elsewhere if he goes to live with an attractive blonde with whom he was previously acquainted. Where a wife nursed her wrath to the point that she refused to visit a husband stricken with coronary thrombosis, she exceeded the limit of tolerance. This rule is further enforced by the application of another, that a divorce will not be granted on the uncorroborated testimony of the plaintiff complainant. On the other hand, philandering to the extent that the sensibilities of the wife are shocked and she suffers in mind and body, may afford grounds to the wife.

**Alimony and property settlements.** The amount of alimony or property settlement is left to the discretion of the chancellor in divorce cases: the supreme court will intervene only when it is shown that discretion has been abused. Lump sum alimony should not be granted, however, where the amount is based upon the husband’s earning capacity, and immediate payment would impair the capital needed in the conduct of his business. A statute forbids the award of alimony where a wife is found guilty of adultery, but

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66. Brenner v. Perlman, 40 So.2d 901 (Fla. 1949). The minor attempted to rescind the purchase of an automobile.
68. Clark, Summary of American Law 152 (1947). The author points out, however, that in those jurisdictions the minor may be liable in tort for his fraud, which leads to the same result.
69. Harmon v. Harmon, 40 So.2d 209 (Fla. 1949). Husband, an airline pilot, continued able to pass the frequent and rigorous physical examinations required of his profession.
70. Morgan v. Morgan, 40 So.2d 778 (Fla. 1949).
71. Lieber v. Lieber, 40 So.2d 111 (Fla. 1949).
72. See note 70, supra. It may be difficult to determine whose story the corroborating evidence supports. “The female of the specie homo is as quick as a spider to sense another woman in the domestic web,” Terrell, J.
73. See note 69, supra.
74. Bouchez v. Bouchez, 39 So.2d 286 (Fla. 1949). Held, not error to divide the proceeds of the sale of a homestead, where the wife was 54, husband 67, and there were no children.
75. Yandell v. Yandell, 39 So.2d 554 (Fla. 1949); Rubinow v. Rubinow, 40 So.2d 561 (Fla. 1949).
this does not prohibit the allowance of a settlement or of attorney's fees.\textsuperscript{76} It is error not to grant a settlement to an adulterous wife, where she has contributed through the years to the acquisition of her husband's property.\textsuperscript{77} A lump sum award of alimony is subject to review and modification upon a showing that conditions have changed. An agreement or stipulation between the parties not to apply for modification, being against public policy, will not bar an application for an increased allowance.\textsuperscript{78}

\textit{Corporations.} Receivership of a corporation, either temporary or permanent, should not be granted unless it appears that corporation assets will be lost or fraudulently transferred. A receivership is attended with heavy charges and expenses, and should not be used, especially as a temporary measure, when the court can preserve the \textit{status quo} by injunction or other appropriate orders pending inquiry. This rule was illustrated in a recent case\textsuperscript{79} where a non-voting stockholder charged the principal stockholder with intentionally "freezing out" the non-voting stockholder. Neither the corporation nor the defendant stockholder were alleged to be insolvent; in fact, the latter was said to be "incredibly wealthy."

Evidence sufficient to show that corporate directors engaged on their own account in the same business as the corporation, circumstances in which the directors would doubtless be liable as constructive trustees, was found to be lacking in another case.\textsuperscript{80} To the liability as trustees which the directors of a corporation must carry for three years after dissolution may be added a new one. It has been held that they are not liable to suit, but that an equitable attachment can be levied against them. If, however, they know of an outstanding claim at the time of dissolution, they may be liable as constructive trustees in an original bill.\textsuperscript{81}

\textit{Torts. Wrongful death.} When one person has been killed through the tortious act of another, the dependents of the decedent have a cause of action against the tortfeasor in their own right for loss of support. This cause of action is to be distinguished from the right of the decedent to sue for his own damages, including loss of earnings, expenses, and pain and suffering. This right was extinguished on death at common law, but survives to his personal representative for the use of dependents under statutes in many states. In Florida, the right of the dependents to sue is governed by statute,\textsuperscript{82} and a general statute\textsuperscript{83} provides for the survival of all causes of action, with certain

\begin{thebibliography}{99}
\item 76. Foreman v. Foreman, 40 So.2d 560 (Fla. 1949).
\item 77. \textit{Ibid.}
\item 78. Haynes v. Haynes, 40 So.2d 123 (Fla. 1949).
\item 79. McAllister Hotel Inc. v. Schatzberg, 40 So.2d 201 (Fla. 1949). On certiorari, the court quashed an order granting a temporary receivership. Through a managerial contract with and loans from another corporation which he controlled, the principal stockholder was charged with diverting profits.
\item 80. Blanchard v. McCord, 40 So.2d 457 (Fla. 1949).
\item 81. Megdall v. Scott Corp., 40 So.2d 139 (Fla. 1949).
\item 82. \textit{Fla. Stats. §§ 768.01-.02} (Fla. 1949).
\item 83. \textit{Fla. Stats. § 45.11} (Fla. 1941).
\end{thebibliography}
exceptions, to the personal representative. Because there are two different causes of action, recovery or failure to recover in one has no effect upon the other by the view generally held in this country. While recognizing that there are two separate causes of action, our court has taken the view that an adverse decision in an action brought by a widow in her own right will bar recovery by estoppel in an action brought by the widow as personal representative.

Negligence. In a case in which a verdict was directed for the defendant, arising out of an accident in which a child was hurt crossing a street at the corner, the court held that the fact that the accident took place at a place where pedestrians have the right of way was some evidence to prove negligence, sufficient to require the case to be submitted to a jury. The quantum of evidence necessary to support a verdict against a municipal hospital for negligently administering harmful drugs is discussed in another case. It is made very plain in a number of cases that the function of a court in reviewing a negligence case is not to determine whether the evidence is more consistent with a recovery than not, but whether there is adequate evidence, disregarding all to the contrary, to support the verdict.

Res ipsa loquitur in food cases. A current decision in which the application of the rule of res ipsa loquitur in an exploding bottle case was discussed has been treated above under Contracts (Implied Warranties).

Workmen's Compensation. Coverage. Current decisions relating to the scope of the act show that horse trainers are entitled to the benefits of the act, not being classed as athletes and their trainers, who are excepted. A foreign corporation which employs more than three persons, but only two within this state, is subject to the provisions of the act with respect to those employed locally. A husband who earns 55% of the family income is not a "dependent" within the terms of the act.

Independent contractors. Whether a person should be treated as an employee within the scope of the act or as an independent contractor was discussed in three cases. The following were held to be independent contractors: a handyman who supplied his own tools and ingenuity, and a laundry truck driver who owned his own truck which bore the name of the laundry. A lumberman employed as part of a crew and paid by the fore-
man, who used equipment supplied by and worked under the general direction of a sawmill owner, was held to be an employee, although a specific arrangement had been entered into whereby the injured person, who had formerly been employed by the sawmill, was to be treated as an employee of the foreman.95

Negligence and cause. While the right to recover in workmen's compensation does not depend on proof that the employer has been negligent, it is still necessary to show that the injury resulted from an accident occurring during employment. That is basically a question of fact, and findings by the trier of fact should not be reversed if supported by competent evidence. Where the evidence shows that injury may have resulted from an accident occurring during the course of employment, the decision of the deputy commissioner should be sustained;96 but where the evidence shows that it could not have resulted from an accident occurring while employed, that is a matter of law for the courts on appeals.97

While contributory negligence is not a defense in workmen's compensation cases, it may nevertheless be asserted when the employer sues a person liable over.98 Under the Federal Employers' Liability Act, negligence of the employee is a defense.99

Damages. Liquidated damages. Notwithstanding a recent opinion100 in which the Supreme Court of Florida threw some doubt upon the validity of a liquidated damages clause in a contract, the court held such a clause valid in a recent case.101 The clause operated to reduce the amount proportionately as partial performance of the contract was received. Amount. While in tort cases the amount of recovery is largely in the control of the jury,102 the element of pain and suffering affording considerable leeway as also punitive damages in appropriate cases, damages in contract cases must bear some connection with the evidence. In a recent case, the court awarded a new trial where it could not reconcile the verdict with the evidence.103 A new trial on the issue of damages alone may be given in such cases; but where the liability is not contested, and the amount is the sole issue, a new trial is appropriate.

95. Taylor v. Williams, 40 So.2d 122 (Fla. 1949).
96. Crawford v. Benrus Market, 40 So.2d 889 (Fla. 1949).
97. Morris v. American Machinery Corp., 40 So.2d 839 (Fla. 1949). The Industrial Commission and the courts reversed the deputy commissioner, ruling as a matter of law that the evidence could not support the finding. Some of the language of the opinion, however, is consistent with a weighing of the evidence on appeal. See Lester Harris, Appeals in Workmen's Compensation Cases, 2 MIAMI L. Q. 215 (1948).
98. Cone v. Telephone Co., 40 So.2d 148 (Fla. 1949).
99. Atlantic Coast Line v. Johnson, 40 So.2d 892 (Fla. 1949).
100. Pembroke v. Caudill, 37 So.2d 538 (Fla. 1948), noted in Synopsis, 3 MIAMI L. Q. 290, 293, 294, 437 (1948-49).
103. Citizens' Insurance Co. v. Harris, 40 So.2d 775 (Fla. 1949).