INSTRUCTIONS

THE LAW AND APPROVED FORMS FOR FLORIDA

1965 Cumulative Supplement

BY

THE PUBLISHERS' EDITORIAL STAFF

Volume 1

Place in Pocket of Volume 1 of Main Set

THE MICHIE COMPANY
CHARLOTTESVILLE, VIRGINIA

Explanatory Note

This Cumulative Supplement brings to date Instructions for Florida, published in two volumes in 1954. It contains the general law and approved instructions from cases decided since the completion of the main set, concluding with the Florida decisions reported through Volume 172, Southern Reporter, Second Series, page 224. Instructions have also been taken from the records in these cases, in accordance with the practice followed in the preparation of the bound volumes.

The plan of this Supplement follows that of the original publication. New matter is placed in the Supplement where it would have been used in the bound volumes had it then been available. In Part I, reference is made in the text to the numbers of the footnotes in which such new matter appears when not used in the text. The section lines under which any material has been placed are set out in full, but only those which are new with this Supplement or vary from the original publication are repeated in the frontal analyses and referred to in the index.

An additional feature of this Supplement is the inclusion of an appropriate note to those instructions appearing herein which are also set out in Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida, 7 Miami Law Quarterly 147 (1953), prepared by Judge George E. Holt, Senior Judge, Eleventh Judicial Circuit, and Judge Paul D. Barns.

The publishers wish to express appreciation for the cooperation and assistance received from the Honorable Guyte P. McCord, former Clerk of the Supreme Court of Florida, the Honorable Sid J. White, present Clerk of the Supreme Court of Florida, and Mrs. Ella Wilkins, Deputy Clerk, during the examination of the records in the Clerk's office.

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INSTRUCTIONS

1965 CUMULATIVE SUPPLEMENT

Volume 1

PART I

General Law of Instructions

I. INTRODUCTORY.

§ 1. Office of Instructions.

See notes 1, 2.

1. Board of Public Instruction of Dade County v. Everett W Martin & Son (Fla.), 97 So. (2d) 21.

2. Board of Public Instruction of Dade County v. Everett W. Martin & Son (Fla.), 97 So. (2d) 21.

II. DUTY TO INSTRUCT.

§ 3. Upon Request.

See notes 17, 18, 28.

17. Common Law Rule 39, cited in note in original edition, has been superseded by Rule 2.6, 1954 Florida Rules of Civil Procedure, which has provisions similar to those of the old rule.

18. Section 54.19, F. S. '53, cited in note in original edition, was repealed by Fla. Laws 1955, ch. 29737, § 1.

28. Section 54.19, F. S. '53, cited in note in original edition, was repealed by Fla. Laws 1955, ch. 29737, § 1.

§ 5. Duty to Instruct in Absence of Request.

It is the duty of the trial court to instruct the jury on all the law applicable to the facts proven in a case,[38] and a refusal to do so when asked would, of course, be error.[39] However, the Supreme Court has said that, if the trial court fails or omits

to charge on the law applicable to some phase of the case, a party cannot avail himself of this omission without first requesting the court to charge on the point or points desired to be submitted to the jury.[40] It has been repeatedly held that, if a party wishes to avail himself of the omission of the court to charge the jury on any point of the case, he must ask the court to give the instruction desired; otherwise he will not be permitted to assign it as error.[41] But the Supreme Court has made an exception to this general rule. It has held that the trial court, in a criminal case, was under a duty to instruct on the weight to be accorded to a confession, whether requested to so charge or not, and that it was reversible error not to have done so even in the absence of a request.[41a] Later cases on the particular point, however, have been distinguished from this decision on the facts.[41b] In order for a party to assign as error the omission of the trial court to instruct the jury on a particular phase of the law, the matter should be called to the attention of the trial judge in an appropriate manner.[42] And where a party did not formulate any charge and request the same in writing, he is not in position to complain.[43]

38. Fred Howland, Inc. v. Morris, 143 Fla. 189, 196 So. 472; Milton v. State, 140 Fla. 617, 192 So. 219; Rawlins v. State, 40 Fla. 155, 24 So. 65; Blount v State, 30 Fla. 287, 11 So. 547.

39. Milton v State, 140 Fla. 617, 192 So. 219; Rawlins v. State, 40 Fla. 155, 24 So. 65. See § 3.

40. Fred Howland, Inc. v. Morris, 143 Fla. 189, 196 So. 472; Blount v. State, 30 Fla. 287, 11 So. 547.

41. Fred Howland, Inc. v. Morris, 143 Fla. 189, 196 So. 472; Milton v. State, 140 Fla. 617, 192 So. 219; Adelhelm v. Dougherty, 129 Fla. 680, 176 So. 775; Cason v. State, 86 Fla. 276, 97 So. 720; Witt v. State, 80 Fla. 38, 85 So. 249; Hicks v. State, 75 Fla. 311, 78 So. 270; Cross v State, 73 Fla. 530, 74 So. 593; Padgett v State, 64 Fla. 389, 59 So. 946; Pugh v State, 55 Fla. 150, 45 So. 1023; Lindsey v. State, 53 Fla. 56, 43 So. 87; Clemmons v. State, 43 Fla. 200, 30 So. 699; Shiver v State, 41 Fla. 630, 27 So. 36; McCoy v. State, 40 Fla. 494, 24 So. 485; Rawlins v. State, 40 Fla. 155, 24 So. 65; Blount v. State, 30 Fla. 287, 11 So. 547; Reed v. State, 16 Fla. 564.

41a. Harrison v. State, 149 Fla. 365, 5 So. (2d) 703.

41b. For these cases and the distinction commonly found, see note to § 340.

42. Milton v. State, 140 Fla. 617, 192 So. 219. See Copeland v State, 41 Fla. 320, 26 So. 319; Camp Phosphate Co. v. Stokes (Fla.), 41 So. (2d) 340; Stanley v. State, 93 Fla. 372, 112 So. 73.

43. Prevatt v. State, 135 Fla 226, 184 So. 860

§ 7. Amendment, Qualification or Omission of Requested Instructions.

See note 62.

62. Section 54.19, F. S. '53, cited in note in original edition, was repealed by Fla. Laws 1955, ch. 29737, § 1.

In the situation where a trial court, after having ruled that a

certain requested charge would be given, inadvertently left out the last sentence in delivering that charge, it has been held that his failure to give a part of it amounted to a denial of the request for that part. Under those circumstances it was held to be the duty of counsel to call such omission to the attention of the court in a manner in which the court would be duly informed of what had occurred, and thus would have an opportunity to submit or resubmit his charge to the jury with the sentence which had been left out and which he had intended to give.[63a]

63a. Butler v. Watts (Fla. App. 3rd Dist.), 103 So. (2d) 123.

§ 8. Presumption That Instructions Given.

See note 64.

64. Where it was not shown that refused instructions were not embraced in the charges actually given and it appeared that other instructions not contained in the record were given, the Supreme Court would be bound to presume that the requested instructions were properly refused, because embraced, in substance, in the charge given. Younglove v. Knox, 44 Fla. 743, 33 So. 427. See also, Sammis v. Wightman, 31 Fla. 10, 12 So. 526.

Without respect to whether a requested charge correctly stated principles of law applicable to the facts in proof, the question of whether the charge should have been given could not be considered, because the charge given by the court was not contained in the record. Presumably the charge given correctly instructed the jury upon the law of the case. If so, the refusal to give the requested instruction was not error. Crawford v. State. 86 Fla. 94. 97 So. 288.

§ 9. Repetition of Instructions at Request of Jury.

See note 66.

66. Where a jury returned to the courtroom and requested additional instructions, the trial court did not commit reversible error when it reread plaintiff's requested instruction No. 4 without rereading defendant's requested instruction No. 3. While there is some advantage to the side which is favored by the last instruction of the judge on a point of law, the court said in the instant case that the effect was not sufficiently harmful to justify reversing, as a study of all the instructions given showed that the issues were fairly presented to the jury. Bowser v. Harder (Fla. App. 2nd Dist.), 98 So. (2d) 752.

III. FORM AND REQUISITES.

§ 10. Form.

See note 68.

68. While it is true that this statute [§ 918.10, F. S. 1957] requires the trial judge in a capital case to reduce to writing his instructions to the jury, where the lower court failed to reduce to writing its charges to the jury and appellant did not object to the charges in the form given at any time prior to the jury's retirement but for the first time upon his motion for new trial, no prejudice was shown to have resulted to the appellant and he was deemed to have waived such objection. Coggins v. State (Fla. App. 3rd Dist.), 101 So. (2d) 400.

The jury must get their instructions as to the law of the case from the court and not from their own perusal of books. It is erroneous to allow the jury, after retiring to consider their verdict, to have access to lawbooks of any description.[68a]

68a. Johnson v. State, 27 Fla. 245, 9 So. 208. In this connection, also, it has been held to be error to permit the jury to have the use of a dictionary while deliberating. The provisions of § 919.04, F. S. 1957, which set out in clear language what a jury may take with them to the jury room, do not include a dictionary. Smith v. State (Fla.), 95 So. (2d) 525. But a handbook for jurors was held not to violate § 918.10, F. S. 1957, which specifies the manner of charging the jury, and was not a premature charge, but, on the contrary, was pregnant with sound, sensible advice. Ferrara v. State (Fla.), 101 So. (2d) 797.

See note 69.

69. Section 54.20, F. S. '53, cited in note in original edition, was repealed by Fla. Laws 1955, ch. 29737, § 1.

§ 11. Requisites in General.

See note 84.

84. It is unquestionably true that each party to an action is entitled to have the jury instructed with reference to his theory of the case, where such theory is supported by competent evidence and the instructions are properly requested, and this although such theory may be controverted by evidence of the opposing party. But this does not mean that the court is required to give the instructions in the language chosen by the parties or their counsel, or that they are entitled to the use of any particular language. The court may adopt the requested instruction if it so chooses, but unquestionably has the right to phrase instructions in language of its own, or as it deems applicable, so long as the charge or instruction is full, fair and applicable to the facts in the case. Luster v. Moore (Fla.), 78 So. (2d) 87.

§ 12. Must Be Correct as to Law and Fact.

See note 91.

91. When stating to a jury what elements of proof will warrant a conviction for a particular crime concerning which the court is charging the jury, the trial judge must be careful to so state the essential elements indispensable to a conviction, that no less proof than proof of all of them will be considered by the jury as warrant for a finding of guilty. Finch v. State, 116 Fla. 437, 156 So. 489.

In criminal cases it is an inherent and indispensable requisite of a fair and impartial trial under the protective powers of the federal and state Constitutions, as contained in the due process of law clauses, that a defendant be accorded the right to have a court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence.[91a]

91a. Gerds v. State (Fla.), 64 So. (2d) 915.

See notes 92, 98.

92. Bessett v. Hackett (Fla.), 66 So. (2d) 694.

98. Although not considered model procedure, a trial court's alleged error in failing to instruct correctly on the issues was held

properly reserved for appeal as a ground for motion for a new trial where defendant's substantial rights were prejudiced, i.e., "That the court has misdirected the jury on a matter of law" [§ 920.05(1)(g). F. S. 1957], despite his failure to draw the trial court's attention to the necessity for a correct instruction. Fiske v. State (Fla. App. 2nd Dist.), 106 So. (2d) 586.

§ 15. Must Be Applicable to Case.

See note 16.

16. Charges were correctly refused which would have been merely abstract propositions of law under the facts and circumstances of the case. Olsen v. State (Fla.), 75 So. (2d) 281.

§ 16. Must Be Founded on Evidence.

See notes 20, 25, 26, 30.

20. Stores v. Hussey (Fla. App. 1st Dist.), 100 So. (2d) 649.
25. Kimbro v. Metropolitan Life Ins. Co. (Fla. App. 3rd Dist.), 112 So. (2d) 274.
26. Smith v. Whidden (Fla.), 87 So. (2d) 42.
30. Smith v. Whidden (Fla.), 87 So. (2d) 42.

Since the law is settled that instructions to the jury must be predicated upon facts in proof and a charge on an issue as to which evidence has not been submitted will constitute error, it was not error for the trial judge to grant a new trial where such a charge has been given. Bessett v. Hackett (Fla.), 66 So. (2d) 694.

Where the evidence is inconclusive or conflicting, the failure of the trial judge to provide a charge which lays down standards for the jury to follow under varying permissible views of the evidence constitutes reversible error.[32a]

32a. Holley v. Kelley (Fla.), 91 So. (2d) 862; Schweikert v. Palm Beach Speedway (Fla.), 100 So. (2d) 804.

§ 18. Undue Prominence to Particular Matters.

See notes 40, 44.

40. Where it appeared that, in repeating one of the charges given to meet the argument of counsel for the defendant as to the law applicable to the case, the charge so singled out and repeated gave emphasis to an incomplete statement of the law that reasonably might have influenced the jury in finding a verdict of guilt, the case was reversed for a new trial. McCray v. State, 89 Fla. 65, 102 So. 831.

A court should not in its charge give undue prominence to one phase of the case. Orme v. Burr, 157 Fla. 378, 25 So. (2d) 870.

It is quite true that in many cases charges contain repetitions and at times such repetitions may unnecessarily emphasize a particular rule of law advantageous to one of the parties. It is frequently true that the record, and particularly the charges requested by one party or the other, discloses an over-trial of a case and where such conditions result in a miscarriage of justice, the judgment should be reversed and set aside. Dowling v. Loftin (Fla.), 72 So. (2d) 283.

Where a jury returned to the courtroom and requested additional instructions and the trial court reread plaintiff's requested instruction No. 4 without rereading defendant's requested instruction No. 3, this was not reversible error even though there is some advantage to the side favored by the last instruction of the judge on a point of

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It is quite true that in many cases charges contain repetitions and at times such repetitions may unnecessarily emphasize a particular rule of law advantageous to one of the parties. It is frequently true that the record, and particularly the charges requested by one party or the other, discloses an over-trial of a case and where such conditions result in a miscarriage of justice, the judgment should be reversed and set aside. Dowling v. Loftin (Fla.), 72 So. (2d) 283.

Where a jury returned to the courtroom and requested additional instructions and the trial court reread plaintiff's requested instruction No. 4 without rereading defendant's requested instruction No. 3, this was not reversible error even though there is some advantage to the side favored by the last instruction of the judge on a point of

law. The instructions as a whole were held to present the issues fairly, thus obviating any harmful effect. Bowser v. Harder (Fla. App. 2nd Dist.), 98 So. (2d) 752.

44. Martin v. Johns (Fla.), 78 So. (2d) 398; Chambers v. Nottebaum (Fla. App. 3rd Dist.), 96 So. (2d) 716.

§ 20. Confused and Misleading Instructions.

See note 48.

48. Fla. Power & Light Co. v. McCollum (Fla.), 140 So. (2d) 569.

§ 21. Must Not Invade Province of Jury.

See notes 63, 65, 71, 75.

63. Western Union Telegraph Co. v. Michel, 120 Fla. 511, 163 So. 86; Rollins v. Katzen (Fla.), 77 So. (2d) 791.

65. No question is better settled under our system of jurisprudence than that the trial court is without power to invade the province of the jury in its determination of questions of fact. On the other hand, when the trial court concludes that in the determination of questions of fact the jury did not consider the evidence or the charges of the court with reference thereto sufficiently or that it ignored material evidence pertinent to the interest of either party, it becomes his duty to grant a new trial. Atlantic Coast Line R. Co. v. McIlvaine, 121 Fla. 78, 163 So. 496.

71. Bessett v. Hackett (Fla.), 66 So. (2d) 694.

75. There is no invasion by a court of the province of the jury if, after hearing all of the testimony in the case, there is uncontradicted evidence to support the plaintiff's position, and any other verdict rendered would, in his opinion of the controlling law, have to be set aside upon motion for new trial. It is likewise sound procedure for the judge to charge the jury the amount the verdict should recite, if it is shown by competent and uncontradicted evidence. Hillsborough County v. Highway Engineering & Constr. Co., 145 Fla. 83, 199 So. 499.

IV. TIME OF GIVING.

§ 23. Generally.

See note 80.

80. Common Law Rule 39, cited in note in original edition, has been superseded by Rule 2.6, 1954 Florida Rules of Civil Procedure, which has provisions similar to those of the old rule.

V. REPETITION OF INSTRUCTIONS.

§ 24. Generally.

See note 83.

83. Tooley v. Margulies (Fla.), 79 So. (2d) 421.

VI. INTERPRETATION AND CONSTRUCTION.

§ 26. Generally.

The reviewing court will assume that an instruction met the facts and conditions as they existed at the time the instruction

was given. Otherwise a litigant might inject error into the record and take advantage of it, which he should not be permitted to do.[3a] Where charges do not appear to be unfair to the party complaining, the court will assume that the charge as a whole fairly submitted the issue and the question of damages to the jury.[3b]

3a. Roe v. Henderson, 139 Fla. 386, 190 So. 618.
3b. Tatum Bros. Real Estate & Investment Co. v. McSweeney, 78 Fla. 89, 82 So. 605.

§ 27. Must Be Construed as a Whole.

See notes 5, 6, 9, 10, 12, 13, 15.

5. Martin v. Tindell (Fla.), 98 So. (2d) 473.
It is the duty of the reviewing court to examine not one but all of the charges and where an examination of the entire record, including all of the charges given, does not show that the trial resulted in a miscarriage of justice, the burden of showing reversible error has not been carried. Dowling v. Loftin (Fla.), 72 So. (2d) 283.
6. Martin v. Johns (Fla.), 78 So. (2d) 398; Chambers v. Nottebaum (Fla. App. 3rd Dist.), 96 So. (2d) 716.
A single charge need not contain all of the law relating to the particular subject treated, and a refusal of the trial judge to give a requested charge, or group of charges dealing with a particular topic or phase of the case, will not support an assignment of error when the charges given by the court on that subject, taken together and read as a whole, are found to have fully and clearly instructed the jury on the law applicable to the case, in that regard. Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.
9. Rainbow Enterprises v. Thompson (Fla.), 81 So. (2d) 208; Chambers v. Nottebaum (Fla App. 3rd Dist.), 96 So. (2d) 716.
10. Chambers v. Nottebaum (Fla. App. 3rd Dist.), 96 So. (2d) 716.
12. Martin v. Johns (Fla.), 78 So. (2d) 398; Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.
13. Martin v. Tindell (Fla.), 98 So. (2d) 473.
15. Smith v. Tantlinger (Fla. App. 2nd Dist.), 102 So. (2d) 840.

§ 30. Error in Isolated Expressions.

See notes 21, 23.

21. Martin v. Johns (Fla.), 78 So. (2d) 398.
23. Chambers v. Nottebaum (Fla. App. 3rd Dist.), 96 So. (2d) 716.

VII. CURATIVE EFFECT OF INSTRUCTIONS.

§ 32. On Incomplete Instructions.

See note 32.

32. Martin v. Johns (Fla.), 78 So. (2d) 398; Chambers v. Nottebaum (Fla. App. 3rd Dist.), 96 So. (2d) 716.

§ 33. On Improper Admission of Evidence.

See note 35.

35. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

VIII. APPEAL AND ERROR.

§ 34a. Generally.

The Supreme Court of Florida is always reluctant to interfere with the ruling of a judge when he decides what charges he should give to advise the jury of the law of the case as he is required to do by § 54.17, F. S. 1957, after the conference held pursuant to Rule 2.6(b), 1954 Fla. Rules of Civil Procedure.[39a]

39a. Falnes v. Kaplan (Fla.), 101 So. (2d) 377.

§ 35. Harmless Error.

See notes 40, 59.

40. For provisions of the harmless error statute, see § 54.23, F. S. 1957, in place of § 54.5 cited in note in original edition.

59. Roe v. Henderson, 139 Fla. 386, 190 So. 618; Arsenault v. Thomas (Fla. App. 3rd Dist.), 104 So. (2d) 120.

§ 36. Exceptions, Objections and Assignments of Error.

See notes 66, 67, 69, 70.

66. Common Law Rule 39, cited in note in original edition, has been superseded by Rule 2.6, 1954 Florida Rules of Civil Procedure, which has provisions similar to those of the old rule.

67. Section 54.21, F. S. '53, cited in note in original edition, was repealed by Fla. Laws 1955, ch. 29737, § 1.

69. Common Law Rule 39, cited in note in original edition, has been superseded by Rule 2.6, 1954 Florida Rules of Civil Procedure, which has provisions similar to those of the old rule. See Board of Com'rs of State Institutions v. Tallahassee Bank & Trust Co. (Fla. App. 1st Dist.), 108 So. (2d) 74.

Where the required procedure with reference to instructions to the jury was strictly complied with, a conference was had with the trial judge by the attorneys representing the respective parties, after which they were notified of the instructions to be given and at the proper time the trial judge instructed the jury, and no complaint was made until the filing of a motion for new trial, the attempt to raise a question of alleged error in the instructions for the first time in the motion for new trial, under the circumstances shown, was too late. Berger v. Nathan (Fla.), 66 So. (2d) 278.

While it is true that this statute requires the trial judge in a capital case to reduce to writing his instructions to the jury, where the lower court failed to reduce to writing its charges to the jury and appellant did not object to the charges in the form given at any time prior to the jury's retirement but for the first time upon his motion for new trial, no prejudice was shown to have resulted to the appellant and he was deemed to have waived such objection. Coggins v. State (Fla. App. 3rd Dist.), 101 So. (2d) 400.

It was pointed out that defendants failed to object to the giving of the charge at the conference called by the Court to settle the charges at the close of the evidence, in compliance with Rule 2.6(b), 1954 Florida Rules of Civil Procedure. As this rule provides that error may not be assigned without objection to its giving at that time, the Court declined to consider the point. Smith v. Tantlinger (Fla. App. 2nd Dist.), 102 So. (2d) 840.

In the situation where a trial court, after having ruled that a cer-

tain requested charge would be given, inadvertently left out the last sentence in delivering that charge, it has been held that his failure to give a part of it amounted to a denial of the request for that part. Since no objection was made to this "denial" or omission to give the charge or part of the charge at the time it occurred, nor was the fact of the omission called to the court's attention at that time and counsel's later statements to the court were not sufficient to inform him adequately of what had happened, the court concluded that no proper objection was made and that there was not good reason upon which to base a demand for a retrial, when the situation could have been cured by counsel through the aforestated natural procedure. Butler v. Watts (Fla. App. 3rd Dist.), 103 So. (2d) 123.

70. Hodges v. State (Fla. App. 2nd Dist.), 107 So. (2d) 794.

Where appellant failed to object to any charge given by the trial judge and failed to request a charge upon the issue in question, the trial judge could not be held in error. J. A. Cantor Associates, Inc. v. Blume (Fla. App. 3rd Dist.), 106 So. (2d) 603.

While it is the duty of the court to hold such a conference, counsel may not sit idly by on the court's failure so to do and then take advantage of such failure, when it may be advantageous after the jury verdict, to make such complaint. Thus, where the record failed to disclose any request for a conference but only that, after instructions to the jury were given and the jury had retired to consider its verdict, counsel then for the first time noted an exception because of the court's failure to hold such conference, this came too late.[71a]

71a. Luster v. Moore (Fla.), 78 So. (2d) 87.

See notes 73, 74, 75.

73. Nelson v. State (Fla.), 97 So. (2d) 250; Townsend v. State (Fla. App. 1st Dist.), 97 So. (2d) 712; Clinton v. State (Fla. App. 2nd Dist.), 100 So. (2d) 82; Williams v. State (Fla. App. 2nd Dist.), 109 So. (2d) 379.

After referring to the provisions of § 918.10(4), F. S. 1957, quoted in the text in the original edition, and § 924.32, F. S. 1957, which provides inter alia that the appellate court shall "review all instructions to which an objection was made and which are alleged as a ground of appeal," and that "the court may also in its discretion, if it deems the interests of justice to require, review any other things said or done in the cause which appears in the appeal papers including instructions to the jury," which statute is tracked by Rule 6.16(a), Florida Appellate Rules, the District Court of Appeal of Florida, First District, noted that the quoted provisions of § 924.32 and Rule 6.16(a) are in direct conflict with § 918.10(4). Giving effect to and reconciling the plain language of § 918.10(4) with the quoted portion of § 924.32 and the related portion of Rule 6.16, the District Court of Appeal held that the circuit courts when sitting as courts of appeal have unassailable discretion to review or not to review charges to the jury as to which no objection was interposed at the trial. Townsend v. State (Fla. App. 1st Dist.), 97 So. (2d) 712. Rule 6.16(a), Florida Appellate Rules (effective July 1, 1957), provides in part that "The court shall also review all instructions to which an objection was made and which are alleged as a ground of appeal, and the sentence when there is an appeal therefrom. The court may also in its discretion, if it deems the interests of justice to require, review any other things said or done

in the cause which appear in the appeal record, including instructions to the jury." See also Burnette v. State (Fla.), 157 So. (2d) 65.

Where it was contended that the Court committed error in failing to call for a conference with counsel to settle the question of instructions to be given prior to actual charge of the jury as required by Common Law Rule 39(b), [now Rule 2.6(b), 1954 Florida Rules of Civil Procedure] or § 918.10(4), F. S. 1951, 1957, and the Court's refusal to give such instructions was not substantial error and counsel had stated that he had no requested instruction, no useful purpose could have been served by holding a further conference with the attorneys for the respective parties. Appellant was, therefore, prohibited from assigning as error the action on the part of the trial judge. Guarino v. State (Fla.), 67 So. (2d) 650.

Where a question relating to instructions and presented on appeal was not called to the attention of the trial court nor ruled on by him at any time, it will not be considered by the appellate court. Everett v. State (Fla.), 97 So. (2d) 241.

74. Jackson v. State (Fla. App. 2nd Dist.), 107 So. (2d) 247.

Although not considered model procedure, a trial court's alleged error in failing to instruct correctly on the issues was held properly reserved for appeal as a ground for motion for a new trial where defendant's substantial rights were prejudiced, i.e., "That the court has misdirected the jury on a matter of law" [§ 920.05(1)(g), F. S. 1957], despite his failure to draw the trial court's attention to the necessity for a correct instruction. Fiske v. State (Fla. App 2nd Dist.), 106 So. (2d) 586.

75. Guarino v. State (Fla.), 67 So. (2d) 650; Nelson v. State (Fla.), 97 So. (2d) 250; Williams v. State (Fla. App. 2nd Dist.), 109 So. (2d) 379.

Where there was no request contained in the record for a particular charge and no objection to the court's refusal to give it was shown, it was too late to raise the question on a motion for new trial. Fort v. State (Fla.), 91 So. (2d) 637.

Where a charge contended for on appeal was not requested in the trial court, appellant cannot complain that the charge was not given. Everett v. State (Fla.), 97 So. (2d) 241.

But the Supreme Court has made an exception to this general rule. It has held that the trial court, in a criminal case, was under a duty to instruct on the weight to be accorded to a confession, whether requested to so charge or not, and that it was reversible error not to have done so even in the absence of a request.[75a] Later cases on the particular point, however, have been distinguished from this decision on the facts.[75b]

75a. Harrison v. State, 149 Fla. 365, 5 So. (2d) 703.

75b. For these cases and the distinction commonly found, see note to § 340.

See note 76.

76. In connection with language of text in original edition, Rule 3.5(c), Florida Appellate Rules (effective July 1, 1957) which now govern all proceedings in the Supreme Court of Florida and the district courts of appeal, requires that assignments of error point out clearly and distinctly all alleged errors and, where based on charges, etc., that such matters be specifically referred to.

Where an assignment of error refers to the charges in their entirety,

and does not specify the parts or matters complained of therein as contemplated and required of an assignment relating to charges under Florida Appellate Rule 3.5(c), and these matters were not outlined or discussed in the portion of the appellant's brief devoted to argument on the point, it was not a proper assignment of error as required by this rule. Red Top Cab & Baggage Co. v. Grady (Fla. App. 3rd Dist.), 99 So. (2d) 871.

§ 36a. Presumptions.

The general rule is that an appellate court will presume in favor of and not against the action of a trial court.[79a] It will presume that the trial court correctly instructed the jury when the case was submitted[79b] and also where the record fails to include the instructions of the trial judge to the jury upon the law of the case.[79c] Likewise, where the giving of certain charges is assigned as error but the charges do not appear to be unfair to the party complaining, the reviewing court will assume that the charge as a whole fairly submitted the issue and the question of damages to the jury.[79d]

The appellate court will also assume that an instruction met the facts and conditions as they existed at the time the instruction was given. Otherwise a litigant might inject error into the record and take advantage of it which he should not be permitted to do.[79e] And where an instruction is not erroneous as a matter of law, in the absence of evidence contained in the record the court will nevertheless assume that there was evidence as a predicate for the charge given and that there was no evidence for the charges refused.[79f]

The reviewing court will presume that error in a charge was acted upon by the jury in the trial court[79g] and that there was injury, unless from an inspection of the whole record the court can say affirmatively that the jury could not have been misled thereby.[79h]

79a. Sammis v. Wightman, 31 Fla. 10, 12 So. 526. See also, Gibson v. State, 26 Fla. 109, 7 So. 376.

79b. Harby v. Florida East Coast Hotel Co., 59 Fla. 280, 52 So. 193.

79c. J. R. Watkins Co. v. Eatmon, 140 Fla. 144, 191 So. 199. See also, Boswell v. State, 20 Fla. 869.

Where it was not shown that refused instructions were not embraced in the charges actually given and it appeared that other instructions, not contained in the record, were given, the Supreme Court was bound to presume that the requested instructions were properly refused, because embraced in substance in the charges given. Younglove v. Knox, 44 Fla. 743, 33 So. 427. See also Sammis v. Wightman, 31 Fla. 10, 12 So. 526.

The question of whether a requested charge should have been given cannot be considered where the charge given by the court was not contained in the record. Presumably the charge given correctly instructed the jury upon the law of the case. If so, the refusal to give the re-

quested instruction was not error. Crawford v. State, 86 Fla. 94, 97 So. 288.

79d. Tatum Bros. Real Estate & Investment Co. v. McSweeney, 78 Fla. 89, 82 So. 605.

79e Roe v. Henderson, 139 Fla. 386, 190 So. 618.

79f. Sutton v. State, 84 Fla. 98, 92 So. 808 See also, Gibson v. State 26 Fla 109, 7 So 376

79g Henning v. Thompson (Fla.), 45 So. (2d) 755.

79h. Walker v. Parry, 51 Fla. 344, 40 So. 69.

PART II

Approved Instructions

ABORTION.

§ 40a. In General.

If you find from the evidence, beyond a reasonable doubt, that the defendant, Theodore R. Carter, did within two years prior to the date of the filing of the information in this case, on March the 19th, 1962, in Palm Beach County, Florida, unlawfully did attempt to commit abortion on Winifred Holden and furtherance thereof did commit an overt act by inserting an instrument into the body of said Winifred Holden with the intent to procure a miscarriage of the said woman, then you should find the defendant guilty as charged. Now I used the words procure a miscarriage, and let me define what the word procure means, Gentlemen. The word procure may be defined as to obtain by any means, to acquire, gain, get, contrive, to effect or cause. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 40b. Abortion Defined.

An abortion as defined by law is the premature expulsion of the human fetus at any period nearing uterogestation, in other words, when it is in the uterus of a woman, before it is capable of sustaining independent life. Medical science makes a technical distinction between abortion and miscarriage, depending upon the preceding length of time from conception. However, in law there is no ground for any distinction between the two terms, abortion and miscarriage. The Florida statute uses the term miscarriage to define the crime abortion, and said words, abortion and miscarriage, are synonymous under the law. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 41. Intent of Accused.

Gentlemen, it is not necessary that the State allege or prove that the female upon whom the alleged attempt to commit abortion was committed was actually pregnant. The statute prohibits the attempt to procure the miscarriage of a woman by the different means mentioned in the statute, if such an attempt was made by the defendant with an unlawful intent to procure a miscarriage, and it is immaterial whether or not the woman in question was actually pregnant or whether or not an abortion actually occurred.

The gist of the offense of an abortion or an attempt to commit an abortion is the intent, if any, on the part of the person attempting to administer or administering the method used, or methods, to procure a miscarriage. Carter v. State (record) (Fla.), 155 So. (2d) 787.

Gentlemen, under the law of Florida anyone with the intent to procure a miscarriage of any woman, who unlawfully administers to her, or advises or prescribes for her, or causes to be taken by her any poison, drugs, medicine or other noxious things, or unlawfully uses any instrument or other means whatsoever, with like intent, or with like intent aids or assists therein, if the woman does not die as the consequence thereof, is guilty of the crime known as abortion. Carter v. State (record) (Fla.), 155 So. (2d) 787.

If you believe from the evidence, beyond a reasonable doubt, that the defendant believing Winifred Holden to be pregnant, did attempt to abort her by inserting an instrument into Winifred Holden with intent to cause a miscarriage, then you should find the defendant guilty, and it is immaterial whether the said Winifred Holden was actually pregnant or not or whether a miscarriage was actually produced. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 42. Consent No Defense.

Gentlemen, the fact that the woman who may be involved in the charge involving abortion consented, or attempt abortion—consented to undergo an abortion does not constitute any defense to an information charging a defendant with the crime of attempting to commit an abortion. Her consent, as such, to submit to an abortion should not be taken into consideration by the jury in reaching a verdict. In other words, Gentlemen, if you should find, beyond a reasonable doubt, that all the elements of the crime of attempted abortion, as previously defined to you, and I am also going to define for you the definition of attempt and also give you the definition as to intent, and if you find that all of the elements have been proved, beyond a reasonable doubt, the defendant should not be exonerated by a jury, because of the fact that the woman upon whom the attempted abortion may have been committed, or attempted, gave her consent to the procedure that was used to procure the miscarriage. Carter v. State (record) (Fla.), 155 So. (2d) 787.

ACCOMPLICES AND ACCESSORIES.

§ 58. Principals in First or Second Degrees and Aiders or Abettors.

§ 59. —— In General.

A principal in the second degree is equally guilty with a principal in the first. Where two or more persons are charged jointly with the commission of crime, one as a principal in the first, the other as a principal in the second degree, it is immaterial which of the defendants is shown to have been the principal in the first degree and which are shown to have been merely principals in the second degree. Chacon v. State (record) (Fla.), 102 So. (2d) 578.

If it is charged that "A" committed the crime and that "B" was present aiding and abetting, it is immaterial if the evidence shows that "B" committed the crime and "A" was present aiding and abetting. It is not necessary for the state to prove that each of the co-principals did every one of the acts essential to the consummation of the commission of the crime. Frequently, things are done, not only in crime but elsewhere, piecemeal. One does one, one does something else. But, it all must be part of the whole. Chacon v. State (record) (Fla.), 102 So. (2d) 578.

Where several persons join in the execution of a common criminal purpose, each is criminally responsible for every act done in the execution of that purpose, whether done by himself or by one of his confederates. In the case of a felony, and one of these is a felony and the other three are misdemeanors, which is any crime punishable by imprisonment in the State prison or death—and this is not a death punishment felony—persons who are criminally responsible for the crime are either principals or accessories, depending on whether they were present or absent when the crime was committed. In the case of a misdemeanor, all persons present when a crime is committed are deemed to be principals or co-principals. In the case of a felony, a principal in the first degree is the one who actually perpetrates the crime, either by his own hand or through an innocent agent, while a principal in the second degree is one who did not actually perpetrate the crime, but who was present aiding and abetting another in the commission of a crime. Chacon v. State (record) (Fla.), 102 So. (2d) 578.

Gentlemen of the jury, you are instructed that under the laws of the State of Florida whoever commits any criminal offense against the State, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be com-

mitted is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offense. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

Where two or more persons are charged in the same indictment, such as in the indictment against the defendants in this case, as principals in the first degree, with the commission of a felony, it is permissible to show under such charge that one defendant actually committed the felony and that the other aided, abetted, counseled, hired or otherwise procured such offense to be committed, whether he was or was not actually or constructively present at the commission of such offense, and both may be convicted under such charge and proof. Therefore, if you find from the evidence that one of the defendants did kill and murder the third Rudi Plauck, while the other defendant aided, abetted, counseled, hired, or otherwise procured such offense to be committed, even though he was not actually or constructively present, then you may find such second defendant guilty of the same crime as the defendant who did actually kill and murder the said Rudi Plauck. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

Under the law of this State when two persons are charged in the same count of an indictment as principals, as in this case, it is permissible for the prosecution to introduce evidence under such charge that one defendant actually committed the offense charged in the indictment and that the other was present, aiding and abetting in the commission thereof, and both may be convicted under such charge provided the proof offered in support thereof convinces the jury beyond any reasonable doubt. Where two or more persons combine to commit an unlawful act, each is criminally responsible for the acts of his associates committed in furtherance of the common design. Roberts v. State (record) (Fla.), 167 So. (2d) 817.

§ 60. Principals in Second Degree and Aiders or Abettors.

§ 61. —— Actual Presence Not Required.

A principal in the second degree may be present either actually or constructively. Actual presence such as to make him an eye or ear witness is not necessary if he were sufficiently near to render assistance in the commission of a crime, or in escaping after its commission, and was assenting to the commission of the crime. Chacon v. State (record) (Fla.), 102 So. (2d) 578.

§ 65. Evidence.

§ 66. —— Verdict May Be on Uncorroborated Testimony of Accomplice but Such Testimony Should Be Received with Caution.

The court instructs the jury that the testimony of an accomplice must be received with the greatest caution. The jury should pass upon the weight to be given such evidence and when such evidence is uncorroborated it should be carefully weighed by the jury with great caution. But, if such evidence carries conviction to the minds of the jury of the guilt of the accused beyond every reasonable doubt, then the jury should give to such evidence the same effect as would be allowed to a witness who is in no way implicated in the event. Hall v. State (record) (Fla.), 66 So. (2d) 863.

The state has offered into evidence here testimony of accomplices, that is to say, testimony of witnesses who have admitted their guilty participation in the crimes charged against these two defendants, and in that connection the Court charges you that the testimony of an accomplice is competent evidence to be considered by the jury and that the credibility of such evidence and testimony of such accomplice is for the jury to pass upon as you do upon the credibility of any other witness in the case. However, although the testimony of an accomplice will sustain a verdict of conviction even though uncorroborated by other testimony, yet you, the jury, should receive such testimony with great caution. However, if in your minds such testimony carries conviction, that is to say, if you find it worthy of belief and you are convinced of the truth of it, then you should give it under those circumstances the same effect as you would allow to a witness who is in no way implicated in the offense. In further connection with that, the Court charges you that when a witness takes the stand and admits either in his testimony or by a previous plea of guilty to the offense as to which the defendant is charged, such witness is known in the law as an accomplice or one who admits that he has been a party to the crime. His testimony is therefore subject to suspicion and for that reason you should scrutinize the testimony of such a witness very closely and accept it with caution, for the purpose of determining whether or not it was molded and colored to shift the blame to some other person or persons, and thus further the interest of the guilty accomplice, or whether or not it was colored and molded by such accomplice to save and protect himself; whether or not it was given by the accomplice in the hope of leniency with respect to the penalty to be imposed upon such accomplice either now or in the future for the consequences of the crime for which such witness stands convicted. In further connection with that, the Court charges you that in weighing the evidence

of a witness you are entitled to take into consideration his interest, if any, in the case or in the outcome of the case, and should you believe from the evidence that any witness or witnesses who have taken the stand and who have admitted their guilty participation in the crime charged have been promised either directly or indirectly any immunity or leniency, or have been led to hope for immunity or leniency in consideration of testifying for the state in the case you should take that fact into consideration, if you find it to be a fact, in weighing the testimony of such accomplice. Olsen v. State (record) (Fla.), 75 So. (2d) 281.

We have in this case the testimony of two state witnesses who admitted their own complicity in a kindred offense to the one charged here. They are known as accomplices. The testimony of an accomplice is competent evidence and the credibility of such accomplice is for the jury to pass upon as they do that of any other witness. While the testimony of an accomplice will sustain a verdict of guilty, even if uncorroborated, yet, the testimony of an accomplice should be received with great caution; but if the testimony carries conviction and the jury believe it is true, they should give it the same effect as they would allow to that of a witness in nowise implicated in the offense. Albano v. State (record) (Fla.), 89 So. (2d) 342.

The Court instructs you further, gentlemen, that the testimony of an accomplice is competent evidence, and the credibility of such accomplice is for the jury to pass on, as they do any other witness; but the testimony of an accomplice must be received with great caution, but if the testimony carries conviction, and the jury is convinced beyond and to the exclusion of every reasonable doubt of its truth, they should give it the same weight as that of any other witness. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

ACCORD AND SATISFACTION.

§ 67a. In General.

To the defense of accord and satisfaction and full settlement, which are defenses that the defendant has put up, the plaintiff has filed a reply which, in substance, sets up an admission that the father of the plaintiff received the sum of $2,500 in payment for the injuries, but alleges that at the time the alleged settlement was made the plaintiff had not employed an attorney, and

that from the time of the accident and for a period of more than twenty-four months thereafter, the plaintiff was rendered mentally incompetent as a result of the accident; that he had no personal knowledge of the settlement; that the defendant knew or had reasonable cause to believe that the plaintiff was incompetent at the time of the alleged settlement; that the consideration therefor was wholly inadequate. So, gentlemen, what you have to determine primarily, I think, is, first, whether or not there was a binding settlement, and if you find that there was, of course that will end the case. The defendant then would be entitled to a verdict at your hands if you find from the law and the facts in the case that there was a complete settlement. Vasquez v. Simms (record) (Fla.), 75 So. (2d) 783.

§ 69. Burden of Proof.

This defense of settlement is what we call an affirmative detense. The plaintiff comes along and sets up these defenses to avoid this receipt and settlement for $2,500; so, whenever a party files an affirmative defense of any kind, whoever files it is under the rule of proving it by a fair preponderance of the evidence. Vasquez v. Simms (record) (Fla.), 75 So. (2d) 783.

The plaintiff has admitted receiving the sum of $2,500, and alleged that he knew nothing about the settlement, that he did not employ an attorney, and that at the time of the settlement he was mentally incompetent; that the defendant and his agent knew or had reasonable grounds to believe that the plaintiff was mentally incompetent, and that the consideration of $2,500 was wholly inadequate. That is the defense in regard to the alleged settlement. Now, the burden is on the plaintiff to prove this, it being an affirmative defense—to prove by a fair preponderance of the evidence that he knew nothing about the settlement or nothing about the attorney and that he was mentally incompetent on December 13, 1946, as a result of the accident, and that the defendant or his agent knew or had reasonable cause to believe that the plaintiff was mentally incompetent all of that time, and that the consideration of $2,500 is wholly inadequate. If you find that that has been established by a fair preponderance of the evidence, then in that event the release would not be a defense and the plaintiff would be entitled to recover if he has otherwise proved the elements of his claim. If the defense, this defense, is not established by a fair preponderance of the evidence, then, of course, the release would be binding on the plaintiff. If you find that what he has set up about the release in his reply is true, then the release would not be binding on him. Vasquez v. Simms (record) (Fla.), 75 So. (2d) 783.

§ 69a. Settlement Amount to Be Credited Defendant Where Damages Awarded Plaintiff.

In this case, gentlemen, it has been admitted that there was a settlement in the sum of $2,500. Thus, if you find that the plaintiff is entitled to recover, then to whatever amount of damages you may award, the defendant is entitled to a credit of this amount, $2,500. Vasquez v. Simms (record) (Fla.), 75 So. (2d) 783.

ADVERSE POSSESSION.

I. REQUISITES OF ADVERSE POSSESSION.

§ 81. Possession and Occupation.

§ 87a. —— Laying Railroad Track and Operating Trains.

If you find from the evidence that the defendant in the year 1882, or more than seven years before the beginning of this suit, under a claim of right, laid its track on the land in question, and, from the time of laying the track until the beginning of the suit, visibly, openly, and notoriously used the said track for the daily passing and repassing of its trains without the consent of the owners of the land, then such use of the land by the railway company has been adverse to the true owner, and the railway company has acquired the permanent right to continue such use, irrespective of the question of title. Florida Southern R. Co. v. Loring, 51 F. 932, holding that it was error to refuse to give the foregoing charge.

ALIBI.

§ 110. Accused Entitled to Benefit of Doubt.

For case again giving the 1st instruction in this section in original edition, see Irvin v. State (record) (Fla.), 66 So. (2d) 288.

For case again approving the 4th instruction in this section in original edition, see McDuffee v. State, 55 Fla. 125, 46 So. 721.

The defense of an alibi has been offered, which means that the defendant was not there when the house was set fire to, and consequently did not do it. If from the evidence in the case you have a reasonable doubt as to the truth of the alibi, that is to say, whether the defendant was there or not, then you should

give him the benefit of such reasonable doubt and find him not guilty. Knight v. State, 60 Fla. 19, 53 So. 541.

One of the defenses interposed by each of the defendants is what is known as an alibi. This means that each defendant claims that he was in another and different place than where the alleged crime was committed at the time the alleged crime was committed. In this connection, you are instructed that if you have a reasonable doubt of the presence of either defendant at the time and place where the alleged crime was committed, you will acquit that defendant. It is not necessary that either defendant shall prove an alibi beyond a reasonable doubt, but it is sufficient if the evidence offered to prove the alibi raises a reasonable doubt in the minds of the jury as to whether or not that defendant was as the scene of the crime and participated therein, and in such case it is the duty of the jury to acquit that defendant. Roberts v. State (record) (Fla.), 167 So. (2d) 817.

ANIMALS.

§ 113a. Willful and Malicious Killing, Maiming or Disfiguring of Animals.

§ 113b. —— In General.

In order to convict the defendants in this case, the state must prove that these defendants in Duval County, Florida, either on the date charged which is May 17th, 1938, or on some other date within two years before this information was filed, which was on June 21, 1938, did unlawfully and maliciously maim and disfigure a steer, that the steer was the property of one W. J. Bell and next, that the defendants did that, if you find that they did do it, by shooting such steer with a shotgun. The statute on which this information is based requires that the maiming or disfiguring be done willfully and maliciously, and those are essential elements of the charge. Now the term "willful" means intentionally, as distinguished from accidently or inadvertently. The word "maliciously" as used in the statute and this information means the act must have been because of some ill will toward the owner of the animal; however, the court charges you that the Supreme Court of the state has held that if a steer is

maimed as an incident to larceny of the steer, with the intent to unlawfully deprive the owner of his property then that constitutes malice towards the owner. In other words, to make that a little clearer, if the evidence convinces you beyond a reasonable doubt that the defendant willfully maimed or disfigured this steer, and that they did that as an incident to stealing the steer, that is, with the intention of depriving the owner of it permanently, then that would be maliciously done as required by the statute. Oliver v. State (record), 138 Fla. 652, 190 So. 13.

See § 828.07, F. S. 1957. As to larceny of cattle see generally, Larceny (original edition and supplement).

§ 113c. —— Not Proved Where Accused Had Honest Belief in Right to Maim or Disfigure.

The court further charges that if the evidence in this case shows that the two defendants maimed or disfigured this steer in the honest belief that they had the right to do so, or if the evidence raises a reasonable doubt in your minds as to that, then of course it is up to you to acquit the defendants on trial here because in that event the state would not have proved that maiming or disfiguring the steer was done willfully or maliciously. Oliver v. State (record), 138 Fla. 652, 190 So. 13.

§ 113d. Fraudulent Alteration or Change of Marks on Animals.

§ 113e. —— In General.

Gentlemen of the jury, the defendants John Colvin and Marion Hall are on trial charged with having unlawfully marked a hog, the property of one A. C. Daughtry, with intent to claim the same as their own. In order to convict the defendants as charged, you must be convinced by the evidence beyond a reasonable doubt that the offense was committed in Walton County, Florida, within two years prior to the filing of the information which was Nov. 10, 1910, and that the hog was the property of A. C. Daughtry and that it was done with a fraudulent intent to claim the hog. Colvin v. State (record), 62 Fla. 27, 57 So. 193.

See § 817.26, F. S. 1957.

The court charges you that among other things it is proper for you to determine from the evidence in this case, beyond a reasonable doubt, if there was one black sow hog the property of C. B. Chewning in this county, if she had been marked [description of marks], if her marks had been altered and changed from the marks she was in to [description of marks as altered], and if so, then find whether or not such change and alteration had been made by the defendant alone, with Willard

Driggers, or others; and if you find that he did make such change and such alteration in the mark of said sow hog, the property of C. B. Chewning, then find from the evidence in this case whether or not such change and alteration was made with or without the consent of the owner; whether it was done rightly or fraudulently; whether done intentionally with intent to defraud or honestly and in good faith; and whether or not such alteration and change was made with intent to claim the sow hog or was made by accident or misfortune, and if such change and alteration of mark was made in this county and state within the last two years. And in passing upon these questions you should and may take into consideration among other things whether or not the hog in question was penned, and if so where and in what kind of place; whether she had been fed, upon what and by whom; who made claim to the said hog and under what circumstances; what was said and done at the time and place of the making such claim as well as who was present. In fact you may and you ought to take into consideration every fact and every circumstance established by the evidence in this case to your satisfaction beyond a reasonable doubt to that end that you rightfully by your verdict settle the question as to the guilt or innocence of the defendant. Driggers v. State (record), 90 Fla. 324, 105 So. 841.

§ 113f. —— Inference from Possession of Animal Recently Re-marked Where No Reasonable Explanation.

You are charged that, when a person is found in the exclusive possession of an animal recently taken and re-marked, the jury may infer from that fact that such person was the perpetrator of the fraudulent act, unless such person gives directly a reasonable account of how he came into possession of the animal, the marking of which had recently been changed and in his possession, or such an account as would raise a reasonable doubt in your minds of such person's guilt. Colvin v. State (record), 62 Fla. 27, 57 So. 193.

In a criminal case in which the indictment alleges the fraudulent alteration of the mark of an animal of another with intent to claim the same—if the evidence satisfies the jury trying the case beyond a reasonable doubt that the defendant was with his associates in the exclusive possession of the animal described in the indictment and that such animal had been recently stolen and his mark recently altered, as alleged in the indictment, unlawfully and fraudulently, and upon being so found in such possession of such recently stolen property with such recently altered mark—the defendant did not give forthwith a reasonable

and creditable account of how come such animal so stolen and with its mark so changed be in his possession or said mark altered, and fails to disclaim possession or explain said changed mark, then the jury may presume that the defendant was the thief and that such mark had been changed by the defendant with intent to claim the same, and if such explanation be given and if it be reasonable and creditable in the opinion of the jury, then the defendant should be acquitted unless the State should by evidence satisfy, [and] the jury trying the case find, that such explanation or disclaimer was false in point of fact, and if this be done then the defendant may be found guilty if the other elements of the offense be proven as required by law to the satisfaction of the jury. Driggers v. State (record), 90 Fla. 324, 105 So. 841.

ARREST.

§ 115. Arrest without Warrant.

§ 116. —— In General.

A peace officer—that's a deputy sheriff, a policeman, or constable, or a sheriff—may arrest without a warrant a person (1) when the person to be arrested has committed a felony or misdemeanor or violation of a municipal ordinance in his presence. In the case of such arrest for a misdemeanor or violation of a municipal ordinance, the arrest should be made immediately or on fresh pursuit. (2) When a felony has, in fact, been committed and he has reasonable ground to believe that the person to be arrested has committed it; or (3) when he has reasonable ground to believe that a felony has been or is being committed and reasonable ground to believe that the person to be arrested has committed or is committing it. Escobio v. State (record) (Fla.), 64 So. (2d) 766.

See § 901.15, F. S. 1957.

§ 117. —— Arrest for Felony.

I charge you, gentlemen of the jury, that under the laws of Florida, it is the duty of a sheriff to arrest without warrant and take into his custody any person whom such sheriff has reasonable grounds to believe, and does believe, has committed a felony. Goodman v. State (record), 132 Fla. 672, 181 So. 892.

The statute empowering officers to arrest without a warrant requires the officers to take into custody without a warrant any person believed upon reasonable ground to have perpetrated a felony, so that if an officer reasonably believed an accused had committed a felony, he was entitled, as an incident to

that arrest, to have searched the man and the search would be a valid search, based upon and subsequent to a lawful arrest. Escobio v. State (record) (Fla.), 64 So. (2d) 766.

§ 119. Resisting Arrest.

§ 119a. —— In General.

You are hereby instructed that when officers make known their official capacity a citizen is bound to submit at least to the extent of ascertaining the charge and the officers' authority. When an officer fails to make known his official capacity, the person accosted has the right to defend himself as a reasonably prudent man would do under similar circumstances, unless it is shown that he actually had knowledge of the officer's official capacity. Mackiewicz v. State (record) (Fla.), 114 So. (2d) 684.

ARSON.

§ 128a. Accused Entitled to Benefit of Reasonable Doubt.

If you should find from the evidence, beyond a reasonable doubt, that the defendant, Charlie Holland, did burn this church, it would be your duty to return a verdict of guilty as charged. On the other hand, if you fail to find from the evidence beyond a reasonable doubt that he burned it, or after a full and fair consideration of all of the testimony you should have a reasonable doubt, or if the testimony should be equally balanced to that extent that you cannot say, beyond a reasonable doubt, that he burned that church, then it would be your duty to return a verdict of not guilty. Holland v. State (record), 129 Fla. 363, 176 So. 169.

See generally, Reasonable Doubt (original edition and supplement).

ASSAULT.

I. GENERAL CONSIDERATION.

§ 129. Definitions.

§ 130. —— In General.

An assault and battery is the use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or degree of violence. Glickstein v. Setzer (record) (Fla.), 78 So. (2d) 374.

An assault and battery is the attempt to offer on the part of one person with force and violence to inflict a bodily hurt upon another. The use of force is a battery. The force coupled with the offer constitutes a battery and makes it assault and battery. Caraker v. State (record) (Fla.), 84 So. (2d) 50.

§ 131. —— Assault.

Simple assault is any attempt to offer with force and violence to do bodily hurt to another wrongfully or intentionally without just cause or excuse from malice or wantonness, with time to do it coupled with the ability to effectuate such intention. Caraker v. State (record) (Fla.), 84 So. (2d) 50.

The court instructs the jury that an assault is an unlawful attempt, or offer, with force and violence to do corporal hurt to another. Upon the part of the person committing the assault there must be an immediate intent coupled with the present ability to apply to the person of another such force, directly or indirectly. Ezzell v. State (record) (Fla.), 88 So. (2d) 280; Land v. State (record) (Fla.), 156 So. (2d) 8.

An assault is any unlawful attempt by force and violence to do injury to the person of another, the person making the attempt having the present ability to commit such injury. To constitute a simple assault there need not be any actual touching or injury, but a mere threat is not enough. There must be some overt act or attempt or the unequivocal appearance of an attempt with force and violence to do an injury which will convey to the mind of the person assaulted a well grounded apprehension for personal injury. That doesn't mean the breaking of a limb or anything of the kind. The touching of a person with an intent to do wrong is not only an assault but it's assault and battery, as well. You do not have to injure a person to have committed an assault. If you make a threatening gesture towards a person without ever touching him, that is an assault if the intent to do harm is present. Gentlemen, as I reflect upon the instruction I first gave you, the definition of an assault, I may have left you with the impression that the state must prove that the defendant had an intention to do physical hurt. If that impression has been left with you, I want to avoid it because the state does not have to prove that and it is not necessary to the proof of this case that he had an intention to hurt her in a physical sense, cause her pain or suffering, in a physical way. There are many ways of hurting people. You can hurt people emotionally. You can destroy their morality. You can injure them in many ways without breaking the skin or causing any physical pain and an assault includes all of those kinds of injuries. Hamilton v. State (record) (Fla.), 88 So. (2d) 606.

An assault is a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present. Any threatening gesture showing, itself or by words accompanying it, an immediate intention coupled with a present ability to commit a battery is an assault. Actual physical contact is not an essential element of an assault. An assault renders the person making the assault liable in damages to the person assaulted. O'Brien v. Howell (Fla.), 92 So. (2d) 608, in which the foregoing instruction, though contained in the record, was not passed upon by the court.

An assault is any intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as to create a well-founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt, if not prevented. O'Brien v. Howell (Fla.), 92 So. (2d) 608, in which the foregoing instruction, though contained in the record, was not passed upon by the court.

§ 132. —— Battery.

A battery is the unlawful use of force or violence on the person of another or any unlawful beating or other wrongful physical violence or constraint inflicted on a person without his consent. The simple touching of a person or his clothes or anything attached to his person, if done in a rude, insolent and angry manner, constitutes a battery for which damages may be recovered. O'Brien v. Howell (Fla.), 92 So. (2d) 608, in which the foregoing instruction, though contained in the record, was not passed upon by the court.

If the assault and battery took place and was a result of the defendant using more force than reasonably necessary in order to eject the plaintiff, then the defendants would be liable and the plaintiff would be entitled to a verdict against one defendant or both defendants O'Brien v. Howell (Fla.), 92 So. (2d) 608. in which the foregoing instruction, though contained in the record, was not passed upon by the court.

II. AS A CRIME.

§ 132a. Indictments and Informations.

§ 132b. —— Degrees of Offense Charged.

Under an indictment of this character, if the evidence justifies it, the jury may find the defendant guilty either of an assault with intent to commit murder in the first degree, or an assault with intent to commit murder in the second degree, an assault with intent to commit manslaughter, an assault and battery, or simple assault. In other words, an indictment drawn as this one is includes not only an assault with intent to commit murder in the first degree, but also these unlawful degrees of the offense which I have mentioned to you. Lindsey v. State (record), 53 Fla. 56, 43 So. 87.

§ 132c. —— Allegations Requiring Proof.

The indictment charges that the offense was committed on the 21st day of June, A. D. 1906, in Santa Rosa County, Florida, but it is not necessary for the State to prove that it was committed the same day laid in this indictment, but it will be sufficient if it is proven that the offense was committed some day within two years immediately preceding the finding of this indictment, but it is not material to prove the exact date alleged in the indictment. Of course, it is also necessary that the State prove the offense was committed in Santa Rosa County, Florida, and also that the assault was committed in the manner and by the means alleged in the indictment, which is by the use of an

open knife, cutting Dove Lindsey, the party whom it is alleged was assaulted, and it must also be proven that the assault was unlawful. Lindsey v. State (record), 53 Fla. 56, 43 So. 87.

§ 132d. Types of Criminal Assaults.

If a man should strike another with an open knife that would be an assault—or if he should strike him with his fists it would be an assault—indeed, it would be an assault and battery. These assaults, if accompanied with other elements, may amount to more than a simple assault or an assault and battery; for instance, if an unlawful assault was committed by a man with a premeditated design to effect the death of the person assaulted, that is an assault with intent to commit murder in the first degree under our law. If the assault was not committed with a premeditated design to effect death, but was committed by an act imminently dangerous to another and evincing a depraved mind, regardless of human life, and with an intention to kill, it would be an assault with intent to commit murder in the second degree. If the assault was committed unlawfully and with an intent to take life, but not with a premeditated design to take life, and not by an act imminently dangerous to another and evincing a depraved mind regardless of human life, it would be an assault with intent to commit manslaughter. If there was merely a striking by the fist or hand or a knife or any other instrument, and the assault was unlawful, it would be an assault and battery. An assault and battery is where the assault is accompanied by a beating, such as by the hand or with an instrument in the hand. Lindsey v. State (record), 53 Fla. 56, 43 So. 87.

See §§ 784.02-784.03, 784.06, F. S. 1957.

§ 132e. Act Must Be Unlawful.

I think I have explained to you, an assault and battery is simply an unlawful assault accompanied by a striking or wounding—striking by the hand or a knife or any instrument, whether a wound was made or not, that would be a battery, and if the assault was unlawful, it would be an assault and battery under our law. The defendant in this case, or any other case, could not be held guilty of any degree of unlawful assault unless his act, if he committed an act, was unlawful; that is to say, unless his act constituting an assault, if there was an assault, was unlawful. Lindsey v. State (record), 53 Fla. 56, 43 So. 87.

§ 132f. But May Be Justifiable or Excusable.

An unlawful assault is one made without justification or excuse, as defined by our statutes, and an assault is justifiable, however, or excusable when the facts are such that had the as-

sault resulted in the death of the person assaulted the homicide would have been justifiable or excusable. Caraker v. State (record) (Fla.), 84 So. (2d) 50.

An assault is justifiable and lawful if committed when a person is resisting an attempt to murder such person or to commit any felony upon him, or in lawful defense of such person, and there shall be reasonable grounds to apprehend a design to commit a felony or to do some great personal injury and there shall be imminent danger of such design being accomplished. And it is excusable when committed by accident and misfortune in doing some lawful act by lawful means with usual ordinary caution and without any unlawful intent, or by accident and misfortune in the heat of passion under any sudden and sufficient provocation, or upon a sudden combat without any dangerous weapon being used and not done in a cruel and unusual manner. Caraker v. State (record) (Fla.), 84 So. (2d) 50.

§ 132g. Lewd, etc., Assault, etc., upon Child.

§ 132h. —— In General.

The essential elements of this offense must be proved beyond a reasonable doubt. The time and the venue must be proved to your satisfaction. The Information was filed January 5, 1955. The time element will have been satisfied if you are satisfied that the events took place in Hillsborough County—that will satisfy the venue—and within the period of two years before the filing of the Information, that will satisfy the time alleged. The remaining elements must be proved beyond a reasonable doubt. They are that he made an assault upon her. An assault will be defined to you. That the recipient of this assault and this fondling, if any there was, was the complaining witness, Sandra Mathis. That she was under 14 years of age and that this assault was done in a lewd, lascivious and indecent manner by placing the hands of the Defendant upon the breasts of the complaining witness without intent to commit rape. All of those things must be proved beyond a reasonable doubt. Hamilton v. State (record) (Fla.), 88 So. (2d) 606.

See § 800.04, F. S. 1957.

§ 132i. —— Consent Immaterial.

Gentlemen, this offense is not one that is cured by consent. It does not make any difference what the proof is. It does not make any difference whether the girl, with respect to consent, whether the girl consented or did not resist, or did not outcry. The offense is the actual doing of the thing and if the thing was done, it is just as effectively done with or without consent. So, the element of consent simply is absent in this type of case. If

the girl had consented to the act, if the act was done, that would not change the situation. Of course, the mother's consent would not enter into the situation one way or the other, at all. Hamilton v. State (record) (Fla.), 88 So. (2d) 606.

§ 132j. —— Intent of Accused.

How do we get at the intent with which things are done? The intent to a thing charged is a necessary and essential element which must be proved by the state beyond a reasonable doubt. Intent is a state or condition of mind and is ordinarily not susceptible of proof by direct or positive evidence. Intent may be inferred if facts have been proved by the evidence produced from which the jury will reasonably infer such intent. In determining whether or not there was an intent to do the thing charged in the information, you may consider whether any method or control or device was used by the accused which in your judgment was reasonably calculated to produce the result, if any, which the accused desired. Hamilton v. State (record) (Fla.), 88 So. (2d) 606.

§ 133. Aggravated Assault.

§ 134. —— In General.

If you should find from the evidence beyond a reasonable doubt that the defendant unlawfully committed an assault upon Ed McWilliams in the manner and by the means charged in the indictment and that he did not have a premeditated design to effect death, and that it was not an act imminently dangerous to another evincing a depraved mind, and that it was not an act of culpable negligence and that the Ford car was a deadly weapon, and he did not have a premeditated design to effect death, it will be your duty to find the defendant guilty of an aggravated assault. Williamson v. State (record), 92 Fla. 980, 111 So. 124.

As to what constitutes deadly weapon, see Weapons, § 1063. As to automobile as deadly weapon, see Weapons, § 1063a.

Aggravated assault is an assault made upon another, an unlawful assault, with a deadly weapon and there not being any premeditated design to effect the death of the person assaulted. That is, the assault must be made with a deadly weapon, that is, any weapon likely to produce death or great bodily hurt. Intent to kill is not an essential element of aggravated assault. No battery is necessary to constitute this offense. Caraker v. State (record) (Fla.), 84 So. (2d) 50.

§ 137. Assault with Intent to Commit Murder or Manslaughter.

§ 138. —— Intent of Accused.

An assault with intent to commit murder in the second degree or an assault with intent to commit manslaughter do not have the element of premeditated design, because when there is a premeditated design accompanying an unlawful assault and the assault was committed in pursuance of that design, then it is an assault with intent to commit murder in the first degree; but if a man has an intention to kill, not a premeditated intention, but an intent to kill at the time he commits the assault, although the intent may have been formed at the very time of committing it, and the assault is committed by an act imminently dangerous to another and evincing a depraved mind regardless of human life, that is an assault with intent to commit murder in the second degree; if it was not committed with a premeditated design, nor by an act imminently dangerous to another and evincing a depraved mind regardless of human life, but there was an intent to kill, although formed at the very time of the assault, and the assault was unlawful and was committed in pursuance of that intent, then it would be an assault with intent to commit manslaughter. Lindsey v. State (record), 53 Fla. 56, 43 So. 87.

Intent to kill in making an assault does not necessarily mean he had a premeditated design or fixed purpose to kill or effect death even a short time before the assault, but means he willfully and unlawfully makes an assault with a deadly weapon which he knows or should know may reasonably result in the death of the person assaulted. Caraker v. State (record) (Fla.), 84 So. (2d) 50.

§ 138a. —— Intent to Kill and Premeditated Design Distinguished.

The highest grades of assaults charged here, that is, an assault with intent to commit murder in the first degree, an assault with intent to commit murder in the second degree, or an assault with intent to commit manslaughter, all require as an essential element an intent to kill, but an assault with intent to commit murder in the first degree requires something more than an intent to kill because there must be the element of premeditated design; a simple intent to kill is not a premeditated design. but that intent to kill must have been thought over and deliberated upon in the mind, before the assault is committed, to that extent that the mind is conscious of a settled and fixed purpose to kill and of the consequences of carrying that purpose into execution—that would be a premeditated design. Lindsey v. State (record), 53 Fla. 56, 43 So. 87.

§ 138b. —— Elements of Premeditated Design.

The law does not undertake to prescribe the length of time it takes to constitute a premeditated design, because the human mind acts very quickly. A design may be premeditated within the eyes of the law where executed only a few moments after it was formed, but the law requires that the design should have been reflected upon and deliberated upon before it was executed, to the extent that the mind is fully conscious of a fixed settled purpose to kill, before it is carried into execution. Whenever that is done, no matter how short the time, providing it is sufficient for the mind to come to this condition I have explained to you, in the eyes of the law, that would be a premeditated design. Lindsey v. State (record), 53 Fla. 56, 43 So. 87.

A premeditated design to effect death is a fully formed, conscious purpose to take human life, formed upon deliberation and reflection entertained in the mind before and at the time the assault was committed if an assault was committed. The law does not prescribe any particular period of time that must elapse between the formation of the premeditated design and its execution in order to determine it a premeditated design. It may exist for only a few moments and yet be premeditated if the party at the time that he entertained the design was so in the possession of his faculties as to know what he was doing and realize the consequences of his act. Williamson v. State (record), 92 Fla. 980, 111 So. 124.

Premeditation means intent before the act, but not necessarily existing any extended time before the act. Premeditation is proven if from all the evidence you gentlemen of the jury may reasonably conclude that there was a fully formed purpose to kill with enough time for thought and that the mind of the accused had become fully conscious of its own design. Caraker v. State (record) (Fla.), 84 So. (2d) 50.

§ 138c. —— Proof of Premeditated Design.

As I have explained to you, premeditation and intent are operations of the mind as to which we cannot obtain positive testimony; therefore the law permits it to be proved by circumstantial evidence. We judge of the person's intentions ordinarily and the law permits you to take these things into consideration in determining whether there was a premeditated design—by the conduct, declarations, or actions of the party who, it is alleged, entertained such a design, and from other facts and circumstances shown by the evidence bearing upon that question and if from the circumstances proven by the evidence, the jury are satisfied beyond a reasonable doubt and to a moral certainty of the ex-

istence of this premeditated design at the time of the unlawful assault, and that the assault was committed in pursuance of such a premeditated design, that is all the law requires as proof of premeditated design; in other words, the jury must be satisfied of the existence of that design beyond a reasonable doubt. Lindsey v. State (record), 53 Fla. 56, 43 So. 87.

§ 139. —— Murder in First Degree.

Under the statute laws of our state whoever commits an assault upon another with a premeditated design to effect the death of such person is guilty of what is known as an assault with intent to commit murder in the first degree. In order that one be convicted of an assault with an intent to commit murder in the first degree, there must have been an unlawful assault and it must have been made from a premeditated design to effect the death of the party assaulted. Williamson v. State (record), 92 Fla. 980, 111 So. 124.

The defendant is on trial before you under an indictment charging him with what is known as an assault with intent to commit murder. Before the defendant can be found guilty under this indictment it is necessary that the jury find from the evidence beyond a reasonable doubt that the offense, if an offense was committed, was committed in Walton County, Florida, and at sometime within two years before this indictment was returned, the indictment having been returned on the 16th day of May last year. The indictment charges that the defendant on the 1st day of April, 1925, with a certain Ford touring car, which said Ford touring car the said Ed Williamson then and there steered, operated and drove, and that he did then and there operate it and drive it upon and against one Ed McWilliams, and that in doing so he acted from and with a premeditated design to effect the death of Ed McWilliams. Williamson v. State (record), 92 Fla. 980, 111 So. 124.

Should you find from the evidence in this case beyond a reasonable doubt that the defendant, Ed Williamson, at any time within two years before the finding of this indictment in this case, from and with a premeditated design, as I have already defined that to you, to effect the death of Ed McWilliams, drove at and upon the said Ed McWilliams, as set forth in the indictment, it would be your duty to return a verdict of an assault with intent to commit murder in the first degree. Williamson v. State (record), 92 Fla. 980, 111 So. 124.

Murder in the first degree—homicide—is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being or when committed in the perpetration of or in the attempt to per-

petrate any arson, rape, robbery, burglary, the abominable crime against nature or kidnapping. This is a charge of assault with intent to commit murder in the first degree. What that means is: if you believe the circumstances were such that had the person assaulted died as a result of that assault the defendant would be guilty of murder in the first degree, then he would be guilty of assault with intent to commit murder in the first degree. Caraker v. State (record) (Fla.), 84 So. (2d) 50.

§ 140. —— Murder in Second Degree.

This information also includes the offense of assault with intent to commit murder in the second degree. If you believe from the evidence beyond a reasonable doubt that the defendant in the manner and by the means alleged in the information unlawfully made an assault upon Joe T. Jennings with the intent to kill him by an act imminently dangerous to him and evincing a depraved mind regardless of human life, although without a premeditated design to effect the death of any particular individual, you should find him guilty of assault with intent to commit murder in the second degree. Caraker v. State (record) (Fla.), 84 So. (2d) 50.

§ 140a. —— Manslaughter.

There is also, as I told you, in this information, assault with intent to commit manslaughter, and if you do not believe that this defendant is guilty of either of the crimes, assault with intent to commit murder in the first degree or assault with intent to commit murder in the second degree, then if you believe from the evidence beyond a reasonable doubt that the defendant in the manner and by the means alleged in the information unlawfully made an assault upon Joe T. Jennings with the intent to kill the said Joe T. Jennings, but not from a premeditated design to take his life and not by an act imminently dangerous to another and evincing a depraved mind regardless of human life, you should find him guilty of assault with intent to commit manslaughter. Caraker v. State (record) (Fla.), 84 So. (2d) 50.

§ 141. Verdict and Conviction.

Of course you understand you can only find him guilty, if you do find him guilty, of such particular assault as I have defined to you as the evidence shows him to be guilty beyond a reasonable doubt. In other words, if you believe from the evidence that he was guilty of one particular grade of the assault, it would not justify you in finding him guilty of the highest grade of assault charged in the indictment, but only of the particular assault of which the evidence shows him to be guilty. Lindsey v. State (record), 53 Fla. 56, 43 So. 87.

See generally, Verdict.

If you should find the defendant guilty, you should state in your verdict the particular offense of which you find him guilty. If you should find the defendant guilty of an assault with intent to commit murder in the first degree, the form of your verdict should be "We, the jury, find the defendant guilty of an assault with intent to commit murder in the first degree". If you should find the defendant guilty of an assault with intent to commit murder in the second degree, the form of your verdict should be, "We, the jury, find the defendant guilty of an assault with intent to commit murder in the second degree". If you should find the defendant guilty of an assault with intent to commit manslaughter, the form of your verdict should be, "We, the jury, find the defendant guilty of an assault with intent to commit manslaughter". If you should find the defendant guilty of an assault and battery, the form of your verdict should be "We, the jury, find the defendant guilty of an assault and battery" and any verdict found by you should be signed by one of your number as foreman. Lindsey v. State (record), 53 Fla. 56, 43 So. 87.

As you consider this, you should first consider the crime contained in the information, that is, whether or not the defendant is guilty or not guilty of assault with intent to commit murder in the first degree. If you come to the conclusion he is not guilty of that, you should next consider whether or not, under the evidence, he is guilty of the next crime in point of importance contained in that information, the lesser crime of assault with intent to commit murder in the second degree. If you determine that he is, that the state has proven to you by competent evidence and each of you beyond a reasonable doubt he is guilty of that, then your verdict should be guilty of assault with intent to commit murder in the second degree. If you do not believe so, then of course you will proceed to your consideration of the next offense, which is assault with intent to commit manslaughter. If you do not believe upon your consideration of that crime as it was defined to you that he is guilty of that crime and, of course, having already considered he is not guilty of the others of greater importance, you will proceed to the crime of aggravated assault, and then down to assault and battery and finally, if you have eliminated them all, to simple assault; and if you have determined he is not guilty of any of those, then, of course, your verdict would be not guilty. If you determine he is not guilty of any of the crimes defined to you, then he will be entitled to a verdict of not guilty. Caraker v. State (record) (Fla.), 84 So. (2d) 50.

III. AS A CIVIL INJURY.

§ 142. Damages.

§ 143. —— In General.

The elements of damages to be considered by you, in the event you find for the plaintiff, are the following: Such compensation for the injuries that the plaintiff may show by a preponderance of the evidence to have been inflicted as a result of the alleged assault and battery, taking into consideration the bodily pain and suffering sustained because of such injury, the plaintiff's shock, embarrassment and humiliation at being publicly assaulted, his wounded pride and mental suffering, an injury to his name and reputation, and the damage to health if any. You may add to your verdict such amount as you may find from the evidence the plaintiff expended or became obligated to expend for doctor bills and medical expenses in the matter of such injuries. Glickstein v. Setzer (record) (Fla.), 78 So. (2d) 374.

§ 147. —— Punitive Damages.

If you should find from a preponderance of the evidence in this case that the injury complained of was attended with malice, wantonness, oppression or gross outrage, then, in addition to such compensatory damages as you may find from a preponderance of the evidence the plaintiff is entitled to, you may also assess exemplary or punitive damages against the defendant, such damages to be dependent upon the circumstances of this case and upon the demonstrative degree of maliciousness, wantonness, oppression or gross outrage. Glickstein v. Setzer (record) (Fla.), 78 So. (2d) 374.

As to exemplary or punitive damages, I give you this: The court charges you that exemplary or punitive damages are assessable, dependent upon the circumstances showing moral turpitude or atrocity in the defendant's conduct, in causing an injury that is wanton and malicious or gross and outrageous to such an extent that the measure of compensation to the plaintiff should have an additional amount added thereto as smart money against the defendant, by way of punishment or simply as a deterrent to others inclined to commit similar wrongs. Glickstein v. Setzer (record) (Fla.), 78 So. (2d) 374.

IV. DEFENSES.

§ 150. Self-Defense.

§ 151. —— Generally.

The law of self-defense, gentlemen, requires two things—first, there must be a belief on the part of the defendant that his act

was necessary and that he was in imminent danger of his life or of receiving some great personal injury, and there must be reasonable grounds to believe it. He must not only believe it, but there must be reasonable grounds to believe it, judging from the standpoint of the defendant at the time that a reasonably cautious and prudent man in his situation, seeing what he saw, hearing what he heard, and knowing what he knew, would have believed his life in imminent danger, or that his person was in imminent danger of receiving some great personal injury at the hands of the party assaulted, and that his act was necessary, in order to avert the danger. The danger must be either really or apparently imminent, in order to be justified on the grounds of self-defense. Lindsey v. State (record), 53 Fla. 56, 43 So. 87.

An assault would not be unlawful if committed in lawful self-defense, because if the defendant should have acted in self-defense the law justifies him and absolutely requires a verdict of not guilty at the hands of the jury, and he could not be convicted of any degree of assault if he acted in self-defense. A man is so justified when he is or reasonably believes himself to be in present, imminent danger of death or of receiving some great personal injury at the hands of another, and his acts are or reasonably seem to be necessary to protect himself from such present imminent danger. In order that he be so justified, it is not essential that there be real danger, if there be only apparent danger, but the appearances are such that a reasonably prudent and cautious man in the same situation would believe it real, and the defendant did so believe, he would be justified in taking such steps and using such force and means and only such force and means as reasonably seemed to be necessary to avert such apparent danger, but unless such belief of danger is real, that is, unless a reasonably cautious and prudent man in the same situation would entertain the same belief from the said appearances it would be no defense even if it was an honest belief of danger. Lindsey v. State (record), 53 Fla. 56, 43 So. 87.

§ 153a. —— No Defense in Absence of Reasonable Attempt to Avert Danger and Avoid Assault.

Neither could he justify his act on the ground of self-defense unless he had used every reasonable means in his power, consistent with his own safety, to avert the danger and avoid the necessity of assaulting Dove Lindsey, if he did assault him, and you are to determine from the evidence, whether he used such means. Lindsey v. State (record), 53 Fla. 56, 43 So. 87.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

§ 154a. Fraudulent and Void Assignments.

§ 154b. —— Where Preference Given to Debts Not Due and Owing — Confer No Title on Assignee nor Purchasers from Assignee with Notice.

If you believe, from a preponderance of the evidence before you, that the said Mayer & Ellis and R. Mayer & Co. included in their said assignment to said Ollinger in October, 1885, debts as due and owing by them to parties whom they made preferred creditors under said assignment, which were not due and owing by them in whole or in part, and that the plaintiffs were among such preferred creditors, or had notice that the debts of others preferred were not bona fide, then said assignment was void and conferred no title on said Ollinger, and a sale by him of goods formerly belonging to R. Mayer & Co., embraced in said assignment, to the plaintiffs, would confer no title upon them, the plaintiffs, and the goods would be subject to be levied upon to satisfy the said execution of Adler & Co. and others against Mayer & Ellis, and your verdict should be for the defendant. Mayer v. Wilkins, 37 Fla. 244, 19 So. 632.

As to levy of execution on goods subject of fraudulent assignment for benefit of creditors, see Executions, § 492c.

§ 154c. —— But Do Confer Title on Bona Fide Purchasers from Assignee Without Knowledge of Fraud.

The court charged that fraud would not be presumed, but must be proved, and that if the jury believed from the evidence that the assignment to Ollinger was fraudulent and void as to Adler & Co., but that plaintiffs were bona fide purchasers from him without knowledge of the fraud, they should find for plaintiffs. Mayer v. Wilkins, 37 Fla. 244, 19 So. 632.

§ 154d. Effect Where Goods Procured with Proceeds of Sale of Fraudulently Assigned Merchandise.

If you believe from the evidence that the plaintiffs bought of

J. Ollinger, as assignee of Mayer & Ellis and R. Mayer & Co., goods and merchandise, and that at the time of such purchase A. Adler & Co. were creditors of Mayer & Ellis, and that as to them said purchase was fraudulent and void, and that said plaintiffs sold said goods and merchandise, and, with the proceeds arising from the sale, purchased other goods and merchandise, which were levied on and sold by the defendant under an execution in favor of A. Adler & Co. v. Mayer & Ellis, then the said levy was illegal, and you should find for plaintiffs. Mayer v. Wilkins, 37 Fla. 244, 19 So. 632.

ASSUMPSIT.

§ 154e. Action on Common Counts.

§ 154f. —— In General.

You are instructed that if the plaintiff has failed to produce evidence upon which you can arrive at a definite figure of any amount owing by the defendant to the plaintiff, then you should find for the defendant. Woodlawn Park Cemetery Co. v. Tangerman, 117 Fla. 470, 158 So. 306.

§ 154g. Action for Money Lent.

§ 154h. —— In General.

Mrs. Davis has brought suit against the defendant, Mr. Turner. She claims that Mr. Turner, the defendant, is indebted to her for money which she and her late husband advanced for loan to the defendant Turner. The defendant has filed a plea by which he denies that there is any indebtedness on his behalf to the plaintiff. This forms the issue for you to try. In order for the plaintiff, Mrs. Davis, to recover here, it is incumbent upon her to establish by a fair preponderance of the testimony that the defendant is indebted to her for moneys which he has borrowed or which have been advanced to him under an agreement that he was to repay the same July 31, 1928. Davis v. Turner (record), 118 Fla. 907, 160 So. 376.

If Mrs. Davis has established here by the preponderance of the testimony that she and her husband had advanced $8,000.00 or any sum of money to the defendant, Turner, and he agreed to pay the same back by July 31, 1928, then your verdict should be in her favor in whatever sum you find he was indebted to them and is indebted to them. On the other hand if the testi-

mony does not by preponderance establish that fact or if the defendant has established his plea, that is, that he was not indebted, or that he did not obligate himself to repay the funds, then of course you should find a verdict in his favor. Davis v. Turner (record), 118 Fla. 907, 160 So. 376.

ATTEMPTS AND SOLICITATION TO COMMIT CRIME.

§ 155a. In General.

Any person who attempts to commit an offense prohibited by law, and in such an attempt does any act towards the commission of the offense, but fails in its perpetration, or is intercepted or prevented in the execution thereof is criminally liable. Mackiewicz v. State (record) (Fla.), 114 So. (2d) 684.

§ 155b. Attempt Defined.

Gentlemen, I want to define now to you the word, or the law with reference to attempt. Under the law of Florida whoever attempts to commit an offense prohibited by law, and an abortion is an offense prohibited by law, with the intent to commit the crime, and in such attempt does any overt act towards the commission of such an offense, but who fails in the perpetration of the offense, or who is intercepted or prevented in the preparation —correction—perpetration of the offense, is guilty of an unlawful attempt to commit the offense. In this respect you noted that the word overt act was used, and it is also mentioned in the information, and let me define to you what the word overt means under the law. In criminal law an overt act means an open manifest act from which criminality may be implied. An outward act, an overt act is an outward act done in pursuance and manifestation of intent towards the crime, an open act which must be manifestly proved. An overt act essential to establish an attempt to commit a crime is an act done to carry out the intention, it must be such that would naturally effect that result unless prevented from some extraneous cause. It must be something done that directly moved toward the crime and brings the accused nearer to its commission than mere act of preparation or planning and will apparently result in the usual and natural course of events, if not hindered by extraneous causes in the commission of the crime itself. Carter v. State (record) (Fla.), 155 So. (2d) 787.

An attempt to perpetrate a crime is an act done with the intent to perpetrate that crime and tending to but falling short of its commission. Land v. State (record) (Fla.), 156 So. (2d) 8.

§ 156. What Constitutes an Attempt.

An attempt to perpetrate a crime is an act done with intent to perpetrate that crime intending to but falling short of its perpetration. Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

You are hereby charged that an attempt to commit a crime consists of 2 elements. First, the intent to commit it; and, second, a direct, unsuccessful overt act done towards the commission of the crime. The overt act must reach far enough towards the accomplishment of the crime to amount to the beginning of the completion, and must not be merely preparation. In other words, while it need not be the last act in the completion of the attempted crime it must approach near enough to it to stand either as the first step, or some later step, in the direct movement towards the commission of the crime after the preparations are made. Between preparation and the attempt there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the crime. The attempt is the direct movement toward the commission after the preparations are made. A mere intention to commit a crime does not amount to an attempt. Mackiewicz v. State (record) (Fla.), 114 So. (2d) 684.

AUTOMOBILES.

I. Operation with Respect to Other Vehicles.

A. Generally.

§ 157a. Law of the Road.
§ 161. Duty of Care.
§ 161a. —— In General.
§ 161b. —— Sudden Emergency.
§ 161c. —— As to Children.
§ 161d. —— Driver of Emergency Vehicle.
§ 163. Duty to Maintain Proper Lookout.
§ 163a. —— In General.
§ 163b. —— As to Children.
§ 163c. Duty to Sound Horn.
§ 163d. Duty to Hear Horn.
§ 166. Right of Motorist to Assume That Others Will Exercise Care and Obey Rules of Road.
§ 166a. —— In General.
§ 166b. —— Driver of Emergency Vehicle.
§ 166c. Driving While Under Influence of Intoxicating Liquor.
§ 180. Passing Another Vehicle.
§ 182a. —— Duty of Truck Drivers as to Passing Vehicles.
§ 183a. Duty to Yield Right of Way to Emergency Vehicle.
§ 186a. Failure to Display Flares as Creating Sudden Emergency.
§ 187a. Turning Off Highway.

B. Intersections.

§ 191. Care Required of Motorist Approaching Intersection.

I. OPERATION WITH RESPECT TO OTHER VEHICLES.

A. GENERALLY.

§ 157a. Law of the Road.

The court instructs you that the law of the road is now embraced in statutes, ordinances and regulations promulgated for the protection of life and property and is an essential part of the

common knowledge of every traveler, and he who goes upon the highway and negligently, or otherwise fails to observe the law of the road, does so at his own peril. Miami Transit Co. v. Dalton (record) 156 Fla. 485, 23 So. (2d) 572; Stark v. Vasquez (record) (Fla.), 168 So. (2d) 140.

§ 160. Owner or Driver Not Insurer against Accident.

You are charged that the defendant is not the guarantor of the safety of the lives and limbs of other persons on the highway merely because the defendant was operating a motor vehicle on the highway. The defendant is not required to anticipate and guard against dangers which are not probable and which could not be reasonably foreseen. Higbee v. Dorigo (record) (Fla.), 66 So. (2d) 684.

You are instructed, gentlemen, that the defendants did not insure the safety of the plaintiff, Pearl Morrell Morris, and are not liable as insurers of her safety. The measure of the duty owing by the defendants to the plaintiff in this case is simply that of reasonable and ordinary care, and if you find, after a consideration of all of the evidence in this case, that the defendants have exercised reasonable and ordinary care under the circumstances, and that they were not guilty of any negligence in the operation of the rented automobile, which was the direct and proximate result of the alleged injuries claimed, then it will be your duty to find a verdict for the defendants. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

§ 161. Duty of Care.

§ 161a. —— In General.

For a case again approving the 2nd instruction under section 161 in original edition, see Stark v. Vasquez (record) (Fla.), 168 So. (2d) 140.

For a case again approving the 13th instruction under section 161 in original edition, see Stark v. Vasquez (record) (Fla.), 168 So. (2d) 140.

The driver of an automobile is required by law to keep his car under control and to use that degree of care and caution which a reasonable, prudent person would use in driving and operating a car on the highway, under the same circumstances and conditions where the injury complained of occurred. Peninsula Telephone Co. v. Marks (record), 144 Fla. 652, 198 So. 330, holding that the trial court well and ably presented the law of the case to the jury.

I further charge you, gentlemen of the jury, that the law of this state required the driver of the automobile in which the plaintiff was riding to operate his automobile in a careful and prudent manner, consistent with the width, condition, traffic and

use of the highway upon which the automobile was being driven, and if you find from the evidence in this cause that the driver of the automobile in which plaintiff was riding failed to observe this rule of law, and the proximate result of his failure to so do was the sole proximate cause of the plaintiff's injuries, then she is not entitled to recover and your verdict must be for the defendant. Peninsula Telephone Co. v. Marks (record), 144 Fla. 652, 198 So. 330, holding that the trial court well and ably presented the law of the case to the jury.

I charge you further that it was the duty of the defendant in driving his automobile to exercise ordinary care to avoid collision with anyone on the street; that is to say, that degree of care which is usually exercised by ordinary or prudent persons under the same or similar circumstances. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

The operator or owner of a motor vehicle who has performed his full duty with respect to exercise of care is not liable for an injury to a person of another which the operator or owner could not reasonably have foreseen. Higbee v. Dorigo (record) (Fla.), 66 So. (2d) 684.

§ 161b. —— Sudden Emergency.

It is just a psychological truth—and I only remind you of it—that if one is confronted with a sudden emergency, that is, a condition which one wasn't aware of or wasn't under a duty to anticipate, then one's judgment isn't expected to be as good as though one had ample time to deliberate upon the matter. Tooley v. Margulies (record) (Fla.), 79 So. (2d) 421.

The Court further charges you that a motorist who is placed in a position of sudden emergency by the negligence of another is not held to the same degree of care and prudence as one who has time for thought and reflection. Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158.

Where the operator of an automobile by a sudden emergency, not due to her own negligence, is placed in a position of imminent danger and has insufficient time to determine with certainty the best course to pursue, she is not held to have the same accuracy of judgment as is required under ordinary circumstances, and if she pursues a course of action to avoid an accident such as a person of ordinary prudence placed in a like position might choose, she is not guilty of negligence, even though she did not adopt the wisest choice. Klepper v. Breslin (Fla.), 83 So. (2d) 587, holding that the trial judge's instructions very completely and properly advised the jury on the applicable law.

Editor's note.—For a case where the evidence would not support the granting of the above instruction, see Bellere v. Madsen (Fla.), 114 So. (2d) 619.

I further charge you, gentlemen of the jury, where one is confronted by an emergency, a sudden emergency, he is not held to the same accuracy of judgment as is required of him under ordinary circumstances. Whether or not an emergency existed on the part of either of the parties to this litigation, existed at the time, is to be taken into consideration by the jury in determining whether the driver of an automobile has exercised reasonable care under the circumstances existing at the time of and just prior to the alleged accident and injury. Mangan v. Amos (record) (Fla.), 98 So. (2d) 340.

§ 161c. —— As to Children.

It is a matter of common knowledge that small children are erratic and unpredictable; that they are liable to take off anytime and in any direction with no concern whatever for their own safety. The drivers of motor vehicles are charged with knowledge of their behavior and are expected to govern themselves accordingly in all parking or driving about recreation parks, residential communities, trailer parks, and other places inhabited by or frequented by children. Motorists are expected to anticipate children about such places. Therefore, in cases where their safety is involved, more care is demanded than towards adults, and all persons who are chargeable with the duty of care and caution towards them must consider them and take precautions accordingly. Klepper v. Breslin (record) (Fla.), 83 So. (2d) 587, holding that the trial judge's instructions very completely and properly advised the jury on the applicable law.

§ 161d. —— Driver of Emergency Vehicle.

It is the duty of the driver of an emergency vehicle to exercise ordinary and reasonable care and diligence in the operation of an ambulance to avoid injury and damage to persons and property, and it is your duty to determine from all the evidence in this case whether or not the driver of the ambulance in this case complied with this duty. In determining whether the ambulance driver exercised all ordinary and reasonable care and diligence you may consider the nature and character of the warning devices on the ambulance, the condition of the ambulance and its equipment, the speed of the ambulance in relation to the environment, existing traffic conditions and the signals given of the approach of the ambulance. Shearn v. Orlando Funeral Home, Inc. (record) (Fla.), 82 So. (2d) 866.

Ambulance drivers owe to the traveling public the duty of exercising reasonable care to avoid injury to others using the highways at street intersections. The standard of care is that of ordinary care under the circumstances—in other words, such

precaution and prudent management and respect as public safety requires. What constitutes ordinary and reasonable care on the part of a driver of an emergency vehicle in his operation of ambulance on a public highway is to be determined in the light of all the surrounding facts and circumstances. The care required to prevent or avoid injury is always in proportion to the danger and chances of injury. Shearn v. Orlando Funeral Home, Inc. (record) (Fla.), 82 So. (2d) 866.

§ 163. Duty to Maintain Proper Lookout.

§ 163a. —— In General.

For a case again approving the 1st instruction under section 163 in original edition, see Stark v. Vasquez (record) (Fla.), 168 So. (2d) 140.

I charge you further that if you find by a preponderance of the testimony that the accident was caused because the defendant was not looking ahead, and that if he had looked ahead he would have seen the plaintiffs and could have stopped the car and could have avoided the accident, then you can find that the failure to keep a lookout was negligence. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

Mr. Berger and Mr. and Mrs. Rosenberg all admit that they did not see Mr. Nathan's car at all, and, therefore, I instruct you that if the car was within the range of their vision so that they could have seen it, had they looked effectively either before they crossed the street or while they were crossing, then their failure to see it was negligence as a matter of law, and if their negligence in that respect proximately helped to cause the accident, then they are not entitled to a verdict in this case, and you must return a verdict in favor of Defendant, Mr. Nathan. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

It is the duty, the duty of everyone who drives a car, to keep a reasonable lookout ahead at all times in order to guard against dangers that may appear. It goes without saying that the degree of one's diligence and the concentration that one should give must be in proportion to the likelihood of danger; that is, that one is under the duty to concentrate mostly in the direction in which danger is more likely than it is to some place it is less likely. Tooley v. Margulies (record) (Fla.), 79 So. (2d) 421.

The law requires a person to make reasonable use of his faculties. In other words, the law is that a person is charged with seeing that which he could have seen if he had looked. I, therefore, charge you that if you believe from the evidence in this case that the plaintiff's deceased, under the circumstances existing at the time and place of the accident, would have known of the close approach of the truck with which he had an accident in

time to have avoided driving into the pathway of said truck had he made reasonable use of his faculties, but that he failed to make such use, to ascertain said fact, and that his failure to do so proximately contributed in an appreciable degree to the accident, then your verdict must be for the defendant. Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158.

§ 163b. —— As to Children.

A motorist is required to keep a vigilant outlook not only over the whole street on which he or she is traveling but also the side of the road particularly where he or she observes children of tender years along the side of the road. Parents are not required to keep young children under lock and key or to keep them on a leash. Children play in the yard area next to their homes, and it is commonly known that in so doing may stray upon the road, and motorists are required to govern themselves accordingly. Klepper v. Breslin (record) (Fla.), 83 So. (2d) 587, holding that the trial judge's instructions very completely and properly advised the jury on the applicable law.

§ 163c. Duty to Sound Horn.

I charge you further that if you find that the defendant, in the exercise of ordinary care, should have sounded a warning as he operated his automobile at the time and place alleged, but neglected to do so, and that as a proximate result of his failure the accident occurred and the plaintiffs were injured, then you may find the defendant guilty of actionable negligence. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

See § 317.621, F. S. 1963.

§ 163d. Duty to Hear Horn.

It is the duty of those who have normal hearing to hear that which is audible. In weighing the evidence which has been presented to you relative to the siren of the emergency vehicle, you should take into consideration the opportunity of William J. Shearn to hear the siren before he began to make his turn to the left. A person has no duty to avoid a danger before he is put on notice or has a reasonable opportunity in the exercise of ordinary care to learn about the danger in order to act to avoid the danger. Shearn v. Orlando Funeral Home, Inc. (record) (Fla.), 82 So. (2d) 866.

§ 164. Duty When Following Another Vehicle.

For case again approving the 1st instruction in this section in original edition, see Stark v. Vasquez (record) (Fla.), 168 So. (2d) 140.

When a driver so operates his car that he is not able to stop before running into another vehicle in his lane of traffic, the operator of the following car will be presumed to be guilty of negligence. This rule is a necessary corollary to the duty of a following driver to have his vehicle under such control that he can avoid a collision from any ordinary avoidable situation. However, it is not an absolute rule of liability. It is subject to proof that it does not apply in a particular situation. Where, as in this case, the evidence shows the following car ran into the rear of plaintiff's car in the same lane of traffic, and the defendants have presented evidence to show why the overtaking car ran into the rear of the plaintiff's car, the question as to the existence or non-existence of facts which would keep the presumption from applying, is a matter for decision by you as a jury, under all the instructions I give you. Stark v. Vasquez (record) (Fla.), 168 So. (2d) 140.

§ 165. Duty to Have Proper Lights.

The laws of Florida require, among other things, that on every truck of 80 inches or more overall width it is the duty of the owner thereof to have 2 clearance lights, one on each side, which must be located on the front of the truck. These clearance lights must be burning and operating when the truck is being used one hour after sunset or later. The violation of such regulation is prima facie evidence of negligence. Chase & Co. v. Benefield (record) (Fla.), 64 So. (2d) 922.

If you find that such clearance lights were required on the vehicle owned by Chase & Company which was involved in this accident and that these lights were not burning at the time of the accident, the failure of these lights to be so located and so burning at the time of the accident was negligence, such negligence proximately caused the collision, and that the vehicle was then and there being operated by the driver with the knowledge and acquiescence of the defendant, express or implied, that the plaintiff was free from negligence proximately contributing to the happening of the collision, then you must return a verdict for the plaintiff. Chase & Co. v. Benefield (record) (Fla.), 64 So. (2d) 922.

§ 166. Right of Motorist to Assume That Others Will Exercise Care and Obey Rules of Road.

§ 166a. —— In General.

For a case again approving the 2nd instruction under section 166 in original edition, see Stark v. Vasquez (record) (Fla.), 168 So. (2d) 140.

I charge you further that the plaintiffs had a right to presume

that no automobile would be run or be driven upon the public street or highway, and particularly at an intersection much used for traffic, at a rate of speed which would be dangerous for people who might be crossing the said street or intersection. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

§ 166b. —— Driver of Emergency Vehicle.

A motorist has no duty to anticipate negligence, if any, on the part of an emergency vehicle which is traveling on a highway. A motorist on the highway has a duty at all times to use his senses of sight and hearing in the exercise of ordinary care to learn of any danger of collision with an emergency vehicle. There is no duty on the motorist on the highway to yield the right of way to avoid a collision with an emergency vehicle, unless he is put on notice of the danger or in the exercise of ordinary care should have learned of the danger in sufficient time to avoid collision. Shearn v. Orlando Funeral Home, Inc. (record) (Fla.), 82 So. (2d) 866.

§ 166c. Driving While Under Influence of Intoxicating Liquor.

I further charge you, gentlemen of the jury, that it is unlawful under the laws of this state for a person to drive an automobile on a public highway or street while under the influence of intoxicating liquor, and if you believe from the evidence in this cause that the driver of the automobile in which plaintiff was riding was operating the same at the time and place alleged in the declaration while under the influence of intoxicating liquor, and his action in this regard was the sole proximate cause of the collision and the plaintiff's injuries, if any, then it is your duty to return a verdict for the defendant [telephone company]. Peninsula Telephone Co. v. Marks, 144 Fla. 652, 198 So. 330, holding that the trial court well and ably presented the law of the case to the jury.

See § 317.201, F. S. 1963.

I charge you further as a matter of law that it is unlawful for any person while in an intoxicated condition or under the influence of intoxicating liquor to such extent as to deprive him of full possession of his normal faculties to drive or operate a motor vehicle over the highways, roads, streets and thoroughfares of this state, and any person driving an automobile while intoxicated by intoxicating liquor or under the influence thereof to the extent that it deprives him of full possession of his normal faculties, would upon conviction be subject to the penalties prescribed by law therefor. Dunning v. State (record) (Fla.), 83 So. (2d) 702.

§ 167. Driving on Wrong Side of Road.

§ 168. —— In General.

If you find that this accident was caused by the operation of the defendant's vehicle by its driver on the wrong side of the road, and was being operated by its driver with the knowledge and consent and acquiescence express or implied of the defendant and, as a result thereof this accident was caused without contributory negligence on the part of the plaintiff, then you must find for the plaintiff. Chase & Co. v. Benefield (record) (Fla.), 64 So. (2d) 922.

§ 171. —— Right to Assume That Approaching Vehicle Will Drive on Its Side.

You are instructed that a person operating a motor vehicle on his side of the highway has the right to assume that a person in charge of a vehicle coming from the opposite direction will observe the laws established for the regulation of traffic on the highways and will exercise due care to avoid accidents, and such person has the right to act upon such assumption. Thus, if you find that the plaintiff's car was being driven on the proper side of the road at proper speed, the plaintiff had the right to assume that the driver of the defendant's vehicle would observe the rules of the road and exercise due care and the plaintiff had a right to act upon such assumption. Chase & Co. v. Benefield (record) (Fla.), 64 So. (2d) 922.

§ 172. Violation of Statute or Ordinance.

The law in this state makes it prima facie evidence of negligence on the part of the driver to drive an automobile twenty-five or over twenty-five miles an hour within the residential protion of a city and fifteen miles or more than fifteen miles an hour within the business section, so that if you find that the driver of the automobile in this case, was driving twenty-five miles an hour or more than twenty-five miles an hour in the residential section of the city of Haines City, or more than fifteen miles an hour in the business section, then that would be prima facie guilt of negligence. In other words, that prima facie evidence of negligence is to be taken into consideration, together with all the other circumstances as to whether the driver himself was guilty of negligence in the operation of his car at the time in question. Peninsula Telephone Co. v. Marks (record), 144 Fla. 652, 198 So. 330, holding that the trial court well and ably presents the law of the case to the jury.

I instruct you that the violation of a traffic statute by a party is prima facie, that is, on the face of it, negligence; and in the event that such negligence proximately contributes to the cause

of injury then the party that is guilty of the violation of the traffic statute is guilty of negligence and may be responsible for injury or may be denied the right to recover depending upon who was the one that violated this traffic ordinance. Povia v. Melvin (record) (Fla.), 66 So. (2d) 494.

If you find from the evidence that any of the parties violated any of the laws of the state, the violation thereof is not in and of itself negligence as a matter of law. But the violation thereof is evidence which you should consider together with all the other circumstances in the case to determine whether or not the parties, or any of them, were guilty of negligence. And this rule with regard to the violation of any laws of this state applies equally to the operator of the automobile of the defendant Townsend Sash Door and Lumber Company and the operator, the said Harold G. Silas, now deceased, of the automobile which he was driving at the time of the alleged collision, and if you find from a preponderance of the evidence that the operator and custodian of the truck of the defendant Townsend Sash Door and Lumber Company or Harold Silas, the operator of the Pontiac automobile involved, was, at the time of the collision, violating any law of the State of Florida, then the fact of such violation should in either case be considered by you evidence, together with all the other evidence in the case, in determining whether or not either of said operators was, or both of them were, guilty of negligence. Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158.

I charge you that on the question of negligence, without consideration of contributory negligence at this time, violation of traffic law is prima facie evidence of negligence, but such prima facie evidence may be overcome by proof of surrounding circumstances which will eliminate the character of negligence from the transaction. And it is a question for the jury whether prima facie evidence of negligence is overcome. Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158.

The violation of any ordinance providing for the regulation of emergency vehicle traffic in the city of Orlando is prima facie evidence of an act of negligence, and if the jury believes that the driver of the ambulance was violating any provision of the ordinance referred to at the time of the accident, and that in so doing he was guilty of negligence and if you further believe that such negligence, if any, proximately contributed to causing the damages plaintiff herein claims to have suffered and if you do not find that Mr. Shearn was guilty of contributory negligence, then it would be your duty to return a verdict for the plaintiff. The evidence of negligence, if any, resulting from a violation of an ordinance regulating traffic in the City of Orlando may be

overcome by other evidence showing under all of the circumstances surrounding the occurrence of the accident that the driver of the ambulance exercised such ordinary care as might be expected from a reasonably prudent person under the existing circumstances. Shearn v. Orlando Funeral Home, Inc. (record) (Fla.), 82 So. (2d) 866.

I further charge you, gentlemen of the jury, that the violation of the traffic ordinances is prima facie evidence of negligence, but that prima facie evidence may be overcome by proof of surrounding circumstances and conditions which will eliminate the character of negligence from the transaction. Therefore, when it is shown that the traffic law has been violated, it is a question for you to determine from all the facts and circumstances whether or not the prima facie evidence of negligence is overcome by other evidence of existing facts and circumstances. Mangan v. Amos (record) (Fla.), 98 So. (2d) 340.

The violation of a municipal or state traffic regulation is prima facie, but not conclusive, evidence of negligence. The presumption that such a violation was negligence may be rebutted and overcome by proof that the circumstances were such that the violation was not negligence. If you shall find that there was such a violation and that it was negligence, the question of whether or not such negligence was a proximate cause of the fatal accident is a factual question for you to decide. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 173. Speed.

§ 174. —— Must Be Reasonable.

For case again approving the 1st instruction in this section in original edition, see Klepper v. Breslin (Fla.), 83 So. (2d) 587 (instruction found in record only).

As to consideration of speed of automobile by jury as matter of everyday experience, see Jury, § 709.

I charge you further that it was the duty of the defendant in operating his automobile to have it under control and to operate it at such speed as is reasonable and proper. Further, that if you find that the defendant at the time and place in question did not have his automobile under control and did not operate it at such a speed as was reasonable and proper, and such excessive speed or lack of control was the proximate cause of the accident, then the defendant may be found to be negligent. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

One, of course, is under the duty to proceed at a reasonable speed. If we are driving within any municipality that has any speed regulations, those are maximum; those are not minimum speeds. We are under the duty to observe them and such lesser

speeds as the safety of the particular occasion demands and, there again, one can't be dogmatic and reduce that to particular miles per hour because it is relative. Tooley v. Margulies (record) (Fla.), 79 So. (2d) 421.

The Court further instructs you that it is the law of this state that no person shall operate a motor vehicle on the public highways of this state recklessly or at a rate of speed greater than reasonable and proper, having regard to the width, traffic, and use of the highways so as to endanger the property or life or limb of any person. And if you believe from the evidence that the plaintiff's deceased at the time and place of the happening of which he complains was operating his automobile recklessly or at a rate of speed greater than was reasonable and proper under the circumstances, then and there existing, and that in so doing he proximately contributed to causing the accident in any appreciable degree, then he was guilty of contributory negligence and you must return your verdict for the defendant. Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158.

I further charge you, gentlemen of the jury, that no matter what the maximum speed limit may be upon a highway in the State of Florida, that the laws of the State of Florida provide that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care, and that the driver of every vehicle shall so drive at an appropriate reduced speed when any special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. Stark v. Vasquez (record) (Fla.), 168 So. (2d) 140.

See § 317.221, F. S. 1963.

§ 175. —— Must Not Be in Excess of Legal Limit.

It has been stipulated by the parties that, at the place where the accident which is the subject matter of this suit occurred, the speed limit for motor vehicles was thirty miles per hour. If you should find by a preponderance of the evidence in this case that at the time complained of the defendant driver of the automobile in question was exceeding the lawful speed limit for motor vehicles and such excess speed was the proximate cause of the plaintiff's injury, it would be your duty to find your verdict for the plaintiff and against the owner and operator of such automobile if you should further find from the evidence that the plaintiff was free from any contributory negligence. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

The Court did not err in instructing the jury to the effect that in determining the question of negligence they could consider the applicable law and regulations governing the speed of motor vehicles, and if they found that the vehicle was operated in excess of the legal limit it would be prima facie evidence of reckless driving on the part of either or both of the drivers of the vehicles in question, and if violations of the statute "contributed in whole or in part proximately to the injuries of the passengers in the taxicab, then you may find for the plaintiffs against either the corporate defendants or the individual defendants or both as you believe the evidence to justify". Red Top Cab & Baggage Co. v. Masilotti, 190 F. (2d) 668.

§ 176. —— Must Be Such as to Enable Driver to Stop Within Range of Vision.

I charge you that an automobile driver must drive at such speed as to be able to stop or control his car within the range of his vision, whether it be by nighttime or daylight. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

You are further charged that it is the law of Florida that it is the duty of a person driving an automobile, whether in daytime or night, to so regulate his speed as to be able to stop or control his car within the range of his vision. And I further charge you that in this case if Harold G. Silas saw or by the use of ordinary care and diligence could have seen the parked truck within the range of his vision, and he failed to see it, he was in violation of the Florida law. And if you find that his violation of the range of vision doctrine contributed directly to his death, you must find for the defendant. Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158.

§ 177. —— Speed Within Legal Limit Does Not Necessarily Exempt Driver From Liability.

For a case again approving the 1st instruction in original edition, see Stark v. Vasquez (record) (Fla.), 168 So. (2d) 140.

§ 180. Passing Another Vehicle.

§ 181. —— Must Ascertain That Passage Can Be Made Safely.

It is the duty of a motorist, who desires to overtake and pass a vehicle to the left on a roadway zoned for one lane of traffic in each direction, to ascertain that the passing can be accomplished in safety before attempting to overtake and pass a vehicle; and no vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible for

a sufficient distance ahead to permit such overtaking and passing to be completely made without interference with the safe operation of any vehicle overtaken. De La Concha v. Pinero (record) (Fla.), 104 So. (2d) 25.

See § 317.271, F. S. 1963.

§ 182a. —— Duty of Truck Drivers as to Passing Vehicles.

The Court charges you that under the law of the State of Florida drivers of trucks are under a duty to anticipate the approach of automobiles from the rear and are required to hold their trucks to the right side of the highway when being overtaken by automobiles that are in the act of passing them. De La Concha v. Pinero (record) (Fla.), 104 So. (2d) 25.

§ 183a. Duty to Yield Right of Way to Emergency Vehicle.

It was the duty of William J. Shearn, upon the immediate approach of an authorized emergency vehicle when the driver thereof was giving audible signal by siren, to yield the right of way and in general to exercise reasonable care for his own safety and to avoid being injured. Shearn v. Orlando Funeral Home, Inc. (record) (Fla.), 82 So. (2d) 866.

§ 186a. Failure to Display Flares as Creating Sudden Emergency.

If in this case you find that the truck driver of the parked truck was negligent in failing to display proper flares or similar devices to warn approaching traffic, or was negligent in leaving his truck parked on the highway, and that this negligence contributed proximately to the accident, and that the deceased, Harold Silas, was confronted with a situation of sudden emergency because of the truck obstructing the road, without flares or similar warning devices, then the Court charges you that the deceased driver, Harold Silas, is not to be held to the same degree of care and prudence as a driver might be who had time for thought and reflection as to what he might do or possibly should have done in order to have avoided the accident. Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158.

See § 317.671, F. S. 1963.

§ 187a. Turning Off Highway.

The operator of a vehicle desiring to make a left turn off the highway must ascertain that such movement can be made with reasonable safety, and then must give a signal of his intention to turn continuously during not less than the last one hundred

feet traveled by the vehicle before turning. However, when the driver of a vehicle intending to make a left turn commences to make a proper and lawful signal at such a time when both overtaking and oncoming traffic would not constitute a hazard to the turning movement if said overtaking or oncoming vehicles were obeying the law, then the turning vehicle becomes entitled to the right of way, and all overtaking and oncoming vehicles are required to yield the right of way to him. De La Concha v. Pinero (record) (Fla.), 104 So. (2d) 25.

See § 317.371, F. S. 1963.

B. INTERSECTIONS.

§ 191. Care Required of Motorist Approaching Intersection.

§ 192. —— In General.

A "go" signal given by a green light on a traffic control at an intersection is not a command to go, but it gives permission to proceed lawfully and with the exercise of ordinary care so as to prevent injury to others who are using the intersection in a lawful manner. Shearn v. Orlando Funeral Home, Inc. (record) (Fla.), 82 So. (2d) 866.

§ 194a. —— Right to Assume That Others Will Observe Rules of Road, Obey Law and Use Due Care.

A person operating a vehicle along a roadway in compliance with the law has a right to assume that the person operating a vehicle upon an intersecting street will observe the rules of the road, will obey the laws governing the operation of automobiles and that such approaching driver will exercise due care to avoid an accident, and he has a right to act upon this assumption; and if such motorist has the right of way under the law and circumstances of the case, he has the right to assume that the approaching motorist on the intersecting street will yield the right of way to him, and it would not be contributory negligence on his part to act on such assumption in proceeding into the intersection, unless and until he became aware of the fact that such right of way would not be given, and unless he then had a clear opportunity to act in such emergency to avoid the collision after the emergency arose. Kerr v. Caraway (Fla.), 78 So. (2d) 571, holding that it was error to refuse to give the foregoing instruction.

§ 195. Right of Way Generally.

§ 196. —— Motorist First Entering Intersection.

The one entering the intersection under circumstances in

which reasonable people would foresee that car was entering the intersection first would have a right to rely upon the proposition that the other party would yield to that physical fact. Of course, there has to be enough difference so that reasonable people can perceive the distinction. Schumacher v. Passow (record) (Fla.), 85 So. (2d) 734.

See § 317.401(1), F. S. 1963.

§ 197. —— Motorist Approaching on the Right.

The car on the right would have the right of way, meaning that under those circumstances one driver would be expected to yield and the other driver would have a right to expect the first driver to yield. Schumacher v. Passow (record) (Fla.), 85 So. (2d) 734.

See § 317.401(2), F. S. 1963.

§ 198a. —— Yielding Right of Way to Emergency Vehicle.

You are instructed that if the ambulance driver was giving audible signal by siren as he approached the intersection he was entitled to assume, until the contrary appeared, that the driver of the automobile operated by William J. Shearn would yield the right of way and would exercise reasonable care to avoid being injured. Shearn v. Orlando Funeral Home, Inc. (record) (Fla.), 82 So. (2d) 866.

II. OPERATION WITH RESPECT TO PEDESTRIANS.

§ 205. Rights and Duties of Motorist and Pedestrian Reciprocal and Equal.

For case again giving the 4th instruction in this section in original edition, see Mangan v. Amos (record) (Fla.), 98 So. (2d) 340.

I charge you further, gentlemen of the jury, that the rights of pedestrians and vehicles on the highways are equal. That is, drivers of vehicles have an equal right on the street with the pedestrians, and pedestrians and drivers of vehicles are each required to exercise care to look out for persons or vehicles on the street. While it is the duty of automobile drivers to look out for pedestrians who are about to cross the street in front of the automobile, it is equally the duty of the pedestrians about to cross the street to look for vehicles approaching the point where they undertake to cross. Any person about to cross a city street has no right to assume that the street is free of vehicles, but must expect to encounter vehicles on the streets and has no right to cross without looking. Any pedestrians attempting to cross the street must look for vehicles, and must look effectively. That

means they must look carefully enough to see what there is to be seen, and if a vehicle is actually approaching, it is no answer for a person to say that he looked and did not see, because a failure to see a vehicle approaching in sight of the person attempting to cross, is negligence in and of itself. In this case, Mr. Berger and Mr. and Mrs. Rosenberg were required to exercise reasonable care for their own safety before attempting to cross Ocean Drive and were required to look for vehicles approaching from either direction. They had no right to start across the street without looking, or to proceed across without keeping a lookout for vehicles approaching; and if the car being driven by Mr. Nathan was within the range of their vision, had they looked effectively, then they must be held to the same responsibility as though they had actually seen it, because under those circumstances their failure to see it would constitute negligence as a matter of law. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

I further charge you, gentlemen of the jury, that a traveler on foot has the same right to the use of the public streets of a city as a vehicle of any kind. In using any parts of the streets, all persons are bound to exercise reasonable care to prevent collisions and accidents. Such care must be in proportion to the danger or the peculiar risk in each case. It is the duty of a person operating an automobile or any other vehicle upon the public streets of a city to use ordinary care in its operation, to move at a reasonable rate of speed and cause it to slow up or stop if need be where danger is imminent and could by the exercise of reasonable care be seen or known to him in time to avoid accidents. Greater caution is required at street crossings and in the more thronged streets of the city than in the less obstructed streets in the open or suburban parts. There is a like duty of exercising ordinary care on the part of the pedestrian. The person having the management of the vehicle and the traveler on foot are both required to use such reasonable care as circumstances of the case demand, and exercise of greater care on the part of each being required where there is an increase of danger. The right of each must be exercised in a reasonable and careful manner so as not unreasonably to prejudice the rights of the other and both are bound to the reasonable use of all their senses for the prevention of an accident, and the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise under like circumstances. It is true that a person crossing a public street of a city is required to make reasonable use of all of his senses in order to observe an impending danger, and if he fails to do so and is injured by reason of such failure, he is guilty of such negligence as will prevent any

recovery for the injury sustained. Such reasonable use of the senses, however, means such use as an ordinarily prudent and careful person would have used under like circumstances, and so in the case before you, if the plaintiff saw the automobile before it struck him or by the reasonable use of his senses could have seen it in time to avoid injury, he cannot recover, but if he could not under the conditions existing at the time of the accident by the exercise of reasonable care have avoided it, he would not be guilty of such negligence as would defeat his right to recovery. Mangan v. Amos (record) (Fla.), 98 So. (2d) 340.

In considering the actions and conduct of the persons involved in the accident, you should have in mind the laws by which the rights and duties of motorists and of pedestrians are prescribed and governed. It is the law of this state that the operators of motor vehicles and pedestrians have equal or reciprocal rights and duties in the use of public streets and highways. An operator of an automobile has no greater right than a pedestrian; and a pedestrian has no greater right than a motorist. Each is obligated to act with due regard for the movements of the other and to use due care and to keep a reasonable and proper lookout to observe the condition of traffic and the movements of the other. The degree of care required of each must be according to the circumstances and conditions prevailing and in proportion to the dangers which are known or ought to be known. A pedestrian in a public street or highway is not a trespasser. He or she is charged, however, with the duty of exercising such care for his or her own safety as a reasonable and prudent person would fairly be expected to exercise. The motorist, on the other hand, is bound to exercise reasonable care and diligence to avoid injuring a pedestrian. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 206. Duty of Motorist.

§ 207. —— In General.

For case again giving the 3rd instruction in this section in original edition see Mangan v. Amos (record) (Fla.), 98 So. (2d) 340.

§ 207a. — Speed.

The district in which the accident with which we are concerned occurred was one in which the maximum speed limit for a motor vehicle operated on the street or highway on which the accident happened, as prescribed by statute, was thirty miles an hour, provided, however, that no special hazard existed. It is provided by statute that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the existing conditions and having regard to the actual and potential haz-

ards then existing, and that in every event speed shall be controlled as may be necessary to avoid colliding with any person on or entering the highway in compliance with legal requirements and the duty of all persons to use due care. The statute further provides that the driver of every vehicle shall, consistent with the requirements just mentioned, drive at an appropriately reduced speed when approaching and crossing an intersection and when any special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. By mentioning or calling your attention to municipal or state traffic regulations, I do not mean to indicate or suggest that the court has found that either or both of the persons involved in the accident out of which this case arose was or were guilty of any violation of any of such regulations. The question of whether or not there was any such violation is a factual question to be decided by the jury and not by the court. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 208. —— When Pedestrian Crossing with the Light.

I further charge you, gentlemen of the jury, that a pedestrian crossing a public street from north to south at an intersection within the marked crosswalk when the traffic control signal was in operation and the east and west light was green and the north and south light red or amber, until put on notice to the contrary, was entitled to assume that a vehicle traveling from the east to the west would proceed and yield the right of way to the pedestrian, and that the driver of such vehicle did exercise reasonable care as was required to avoid injuring the pedestrian. Mangan v. Amos (record) (Fla.), 98 So. (2d) 340.

§ 209. Duty of Pedestrian.

§ 210. —— In General.

When the plaintiff undertook to cross Hollywood Boulevard it was her duty to exercise, for her own self-preservation, such care as an ordinarily prudent person would exercise under the circumstances. If you find, from a preponderance of the evidence, that she failed to do so, your verdict should be for the defendants. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

In crossing Hollywood Boulevard it was the duty of the plaintiff, for her own self-preservation, to maintain such lookout for approaching automobiles as would have been maintained by an ordinarily prudent person under the circumstances and to refrain from putting herself in a position of danger. If you find, from a preponderance of the evidence, that she failed in the performance of this duty, your verdict should be for the defendants. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

It was the duty of the plaintiff, before entering the part of Hollywood Boulevard in which west bound traffic would travel, to look to the east for the purpose of ascertaining whether any vehicle was approaching from that direction, and ascertain whether it was safe for her to proceed across the Boulevard. She also had a duty of maintaining a constant lookout for approaching automobiles while crossing the boulevard. If you find, from a preponderance of the evidence, that she failed to do this, and that such conduct on her part proximately contributed to any injury she may have suffered, your verdict should be for the defendants. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

It was the duty of the plaintiff to see what was in plain view as she looked to the east for west bound vehicles. If you find that plaintiff failed to look, and such failure to look was the proximate cause or a proximate contributing cause of the accident, then the plaintiff may not recover and your verdict should be for the defendants. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

§ 212. —— Crossing Between Intersections.

I charge you further, gentlemen of the jury, that a greater degree of care in the operation of a motor vehicle is imposed upon the driver at intersections than when he is driving between crossings or upon an open road. Automobile drivers are not held to the same high degree of care at points between intersections as at regular crossings, since they are not under the same obligation to anticipate the presence of pedestrians between crossings as at the regular crossings provided for them; and on the other hand, for that reason, pedestrians who attempt to cross between intersections are required to exercise a greater degree of care and caution than if they were at a street intersection. So, in this case if you find that Mr. Berger and Mr. and Mrs. Rosenberg crossed between intersections, or some distance from an intersection, you should consider that fact in determining whether, under the circumstances, Mr. Nathan was negligent in failing to see them, and whether Mr. Berger and Mr. and Mrs. Rosenberg were negligent in failing to see the car in time to avoid being hit. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

Under the applicable ordinance of the city of Hollywood, Florida, a pedestrian crossing a street at any point other than an intersection or within a marked crosswalk is required to yield the right of way to vehicles on the street. If you find that the plaintiff violated this ordinance and such violation proximately caused or contributed to the accident, then she cannot recover and your verdict should be for the defendants. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

III. OPERATION WITH RESPECT TO PASSENGERS, GUESTS AND TRESPASSERS.

§ 213. Duty of Passenger or Guest to Warn Driver.

A passenger in an automobile is not required to control the driver unless it appears that there is some reason why such passenger should have real right of control over such driver and he is entitled to assume, in the absence of something to indicate to the contrary to him or to a reasonable, prudent person under like circumstances, that the driver of the automobile will use ordinary, reasonable care in his driving, but when a person is riding with a person carrying him some place and the passenger knows that the party carrying him does not know or may not know of the dangerous condition of the road—that the driver is a stranger to the road and the passenger knows there is a dangerous condition and the passenger appreciates the dangerousness of that situation, then, of course, the passenger is required to use ordinary, reasonable care to protect the passenger against injury and would be required to warn the driver of the dangerous situation which he is likely to face, and if the passenger did not do so he would be guilty of contributory negligence and if this appears from the plaintiff's case—the evidence of the plaintiff in this case, then the defendant would be entitled to a verdict. Peninsula Telephone Co. v. Marks (record), 144 Fla. 652, 198 So. 330, holding that the trial court well and ably presented the law of the case to the jury.

I further charge you, gentlemen, that although the plaintiff was not the operator of the automobile involved in this accident, nevertheless, she was charged with the duty of exercising reasonable care and caution for her own safety, and if you find from the plaintiff's evidence in this cause that she knew the conditions that existed on the highway at the time and place of the alleged accident, and appreciated the dangerous character thereof in sufficient time to have warned the driver of the automobile of the same, and failed so to do, and that her failure in this regard appreciably contributed to proximately cause her injuries, if any, she is in law guilty of contributory negligence and cannot recover herein, and your verdict must be for the defendant. Peninsula Telephone Co. v. Marks (record), 144 Fla. 652, 198 So. 330, holding that the trial court well and ably presented the law of the case to the jury.

Ordinarily, a guest riding in an automobile is entitled to trust the vigilance and skill of the driver unless the guest knows or by the exercise of ordinary and reasonable care should know from the circumstances of the occasion, that the driver is not exercising that degree of care in the operation of the vehicle

compatible with the safety of his passenger. In such case, it becomes the duty of the guest to make some reasonable attempt to control the conduct of the driver, provided there is sufficient time and opportunity for the guest to give warning or make a protest before the happening of the accident. Welch v. Moothart (record) (Fla.), 89 So. (2d) 485.

§ 214a. Duty of One Relying on Guest Statute to Use Reasonable Care.

I further charge you that any person who is relying on the guest statute to recover against his host is required to exercise such prudent care for his own safety as the circumstances warrant. If he voluntarily rides with one who is not a safe driver by reason of having imbibed too much, or is, for other reasons not in condition to embark on the journey, he may be guilty of contributory negligence that will prevent any recovery. Welch v. Moothart (record) (Fla.), 89 So. (2d) 485.

§ 215. Liability of Driver to Guest.

§ 215a. —— Degree of Care Required.

A motorist owes his guests the duty of exercising all that degree of care which an ordinarily prudent person should exercise in the handling of dangerous instrumentalities such as motor vehicles. Welch v. Moothart (Fla.), 89 So. (2d) 485.

§ 216. —— No Liability Unless Injury Result of Gross Negligence or Willful and Wanton Misconduct.

The Court further instructs you that it is a part of the law in this case, to be given consideration by you, that no person transported by the owner or operator of a motor vehicle as his guest or passenger, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or willful and wanton misconduct of the owner or operator of such motor vehicle and unless such gross negligence or willful and wanton misconduct was the proximate cause of the injury, death or loss for which the action is brought; and in this case where the plaintiff admits that at the time and place of the involved collision and her alleged injuries she was a guest or passenger in the automobile being driven by the said Bowen, you cannot find a verdict for the plaintiff unless you find from a preponderance of the evidence that the alleged accident was caused by the gross negligence or willful and wanton misconduct of the operator of the said Bowen vehicle at the time of the alleged collision and

injuries, and that such gross negligence or willful and wanton misconduct on the part of the said Bowen was the proximate cause of the injury or loss for which the said plaintiff's action is brought. Welch v. Moothart (record) (Fla.), 89 So. (2d) 485.

Ordinarily, a person would be liable in damages who injures another through the negligent operation of an automobile, though the negligence of the driver constituted only simple negligence; that is, such a course of conduct which a reasonable and prudent man would know might possibly result in injury to persons or property. In a case like this, though, mere simple negligence is not enough to warrant a recovery by the plaintiff. The plaintiff must prove by a preponderance of the evidence gross negligence or wanton and willful misconduct on the defendant's part. This is because the plaintiff was a guest passenger of the defendant, without pay, at the time of the collision, and Florida has a law known as the Guest Statute. Now that statute allows a guest passenger, without payment for transportation, to recover damages against his host driver in case of accident only upon the condition that the accident shall have been caused by the gross negligence or wanton and willful misconduct of the operator of the motor vehicle involved. De La Concha v. Pinero (record) (Fla.), 104 So. (2d) 25.

For the plaintiff to recover in this case, as the Court has previously indicated, she must prove by a preponderance of the evidence not only that the defendant was guilty of gross negligence or wanton and willful misconduct, but that such conduct on his part was the proximate cause, or at least one of the proximate causes, of the accident. De La Concha v. Pinero (Fla.), 104 So. (2d) 25.

§ 218. —— What Constitutes Gross Negligence.

For case again approving 7th instruction in this section in original edition, see Welch v Moothart (Fla.), 89 So. (2d) 485 (instruction found in record only).

For case again giving the last instruction in this section in original edition, see De La Concha v. Pinero (record) (Fla.), 104 So. (2d) 25.

The Court instructs you, gentlemen, that excessive speed alone would not be sufficient to constitute gross negligence or wanton and willful misconduct so as to bring a case within the Guest Statute I have mentioned, nor would mere misjudgment, or some momentary lapse on the part of the driver. De La Concha v. Pinero (record) (Fla.), 104 So. (2d) 25.

§ 219a. Liability of Driver to Trespasser.

§ 219b. —— No Duty to Anticipate Presence of Trespasser nor to Exercise Care Toward Unknown Trespasser.

The operator of an automobile is under no duty to anticipate the presence of a trespasser on his vehicle, or attempting to board it, or to use due care to acquire knowledge of the presence of the trespasser; and he owes to a trespasser, of whose presence on the vehicle he is unaware, no duties whatever, and is not liable for any injury to such a trespasser even though his operation of the car may be found by you to have been grossly negligent. Byers v. Gunn (record) (Fla.), 81 So. (2d) 723.

§ 219c. —— But Duty to Exercise Reasonable Care When Presence of and Danger to Trespasser Known.

The court now charges you that as a matter of law under the vidence of this case that Rachel Gunn was a trespasser. The aintiff, Rachel Gunn, being a trespasser upon the defendant's utomobile, the only obligation of care owed by the driver was to not wantonly or willfully injure the said Rachel Gunn. Willful or wanton injury can only be established by showing that one with knowledge of existing conditions and conscious from such knowledge that injury will likely or probably result from his conduct, nevertheless, with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injury resulting. However, gentlemen, let me point this out. If the driver, Sarah Byers, actually knew of the presence of Rachel Gunn on the fender of the automobile and was aware that she occupied the position of peril to her own safety, then the driver, Sarah Byers, was under a duty to exercise only reasonable and ordinary care under the circumstances to avoid injury to said Rachel Gunn. The term "peril" as used means "imminent, impending, and certain peril" and imparts more than mere possibility of injury. Furthermore, gentlemen, when one is suddenly confronted with a perilous or dangerous situation to another he is not required to exercise a greater degree of caution than the exigencies of the situation permit. Byers v. Gunn (record) (Fla.), 81 So. (2d) 723.

§ 219d. —— And Knowledge of Presence and Danger Must Be Proven.

Unless the plaintiff proves by a preponderance of the evidence that Sarah Byers, the daughter of the defendant, actually saw her in a position of manifest peril on the automobile and with actual knowledge of both her presence and her danger negli-

gently failed to exercise ordinary care to prevent injury to her, you should find the defendant not guilty. Byers v. Gunn (record) (Fla.), 81 So. (2d) 723.

IV. NEGLIGENCE.

§ 219e. In General.

In deciding the question of whether or not it has been proved, by a preponderance of evidence, that the defendant was guilty of negligence which was a proximate cause of the accident, or in deciding the question of whether or not it has been proved, by a preponderance of evidence, that the plaintiff's deceased wife was guilty of negligence which was a contributing proximate cause of the accident, you may and should consider, as I have indicated, all the circumstances revealed by the evidence. You may consider the place and the time at which the accident occurred; the state of the weather; the conditions affecting visibility; the character and condition of the street or highway on which the accident occurred; the character and condition of the surrounding area; traffic conditions; the character and condition of the automobile involved, which, as you know, is a dangerous instrumentality; the speed at which such motor vehicle was operated; the actions and conduct of the persons involved; and all other pertinent, relevant and material circumstances disclosed by the evidence, the consideration of which will aid you in your determination of the factual issues involved in the litigation. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 220. Burden of Proving Negligence.

In this case, the plaintiff alleges in her complaint that at the time of said collision the said W. H. Bowen was under the influence of intoxicating liquors to such an extent that he was deprived of full possession of his normal faculties, and that this fact was unknown to the plaintiff, and the Court instructs you further that before the plaintiff shall be entitled to recover in the case, it is necessary for her to prove by a preponderance of the evidence that the said Bowen at the time of the said collision was under the influence of intoxicating liquors to such an extent that he was deprived of full possession of his normal faculties, and that this fact was unknown to the plaintiff; and any proof submitted by plaintiff in support of these allegations should be considered by you along with any other evidence submitted by plaintiff intended to prove that the said Bowen at said time and place was operating said automobile in a grossly negligent manner and that the gross negligence of said Bowen was the direct cause of the said collision and the resulting injuries to plaintiff. Welch v. Moothart (record) (Fla.), 89 So. (2d) 485.

§ 220a. Presumption That Due Care Exercised.

The Court charges you that the law presumes that, because of the general instinct of self-preservation which prompts men to exercise care for their own safety, that due care was exercised; and this presumption that the driver of the truck exercised due care remains throughout the trial unless or until removed by evidence. And, as applied to the facts in this case, it means that there is a presumption that the driver of the truck was exercising due care, and such presumption can be overcome only if it appears from a preponderance of the evidence that he drove negligently and carelessly. Chase & Co. v. Benefield (record) (Fla.), 64 So. (2d) 922.

With respect to the claim of the plaintiff based upon the death of the driver of the automobile, I charge you that a deceased person is presumed to have acted with common and ordinary care for his or her own safety, until the contrary is made to appear or is deducible from the obvious appearance of things as he or she must have seen them had he or she acted with common and ordinary care to avoid perceivable danger. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

§ 220b. But Negligence Cannot Be Presumed.

No person is an insurer of the safety of others, and negligence is never presumed from the mere happening or occurrence of injury in a case of this kind. Negligence is a fact to be proved by a preponderance of evidence. Chase & Co. v. Benefield (record) (Fla.), 64 So. (2d) 922.

§ 222. Contributory Negligence.

§ 223. —— In General.

Gentlemen, "contributory negligence" is in law that term used to describe or designate the negligence of the plaintiff which precludes the right of recovery. I, therefore, charge you that if you believe in this case that the plaintiff, through her actions as disclosed by the evidence, was guilty of contributory negligence which appreciably contributed to her own injuries, then she is precluded from recovering in this action, and your verdict must be for the defendant. Peninsula Telephone Co. v. Marks (record), 144 Fla. 652, 198 So. 330, holding that the trial court well and ably presented the law of the case to the jury.

I further charge you, gentlemen of the jury, that if you find from the evidence in this case that the plaintiff's injuries were occasioned solely through the negligent operation of the automobile in which she was riding, then your verdict must be for the defendant. This is so because the law will not impose liability against the defendant when its actions did not proximately

cause the plaintiff's injuries. Thus, if you believe from the evidence in this cause that the plaintiff sustained injuries solely as a result of the negligent or unlawful operation of the automobile in which she was riding, by reason of the excessive speed at which it was driven, or the intoxicated condition of its driver, or any other negligent or unlawful means in the operation thereof, your verdict must be for the defendant. Peninsula Telephone Co. v Marks (record), 144 Fla. 652, 198 So. 330, holding that the trial court well and ably presented the law of the case to the jury.

I charge you further that it is the law of the State of Florida that if an injured person by his own negligence has directly and proximately helped to bring about his own injury, then he is not entitled to recover damages, no matter how negligent the other party may be. So in this case, if Mr. Berger and Mr. and Mrs. Rosenberg were guilty of negligence in the slightest degree, and their negligence, however slight it may have been, directly and proximately helped to cause or bring about the accident and their own injury, then that ends this case, and you must return a verdict in favor of Mr. Nathan. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

The law of contributory negligence, which is a part of the law in this case, is that there can be no recovery of damages for personal injuries caused by negligence, if the injured person by his own negligence contributed proximately and appreciably to the cause of his injuries. And in this case if you find from a preponderance of the evidence that the deceased, Harold G. Silas, was guilty of negligence which contributed directly and appreciably to the cause of the alleged collision and the death of said Harold G. Silas, then by your verdict you should find the defendant not guilty. Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158.

The Court further charges you, that even if you find from the evidence that the defendant was negligent in some particular, that the plaintiff in this action cannot recover if you also believe from the evidence, that, notwithstanding defendant's negligence, the deceased could have avoided the accident and his resulting injuries and death had he exercised ordinary or reasonable care for his own safety. Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158.

If, under the court's instructions, you shall find that it has been proved, by a preponderance of evidence, that the defendant was guilty of negligence which was a proximate cause of the accident and the resulting fatality, the second question which you should decide is whether or not it has been proved, by a preponderance of evidence, that the plaintiff's deceased wife was also guilty of

negligence which was a contributing proximate cause of the accident and her death. There can be, of course, more than one proximate cause of an accident. The defendant charges that the plaintiff's deceased wife was guilty of negligence which was a contributing proximate cause of the accident and the fatality. Such charge cannot be sustained unless you shall find that it has been proved by a preponderance of evidence. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 223a. —— Burden of Proving Contributory Negligence.

As I have previously charged you that where the defendants have pleaded contributory negligence, the burden is upon them to prove such defense by a preponderance of the evidence. In deciding whether or not the plaintiff has been guilty of contributory negligence as would prevent her recovering damages against the defendant, I charge you that if you should find from the evidence in this case that the plaintiff in proceeding across Hollywood Boulevard, immediately prior to being struck by an automobile, was using that same degree of care for her own safety as would have been exercised by a reasonably prudent person under the same or similar circumstances, you should then find that the plaintiff was not guilty of any contributory negligence. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

§ 223b. —— Contributory Negligence Does Not Permit Comparison of Parties' Negligence.

Under the law of Florida, even if Mr. Nathan was negligent, no matter how negligent he may have been, if Mr. Berger and Mr. and Mrs. Rosenberg were negligent in the slightest degree, and their negligence in the slightest degree proximately helped to bring about or cause the accident, then you must not concern yourselves whether Mr. Nathan or Mr. Berger and Mr. and Mrs. Rosenberg were the most negligent, nor attempt to determine any difference in degree of negligence as between them, but you must return a verdict in favor of Mr. Nathan, because under the law of this State if both parties were guilty of negligence which directly and proximately brings about or causes an accident, then the injured parties are not entitled to recover any damages. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

Where there is such concurring or combined negligence, the law of this state does not authorize a jury to compare the negligence of one with that of the other and to return a verdict adverse to one whose negligence was greater than that of the other. In such a situation the law will leave the parties where it finds them. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 224. —— Contributory Negligence of Passenger—Knowledge That Driver Intoxicated.

Mere intoxication on the part of the said J. F. Crum is not alone sufficient to constitute a defense under a plea of contributory negligence. And in determining whether or not Evelyn Bielling Marks did or did not use ordinary and reasonable care and prudence in connection therewith, you should take into consideration her age, her capacity to perceive, apprehend and understand the probable danger and all other related circumstances which would properly shed light on her capacity at that time to recognize and understand the situation in which she was thus placing herself. Peninsula Telephone Co. v. Marks (record), 144 Fla. 652, 198 So. 330, holding that the trial court well and ably presented the law of the case to the jury.

§ 224a. —— Duty of Parent to Exercise Ordinary Care for Safety of Child.

It was the duty of the plaintiff and his wife, the father and mother of Scott Robert Klepper, to observe ordinary care for the safety of their child, as the law does not require a little child four years old to know anything about automobiles, nor does the law require of such children any care on their part for their own safety in a case like this, but the law does require that the parents who had the custody of the little boy, Scott Robert Klepper, to exercise ordinary care for his safety. Klepper v. Breslin (record) (Fla.), 83 So. (2d) 587, holding that the trial judge's instructions very completely and properly advised the jury on the applicable law.

§ 225. Last Clear Chance.

You are further instructed that under the law of Florida, there is a rule or doctrine which is recognized as the rule of the "last clear chance", and that under this rule the party to a collision who has the last clear chance or opportunity of avoiding the collision should do so, and even though the other party may be responsible or partially responsible for producing or creating the situation in which the danger arises, the jury must ascertain between the parties whose negligence was the immediate cause of the injury. The commission of the last or immediate negligent act renders all antecedent or prior acts of negligence remote and immaterial; and you are therefore instructed that if you find from the evidence in this case that the defendants' driver had the last clear chance or opportunity to avoid the collision, if you find that the defendants' driver could have avoided the collision by having his motor vehicle under sufficient control to have stopped, slowed down, or taken other appropriate action to avoid the collision, before the actual colli-

sion occurred, or that he saw or should have seen the plaintiff in time to have avoided it had he been looking in the direction he was required to look in the safe operation of his motor vehicle, and thus could have avoided the collision, then you may find a verdict for the plaintiff on the theory that defendants' driver has violated the "last clear chance" rule. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

The party who last has a clear opportunity of avoiding an accident, notwithstanding the negligence of his opponent, is considered solely responsible for it, and such is a simple statement of the doctrine of the last clear chance. Klepper v. Breslin (record) (Fla.), 83 So. (2d) 587, holding that the trial judge's instructions very completely and properly advised the jury on the applicable law.

§ 225a. Unavoidable Accident.

If you find from the evidence that the plaintiff's decedent, Scott Robert Klepper, darted or ran suddenly onto the highway, in front of the defendant's automobile, provided there was no negligence on the part of the defendant, Mrs. Breslin, such automobile was too close for her to avoid hitting him in the exercise of ordinary care, as defined in these instructions, the collision by the defendants' automobile and said Scott Robert Klepper would be an unavoidable accident, and you should find the defendants not guilty. Klepper v. Breslin (Fla.), 83 So. (2d) 587, holding that the trial judge's instructions very completely and properly advised the jury on the applicable law.

§ 226. Imputable Negligence.

§ 228a. —— Negligence Imputed on Basis of Dominion or Control.

Rottman is being sued as a person who committed the act of negligence, Rosenbaum as the owner of the car, and the Mercury Cab Owners' Association, which I will call the Association, as an Association who had dominion or control over this car. Now, "dominion" or "control" means the control and management and operation under the general setup existing at the time, including the 8th day of April, 1953. So if you find that the Association is dealing with the public and had charge of the management and operation of these taxicabs; that it invited the public to call on the telephone its office for service, and in response to those calls it did furnish service; that the Association and the taxicab drivers were jointly in business together for the mutual benefit and advantage, whether it was cash or otherwise, both of them were in the deal, so to speak; if you find those facts to be true, then, likewise, the Association would be guilty of the

negligence that you find for the driver of the cab. Jones v. Mercury Cab Owners' Ass'n (record) (Fla.), 95 So. (2d) 29.

§ 229a. Assumption of Risk.

The defense of assumption of risk rests upon the plaintiff's consent to relieve the defendant of an obligation of conduct toward him and to take his chances of harm from a particular risk. Now such defense may be by express agreement or by implication from the conduct of the parties. When the plaintiff enters voluntarily into a relation or situation involving obvious danger, he may be taken to have assumed the risk and to relieve the defendant of responsibility. Such implied assumption of risk requires knowledge and appreciation of the risk and a voluntary choice to encounter it. Byers v. Gunn (record) (Fla.), 81 So. (2d) 723.

A person riding upon an automobile in a dangerous or improper place or position ordinarily assumes the risk of injury incident to the insecurity of his position from the ordinary operation of the motor vehicle. If, therefore, you find from a preponderance of the evidence in this case that the plaintiff, Rachel Gunn, had knowledge of and appreciated the danger attendant upon getting upon the right, front fender of the defendant's automobile, sitting down upon it while the motor of the automobile was running, and there remaining after the car started forward and continued in motion, or if you find from such preponderance of the evidence that the danger of Miss Gunn's action in this behalf was so obvious or apparent that knowledge of the danger should be imputed to her, then I charge you that she thereby assumed the risk of her fall and resulting injuries and your verdict should be for the defendant. Byers v. Gunn (record) (Fla.), 81 So. (2d) 723.

The Court charges you that, when upon entering a vehicle to accept a ride as a guest one knows or by exercising ordinary care for her own concern would know that one who is to operate the vehicle is intoxicated, the law holds that she assumes the hazard of her undertaking, and, therefore, may not recover in the event of injury resulting from the driver's intoxication. Welch v. Moothart (record) (Fla.), 89 So. (2d) 485.

V. LIABILITY OF OWNER WHEN OTHERS IN CONTROL.

§ 230. In General.

Where a child is in a place of safety on a sidewalk or elsewhere and exhibits no intention to cross the street or make any movement showing such a purpose until the car is so near that it cannot be stopped, and the child suddenly darts in front of it

and is injured, the owner of the car is not chargeable with negligence because of the failure of the driver to stop the car. Klepper v. Breslin (Fla.), 83 So. (2d) 587, holding that the trial judge's instructions very completely and properly advised the jury on the applicable law.

Gentlemen of the jury, I further charge and instruct you that under the law of this State, a motor vehicle is a dangerous instrumentality as a matter of law, and a person, or corporation who has a motor vehicle and entrusts it to a driver to operate is responsible for the damage such driver might do while operating the motor vehicle. Therefore since it is admitted in this case that the defendant Charles N. Stark owned the automobile involved in the collision which gave rise to this suit and that the defendant Linda Lee Stark was driving it at the time of the collision, with the consent of the owner, I charge you that if you find from the evidence that the plaintiff is entitled to a verdict upon consideration by you of all the evidence under the charges and instructions I give you, then your verdict should be in favor of the plaintiff and against both defendants. Stark v. Vaquez (record) (Fla.), 168 So. (2d) 140.

§ 230a. Owner Not Liable When Vehicle Used Without Express or Implied Authority and Consent.

If you find from the evidence that the defendant, Chase & Company, did not either expressly or impliedly authorize and consent to the use of its truck by Willie Reynolds at the time and place alleged, then you must return a verdict for the defendant. Chase & Co. v. Benefield (record) (Fla.), 64 So. (2d) 922.

§ 230b. Facts to Be Considered by Jury in Determining Express or Implied Authority and Consent.

You are instructed that if you find from the evidence that the defendant, Chase & Company, entrusted its motor vehicle to its employee for the purpose of keeping the same at his residence during the time he was not specifically employed in defendant's business, and that the employee could use the automobile in driving back and forth from his home to the place of work, and had, on a previous occasion, given the employee specific permission to use the vehicle on an errand of his own, you are permitted to use these facts together with all the other facts and circumstances which you find from the evidence in arriving at your conclusion as to whether or not the defendant had impliedly consented or acquiesced in the use of the vehicle by its employee at the time and place of the collision. You may also consider any specific instruction given the employee by the company. Chase & Co. v. Benefield (record) (Fla.), 64 So. (2d) 922.

VI. HOMICIDE.

§ 232. In General.

Now, the indictment charges the defendant with having brought about the death of Jesse James Jackson by his culpable negligence and disregard for the life and safety of the said Jesse James Jackson, and at a time, it is charged, when the defendant was under the influence of intoxicating liquor to the extent that he was not in possession of all his normal faculties. I charge you as a matter of law that if you find the defendant operated that motor vehicle in manner and form as charged in this indictment, and while he was either Intoxicated or under the influence of intoxicating liquor to the extent that he did not have possession of his normal faculties, then you should find him guilty thereof, if you find such to be the proper verdict from the evidence beyond reasonable doubt. Dunning v. State (record) (Fla.), 83 So. (2d) 702.

A homicide is excusable when committed by accident or misfortune in the doing of any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, or upon any sudden and sufficient provocation or upon any sudden combat without any dangerous weapon being used, and not done in a cruel and unusual manner. Excusable homicides where death results by accident or misfortune or as outlined in the charge are lawful. So, if you should believe from this evidence that this was an accident and that the death of the little boy Jesse James Jackson came about as a result of an accident while the defendant was operating his automobile in a lawful manner and with usual and ordinary caution, without any unlawful intent, and while he was not intoxicated by intoxicating liquor or under the influence of intoxicating liquor to the extent that he was deprived of his normal faculties, and that he was exercising due care and caution, then, in that event, of course, you should find the defendant not guilty. But, if you find from the evidence beyond reasonable doubt that, in the operation of his automobile as heretofore stated he was intoxicated by intoxicating liquor or under the influence of intoxicating liquor to the extent that he was deprived of his normal faculties, and his ability to drive and operate the automobile, and that while he was in that condition and because of his culpable negligence in the operation of the automobile at such time, you believe he brought about and caused the death of Jesse James Jackson in manner and form as charged in the indictment, then you should find him guilty. Dunning v. State (record) (Fla.), 83 So. (2d) 702.

The second count charges the defendant with manslaughter resulting from operating an automobile while under the in-

fluence of intoxicating liquors, voluntarily under the influence of intoxicating liquors to such an extent as to deprive him of his normal faculties. The law on that seems to be this—if you believe from the evidence beyond a reasonable doubt that at the time and place charged in the information, the defendant while voluntarily intoxicated to such an extent as to deprive him of his full possession of his normal faculties, did operate and drive a motor vehicle: to wit, a passenger automobile, over the highways and streets or thoroughfares of Lake County, Florida, and that while in such condition the car which he was driving collided with a car occupied by the deceased and that thereby the death of the deceased was caused by the operation of such motor vehicle while defendant was voluntarily intoxicated, you will find him guilty of manslaughter. Hunt v. State (record) (Fla.), 87 So. (2d) 584.

Unless you believe beyond a reasonable doubt that at the time and place charged in the information, that the defendant while voluntarily intoxicated to such an extent as to deprive him of his normal faculties, did operate said vehicle, colliding with car of deceased, thereby causing death of deceased, you must acquit the defendant. Hunt v. State (record) (Fla.), 87 So. (2d) 584.

In order for you to find the defendant guilty of the charge you must believe from the evidence beyond a reasonable doubt that, within 2 years prior to the filing of the information, which was the 30th day of March, 1955, that the defendant unlawfully, by and through his own act, in Osceola County, Florida, by his own act, procurement and culpable negligence, did operate a certain Chevrolet automobile in such a negligent, careless and reckless manner as to run into and collide with a certain Buick automobile in which Louis Monoti was then and there riding with such force and violence as to inflict in and upon the person of the said Louis Monoti certain mortal injuries of which mortal injuries the said Louis Monoti then and there died; and that at the time the defendant was operating said automobile in a gross and flagrant manner, evincing reckless disregard of human life or safety of persons exposed to its dangerous effects; or the defendant was guilty of entire want of care raising the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness or a grossly careless disregard of the safety and welfare of the public or with reckless indifference to the rights of others, which is equivalent to an intentional violation of them. Fort v. State (record) (Fla.), 91 So. (2d) 637.

It is unlawful for any person, while in an intoxicated condition or under the influence of intoxicating liquor to such extent as to deprive him of full possession of his normal faculties,

to drive or operate over the highways or streets, or thoroughfares of Florida, any automobile, truck or vehicle or motorcycle or any other vehicle propelled by gasoline, gas, vapor, electricity, steam or other power. Any person convicted of a violation of this section shall be punished as provided by law. If the death of any human being is caused by the operation of an automobile by a person under the influence of intoxicating liquor he shall be deemed guilty of manslaughter, and upon conviction shall be punished as provided by the law relating to manslaughter. Clowney v. State (record) (Fla.), 102 So. (2d) 619.

Lady and gentlemen of the jury, you are instructed that under the statute creating offense of manslaughter by intoxicated motorist, the state has no burden to prove that at the time of the accident the defendant was negligent, but such element is established if it be shown that the defendant was not at the time of the accident in possession of his faculties due to the voluntary use of intoxicants. Clowney v. State (record) (Fla.), 102 So. (2d) 619.

§ 232a. Accused Not Guilty Where Accident Result of Mechanical Failure.

The court charged the jury that if they believed that the tragedy resulted from mechanical failure and that the appellant was not guilty of culpable negligence under the circumstances, then they should bring in a verdict of not guilty. Hutley v. State (Fla.), 94 So. (2d) 815.

VII. AUTOMOBILE LIENS.

§ 232b. In General.

The court further instructs you that no liens for purchase money or as security for a debt in the form of retain title contract, conditional bill of sale or chattel mortgage, or otherwise, on a motor vehicle, as now or may hereafter be defined by law, shall be enforceable in any of the courts of this state, against creditors or subsequent purchasers for a valuable consideration and without notice, unless a sworn notice of such lien, showing the following information, viz.: 1) name and address of the registered owner; 2) date and amount of lien; 3) description of the motor vehicle; particularly showing make, type, motor and serial number; and 4) name and address of lien holder, shall be recorded in the office of the motor vehicle commissioner of the State of Florida, which filing is in lieu of all filing and recording now required or authorized by law, and shall be effective as constructive notice when filed. Woods v. Thompson (record), 159 Fla. 112, 31 So. (2d) 62.

See § 319.15, F. S. 1957.

BASTARDY.

§ 238. Complainant in Bastardy Proceeding Must Be Unmarried.

Section 742.01, F. S. 1953, cited under this section in original edition, should read section 742.011, F. S. 1951.

BIGAMY.

§ 241a. In General.

If you find upon the evidence beyond a reasonable doubt that the defendant, J. W. Ellerson, on the 3rd day of December, 1928, or at any time within two years prior to the date of filing the information, which was on November 25, 1929, in Orange County, Florida, did then and there marry and have for his wife one Ida Lawrence, and that he, the said J. W. Ellerson, was then and there a married man and that he then had a lawful wife still alive, then it will be your duty to find the defendant guilty as charged in the information. If you do not so find or if you have a reasonable doubt as to his guilt it will be your duty to find him not guilty. Ellison v. State (record), 100 Fla. 736, 129 So. 887.

See §§ 799.01-799.03.

BILLS, NOTES AND CHECKS.

§ 252a. Pledgee as Innocent Holder for Value.

The court instructs you, gentlemen of the jury, that if you believe from a preponderance of the evidence that Charles A. Brown, Jr., the payee named in the Avondale Company note in evidence herein, received said note from Lilly H. Wood, with the consent of the plaintiff, Eleanor B. Alford, and thereafter pledged the same for a loan—pledged the same as security for a loan made to him by the defendant bank in the sum of $11,000, then the defendant became an innocent holder for value of said note, and you must find the defendant not guilty. Alford v. Barnett Nat. Bank of Jacksonville, 137 Fla. 564, 188 So. 322.

§ 263a. Payments on Note as Tolling Statute of Limitations.

The issue, whether a claim based on a note was barred by the statute of limitations, was correctly submitted to the jury under an instruction that they should find for the plaintiff if they determined from the evidence that the interest payments had been

made on the note before its maturity, and if they concluded otherwise, the verdict should be for the defendant. Long v. Angel, 144 Fla. 644, 198 So. 339, in which it was specifically averred that payments endorsed on the note were actually made at the times indicated, thus raising the issue whether the operation of the statute of limitations was suspended.

BOUNDARIES.

§ 265a. Issues in Contested Boundary Disputes.

Gentlemen of the jury, the plaintiff is suing the defendant, Marvin Reynolds, under a complaint alleging that the defendant dispossessed the plaintiff of certain lands which are described in the declaration, and they ask for a determination of the jury that they are entitled to the land of which they were dispossessed by the defendant. The defendant denies that he has dispossessed the plaintiff of any land, and claims that the land described in the declaration belongs to him and not to the plaintiff. The issue, therefore, since both of the parties admit the record title of the other, the issue is made as to where the true boundary line is between the property of the plaintiff and defendant, and that is the issue which the jury is called upon to determine. If the jury finds for the plaintiff, the jury will find a verdict restoring to the plaintiff the property described in the declaration. If you find for the defendant the verdict should simply be for the defendant, which will entitle the defendant to keep the land which it is alleged in the complaint he has possessed himself of, and which is described in the declaration. Reynolds v. Alger-Sullivan Lumber Co. (record) (Fla.), 76 So. (2d) 137.

§ 266. Evidence Considered in Establishing Boundaries.

§ 268a. —— Section Corner Conclusive Where Proved as Established in Government Survey.

The Court charges you that a section corner which is proved to be the corner established in the government survey is conclusive and binding on all parties, regardless of whether the corner is in the place called for in the field notes or shown on the government plat. This rule also applies to quarter section corners so established and proven. Reynolds v. Alger-Sullivan Lumber Co. (record) (Fla.), 76 So. (2d) 137.

§ 269. Effect of Natural Boundaries and Lines Actually Run, etc.

In re-establishing government survey lines where none of the original monuments can be found, old fence lines may and should be consulted. Also, consideration should be given to hedges or rows of trees growing in the immediate vicinity. Reynolds v. Alger-Sullivan Lumber Co. (record) (Fla.), 76 So. (2d) 137.

§ 269a. Recognition of Fence as Boundary Line—Recognition of One Owner May Be Tacked to That of Successor.

In the locating of the disputed boundary line between adjacent landowners the maintenance of a fence by either of them for a long period of time and the recognition of the fence as a boundary line by either or all the predecessors in title of the property may be considered by the jury as an indication of the location of the boundary line. Recognition and acquiescence in such a boundary fence by one owner may be tacked or added to that of a succeeding owner or successive owners. Reynolds v. Alger-Sullivan Lumber Co. (record) (Fla.), 76 So. (2d) 137.

§ 269b. Proven Corners Conclusive Despite Conflict in Field Notes.

In re-establishing the lines of the survey the footsteps of the original surveyor should be followed and it is immaterial that the lines actually run by him are not correct. It is the survey as it was actually run on the ground that governs, if the monuments, corners, or lines actually established can be located or proved. Distances called for in field notes must yield to proven corners and in case of conflict the corners, and not the field note distances, ought to govern. Such proven corners are conclusive notwithstanding any conflict in the field notes. This is so because the corners are the fact or truth of the survey as it was actually made, while the distances called for in the field notes are but descriptions of the act done, and, when the distances called for are inaccurate, they cannot change the fact of the proved corners. Reynolds v. Alger-Sullivan Lumber Co. (record) (Fla.), 76 So. (2d) 137.

BRIBERY.

§ 272a. Elements of Offense.

§ 272b. —— In General.

Gentlemen of the jury, under the laws of the State of Florida, it shall be unlawful for any officer, state, county or municipal, or any public appointee, to exact or accept any reward, compensation, or other remuneration other than those provided by law from any person whatsoever for the performance, nonperformance or violation of any law, rule or regulation that may be incumbent upon the said officer or appointee to administer, respect, perform, execute or to have executed, without reasonable ground for believing that the reward, compensation or remuneration exacted or accepted was authorized by law; provided, that nothing in the law shall be construed so as to preclude a sheriff or his deputies, city marshal or policeman from accepting rewards or remuneration for services performed in apprehending any criminal. Richards v. State (record), 144 Fla. 177, 197 So. 772.

See §§ 838.01-838.12. F. S. 1957.

§ 272c. —— State Must Prove Defendant Had No Reasonable Ground for Believing Reward, etc., Authorized by Law.

The court instructs you that it is one of the material allegations of the information in this case for the state to prove beyond and to the exclusion of every reasonable doubt that the defendant did not have reasonable ground to believe that he was authorized by law to receive the sum paid him, if you find that any sum was paid him, and if a reasonable doubt arises in your minds as to whether or not the defendant had reasonable grounds to so believe you should find him not guilty. Richards v. State (record), 144 Fla. 177, 197 So. 772.

§ 272d. —— "Authorized by law" defined.

The court instructs you that the phrase "authorized by law" in these charges of the court simply means a lawful right to receive, and if the state has failed to prove by the evidence beyond and to the exclusion of every reasonable doubt that the defendant, Ralph W. Richards, under all of the circumstances of the case, had no reasonable grounds for believing that he had a lawful right to receive the money, you will find him not guilty. Richards v. State (record), 144 Fla. 177, 197 So. 772.

§ 272e. —— But Need Not Prove Precise Time of Offense Laid in Information.

The court also instructs you that the precise time laid in the information as the time of the commission of the offense need not be proved, but that if you believe from the evidence beyond a reasonable doubt that the defendant, Ralph W. Richards, at any time subsequent to May 29, 1937, which is the effective date of Chapter 18483 of the Laws of Florida, Acts of the Legislature of 1937, and prior to the filing of the information of this cause, unlawfully and corruptly either exacted or accepted a reward, compensation or remuneration from one Frank V. B. Couch for casting his vote as such commissioner in favor of electing the said Frank V. B. Couch to the office of commissioner at large of the said city of Daytona Beach at a meeting of the said city commission held in the said city of Daytona Beach on the 10th day of January, 1938, as charged in the information, you may convict the defendant regardless of the time alleged in the information as to such exaction or acceptance. Richards v. State (record), 144 Fla. 177, 197 So. 772.

§ 272f. —— Nor Whether Reward, etc., Exacted or Accepted from One Offering It or from His Agent.

The court further instructs you that if you believe from the evidence beyond a reasonable doubt that the defendant, Ralph W. Richards, unlawfully and corruptly either exacted or accepted a reward, compensation or remuneration in consideration for casting a vote as a member of the commission of said city of Daytona Beach, in favor of electing Frank V. B. Couch to the office of commissioner at large of said city of Daytona Beach, as charged in the information, it is immaterial whether the reward, compensation or remuneration so exacted or accepted by said defendant, as aforesaid, was exacted or accepted by him from the said Frank V. B. Couch personally or from the said Frank V. B. Couch through someone acting as the agent of the said Frank V. B. Couch, if you so find. Richards v. State (record), 144 Fla. 177, 197 So. 772.

§ 272g. —— Nor Whether Reward, etc., Exacted or Accepted Before or After Act Influenced Thereby.

The court further instructs you that if you believe from the evidence beyond a reasonable doubt that there was a meeting of the minds between the defendant, Ralph W. Richards, and one Frank V. B. Couch, or someone acting for and on behalf of the said Frank V. B. Couch and authorized by him to so act, upon an agreement that said defendant would, as a member of the city commission of the city of Daytona Beach, cast his vote in favor of electing the said Frank V. B. Couch to the office of commissioner at large of the said city of Daytona Beach, in consideration for the receipt by said defendant of a reward, compensation or remuneration from the said Frank V. B. Couch, or from someone acting for and on behalf of the said Frank V. B. Couch, and that the defendant, acting on such agreement, did cast his vote as a member of said city commission in favor of electing the said Frank V. B. Couch to the office of commissioner at large of said city of Daytona Beach, and received, in consideration thereof, a reward, compensation or remuneration from the said Frank V. B. Couch, or from someone acting for and on behalf of the said Frank V. B. Couch, and that said defendant was without reasonable ground for believing that such reward, compensation or remuneration was authorized by law, you may convict the defendant irrespective of whether you find that such reward, compensation or remuneration was received by said defendant before the casting of such vote by him as aforesaid or at a time subsequent thereto. Richards v. State (record), 144 Fla. 177, 197 So. 772.

§ 272h. —— And Source from Which Reward, etc., Derived Is Immaterial.

The court further instructs you that the source from which such reward, compensation or remuneration was derived or was to be derived is immaterial, if you believe from the evidence beyond a reasonable doubt that the defendant, Ralph W. Richards, made the reward, compensation or remuneration as alleged in the information a condition precedent to the casting of his vote, as a member of said commission, in favor of electing said Frank V. B. Couch to the office of commissioner at large of the said city of Daytona Beach, and without reasonable grounds for believing that the reward, compensation or remuneration exacted or accepted was authorized by law. Richards v. State (record), 144 Fla. 177, 197 So. 772.

§ 272i. General Charge of Court.

Gentlemen, if you find that the state has proved beyond and

to the exclusion of every reasonable doubt that the defendant, Ralph W. Richards, of the County of Volusia and State of Florida, on the 11th day of January, in the year of our Lord 1938, in the county and state aforesaid, being then and there a municipal officer, to wit, a commissioner of the city commission of the city of Daytona Beach, a municipal corporation, in Volusia County, Florida, did then and there unlawfully and corruptly exact and accept a reward, compensation and remuneration other than that which he, the said Ralph W. Richards, as such municipal officer, was permitted and provided by law to accept and receive, to wit: the sum of ($10,000) lawful money of the United States of America, a more particular description of which is to the state attorney unknown, of the value of ($10,000) from one Frank V. B. Couch, the said Ralph W. Richards then and there exacting, accepting and receiving said reward, compensation, and remuneration without reasonable grounds for believing that the said reward, compensation, and remuneration so exacted and accepted by him was authorized by law; the said reward, compensation and remuneration being then and there exacted and accepted by the said Ralph W. Richards for casting his vote as such commissioner in favor of electing the said Frank V. B. Couch to the office of commissioner at large of the said city of Daytona Beach at a meeting of the said city commission held in the said city of Daytona Beach on the 10th day of January, 1938; there being at the time of casting the aforesaid vote by the said Ralph W. Richards, a vacancy in the office of commissioner at large of the city of Daytona Beach, which vacancy it was the duty of and incumbent upon the said city commission and the members thereof at the meeting of said commission aforesaid to fill by a majority vote of the remaining members of the said city commission, it will be your duty to find the defendant guilty as charged. If you do not so believe, or have a reasonable doubt thereof, it will be equally your duty to find the defendant not guilty and acquit him. Richards v. State (record), 144 Fla. 177, 197 So. 772.

If you find from the evidence in this case beyond a reasonable doubt that the defendant on the 14th day of July, 1951, in Orange County, Florida, then and there knowing D. H. Jackson and Jimmy Bowen to be police officers of the city of Orlando, Orange County, Florida, did then and there corruptly and unlawfully offer and promise to said D. H. Jackson and Jimmy Bowen, police officers as aforesaid, a certain gift or gratuity, with intent to influence the acts of said D. H. Jackson and Jimmy Bowen on a certain matter which might be by law brought before the said D. H. Jackson and Jimmy Bowen in their official capacity, that is to say: the said Morris Zalla did then and there corruptly and unlawfully offer and promise to

take out a certain number in a certain lottery, being to your informant unknown, each week for each of the said officers and to guarantee that the said numbers would come out the winning numbers at least three or four times each month and to give the said D. H. Jackson and Jimmy Bowen, officers as aforesaid, the money received from said winning numbers, which would amount to approximately at least $70.00 per officer per week, all of same being a thing of value and of the value of approximately $70.00 per week, to each of said officers to influence the said D. H. Jackson and Jimmy Bowen to permit the said Morris Zalla to sell Bolita and Cuba unlawfully in Orlando, Orange County, Florida, without interference from the said D. H. Jackson and Jimmy Bowen in their official capacities, then it will be your duty to find the defendant guilty, as charged in the information. Zalla v. State (record) (Fla.), 61 So. (2d) 649.

BURGLARY AND HOUSEBREAKING.

§ 289a. Essential Allegations of Information Requiring Proof.
§ 289b. Intent to Commit Felony or Misdemeanor Necessary Element of Offense.
§ 292a. What Constitutes an Entering.

§ 289. In General.

The court charged that whoever breaks and enters a dwelling house with intent to commit a felony, or any building or structure within the curtilage of a dwelling house, though not forming a part thereof, with intent to commit a felony is a burglary. Everett v. State (record) (Fla.), 97 So. (2d) 241.

There must be some breaking, as well as entering, the dwelling house in order to sustain burglary. Breaking consists of putting aside a part of the house, which obstructs entrance and is closed, or in penetrating by an opening which is as much closed as the nature of the case admits. So the pushing open of a door entirely closed is a sufficient breaking. There must also be some entry, in addition to the breaking. Any actual entry, however slight, is sufficient. In addition to the breaking and entering, in order to sustain burglary, there must be at the same time the intent to commit a felony in the said building. The intent may, and necessarily must in most cases, be inferred from the facts. The intent is the gist of the offense of burglary and it must also be proven beyond a reasonable doubt before you can say the defendant committed burglary or attempted to commit burglary. Everett v. State (record) (Fla.), 97 So. (2d) 241.

Burglary is the breaking and entering of the dwelling house of another with intent to commit a felony. Larry v. State (record) (Fla.), 104 So. (2d) 352.

§ 289a. Essential Allegations of Information Requiring Proof.

The burden is on the state to prove to your minds by testimony beyond and to the exclusion of every reasonable doubt each essential allegation of the information in which this defendant is charged. In the first place, the state must prove that the offense was committed in Palm Beach County, Florida, if it was committed; that need not be proven beyond every reasonable doubt but is sufficiently proven if you may reasonably conclude from all the evidence that the offense, if committed, was committed in Palm Beach County, Florida. The state must prove from the evidence beyond and to the exclusion of every reasonable doubt that the offense was committed, if any was committed, at sometime within two years prior to the filing of the information, which was filed November 14, 1939. The date of the 15th of September, 1939, laid in the information as the date the offense was supposed to be committed, is not material to be proven; it will be sufficient if the state proves to your minds by testimony beyond and to the exclusion of every reasonable doubt that the offense was committed at any time between November 14th, 1939 and November 14th, 1937. You must also believe, gentlemen of the jury, from the testimony beyond and to the exclusion of every reasonable doubt that the defendant did break and enter the building described in the information as the store building of Cyrus Argintar. And then you must also believe beyond and to the exclusion of every reasonable doubt that at the time of the breaking and entering, if you find from the evidence that the defendant did break and enter the building of Cyrus Argintar, if you find that from the evidence beyond and to the exclusion of every reasonable doubt, you must also believe beyond and to the exclusion of every reasonable doubt, that at the time of such breaking and entering, he did so with the intent to commit a felony, to wit, grand larceny, which is the taking, stealing and carrying away of the property of another of the value of more than $50.00. This information also includes the crime of breaking and entering with the intent to commit a misdemeanor. The only difference in the two crimes is the matter of intent; in the second offense there must be a breaking and entering the same as in the first offense, proven by the testimony beyond and to the exclusion of every reasonable doubt, but in the second offense the intent is to take, steal and carry away property of the value of less than $50.00. Hall v. State (record), 144 Fla. 333, 198 So. 60.

I charge you further, gentlemen of the jury, that there are two essential elements to be proven to you beyond all reasonable doubt in the charge contained in this information. One of

these elements is that the defendant feloniously broke and entered, the other is that at the time that he entered the building, if he did so, that there must have been a specific intent in his mind at that time to commit a felony or a misdemeanor. These facts must be proven to your satisfaction beyond all reasonable doubt. Hall v. State (record), 144 Fla. 333, 198 So. 60.

§ 289b. Intent to Commit Felony or Misdemeanor Necessary Element of Offense.

I charge you, gentlemen of the jury, that to constitute the crime of breaking and entering the building of another with the intent to commit a felony, or petit larceny, the defendant must have had an intent to commit the felony or misdemeanor in the building; otherwise, the breaking and entering would amount to a trespass. Hall v. State (record), 144 Fla. 333, 198 So. 60.

Intent, gentlemen, is something that rests in the mind of a person. That you can arrive at only from the facts and circumstances surrounding the case; that is, what was said and done by the defendant. This intent is sufficiently proven if you may reasonably conclude from all the evidence that at the time of the opening of said door and entering therein, if you believe from the evidence beyond and to the exclusion of every reasonable doubt that he did so open the door and enter therein, that he had at that time the intent to either commit the felony of grand larceny or the crime of petit larceny, as defined to you. Hall v. State (record), 144 Fla. 333, 198 So. 60.

I charge you further, gentlemen of the jury, that if you believe from the evidence in this case that the defendant did in fact break and enter the building therein alleged in the information, or that he entered this building at that time, and that he in fact entered it upon what he considered was his duty as a police officer, and that there was no intent upon his part to commit a felony or a misdemeanor by so doing, then it would be your duty to find the defendant not guilty. He must have had a specific intent to commit a felony or a misdemeanor at that time. Hall v. State (record), 144 Fla. 333, 198 So. 60.

§ 292. What Constitutes a Breaking.

A breaking is committed when any force whatever is used to make an opening through which a person can go; the opening of a door would be sufficient breaking. Hall v. State (record), 144 Fla. 333, 198 So. 60.

§ 292a. What Constitutes an Entering.

An entering is the going of a person into the building, either in whole or some part of his person entering into the building. Hall v. State (record), 144 Fla. 333, 198 So. 60.

CARRIERS.

I. CARRIERS OF GOODS.

§ 309a. When Carrier Liable as an Insurer.

I further charge you that a common carrier of goods is liable as an insurer for the value of the loss or value of the goods received for shipment and damaged in transit, or at destination, unless without its fault such injury or damage is caused by an act of God or by a public enemy or by the inherent nature of the goods or by law or by the person entitled to the goods or his agent. Florida East Coast Ry. Co. v. Anderson (record), 110 Fla. 290, 148 So. 553, holding that charges in the instant case relating to common carriers were inappropriate under the facts.

§ 309b. Liability When Goods Transported by Two or More Common Carriers.

I charge you, gentlemen of the jury, that when goods transported by two or more common carriers are lost or injured, and the last carrier is sued, it will be held liable in damages for such amount as you may find from the evidence and the charge of the court to be due to the plaintiffs unless it shows the loss or damage occurred on a preceding connecting line. Florida East Coast Ry. Co. v. Anderson (record), 110 Fla. 290, 148 So. 553, holding that charges in the instant case relating to common carriers were inappropriate under the facts.

§ 309c. Liability When Goods Left in Baggage Room.

§ 309d. —— Duty of Passenger to Call for Baggage—Carrier Liable as Warehouseman upon Failure to Do So.

After baggage has arrived at its destination, it is a passenger's duty, in the absence of some special circumstances excusing him from so doing, to call for and take it away within a reasonable

time, and if the baggage remains in a carrier's possession after the passenger has had a reasonable opportunity to remove it, the carrier's liability in respect thereto is only that of a warehouseman, and as such, it is bound to exercise only ordinary care in protecting the baggage, and is only liable for loss or injury caused by its negligence. Florida East Coast Ry. Co. v. Anderson (record), 110 Fla. 290, 148 So. 553.

The law, gentlemen, is that under ordinary circumstances it is the duty of the passenger to call for his baggage on the day of its arrival, and in the event he does not call for said baggage on the day of its arrival but waits seven days before he applies for it, the liability of the carrier is that of a warehouseman only, and unless the plaintiff shows that the proximate cause of the damage was the defendant's negligence, the plaintiff cannot recover. Florida East Coast Ry. Co. v. Anderson (record), 110 Fla. 290, 148 So. 553.

Under the facts in this case, it has been shown, as a matter of law, that a reasonable time elapsed for the plaintiff to remove her baggage after its arrival in Miami, and after its elapse the defendant was relieved of its responsibility as a common carrier for the delivery of the said baggage, and unless you find the damage to the plaintiff's baggage was occasioned proximately by some negligence on the part of the defendant, it will be your duty as jurors to find for the defendant. Florida East Coast Ry. Co. v. Anderson, 110 Fla. 290, 148 So. 553.

If in this case you find that the plaintiff did not call within a reasonable time for her baggage, the carrier's liability as a common carrier ceased upon the elapsing of a reasonable time after the arrival of the baggage, and thereafter the defendant was only liable as a warehouseman; and if you find the proximate cause of the injury to plaintiff's baggage was not due to any negligence on the part of the defendant, but was occasioned by the rain and windstorm that occurred at that time, and that the defendant used reasonable care to protect the baggage, you will find for the defendant. Florida East Coast Ry. Co. v. Anderson (record), 110 Fla. 290, 148 So. 553.

Under the undisputed evidence in this case, it is my duty to instruct you that at the time the rainstorm occurred the character of the defendant was not that of a carrier but that of a warehouseman in respect to plaintiff's baggage, and if it exercised reasonable care to protect the property from the water that blew in through the windows and doors of the baggage depot, it is not responsible for any damage that was occasioned by the entrance of the water into the said building. Florida East Coast Ry. Co. v. Anderson (record), 110 Fla. 290, 148 So. 553.

§ 309e. —— Effect of Tariff Limiting Defendant's Liability.

Under the undisputed evidence in this case, at the time of the alleged damage to plaintiff's baggage, there was in effect a tariff limiting defendant's liability to $100.00, and if you find that the plaintiff did not declare a value in excess of that amount at the time of checking the baggage at Tampa, the plaintiff cannot recover in excess of $100.00, even though the defendant was negligent in handling said baggage. Florida East Coast Ry. Co. v. Anderson (record), 110 Fla. 290, 148 So. 553.

§ 309f. —— Burden of Proof.

I charge you, gentlemen of the jury, that in this case the burden is first on the plaintiffs to show delivery and acceptance of the goods of the plaintiffs, and next, the damage to said goods and the value thereof; and in the event that you find this to have been shown, I charge you that the burden is then cast upon the defendant to relieve itself of liability by showing either legal contract exemption or that the loss was occasioned by a public enemy, or by the act of God, or that the goods had in themselves elements of destruction which occasioned the damage. Florida East Coast Ry. Co. v. Anderson (record), 110 Fla. 290, 148 So. 553.

II. CARRIERS OF PASSENGERS.

§ 312. Degree of Diligence Required of Carrier.

The duty of the defendant, Miami Transit Company, is more than a duty to use ordinary care under the circumstances. At the time of the accident here involved, the defendant, Miami Transit Company, was a common carrier of passengers for hire and the plaintiff was one of the defendant's passengers. Under such circumstances, it was the duty of the defendant, Miami Transit Company, to exercise towards the plaintiff, the highest degree of care consistent with the practical operation of the bus. Thomason v. Miami Transit Co. (record) (Fla.), 100 So. (2d) 620.

You are further instructed that where the plaintiffs entered the taxicab then being operated by the Red Top Cab & Baggage Co., in the course of its taxicab business by its employee under an implied agreement to pay fare for transportation as fare paying passengers, then there arises between the taxicab company and its passengers an implied contract on the part of the taxicab company to safely transport its passengers to their destination without injury, and in the performance of this duty the taxicab company owes to its passengers the highest degree of care, vigilance and foresight reasonably demanded at any given

time by the conditions and circumstances of the transportation of such passengers, and if the said taxicab company was guilty of any negligence, however slight, which directly either causes or contributes in any way proximately to the cause of the collision of the vehicles and the resulting alleged injuries to its passengers, by any negligence in the operation or control of said taxicab on the part of its employee, then the passengers in the taxicab have a right to maintain an action and to recover for breach of the contract entered into between the taxicab company and the passengers to safely transport them to their destination without injury. Red Top Cab & Baggage Co. v. Masilotti, 190 F. (2d) 668.

§ 312a. Damages Chargeable to Carrier Violating That Degree of Diligence.

If you find that the plaintiff is entitled to a verdict, you are instructed that when a common carrier violates the duty imposed by law of exercising the highest degree of care not to injure its passengers, such carrier may be compelled to respond in damages for all the injuries which it inflicts by reason of the violation of such duty, even if a particular condition may have been aggravated by or might not have happened at all except for the peculiar physical condition of the person injured. Thomason v. Miami Transit Co. (record) (Fla.), 100 So. (2d) 620.

§ 312b. Carrier Not an Insurer of Passengers' Safety.

The defendant is not an insurer of the safety of its passengers. Its duty is to exercise all ordinary and reasonable care and diligence in the operation of its trains, and if you believe from the evidence that such care was exercised in this case then you will find for the defendant. Louisville & Nashville Ry. Co. v. Willis (record), 58 Fla. 307, 51 So. 134.

§ 321. Contributory Negligence as Bar to Recovery.

If a passenger undertakes to stand up or move about on a moving train, he is required to exercise reasonable care for his own safety. If the train in running is swaying or lurching he should take such reasonable precautions as an ordinarily prudent person would take under the same circumstances, to protect himself from falling or losing his balance and if he fails to do so and is injured in consequence he cannot recover of the railroad company for such injury. Louisville & Nashville Ry. Co. v. Willis (record), 58 Fla. 307, 51 So. 134.

If the ordinary movement of a running train tends to make the train sway from side to side, or to lurch, and this swaying or lurching tends to cause a door in a car of such train to close

violently, and this was known or should have been known to the plaintiff then he would be required to exercise such care to protect himself against the sudden closing of a door through which he was passing, if the car was in motion, as a reasonably cautious person would take under the same circumstances to protect himself against falling or losing his balance, and against the probability of a sudden closing of the door, and if he fails to do so, and is injured he cannot recover against the railroad company. Louisville & Nashville Ry. Co. v. Willis (record), 58 Fla. 307, 51 So. 134.

CIRCUMSTANTIAL EVIDENCE.

§ 328a. Value of Circumstantial Evidence.

§ 328. What Constitutes Circumstantial Evidence.

We have in this case what is known as circumstantial evidence. Circumstantial evidence is received and acted upon by courts nd juries of this country, but such evidence should be received nd acted upon with caution and before you would be warranted in convicting any of the defendants here, there should be such a well-connected and unbroken chain of circumstances as to exclude all other reasonable hypotheses but that of guilt. It must not only be consistent with guilt, but it must be inconsistent with innocence. In other words, it must point directly to the guilt of the accused and if it points with equal strength to the guilt of some other, then you must acquit the defendants. In cases of circumstantial evidence, it is not necessary that the proof shall be conclusive. It is sufficient if the jury believe from all the facts and circumstances of the case that the accused is guilty and they have no reasonable doubt of that fact in their minds. If the jury believe beyond and to the exclusion of every reasonable doubt that the facts in the case are not consistent with the supposition that the accused are innocent and cannot reconcile the circumstances produced with any other supposition than that of guilt, then it would be your duty to find the defendants guilty. All that can be required is not absolute or positive proof, but such proof as convinces you that the crime has been made out against the accused beyond and to the exclusion of every reasonable doubt. Chacon v. State (record) (Fla.), 102 So. (2d) 578.

You are advised that a matter or fact may be established by direct or positive proof, or it may be inferred from circumstances and conditions established by the evidence. When, however, circumstantial evidence is relied on to prove an essential matter or fact, the inference of such matter or fact, arising from the established circumstances and conditions, must outweigh any and all contrary or conflicting inferences to such an extent as to amount

to a preponderance of evidence. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

Note.—Where the only evidence remotely tending to establish critical facts was purely circumstantial in character, the trial judge's failure and refusal to properly instruct the jury on the law relating to circumstantial evidence was held to deprive defendants of due process as guaranteed by the basic law of Florida, and justice was held best served by granting to appellant a new trial. Marsh v. State (Fla. App. 1st Dist.), 112 So. (2d) 60.

§ 328a. Value of Circumstantial Evidence.

Gentlemen of the Jury, because some of the evidence in this case is circumstantial, it is necessary that I should charge you upon the value of circumstantial evidence. The value of circumstantial evidence depends upon the conclusive nature of the circumstances relied upon to establish any controverted fact. They must not only be consistent with guilt, but inconsistent with innocence. Such evidence is insufficient where, assuming all to be proved which the evidence tends to prove, some other reasonable hypothesis of innocence may still be true; for it is the actual exclusion of every other reasonable hypothesis but that of guilt, which invests mere circumstances with the force of proof. What circumstances amount to proof, can never be a matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury beyond a reasonable doubt. Absolute metaphysical and demonstrative certainty is not essential to proof by circumstances; it is sufficient if they produce moral certainty to the exclusion of every reasonable doubt. Schneider v. State (record) (Fla.), 152 So. (2d) 731.

§ 329. Circumstantial Evidence Is Legal Evidence and May Be as Conclusive as Positive Evidence.

As to the evidence in this case, which is circumstantial, you are instructed as a matter of law that circumstantial evidence is legal evidence, and that a well-connected chain of circumstances is as conclusive of a fact as is the greatest array of positive evidence. Where a conviction of guilt depends upon circumstantial evidence alone, the circumstances proven should not only all concur to show that the prisoner committed the crime, but that they all are inconsistent with any other rational conclusion. And the circumstances proven should all connect, or tend to connect, the accused with the commission of the alleged crime, and the circumstances proven should be of such character as to satisfy the minds of the jurors trying the case, of the guilt of the accused beyond a reasonable doubt. The circumstances from which the conclusion is drawn should be fully established. All the facts should be consistent with the hypothesis of guilt. The circumstances should be of conclusive nature and tendency, and the circumstances, when

alone relied upon for a conviction, should, to a moral certainty, actually exclude every hypothesis but the one to be proved. Schneider v. State (record) (Fla.), 152 So. (2d) 731.

§ 330. Circumstantial Evidence Acted upon with Caution.

For case again giving the 1st instruction in this section in original edition, see Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

Circumstantial evidence is received and acted upon by Courts and Juries, but such evidence should be received and acted upon with caution, and before you are warranted in convicting the defendant in this case, there should be such a well connected and unbroken chain of circumstances as to exclude every other reasonable hypothesis but that of guilt. In other words, it must point directly to the guilt of the accused, and must convince you beyond a reasonable doubt. Schneider v. State (record) (Fla.), 152 So. (2d) 731.

§ 331. Value of Circumstantial Evidence Determined by Its Conclusive Nature.

For cases again giving the 1st instruction in this section in original edition, see Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

When circumstantial evidence is relied upon for conviction in a criminal case, the circumstances when taken together, must be of a conclusive nature and tendency, leading on the whole to a reasonable and moral certainty that the accused, and no one else, committed the criminal offense. It is not sufficient that the facts create a strong probability of, and be consistent with, guilt; they must be inconsistent with innocence. Roberts v. State (record) (Fla.), 164 So. (2d) 817.

§ 334. Sufficiency of Circumstantial Evidence in Criminal Prosecution.

§ 335. —— In General.

For case again giving the 2nd instruction in this section in original edition, see Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

The Court further charges you that if you find from the evidence in this case beyond a reasonable doubt that these defendants are guilty of grand larceny under the first count, or that they are guilty of receiving, buying or aiding in the concealment of stolen property under the second count, that you should find them guilty whether you base your verdict upon direct and positive testimony or whether you base your verdict upon circum-

stantial evidence, or whether you base your verdict upon both types of evidence. However, before you would be justified in finding the defendants or either one of them guilty upon circumstantial evidence all of the circumstances must be consistent with each other, all of them must be consistent with the defendants' guilt and all of them must be inconsistent with any other reasonable conclusion except that of the guilt of the defendants. Olsen v. State (record) (Fla.), 75 So. (2d) 281.

§ 338. —— But Should Exclude Every Hypothesis Except Guilt of Accused.

For case again giving the 6th instruction in this section in original edition, see Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

For case again giving the 8th instruction in this section in original edition, see Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

For case again giving the 12th instruction in this section in original edition, see Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

CONFESSIONS.

§ 340a. Where Confession Constitutes Legal Evidence.
§ 340b. Evidence Only Against Party Making Confession.
§ 343a. Weight of Extrajudicial Confession.

§ 340. Confessions Acted Upon with Caution.

For cases giving the 4th instruction in this section in original edition, see Jefferson v. State (record) (Fla.), 128 So. (2d) 132; Wilkins v. State (record) (Fla.), 155 So. (2d) 129; Land v. State (record) (Fla.), 156 So. (2d) 8.

All confessions, gentlemen of the jury, should be acted upon with great caution by courts and juries. If you believe that any alleged confession was made or induced because of hope, fear, reward or duress or because of any threat, promise or other inducement held out to defendants by anyone, then such is not a confession because it was not made freely and voluntarily and should be by you disregarded and given no consideration. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

All confessions should be acted upon with great caution by courts and juries. The credibility of a confession is for the jury to determine. You are to determine the credence (which) should be attached to the alleged confession, and every part thereof. It is your duty to give such confession a fair and unprejudiced consideration. The confession should be considered as a whole. You should fairly consider the time and all the circumstances of its making, its harmony or inconsistency in itself or with the other

evidence in the case, and the motives which may have operated on the party in making it. You should give effect to such parts as you find sufficient reason to credit, and reject from your consideration all that you find sufficient reason to reject, but you should not give effect to any part or reject any part, arbitrarily or capriciously. Brown v. State, 135 Fla. 30, 184 So. 518; Schneider v. State (record) (Fla.), 152 So. (2d) 731.

Duty to Instruct That Confessions Should Be Acted Upon with Caution.—It was the duty of the trial court to give the above or a similar charge, under the circumstances of the instant case, whether requested to so charge or not and it was reversible error not to have done so. Harrison v. State, 149 Fla. 365, 5 So. (2d) 703. Later cases in which the Harrison case was cited on the point, and in which it was distinguished, are: Boston v. State, 153 Fla. 698, 15 So. (2d) 607; Thompson v. State, 154 Fla. 323, 17 So. (2d) 395; Brunke v. State, 160 Fla. 43, 33 So. (2d) 226; Miles v. State, 160 Fla. 523, 36 So. (2d) 182; Hamilton v. State (Fla.), 88 So. (2d) 606; Sinnefia v. State (Fla. App. 3rd Dist.), 100 So. (2d) 837. The distinction commonly found was that a confession was the only evidence of guilt in the Harrison case, a capital case involving the death penalty, while in the later cases there was evidence other than a confession sufficient to sustain a jury verdict.

All confessions should be acted upon with great caution by courts and juries. The credibility of a confession is for the jury to determine. You are to determine the credence, if any, which should be attached to the alleged confession, and every part thereof. It is your duty to give such a confession a fair and unprejudiced consideration. The confession should be considered as a whole. You should fairly consider the time and all the circumstances of its making, its harmony or inconsistency in itself or with the other evidence in the case, and the motives which may have operated on the party in making it. You should give effect to such parts as you find sufficient reason to credit, and reject from your consideration all that you find sufficient reason to reject, but you should not give effect to any part or reject any part, arbitrarily or capriciously. But if you believe that any alleged confession was made or induced because of any threats, promises, or other inducement held out to the defendant by any one, then such is not a confession because it was not made freely and voluntarily and should be by you disregarded and given no consideration. State v. Carswell (record) (Fla.), 154 So. (2d) 829.

§ 340a. Where Confession Constitutes Legal Evidence.

In this case there is what is contended by the State to be confessions of the accused in relation to their connection with the homicide of Duke Delano Olsen. Confessions, when made without any effort to obtain them, either from fear or promises of reward in any manner, or when freely made, without inducement of threat, constitutes legal evidence against a party making a confession. Leach v. State (record) (Fla.), 132 So. (2d) 329.

§ 340b. Evidence Only Against Party Making Confession.

The law permits such statement or statements of a co-defendant to be introduced in evidence only as admissions against the one making the statement, but not as against his co-defendant who may be implicated therein. If such were not the law it would be obviously unfair to a person implicated in a crime by the statement of another, and the practice, if allowed, could be the means of great mischief and treachery. Leach v. State (record) (Fla.), 132 So. (2d) 329.

The statement or confession, if any, made prior to trial by one defendant is not competent evidence against the other defendant. Therefore you should disregard any statement or confession made prior to trial by defendant John Henry Roberts when you weigh the guilt or innocence of defendant John Alfred Adderley, and you should disregard any statement or confession made prior to trial by defendant John Alfred Adderley when you weigh the guilt or innocence of defendant John Henry Roberts. Roberts v. State (record) (Fla.), 164 So. (2d) 817.

§ 341. Rejection Where Confession Not Freely Made.

For cases giving the 1st instruction in this section in original edition, see Jefferson v. State (record) (Fla.), 128 So. (2d) 132; Wilkins v. State (record) (Fla.), 155 So. (2d) 129; Land v. State (record) (Fla.), 156 So. (2d) 8.

For case again giving the 2nd instruction in this section in original edition, see Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Schneider v. State (record) (Fla.), 152 So. (2d) 731.

For cases again giving the 3rd instruction in this section in original edition, see Barwicks v. State (record), (Fla.), 82 So. (2d) 356; Everett v. State (record) (Fla.), 97 So. (2d) 241.

§ 342. Credibility and Weight of Confession Is for Jury to Determine.

For cases again giving the 4th instruction in this section in original edition, see Jefferson v. State (record) (Fla.), 128 So. (2d) 132; Wilkins v. State (record) (Fla.), 155 So. (2d) 129; Land v. State (record) (Fla.), 156 So. (2d) 8.

For case again giving the 5th instruction in this section in original edition, see Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

Pertinent confessions, when freely and voluntarily made, are evidence tending to prove guilt, to be considered by the jury with all the other evidence given on the trial. The jury are to determine the *credence* which shall be attached to a confession and every part thereof. They are to give it a fair and unprejudiced consideration. The confession should be taken and con-

sidered as a whole. The time and circumstances of its making; its harmony or inconsistency in itself or with the other evidence in the case, the motive which may have operated on the party in making it, should all be fairly considered by the jury, and then they should give effect to such parts, if any, as they find sufficient reason to credit and reject all that they find sufficient reason to reject; but they should not give effect to any part or reject any part arbitrarily or capriciously. Leach v. State (record) (Fla.), 132 So. (2d) 329.

§ 343a. Weight of Extrajudicial Confession.

Gentlemen of the Jury, the Court charges you that evidence of an extrajudicial confession of guilt, standing alone, will not authorize a conviction on a criminal charge, even though you may believe the confession was made as testified to and that it is true. There should be at least some additional substantial evidence, direct or circumstantial, of the corpus delicti before a lawful conviction can be had based on an extrajudicial confession. Therefore, unless there was some additional substantial evidence that Robert Lee Jefferson shot and killed Lawrence Russell Digsby at the time and place alleged in the indictment from a premeditated design, or while in the perpetration of a robbery, other than admissions or confessions made by the defendant, Robert Lee Jefferson, then you must find him, "Not guilty of murder in the first degree." Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

The rule is well established that a confession made out of Court should not be considered as evidence against the accused unless it has been freely and voluntarily made. All confessions should be acted upon with great caution by courts and juries. Especially you should weigh them carefully and with a great deal of caution if they are made after the defendant has been incarcerated in jail. When evidence of a confession is admitted into evidence it becomes the duty of the jury to give it a fair and unprejudiced consideration, having in mind the time and circumstances of its making and its harmony or inconsistency with the other evidence in the case, as well as the motives which you may find from the evidence to have influenced the defendant in making the confession, if you find in fact that the defendant did make a confession; and then to give effect to such parts thereof as you find sufficient reason to credit, and reject that which you find sufficient to disbelieve. You are to determine the credence which should be attached to the alleged confession and each part thereof. If you should believe that any alleged confession was made or induced because of any threat, promises or other inducements held out to defendant by anyone, then such is not a

confession because it was not made freely and voluntarily and should be by you disregarded and given no consideration. Roberts v. State (record) Fla.), 167 So. (2d) 817.

CONTRACTS.

§ 351a. Phraseology of Agreement Interpreted More Strongly Against Person Preparing.

The court further charges you that where an agreement or assignment is prepared by one person and presented to another person for execution that where the phraseology of said agreement or assignment is not clear, it is interpreted more strongly against the person presenting said agreement or assignment for execution. Silver Lake Estates Corp. v. Merrill, 120 Fla. 467, 163 So. 7.

§ 352a. Effect of Breach of Contract on Agreement as to Notice.

If you believe from the evidence that the defendant, without just or reasonable cause, committed a breach of the contract existing between him and United Grocery Co., then I charge you that the plaintiff would be absolved from giving him any specified number of days' notice of its intention to discontinue relations with him, if you find from the evidence that there was an agreement in regard to the notice to be given, and in such event, I charge you that your verdict must be for the plaintiff. Bibb v. United Grocery Co. (record), 73 Fla. 589, 74 So. 880.

CRIMINAL LAW.

§ 357a. Felony Defined.

A felony, gentlemen, is any criminal offense punishable with death or imprisonment in the state penitentiary. Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

§ 358. Presumption of Innocence.

§ 359. —— In General.

The defendant in every criminal case is presumed to be innocent until the State has, by competent testimony, proven his guilt to the exclusion of and beyond every reasonable doubt. If from the evidence introduced, or from a lack of evidence, you entertain a reasonable doubt as to whether or not the defendant committed said offense, you should acquit the defendant. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

The defendant in every criminal case is presumed to be innocent until the state has by competent evidence proved his guilt to the exclusion of and beyond a reasonable doubt. Before this presumption of innocence leaves the defendant, every material allegation of the indictment must be proved by the evidence to the exclusion of and beyond a reasonable doubt, and this presumption of innocence accompanies and abides with the defendant as to each and every material allegation in the indictment, through each stage of the trial, until it has been so met and overcome by the evidence to the exclusion of and beyond a reasonable doubt. Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Wilkins v. State (record) (Fla.), 155 So. (2d) 129; Roberts v. State (record) (Fla.), 164 So. (2d) 817.

This instruction appears in paragraph 62 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

§ 360. — Presumption Follows Accused Through Every Stage of Trial.

The presumption of innocence that is accorded each defendant, Gentlemen, accompanies and abides with him as to each and every material allegation set out in the charge through each stage of the trial until such time as the presumption of innocence has been so met and overcome by the evidence to the exclusion of and beyond a reasonable doubt. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 360a. —— Presumption Prevails Not Only on General Issue But Also on Lesser Degrees and Offenses Included Therein.

I further charge you that the presumption of the defendant's

innocence prevails not only on the general issue raised by the indictment, but also upon every lesser degree of the specific crime and to every lesser offense included therein. Larry v. State (record) (Fla.), 104 So. (2d) 352.

§ 361. —— Duty of Jury to Adopt Theory Consistent with Innocence.

Instruction Disapproved.—The second instruction in this section in the original edition was disapproved by the Supreme Court of Florida, which held that there was no error in the refusal of the instruction by the trial court. Cross v. State, 73 Fla. 530, 74 So. 593.

§ 361a. —— Uncontradicted Testimony of Defendant to Be Credited by Jury if Reasonable.

I further charge you that under the law, the presumption of innocence being with the defendant until proven guilty beyond a reasonable doubt, testimony of the defendant uncontradicted by other testimony or by circumstances should be given full credit and be believed by you if such testimony appears reasonable. Larry v. State (record) (Fla.), 104 So. (2d) 352.

§ 362. —— Places Burden on State to Prove Guilt.

For case again giving the 9th instruction in this section in original edition, see Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Roberts v. State (record) (Fla.), 164 So. (2d) 817.

The accused are always presumed to be innocent of the offense charged, until they are proved guilty, and to overcome this presumption and establish their guilt, it is not sufficient for the prosecution to furnish a mere preponderance of evidence tending to prove their guilt, nor to prove a mere probability of their guilt, but proof of the guilt of each defendant to the exclusion of, and beyond a reasonable doubt, is indispensible. The burden of such proof is upon the State, and it is to the evidence introduced upon the trial or to the lack of evidence that you are to look for such proof. Keeping this in mind as jurors charged with the solemn duty in hand, you must carefully, impartially and conscientiously consider, compare and weigh all the testimony, and if after doing this, you find that your understanding, judgment and reason are satisfied and convinced by it to the extent of having a full, firm, and abiding conviction to a moral certainty that the charge is true, then the charge has been proved to the exclusion of and beyond a reasonable doubt. Leach v. State (record) (Fla.), 132 So. (2d) 329.

To the charge contained in this indictment the defendant has been arraigned in open Court and has entered a plea of not guilty. The plea of not guilty entered by the defendant places the burden of proof upon the State to prove the guilt of the defendant and

every material element constituting his guilt by evidence which will convince you beyond a reasonable doubt that he is guilty. The defendant comes into Court with the presumption of innocence in his favor. The defendant is presumed in law to be innocent of any crime until his guilt is established by evidence beyond a reasonable doubt. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

Now, Gentlemen, to the information the defendant has entered his plea that he is not guilty, and the effect of the defendant's plea of not guilty under the law of Florida is to cast upon the State of Florida, who is represented in this case by Mr. Sholts, the burden of proving by the evidence, beyond a reasonable doubt, the guilt of the defendant. And the defendant in this trial, represented by Mr. Garlon Davis, is presumed under the law to be innocent until his guilt is so established by the evidence beyond a reasonable doubt. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 363. —— And Every Material Allegation of the Indictment Must Be Proved.

For case again giving the 10th instruction in this section in original edition, see Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

§ 366. Flight of Accused May Be Considered by Jury.

The court further instructs you, gentlemen, that any evidence tending to show that the defendant fled, or attempted to flee, from the scene of the homicide, if proven to your satisfaction, should be considered by you in connection with all the other evidence in the case as a circumstance from which the guilt of the defendant may be inferred. Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

If you find that the defendant, at or subsequent to the time the charge contained in the indictment was preferred against him, fled from his place of confinement in the Dade County Jail, Miami, Florida, to another place and that such flight was induced by the charge, you may consider such flight in determining the guilt, or innocence, of the defendant. The fact of flight is a circumstance to be considered by the jury, as tending to increase the probability of the defendant being the guilty person. It does not give rise to a legal presumption, but he may rebut any inference which may be drawn from such flight by proper testimony which may tend to explain the same. Mackiewicz v. State (record) (Fla.), 114 So. (2d) 684.

§ 367. Failure of Accused to Testify Not Evidence of Guilt.

Now, Gentlemen, in this case the fact that the defendant did not take the witness stand to testify in this trial does not relate to the question of the guilt or innocence of the defendant in and of itself. Under the law of Florida, Gentlemen, a defendant in a criminal case cannot be compelled to and is not required to testify as a witness on his own behalf unless at his own option he desires to do so. Thus the fact that the defendant did not take the witness stand cannot be held or considered for or against the defendant Carter by the jury in reaching a verdict in this trial. Carter v. State (record) (Fla.), 155 So. (2d) 787.

The Court charges you that under the laws of this state a defendant may become a witness and testify in his own behalf, but there is no requirement or obligation for a defendant to take the stand and testify, and if a defendant does not take the stand, that fact shall not operate against him, since under the law he is given the privilege of taking the stand or not, as he chooses, and the fact that he does not take the stand will not create an inference of guilt against him. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

Editor's note.—For cases where comment was made that the defendant did not testify, see Diecidue v. State (Fla.), 131 So. (2d) 7; King v. State (Fla.), 143 So. (2d) 465.

§ 368. Evidence of Good Character of Accused.

§ 369. —— Jury to Consider.

The defendant, Olsen, has put into evidence here testimony of good character, good reputation in the community in which he lives. The Court charges you that is proper evidence for you to consider along with all of the other evidence in the case, and if after considering such evidence of good reputation, together with all of the other evidence in the case, there is a reasonable doubt in your minds as to the defendant Olsen's guilt it would be your duty to acquit him. Olsen v. State (record) (Fla.), 75 So. (2d) 281.

§ 371. Testimony of Accused Weighed and Considered Same as Other Testimony.

For case again giving the 1st instruction in this section in original edition, see Land v. State (record) (Fla.), 156 So. (2d) 8.

For case again giving the 4th instruction in this section in original edition, see State v. Carswell (record) (Fla.), 154 So. (2d) 829; Roberts v. State (record) (Fla.), 164 So. (2d) 817.

For case again giving the 5th instruction in this section in orig-

inal edition, see Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

Under the laws of this state, a defendant has the right to take the stand and testify in his own behalf, and such testimony goes before you the same as the testimony of any other witness in the case to be weighed and considered according to the same rule, but the fact that he does not testify cannot be considered by you to his prejudice. Schneider v. State (record) (Fla.), 152 So. (2d) 731.

§ 372. Not Essential That Exact Date of Offense Be Proved.

Proof of the exact date stated in the indictment is not necessary. Proof of the occurrence upon any date prior to the return of the indictment, that is August 18, 1961, will be sufficient to sustain the charge of murder in the first degree. Proof of the occurrence upon any date within two years immediately prior to such return of the indictment will be sufficient to support the charge of any offense less than murder in the first degree, included within the indictment. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

Now before the defendant can be found guilty of any offense under this information, Gentlemen, it is first necessary that you find, if any offense did occur, that it occurred within a period of two years prior to the filing of the information, and this information was filed on March the 19th, 1962. The reason for that two years statement is that the Statute of Limitation, and after two years a person can't be prosecuted for a crime, and the alleged—or recited date of this alleged incident, May the 13th, is not a material date that has to be proved beyond a reasonable doubt, providing you, the Jury, are satisfied that if any offense did occur that would lie under this first count of the information, that it occurred within a two-year period before March the 19th, 1962. That is the date this paper was filed in the Clerk's office. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 372a. Former Jeopardy.

§ 372b. —— In General.

There has been introduced before you a court file showing that the defendant, Slayton, plead guilty to an information charging him with the operation of a gambling house on January 17, 1936. This information was filed against both Hyde and Slayton on January 27, 1936, and the court records show that the state accepted a plea of guilty on the part of Slayton to gambling and nolle prossed the case against Hyde. Therefore, if you believe

that the evidence in this case as to gambling places Slayton in charge of the gambling room as charged in the second count of this information, and as charged in the information to which he plead guilty, and that there is not sufficient evidence to prove that Slayton operated the gambling room described in the second count after he had plead guilty to a similar charge on February 26, 1936, then I charge you that it would be your duty to return a verdict of not guilty on the second count of the information as to Slayton. Hyde v. State (record), 139 Fla. 280, 190 So. 497.

I further charge you, gentlemen, as to the second count of the information, that the said count covers gambling on races as well as gambling in any other form. The gist of the offense is the operation of a place where persons were permitted to play for money or other thing of value; and if you believe that Slayton operated such a place in 1935 and in January, 1936, and plead guilty to the operation of the same, then it would be your duty, unless the state has introduced credible evidence of gambling operation since that date, to wit: January 27, 1936, to return a verdict of not guilty as to Slayton. Hyde v. State (record), 139 Fla. 280, 190 So. 497.

I charge you that if Red Slayton was arrested and informed against on January 27, 1936, and plead guilty to gambling, although he was charged with operating a gambling house, his plea of guilty on said information as to gambling prevents him from being prosecuted for operating a gambling room for roulette, dice, blackjack, and chuckaluck on any date prior to January 27, 1936. Hyde v. State (record), 139 Fla. 280, 190 So. 497.

§ 373. Verdict.

§ 374. —— Must Be Founded on the Evidence.

You are further instructed that your verdict must be made up from the evidence given by the witnesses and from law given by the court and not from any statement of counsel. Larry v. State (record) (Fla.), 104 So. (2d) 352.

§ 375. —— Must Be Concurred in by Entire Jury.

The Court further instructs you that each and every one of you is entitled to his own conception of the conditions and facts arising either from the evidence or from the lack of evidence, which constitutes a reasonable doubt of the guilt of the accused; and before you can convict the defendant, the evidence must convince each juror of this defendant's guilt beyond and to the exclusion of every reasonable doubt; and if, after a consideration of the evidence, or the lack of evidence, a single juror has a reasonable doubt of the guilt of the defendant, then you cannot lawfully convict him. Albano v. State (record) (Fla.), 89 So. (2d) 342.

Your verdict must be the verdict of each and every juror, each juror being responsible for his own verdict, and you must all concur before you can find any verdict in the case. Roberts v. State (record) (Fla.), 164 So. (2d) 817.

§ 378a. Entrapment.

§ 378b. — In General.

The defense of entrapment presupposes the commission of a crime. Obviously if no crime has been committed, the defense is not available, because the defendant could not be convicted under those circumstances. In this case the defendant, Theodore R. Carter, claims he was entrapped in doing the act charged against him. Entrapment is recognized as a valid defense available to a person charged with the commission of a public offense under certain circumstances. If you find that a criminal design or intent originated in this case not with the defendant, Carter, but was conceived in the minds of the law enforcement officers, and the defendant, Carter, was by persuasion, deceitful representation or inducement lured into the commission of the criminal act, then you should return a verdict of not guilty as to the defendant. On the other hand, Gentlemen, if you find that the criminal design or intent, if there was one, originated with the defendant, Theodore R. Carter, then the defense of entrapment does not apply. Since the defense of unlawful entrapment has been claimed by the defendant, the State has the burden of proving beyond a reasonable doubt that it was not an unlawful entrapment. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 378c. — Defined.

Gentlemen, in this case the matter of entrapment has been raised by the defendant as a defense, and an act of entrapment may be defined under the law as the act of officers or agents of the government in inducing a person to commit a crime not originally contemplated by that person for the purpose of instituting a criminal prosecution against him. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 378d. — When Evidence Is Admissible.

I further instruct you that where the evidence shows an intention on the part of the accused to commit the crime as charged, evidence obtained by entrapment is admissible, and this is true even though the witnesses acted as decoys. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 378e. — Use of Decoys.

Decoys may be used to entrap criminals, or present an opportunity to one to commit a crime, but they are not permissible to

ensnare the innocent and the law abiding citizen into the commission of a crime. The legitimate purpose of law enforcement officers, or an officer, is not to solicit, or to cause a commission of— or to create an offense, but it is legitimate for a law enforcement officer to ascertain if the accused is engaged in an unlawful business, or to furnish an opportunity for one who is engaged in unlawful conduct to commit such crime under such circumstances that he may be apprehended for the violation of the law. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 378f. — As a Defense.

One who is instigated, induced or lured by an officer of the law or other persons for the purpose of prosecution into the commission of a crime he had otherwise no intention of committing may avail himself of the defense of entrapment. Such offense is not available, however, where the officer or other persons acting in good faith for the purpose of discovering or detecting a crime and merely furnish the opportunity for the commission thereof by one who had the requisite criminal intent. You are instructed that the defense of entrapment is not available to a defendant who denies that he committed the alleged offense, that the invocation of the defense presupposes the commission of a crime unless assumed that the act charged was committed. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 378g. Specific Intent.

§ 378h. — In General.

Now, Gentlemen, in a charge such as you are trying in which an intent is involved, a specific intent, the doing of the act does not raise presumption that it was done with that specific intent in and of itself. The intent must be established, beyond a reasonable doubt, and from the facts and circumstances established by satisfactory evidence during the trial of the case. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 378i. —Proof of Intent.

Intent may be proved by direct evidence, or by facts and circumstances from which an intent may be clearly inferred. Now, Gentlemen, you are justified in drawing the inference that the defendant did or did not entertain an intent, if any, at the time the alleged attempt to commit abortion that would naturally be inferred by a reasonable man from all the facts and circumstances of the case. Carter v. State (record) (Fla.), 155 So. (2d) 787.

CROSSINGS.

§ 380. Reciprocal Rights and Duties of Railroad and Traveler.

For case again giving the 1st instruction in this section in original edition, see Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

The law imposes upon both the railroad and the automobile driver a duty to exercise ordinary and usual, reasonable care under the circumstances, and at the time then and there existing. Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.

The rights of trains and travelers at railroad crossings are reciprocal and it is as much the duty of a traveler to look for trains as it is the duty of a railroad company to take every precaution to protect travelers when found to be in peril. The duties and obligations of a railroad company and of a traveler on the highway at a public crossing are mutual and reciprocal. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

The duties of train operators and travelers on public highway at railroad crossing are measured by conditions thereat at time of traveler's attempt to cross tracks. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

§ 381. Care Required of Railroad at Crossing.

§ 382. —— In General.

For case again giving the last instruction in this section in original edition, see Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

A railroad company is not responsible for trees and vegetation or other obstructions not on its right of way but is only required to use ordinary care commensurate with the existing circumstances. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

Gentlemen of the jury, the law of Florida casts upon a railroad company and its agents and employees operating its equipment a legal duty of care in its operation. In so far as the case here is concerned, it was the duty of the defendants to exercise that degree of care toward licensees or persons rightfully on and about the railroad tracks and highway crossings, the care commensurate with all of the physical facts and circumstances prevailing at the particular time and place so as not to negligently injure persons or property of such licensees. Atlantic Coast Line R. Co. v. Ward (record) (Fla.), 81 So. (2d) 476.

The question of whether a railroad company has failed to observe ordinary precaution when one of its trains is approaching a public crossing, and whether such failure is the proximate cause

of any injury that may occur to a traveler on the public highway, should be determined by the jury, and it must be determined from the evidence as any other fact in the case is determined. There exists no arbitrary power in the jury to disregard evidence and place the blame upon the railroad company for any injuries that may occur to the traveler on the highway by a passing train of cars. Atlantic Coast Line R. Co. v. Ward (record) (Fla.), 81 So. (2d) 476.

You are instructed that in the operation of a train in the State of Florida the defendant railroad and its employees are under an obligation to use all ordinary and reasonable care and diligence to avoid injuries to others. Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.

Gentlemen of the Jury, operators of railroad trains and road vehicles are required to exercise such care, prudence and caution as the circumstances of a crossing reasonably demand of each of them. The care required of a railroad company must be commensurate with danger prevalent at crossing, and it may not always be enough to blow whistle and ring the bell, particularly if you should find that the crossing was in an area where vision was materially impaired or obstructed or that the peculiar circumstances, if there were any, required the exercise of other or additional precaution. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

§ 383. —— Care Required Is Proportioned to Danger and Chances of Injury.

For case again giving the 2nd instruction in this section in original edition, see Atlantic Coast Line R. Co. v. Ward (record) (Fla.), 81 So. (2d) 476.

It is the duty of railroad companies to give adequate warning to travelers at railroad crossings and if a crossing is unusually dangerous, ordinary care requires the railroad company to meet the peril with unusual precautions; this is particularly applicable where the dangerous condition results from obstructions on or off of the right of way to the view which prevent a traveler from seeing an approaching train until he is dangerously close to the track. In such a case, the railroad company has the duty of exercising caution, commensurate with the situation, to avoid collisions with travelers on the highway, as by a less amount of speed, or by increased warnings, or otherwise. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

I charge you, gentlemen, that a person using a grade crossing at a railroad track—public highway intersection is a licensee or has a right to use with due care the grade crossing. It is your province to determine as a matter of fact whether the defendants

were negligent insofar as reasonable speed in the approach and crossing of a much used street in settled community was concerned. Likewise, it is your province to determine the question of reasonableness and to take into consideration the equipment provided for the railroad train involved, the matter of lookout maintained, the reactions and actions of the employees of the defendant railroad company, and to determine, using these and other facts brought to you by the testimony, whether the degree of care exercised was reasonable. That, gentlemen, is the duty as I have said of a railroad company operating its equipment through a settled community in the State of Florida. Atlantic Coast Line R. Co. v. Ward (record) (Fla.), 81 So. (2d) 476.

A railroad company operating its trains on the thoroughfare of a village must use greater care than in less frequented localities. The duties of a railroad company in respect and care of operating its trains are dictated and measured by the exigencies of the occasion and in the light of conditions and things at the place and at the time that an accident happens. In operating its railroad crossings and its trains in the streets of the town it is the duty of the railroad company to use such precautions by properly maintained warnings, applications of brakes or otherwise as may be reasonably necessary to avoid injury to a person traveling upon the public street. Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.

§ 386. —— Duty to Keep Lookout Generally.

For case again giving the 1st instruction in this section in original edition, see Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

For case again giving the last instruction in this section in original edition, see Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

The engineer and fireman on the trains are not bound to keep a constant lookout. There are intervals of time when their attention must be directed to the management of the machinery of the locomotive when it is impossible for short periods of time for them to watch the track. Where such is the case they are neither expected nor required to keep a lookout. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

§ 388. —— Right to Assume Traveler Will Exercise Care to Avoid Injury.

I further instruct you that it is the law of Florida that trains have the right of way at highway crossings and persons on the highway must yield precedence to trains and the engineer or fireman of a locomotive engine may properly assume that persons

of normal faculties on or near railroad tracks will get off of the track or not go onto the track in front of an approaching engine. Accordingly, where warning signals of an approaching train are duly and properly given, the operators of a locomotive are not called upon to slow down the locomotive or to take other precautions until such time as they see or should see that a person on or near the track is in a place of danger and is not heeding the warning signals of the approaching train. Atlantic Coast Line R. Co. v. Ward (record) (Fla.), 81 So. (2d) 476.

I further charge you that the engineer of the defendant railroad had a right to assume that the driver of the truck would obey the law and that he would act as a reasonable, prudent person with respect to his own safety until the contrary was made to appear. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

§ 389. —— Speed of Train.

There is no law in Florida which regulates the speed of trains in cases such as this. The only duty of a railroad with respect to the speed of its trains in this kind of case is that the speed must be commensurate with the exercise of reasonable care under the circumstances. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

In considering the rate of speed of the train you may take into consideration the conditions of the crossing; any obstructions, if any, at the crossing or in the vicinity thereof which might interfere with a view of an approaching train, as well as the ability of those in charge of the train to see the highway and those who may be upon it, a reasonable distance from the crossing. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

The railroad should regulate the speed of its trains and the signals of their approach at crossings so as to give reasonably adequate warning in the circumstances to a traveler who is exercising reasonable care for his own safety. Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.

§ 390. —— Duty to Give Warning by Bell or Whistle.

§ 390(1). In General.

For case again giving the 1st instruction in this section in original edition, see Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

It is the duty of railroad companies to give adequate warning to travelers at railroad crossings, and to use such reasonable care as the circumstances require. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

If a railroad installs and maintains safety devices such as

signals and gates at a public vehicular crossing, then it is the railroad's duty and obligation to use reasonable care in the installation and maintenance of these safety devices so that these safety devices will reasonably perform their expected and required functions. Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.

§ 391. Care Required of Traveler at Crossing.

§ 392. —— Duty to Ascertain Approach of Train.

§ 392(1). In General.

Under the law of this state it is the duty of one driving an automobile and approaching a railroad track, to use such care, prudence and caution as the circumstances at the crossing reasonably demand, and to keep the automobile under control and to use ordinary care to discover the approach of a train. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

A traveler driving an automobile on the highway approaching a railroad crossing of which he is, or reasonably should be, aware, is charged in law with seeing all objects down the track which are within the range of his vision and which he would have seen if he had looked. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

Before the driver of the automobile drove upon the railroad track, it was his duty to look and listen for the train, and to do so at a point with reference to the track where looking and listening would have been effective, that is at a point where he could both see and hear a train which might be approaching; and if it was necessary for him to stop the automobile, for the purpose of so looking and listening, it was his duty to do so. If he omitted that duty, and if such omission was the sole proximate cause of the collision, then you should find the defendant not guilty. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

I charge you, gentlemen of the jury, that a railroad crossing is notice of impending danger at any time of day or night, and the duty resting on travelers to expect trains over the crossings never relaxes. When a person approaches a railroad track it is his duty under the law to look and listen for trains. The duty to stop depends on the circumstances revealed by looking and listening. Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.

§ 392(2). Where View Obstructed.

When the view of an automobile driver of the railroad tracks is obstructed by trees, vegetation or mound of earth or embankment, such driver is required to use care commensurate with

such surrounding circumstances by looking and listening and by alighting, if necessary, to determine if a train is approaching. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

The fact that obstructions to hearing and seeing on approaching a railroad crossing exist, instead of excusing the motorist from the effort to see or hear, should only increase his vigilance. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

If trees, vegetation or mound of earth or embankment obstructed the view of the driver of the automobile, his duty to look and listen was the more incumbent upon him and [to] stop if conditions required. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

§ 392(3). Right of Traveler to Assume Train Will Warn of Its Approach.

You are instructed that while one approaching a railroad crossing at which he knows an automatic signal is maintained is entitled to place some reliance on it, he is nevertheless bound to use such care in addition as an ordinary prudent person would use under such circumstances. Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.

§ 393. —— Duty to Stop.

The duty to keep the automobile in control at this crossing means it was the duty of the driver of the automobile to operate the machine at such rate of speed that he could stop in time to prevent having a collision with the train, and the duty to use ordinary care to discover approaching trains means that the driver of this automobile was under a duty to look in both directions and listen, in an effort to discover if a train was approaching. And if you find from the evidence in this case that the driver of the automobile failed to do this and such failure was the sole proximate cause of the accident which resulted, the plaintiffs are not entitled to recover in any amount. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

It is not always an invariable negligence to attempt a crossing in the face of an approaching train. The test of negligence is whether the effort to cross with the train approaching is such conduct as a reasonably prudent man in the exercise of ordinary care would attempt, taking into consideration all of the circumstances which existed at the time, including the speed of the train and the automobile, their respective distances from the crossing, the obstructions to the view or hearing, if any, and any other facts which may be relevant upon the reasonableness of the driver's conduct. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

I charge you that a train must be run on its tracks and that it

is a matter of common knowledge that it cannot be stopped as readily as an automobile. I charge you that a motorist approaching a railroad crossing is first required to look and listen and if the way is clear, he may proceed. Circumstances may require him to stop, look and listen. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

§ 394. Negligence Apportioned between Railroad and Traveler Where Both at Fault.

For case again giving the 1st instruction in this section in original edition, see Atlantic Coast Line R. Co. v. Ward (record) (Fla.), 81 So. (2d) 476.

The court instructs the jury that apportioning negligence simply means this: That if you find that the plaintiff has been damaged by a certain defendant, as you may, and that the plaintiff was half to blame and the defendants were half to blame, then the plaintiff would be entitled to one half of the sum you have determined to be the amount due the plaintiff, the amount he's suffered. Atlantic Coast Line R. Co. v. Ward (record) (Fla.), 81 So. (2d) 476.

Under the laws of Florida, Gentlemen of the Jury, where a person attempts to drive an automobile over a railway crossing with which he is familiar, when his view of the railroad track is so obstructed that an approaching train cannot be seen, and he does not stop and look and listen or take such precautions for his safety as are reasonably required by the existing conditions and circumstances, he is negligent so as to prevent recovery of damages from the railroad company for his injury or death, by being struck by the train, unless some appreciable negligence of the railway company's agents proximately contributed to such injury or death, in which case the damages awarded should be such a proportion of the entire damage sustained as the defendant's negligence bears to the combined negligence of both parties.

Operators of trucks and trains must take due care for the safety of life and property involved in such operations. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

The Court now further charges you that should you find that the plaintiff sustained injuries and damages as a proximate result of negligence of the defendant, its agents or servants, as alleged in the declaration and you should further find that the plaintiff's deceased husband was also guilty of negligence proximately contributing to his injuries and damages or death, then you should find for the plaintiff, but you should determine from the evidence the proportion of fault attributable to the defendant and the proportion of fault attributable to the plaintiff's deceased hus-

band and after determining the full amount of the damages sustained by the plaintiff, you should reduce them by the proportion of the decedent's negligence contributing to his death so that the defendant will be called upon to pay only that proportion of the plaintiff's damages attributable to the negligence of the defendant, its agents or servants. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

You understand, of course, from what has already been said that if you find for the plaintiff and further find that the deceased husband was contributorily negligent, then the amount of any recovery which you should award the plaintiff should be reduced in proportion to the negligence or fault attributable to such deceased husband as will be more specifically hereinafter pointed out to you gentlemen. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

§ 396. Presumptions and Burden of Proof.

§ 397. —— Presumption against Railroad Company.

The giving of the first two instructions in this section in the original edition were held on appeal not to be harmful error in view of other instructions given in that case, but the Supreme Court of Florida has cautioned against any reference to the statutory presumption against railroads in cases in which the evidence is conflicting. "In other words, if there is a complete absence of material evidence to contradict a showing of negligence on the part of the railroad company, the statute will then supply or create a presumption of liability but if any material evidence is offered, by the railroad company tending to show the exercise of ordinary and reasonable care and diligence on its part, the presumption vanishes. In a controverted issue such as is presented here when the plaintiff puts on his evidence to support his charge of negligence and forthwith the defendant responds with evidence showing that it exercised ordinary and reasonable care and diligence, the presumption is out of the picture and is as if it were never in the statute. If there are conflicts in the evidence, it becomes the duty of the jury to reconcile them and reach a verdict without any reference whatever to the presumption created by the statute. Any suggestion to the jury that it then exists is prejudicial." Atlantic Coast Line R. Co. v. Voss, 136 Fla. 32, 186 So. 199, followed in Loftin v. Skelton, 152 Fla. 437, 12 So. (2d) 175, and quoted with approval in Atlantic Coast Line R. Co. v. Walker (Fla. App. 1st Dist.), 113 So. (2d) 420. 424.

§ 399. —— Burden on Railroad to Show Exercise of "All Ordinary and Reasonable Care and Diligence."

§ 399(2). What Constitutes "Ordinary and Reasonable Care and Diligence."

It is the duty of a railroad company to exercise all ordinary and reasonable care and diligence in operation of its trains to avoid injury and damage to persons and property, and it is your province to determine in these cases from all of the evi-

dence whether or not the railroad complied with its duty. The language "all ordinary and reasonable care and diligence" is not susceptible of any hard and fast definition but varies with the circumstances and conditions of each particular case. In determining whether the railroad exercised all ordinary and reasonable care and diligence, you may consider the character of the crossing, the amount of travel that might be reasonably expected there, the existence or nonexistence of obstructions, the nature and character of warning devices, the condition of the track and equipment, the speed of the train in relation to the environment, the signals given of the train's approach. In fact, all of the circumstances should be considered, and, if you find that the employees of the railroad company in charge of the train failed to use that degree of care and caution that was reasonably demanded by the circumstances, you should find the railroad guilty of negligence. Dowling v. Loftin (record) (Fla.), 72 So. (2d) 283.

All of the facts and circumstances surrounding a collision must be considered in arriving at your decision of whether the defendant railroad was negligent. Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.

DAMAGES.

Editor's note.—For a case where the element of mental suffering by the plaintiff because of the malicious killing of her dog was properly submitted to the jury for their consideration in assessing damages, see La Porte v. Associated Independents, Inc., 163 So. (2d) 267.

Cross References.

As to credit toward damages where amount paid in settlement, see Accord and Satisfaction, § 69a. As to damages upon landlord's failure to repair, see Landlord and Tenant, §§ 714e-714e(5). As to damages for libel and slander, see Libel and Slander, § 741. As to damages recoverable under timber contract, see Logs and Logging, § 747a. As to damages in actions of replevin, see Replevin, §§ 976k-976l. As to damages for breach of warranty, see Sales, §§ 998c(2) and 998d(3).

I. GENERAL CONSIDERATION.

§ 400a. Damages Limited to Amount Claimed in Declaration.

Plaintiff may recover only those damages for the injuries and

loss actually alleged in the declaration and established by a preponderance of the evidence to be the proximate result of the negligence averred in the declaration or complaint. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

§ 401a. Jury to Be Guided by Allegations of Complaint.

If your verdict in the case is for the plaintiff, then it will be your duty to assess and to state in your verdict the amount of damages that the plaintiff is entitled to recover from the said defendant. The Court has stated to you herein the allegations of the complaint describing the alleged injuries to plaintiff and also describing the items upon which as a basis plaintiff claims that she is entitled to recover damages, and, in assessing the amount of the damages for plaintiff, if any, the Court instructs you to be guided by the allegations of the complaint as to the alleged injuries to plaintiff and her damages and by the evidence that you have heard in the case supporting the plaintiff's claim as to injuries and damages, and whatever verdict you render must be such as is reasonably based upon a preponderance of the evidence in the case. Welch v. Moothart (record) (Fla.), 89 So. (2d) 485.

§ 401b. But Damages May Be Less Than Those Claimed by Plaintiff with His Consent.

The only testimony which the jury has received as to the amount of damages to which the plaintiff is entitled, should you find for the plaintiff, is the amount testified to by the plaintiff's witnesses, the sum being somewhat over $1600.00, and normally that would be the verdict they would be entitled to, of course, in the event you find for the plaintiff. However, the plaintiff having conceded that the jury may use their own judgment about that and reduce the damages to the amount testified by the defendant himself, you have that much leeway in allowing damages, should you find for the plaintiff. Reynolds v. Alger-Sullivan Lumber Co. (record) (Fla.), 76 So. (2d) 137.

§ 404. Future Damages.

§ 406. —— Must Be Reduced to Present Money Value.

For case again approving the 7th instruction in this section in original edition, see Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

For case again approving the 8th instruction in this section in original edition, see Berger v. Nathan (Fla.), 66 So. (2d) 278 (instruction found in record only).

You are instructed that if you should find that the plaintiff has been to any extent injured or permanently disabled, all damages which you may allow therefor must be reduced to present money value. In so doing you may take into consideration the decreased purchasing power of the American dollar resulting from the increased cost of living. Povia v. Melvin (record) (Fla.), 66 So. (2d) 494.

If you should find from the evidence presented before you that the plaintiff has been permanently injured to any extent, then it will become your responsibility to determine what future damages, if any, he suffers as a result of such. In considering that, you may take into consideration his future pain and suffering, his future personal inconvenience and sickness, if any, and any future medical expenses which he might reasonably expect to incur in an effort to effect a cure or alleviation for pain, suffering or sickness. In determining the amount, if any, that you determine you should award for future losses, if any, you must reduce such future losses to their present money value, and in determining such amount you may take into consideration the age and general health of the plaintiff herein. William Penn Hotel v. Cohen (Fla. App. 3rd Dist.), 101 So. (2d) 404.

II. ELEMENTS AND MEASURE OF RECOVERY GENERALLY.

§ 407. Amount That Will Compensate Plaintiff.

In determining the amount of damages for plaintiff, if you find she is entitled to recover, you should determine the pecuniary loss resulting to her, and in determining this loss the test is what sum will fairly and reasonably compensate plaintiff for the pecuniary loss sustained. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

IV. ELEMENTS AND MEASURE OF RECOVERY FOR TORT.

§ 416. Personal Injuries.

§ 417. —— In General.

If you find from the evidence in this case, after you have considered it calmly and dispassionately under and pursuant to the instructions I have given you, that the plaintiffs are entitled to recover, it will be your duty to determine the amount of damages they have sustained. In estimating and determining such amount, you will take into consideration their bodily pain and suffering, if any, caused by the injuries complained of; their sickness, if any, resulting from such injuries; their age, health.

and condition before such injuries were sustained; the effect, if any, of such injuries on their health and condition; the effect, if any, of such injuries in the future on their health and condition; the medical and other expenses incurred by them because of their injury, and you should allow them if you find that they are entitled to recover such damages as you determine will be fair and just compensation for the injuries, if any, they have sustained. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

If you find from a preponderance of the evidence in this case that the plaintiff, Everett J. Higbee, is entitled to recover a verdict from the defendant, then it will be your duty to determine the amount of damages he has sustained.

In determining such damages, if any, you may take into consideration the following elements:

1. His bodily pain and suffering occasioned by the injuries complained of, if any.

2. His sickness resulting from the injuries, if any.

3. You may take into consideration his age, his general health and condition before the injuries complained of, and the effect, if any of such injuries upon his nervous system.

4. Loss of revenue or income, if any, proximately due to his injuries because of his inability to be gainfully employed.

5. The expenses, if any, heretofore incurred by him for doctors' hire, hospital hire, X-rays, and other related medical expenses in connection with his care, attention and treatment for the injuries sustained, if any.

6. If you find that he has been permanently injured to any extent, or will continue to suffer therefrom, you may take into consideration the extent of such permanent injuries and the effect the same may have upon the following:

(a) His normal life and his ability or inability to lead a normal life and to enjoy the pursuits of happiness.

(b) His future pain and suffering, if any.

(c) Estimated loss of revenue or income, if any, in the future, proximately due to his injuries because of his inability to be gainfully employed from the present day into the future.

(d) Such future expenses, if any, for hospital care, doctors' care, X-rays, medications, and other related medical expenses as the evidence makes reasonably certain will result from the injuries sustained, if you find that it is a reasonable certainty that he will require future medical care. Higbee v. Dorigo (record) (Fla.), 66 So. (2d) 684; Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

If you find, from the preponderance of the evidence in this case, that the plaintiff, Cynthia Ann Stary, is entitled to a verdict against the defendants, or either of them, upon the findings on the facts in this case and upon the issue of negligence, then

it will become your duty to determine the amount of damages the plaintiff has sustained; and in determining and fixing the amount of plaintiff's damages, you may take into consideration the following elements:

(1) The plaintiff's bodily pain and suffering occasioned by her injuries;

(2) The plaintiff's sickness or any illness resulting from said injuries;

(3) The plaintiff's age, and general condition before the receipt of the alleged injuries complained of, and the effect, if any, of such injuries upon her physical and nervous system.

(4) If you find that the plaintiff has been permanently injured to any extent or will continue to suffer in the future from her said injuries, you may take into consideration the extent of such permanent or continuous injuries and the effect that the same may have upon the following:

(a) Her normal life and her ability or inability to lead a normal life and to enjoy the pursuit of happiness;

(b) Her future pain and suffering, both physical and mental;

(c) Her inability to work or her diminished earning capacity, if any.

(5) In estimating the plaintiff's prospective losses in the future during her life expectancy, such future damages must be calculated at their present money value, and the present money value thereof should be the basis of your verdict for such prospective future losses.

(6) In estimating such future damages, such as diminished earning capacity, future pain and suffering, if any, you may take into consideration the future life expectancy of the plaintiff, 55-64 years, based upon the mortality tables which have been offered in evidence. In this case they were not offered, they were stipulated as to what they showed, which is the figure here, 55-64 in this case, and which tables are based upon the age of the plaintiff at the time of the trial of this action, and which show what her probable life expectancy in the future may be according to the common experience of such tables, which should be taken into consideration, together with all the other evidence in the case bearing upon plaintiff's health, age and physical condition, both before and subsequent to the injury. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

I further charge you that if you should find from a fair preponderance of the evidence that the plaintiff, Earl E. Stary, is entitled to recover a verdict against the defendant, then it will be your duty to determine the amount of damages he has sustained. This is the amount which will be written in the verdict form in the blank space provided for the assessment of his damages. These forms will be supplied to you when you retire.

In determining such damages, if you find any, you may take into consideration the following elements:

(1) The expenses heretofore incurred by the plaintiff, Earl E. Stary, if any, for doctors, hospitals, X-rays and other related medical expenses in the care, attention and treatment of his daughter, Cynthia Ann Stary;

(2) Such future expense for hospital care, doctors' care, X-rays, medications and other related medical expense as the evidence makes reasonably certain will result from the injuries sustained during the minority of his daughter, Cynthia Ann Stary, if you find that it is reasonably certain that she will require such future medical care.

(3) If you find from the evidence that the plaintiff, Earl E. Stary, has lost or suffered diminishment of the value of the services of his said daughter during her minority, then you may take into consideration as an element of damage an item for loss of services of his daughter during her minority as to the past, present and future if you find that she is suffering from any disability which will extend into the future.

(4) In estimating any future prospective losses of the plaintiff, Earl E. Stary, such future damages must be calculated at their present money value, and the present money value thereof should be made the basis of your verdict for such future prospective losses. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

If under the court's instructions you shall find that the plaintiff is entitled to recover damages from the defendant it will be your duty to determine the amount of such recoverable damage. In so doing, you may take into consideration the following:

First, the earnings, if any, which the plaintiff has lost in the past because of her injuries.

Second, the expenses for hospitalization and full medical care and treatment and other expenses, if any, which she has paid or is obligated to pay, in the effort to effect a cure or an alleviation of any pain, suffering and sickness caused by her injuries.

Third, the physical pain and suffering, if any, which she has suffered in the past because of her injuries.

Fourth, the personal inconvenience, if any, which she has suffered in the past because of her injuries. Thomason v. Miami Transit Co. (record) (Fla.), 100 So. (2d) 620.

I further charge you that, if you find from the evidence that the plaintiff is entitled to recover, the measure of his damages will be such sum as will justly compensate him for the injury and loss shown to have been inflicted and sustained. In arriving at that compensation, you are entitled to consider the health and physical condition of the plaintiff before and after the injury;

the loss of time and incapacity to follow his usual occupation since the injury; and sums necessarily and reasonably expended or incurred by him for the services of physicians, surgeons or therapist seeking his cure; any sums necessarily and reasonably expended for hospital expenses, medicines, and mechanical aids or braces for his body as a result of such injury; the bodily pain and anguish he has suffered and will continue to suffer by reason of such bodily injury; the effect of the injury on his age, sex, condition and circumstances in life, and earning capacity. If you find that the plaintiff has been permanently injured or disabled. you may award to him such sums as will compensate him for such injury. You may consider his probable future earnings from the present time to the end of his life expectancy; his earning capacity at the time of the injury and the extent to which that capacity has been reduced by the injury. The amount you find as future damages must be reduced to the present value, and such present values awarded by your verdict. Smith v. Tantlinger (Fla. App. 2nd Dist.), 102 So. (2d) 840.

That brings up one other question, and that is should you find for the plaintiff you will compensate her in what we call money damages. How much money you should award, I would like in a case of this kind to be able to give you a rule or a yardstick, but I can't do it, because no two cases of negligence are alike and the law leaves it to the judgment and discretion of the jury as to what would be just and fair compensation if a plaintiff recovers. However, I can give you some of the items or, rather, all of the items that you should consider when you arrive at how much money you should award to the plaintiff, should you do so. The widow's claim for damages for the death of her husband by the wrongful act of another is based upon the following elements, and these are the elements that you should consider in arriving at that amount, should you reach that stage:

(1) Her loss of comfort, protection, and society of the husband, in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as such;

(2) The marital relations between the parties at the time of and prior to his death;

(3) His services, if any, in assisting her in the care of the family;

(4) The loss of support which the husband is legally bound to give the wife, and which is based upon his probable future earnings and other acquisitions;

(5) The station in society which his past history indicates that he would probably have occupied and his reasonable expectations in the future, such earnings and acquisitions to be estimated upon the basis of the deceased's age, health, business capacity, habits, experience, and energy, and his present and future prospects for

business success at the time of his death, all of these elements to be based upon the probable joint lives of the widow and husband;

(6) She is also entitled to compensation for loss of whatever she might reasonably have expected to receive in the way of dower or legacies from her husband's estate in case her life expectancy be greater than his—the sum total of all these elements to be reduced to a money value and its present worth to be given as damages. That means, of course, gentlemen, that where you are considering damages to be earned in the future, since you are awarding them in cash as of today, you would give the present money value of that damage. Tampa Drug Co. v. Wait (record) (Fla.), 103 So. (2d) 603.

If you find that the Plaintiff, Patricia Cline, has been permanently injured to any extent or will continue to suffer therefrom you may take into consideration the extent of such permanent injuries and the effect the same may have upon the following:

(a) Her normal life and her ability or inability to lead a normal life and to enjoy the pursuits of happiness.

(b) Her future pain and suffering, if any.

(c) The sums of money, if any, she will be required to expend for future hospital care, doctors' care, X-rays, medications, and other related medical expenses as the evidence makes reasonably certain will result from the injuries sustained, if you find that it is a reasonable certainty that she will require future medical care.

(d) Any loss of earnings that the Plaintiff, Patricia Cline, may be reasonably expected to suffer in the future directly attributable to the injuries sustained.

(e) Any damages which you may award for future loss of earnings and medical expenses must be reduced to their present value. Klem's, Inc. v. Cline (record) (Fla.), 105 So. (2d) 881.

Gentlemen of the jury I charge you that if you find, from the preponderance of the evidence in this case, that the plaintiff is entitled to a verdict against the defendants, or either of them, upon the findings of the facts in this case and upon the issue of negligence, then it will become your duty to determine the amount of damages the plaintiff has sustained, and in determining and fixing the amount of plaintiff's damages for personal injuries, you may take into consideration the following elements:

1. Her bodily pain and suffering occasioned by the injury complained of, if any;
2. The plaintiff's sickness or any illness resulting from said injury;
3. The plaintiff's age, and general condition before the receipt of the alleged injury complained of, and the effect, if any, of such injury upon her physical and nervous system;

4. The expenses, if any, heretofore incurred by her for doctors' hire, hospital hire, x-rays, and other related medical expenses in connection with her care, attention and treatment for the injuries sustained, if any;
5. The personal inconvenience, if any, which she has suffered in the past because of her injuries.
6. If you find that she has been permanently injured to any extent or will continue to suffer therefrom, you may take into consideration the extent of such permanent injuries and the effect the same may have upon the following:
   A. Her normal life and her ability or inability to live a normal life and to enjoy the pursuit of happiness.
   B. Her future pain and suffering, both physical and mental, if any.
   C. Her inability to work or her diminished earning capacity, if any.
   D. The extent and probable duration of the injury, if any.
   E. The effect of the injuries, if any, on her health.
   F. The personal inconvenience, if any, she will suffer in the future because of her injuries.
7. In determining the plaintiff's prospective monetary losses in the future during her life expectancy, such future damages must be calculated at their present monetary value and the present money value thereof should be the basis of your verdict for such prospective future monetary losses.
8. In determining such future monetary damages, such as diminished earning capacity, if any, you may take into consideration the future life expectency of the plaintiff, based upon the mortality tables which have been offered in evidence. The tables are based on the age of the plaintiff at the time of the trial of this action, and show what her probable life expectency in the future may be according to the common experience of such tables; which should be taken into consideration, together with all the evidence in the case bearing upon the plaintiff's health, age and physical condition, both before and after the injury. Stark v. Vasquez (record) (Fla.), 168 So. (2d) 140.

Gentlemen of the jury, as to pain and suffering the law declares that there is no standard by which to measure it except the enlightened conscience of impartial jurors, the enlightened conscience of each of you. It would be your duty to determine from the evidence what sort of injuries the plaintiff received, if any, their character as producing or not producing pain, the mildness or intensity of the pain; its probable duration, and allow such sum as would fairly compensate her for her pain and suffering, if any, such sum as would receive the approval of the enlightened

conscience of each of you, and if, in considering the case, you reach the conclusion that the plaintiff is entitled to damages for future pain and suffering, in fixing the amount thereof you would bear in mind and give consideration to the fact that the plaintiff is receiving a present cash consideration for damages not yet sustained. However, this does not require a mathematical calculation of present value, such as must be applied to periodic future monetary losses. Braddock v. Seaboard Airline R. R. (Fla.), 80 So. (2d) 662; Stark v. Vasquez (record) (Fla.), 168 So. (2d) 140.

§ 418. —— Physical and Mental Pain and Suffering.

With respect to the assessment of damages for pain and suffering, past, present and future, I instruct you in this case in awarding compensatory damages you may take into consideration damages for personal injuries and physical suffering and pain, and while expenses incurred and other losses of this type may be capable of reasonably certain ascertainment, personal injuries and physical pain and suffering cannot be measured by any exact standard of pecuniary value, and the law makes it the duty of you, as jurymen, to fix the amount of damages to be awarded for personal injuries and physical pain and suffering, as to the present, past and the future. If you find that the injured party has suffered physical injuries, and that pain and suffering have followed as the result thereof, and if you find that it is reasonably certain to continue into the future, in assessing these damages you are instructed that you as a jury are authorized to assess such damages for the physical pain and suffering which are inseparable from the injury and which would necessarily and inevitably flow from such injury. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

Approved Instruction.— The rule for measuring damages for pain and suffering, past, present and future, has been often stated and always in substantial conformity with the charge given in Toll v. Waters, 138 Fla. 349, 189 So. 393 (as set out on page 367 of Volume 1, original edition). Braddock v. Seaboard Air Line R. Co. (Fla.), 80 So. (2d) 662.

§ 418a. —— Nervousness and Fright.

I further charge you, gentlemen, that a person cannot recover for mere fright alone, nor for nervousness resulting from mere fright, nor from any nervous disease or affliction, unless the same was caused by some physical injury, and it must be shown with reasonable certainty that the physical injury caused the alleged nervous condition, and unless you find from a preponderance of the evidence and upon a basis of reasonable certainty that the plaintiff's alleged nervous condition, of which she complains, was directly caused by physical injuries sustained in the happening, then in such event you cannot allow her compensation for her al-

leged nervousness or nervous condition. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

§ 422. —— Loss of Earnings.

I have charged you, gentlemen of the jury, that if you find, from a preponderance of the evidence in this case that the plaintiff is entitled to a verdict against the defendants, or either of them, that in determining and fixing the amount of plaintiff's damages for personal injuries you may take into consideration the diminished earning capacity of the plaintiff, if you find that she has been permanently injured, as an element of her personal injuries. I further charge you that as difficult of appraisal as it may be where, as in this case, the plaintiff was not working and earning any money at the time of her injury, that is it a proper phase of the damages for you to consider under all my charges and instructions to you. Fla. Greyhound Lines v. Jones (Fla.), 60 So. (2d) 396; Stark v. Vasquez (record) (Fla.), 168 So. (2d) 140.

§ 423. —— Permanent Injuries.

423(1). In General.

If you find from the evidence that the plaintiff was permanently injured to any extent, or that she will continue to suffer in the future to any extent as a result of her injuries, you may take into consideration her future physical pain and suffering, her personal inconvenience and sickness, if any; the loss or diminishing, if any, of her earning capacity and the consequent future monetary loss; the future expenses, if any, for medical care and treatment, and other future expenses, if any, which may reasonably be expected she shall incur in a future effort to effect a cure or alleviation of her pain, suffering or sickness. Thomason v. Miami Transit Co. (record) (Fla.), 100 So. (2d) 620.

§ 423(2). Consideration of Mortality Tables.

In estimating any future damages such as permanent injury, diminished earning capacity, or continuing injury and future pain and suffering, if any, and other future damages, if any, you may take into consideration the life expectancy of the plaintiff based upon the mortality tables offered in evidence before you, which show that a person of 47 years of age, being the attained age at the time of the trial testified to by Estelle Thompson, has a normal life expectancy of 23.08 years, which should be taken into consideration, together with all the other evidence in the case bearing upon the plaintiff's health, age and physical condition both before and subsequent to the injury. Rainbow Enterprises, Inc. v. Thompson (record) (Fla.), 81 So. (2d) 208.

The evidence in this case shows the age of Mr. Shearn at the time and place of the accident and the mortality tables were introduced in evidence to aid you in determining his life expectancy. Mortality tables are evidence of the expectation of a person of a given age. These tables are given in evidence to assist you in arriving at the damages, if any, that you might find that the plaintiff is entitled to as a result of the death of William J. Shearn. The mortality tables should be considered by you together with all the other evidence in the case which have a bearing on the life expectancy in fixing the amount of damages, if any, which you may find that Mary A. Shearn is entitled to as the widow of William J. Shearn. Shearn v. Orlando Funeral Home, Inc. (record) (Fla.), 82 So. (2d) 866.

In determining the amount, if any, you shall award for future losses, if any, you must reduce such future losses to their present money value, and in determining such amount, you may take into consideration the life expectancy of the plaintiff as indicated by the mortality tables read into evidence in estimating her life expectancy. However, you are not required to be bound by such tables. They may be considered together with all other pertinent and material evidence in the case which will aid you in estimating such life expectancy. Thomason v. Miami Transit Co. (record) (Fla.), 100 So. (2d) 620.

You are further instructed, gentlemen of the jury, that the mortality tables show the probable duration of the life of a healthy person. In using the mortality tables to determine the life expectancy of the plaintiff, however, you should also take into consideration all other evidence in the case, if any, with respect to the general health of the plaintiff. These tables are not conclusive as to the probable duration of one's earning capacity, because this depends on a great many factors other than health and life expectancy. Thomason v. Miami Transit Co. (record) (Fla.), 100 So. (2d) 620.

Certain mortality tables have been referred to in the course of taking the evidence in the case and you gentlemen should understand that these tables or these calculations are not binding upon you gentlemen but that they should be considered for what they are worth. You should consider these calculations or these tables along with and together with all the other evidence and circumstances in the case in arriving at your verdict. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

In estimating and fixing the amount of damages recoverable by the plaintiff, if you shall decide that he is entitled to a favorable verdict, you may consider his life expectancy, and the life expectancy of his deceased wife had she not died in the accident,

as indicated by the mortality tables read into the evidence. In estimating such life expectancies, however, you are not required to be bound by such tables. They may be considered together with all other pertinent and material evidence the consideration of which will aid you in your estimation of such expectancies. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 425. Father's Damages for Injury to Child.

If you find from the evidence presented in these cases that Cynthia Ann Stary was injured by the negligence, if any, of Dr. Montgomery and Dr. Buchanan, or either of them, then the Court instructs you that the plaintiff Earl E. Stary, her father, is entitled to recover for the damages which he has sustained because of such injury to his infant daughter. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

V. AGGRAVATION OF DAMAGES.

§ 426. Aggravating Prior Condition.

I charge you, gentlemen of the jury, that if you find that the plaintiff sustained injuries in the accident and further find from the evidence that the plaintiff was, at the time of the injury, suffering from any physical ailment and that the injuries aggravated such existing ailment or developed it, if it was latent, that the defendants who caused the injury are required to respond in damages for the results of the disease as well as the original injury. In such case it would be your duty to determine from the evidence such part of the diseased condition as the defendants so caused; and base the damages awarded plaintiff upon such determination; but if you cannot so apportion it, or you cannot determine from the evidence that the disease would have existed apart from the injuries, then the defendants are responsible for the diseased condition and the plaintiff should be awarded damages for such condition. Stark v. Vasquez (record) (Fla.), 168 So. (2d) 140.

DEATH BY WRONGFUL ACT.

§ 429. Right of Action Generally.

The mere happening of an accident in which a wife loses her life does not necessarily entitle her surviving husband to recover damages for her death. The legal responsibility and liability of the party or parties sued must be established by competent, credible and adequate proof before there can be a recovery of dam-

ages. The plaintiff charges that the defendant was guilty of negligence which was a proximate cause of the accident which gave rise to this litigation and of the resulting fatality. The defendant denies such charge; and it cannot be sustained unless you shall find that it has been proved by a preponderance of evidence. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 431. Burden of Proof.

As already indicated, the defendant having denied the negligence alleged against it and having denied any wrongful act causing the death of the deceased husband, the plaintiff has the burden of proving that the death of her deceased husband was caused in the manner and form as alleged in said complaint and she has the burden of proving that the death of her said husband was caused as alleged by a preponderance of good and sufficient evidence. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

§ 435. Measure and Elements of Damages.

§ 436. —— In General.

You may also consider the probable needs of the dependents in the future and the probabilities of the deceased contributing to such needs. You may consider the habits, morals, social adaptability, as well as all other facts and circumstances borne out by the testimony, and you may then award damages that will reasonably compensate each of the plaintiffs for the damage resulting from the wrongful death, should you find that each of the plaintiffs is entitled to recover. Should you find from the preponderance of the evidence that each of the plaintiffs is entitled to recover from the defendants, then you may award such damages as you find from the evidence that each of the plaintiffs has suffered. In awarding damages you are to award only that amount which will wholly compensate for their pecuniary loss. Insofar as future damages are concerned, these future damages should be reduced to their present worth. That sentence refers to what we were talking about when we had Mr. Wright here, about computing the present value of a sum of money which, paid over a period in the future, will operate as full compensation for a loss. On that same subject, you are instructed that in assessing damages, you should determine a sum that would purchase an annuity according to the pecuniary aid by the dependents, or dependents would have derived from the deceased. In other words, the present worth of such an amount as would accrue to the beneficiaries, based on his or her life expectancy. I think I have sufficiently gone into the question about reducing any award that relates to the future to the present value, and anything further I think would be repetitious. Smollin v. Wilson (record) (Fla.), 74 So. (2d) 685.

In estimating the value of damages sustained by each of the plaintiffs you may consider not only the monetary contributions made by Maybelle Wilson to each of the plaintiffs, but in addition thereto you may consider the reasonable value of the care and attention and other services, should you find from a preponderance of the evidence that such were received by each of the plaintiffs. Should you find from a preponderance of the evidence that each of the plaintiffs is entitled to recover from the defendants, you may consider the age and probable life expectancy of each of the dependents as well as the deceased—Maybelle Wilson. On that question of life expectancy, concerning which you recall the mortality tables which were read to you—in one instance the life expectancy of Maybelle Wilson was shorter than that of Willie Wilson, and you will take the shorter life expectancy of the dependent or the deceased; it is the shorter of the two in each case. You see, you have no difficulty about the two older people, because obviously their life expectancy was a great deal shorter than that of Maybelle Wilson; but in the case of Willie Wilson, her life expectancy was shorter because she was older. Smollin v. Wilson (record) (Fla.), 74 So. (2d) 685.

The plaintiff in this case contends that the plaintiff is entitled to damages for pain and suffering of the deceased between the time of injury and death. Plaintiff has the burden of showing that the deceased did suffer pain as a result of the injury, even if you find the defendant negligent, and the plaintiff has the burden of showing that the deceased was conscious or in such state between the injury and death that he could feel and appreciate or suffer pain as a result of his injuries. Unless the plaintiff proves these elements by a preponderance of the evidence you should not consider such an element of damages even if you find a verdict for the plaintiff. Dobbs v. Griffith (Fla.), 70 So. (2d) 317, holding that it was error to refuse to give the foregoing instruction.

§ 436a. — Reliance on Deceased as Ultimate Test of Dependency.

As you already know, the defendants have admitted their responsibility for the wrongful death of Maybelle Wilson, so it leaves for your consideration to determine the amount of damages sustained by the various plaintiffs, if they were dependent upon Maybelle Wilson for support, either solely or in part. Now, the ultimate test of dependency is the reliance by the plaintiffs on the deceased, Maybelle Wilson; upon her contribution for means of living, having regard to the dependents' class and position in life and actual contribution for that purpose. Now, this reliance of the plaintiffs on the deceased must rest upon their inability to maintain themselves wholly or in part. Perhaps to elaborate on that thought for a moment, a contribution to one who is able to

make his living would not be a test of being a dependent; but a contribution to one who either wholly or in part is unable, for whatever reason, to maintain himself, constitutes dependency to the extent that is necessary to make up the livelihood—to make up the difference between what one is earning and the total amount of what one receives. It is not necessary for the plaintiffs to show that Maybelle Wilson was their sole means of support. If you find from a preponderance of the evidence that each of the plaintiffs received contributions from Maybelle Wilson, and by a preponderance of evidence that they were, in fact, dependent upon her for support, then as to this issue you may find for the respective plaintiffs and assess such damages as you find from the evidence that each of the plaintiffs has sustained. Smollin v. Wilson (record) (Fla.), 74 So. (2d) 685.

§ 437. —— For Death of Husband.

For case again approving the 5th instruction in this section in original edition, see Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

In arriving at a proper amount to be awarded to the plaintiff for her damages, you may properly take into consideration her loss of the comfort, protection and society of her husband in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as a husband, and to the marital relations between the parties at the time of and prior to his death. And further, if you find for the plaintiff as stated, the plaintiff would also be entitled to recover reasonable compensation for the loss of support which her husband was legally bound to give her and the children of plaintiff and her said husband, based upon his probable future earnings and acquisitions and his reasonable expectations in the future, his earnings and acquisitions to be estimated upon the basis of deceased's age, health, business capacity, habits, experience, energy and his prospects for business success at the time of his death. All these elements to be based upon the probable joint lives of the widow and husband, and the respective terms of dependency of said children. In addition, plaintiff would also be entitled to compensation for the loss of whatever she might reasonably have been expected to receive as dower, inheritance or legacies from her husband's estate at his natural death above and beyond the amount received by her for such dower and legacy, if any, at the time her husband died. And the sum total of all these elements should be reduced to a money value and its present worth be given as damages. Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158.

Should you find for the plaintiff, Gentlemen, you should assess such an amount of damages for and in her behalf which you find

from a preponderance of the evidence she fairly and reasonably sustained as a result of the death of her husband, James Clayton Tyus. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

§ 438. — For Death of Wife.

If, under the court's instructions, you shall find that it has been proved, by a preponderance of evidence, that the defendant was guilty of negligence, which was a proximate cause of the accident and of the death of the plaintiff's wife and if you shall further find that it has not been proved, by a preponderance of evidence, that she was guilty of negligence which was a contributing proximate cause of the accident and of her heath, it will then be your duty to return a verdict for the plaintiff and, by such verdict, to award him such damages as will reasonably compensate him for (1) the funeral expenses incurred by him incident to the burial of his deceased wife; (2) the loss of the services which he might reasonably have expected to receive from her had she not lost her life in the accident, less, of course, what he might reasonably have been required to expend for her support and maintenance had she not been killed in the accident; and (3) the loss to him of her consortium. The services, for the loss of which the plaintiff should be reasonably compensated if your verdict shall be in his favor, includes such services as the deceased wife had been accustomed to render in the home, in the care and training of their child, and such special services which she had been accustomed to rendering him without compensation. The consortium, for the loss of which the plaintiff should be compensated if your verdict shall be in his favor, is the conjugal fellowship of husband and wife and the right of each to the company, cooperation and aid of the other in every conjugal relation. It is more than the sexual relationship and includes the affection, solace, comfort, companionship, society and assistance as necessary to a successful marriage. If, under the court's instructions, you shall decide that the plaintiff is entitled to recover damages from the defendant, you should, in determining and assessing his damages for the future losses which I have mentioned, reduce such damages to their present money value. If, under the court's instructions, you shall decide that the plaintiff is entitled to recover damages from the defendant, such damages must be restricted or limited to the three items or elements which I have mentioned. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

The burden of proving, by a preponderance of evidence, the amount of damages to which he is entitled is on the plaintiff. He is not entitled to recover speculative or conjectural damages or for any losses except such as he has sustained, or will sustain, as

a proximate result of his wife's death, as shown by a preponderance of evidence. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 440. —— For Death of Child.

The laws of Florida provide that, whenever the death of any minor child shall be caused by the wrongful act, negligence, carelessness or fault of any individual, the father of said minor child may maintain an action against such individual and may recover not only for the loss of services of the minor child, but in addition thereto, for the mental pain and suffering of both parents. Klepper v. Breslin (record) (Fla.), 83 So. (2d) 587, holding that the trial judge's instructions very completely and properly advised the jury on the applicable law.

In arriving at that compensation, you are entitled to take into consideration such mental pain and suffering as parents, both his mother and the father, experienced as a proximate result of the death of their child. And also the value at the date of the trial of the fair compensation or services which in reasonable probability the child would have rendered to the parents during the period from the wrongful death to the date when the child would have become twenty-one years old. You may also consider and assess as damages the reasonable cost of funeral expenses incident to the death of the minor. Klepper v. Breslin (record) (Fla.), 83 So. (2d) 587, holding that the trial judge's instructions very completely and properly advised the jury on the applicable law.

The loss of services sustained by a parent in the death of a minor child is the services that such parent would be entitled to between the death and age of twenty-one years of such minor, and any amount you find for future services must be reduced to its present money value, and such present money value only included in your verdict. Klepper v. Breslin (record) (Fla.), 83 So. (2d) 587, holding that the trial judge's instructions very completely and properly advise the jury on the applicable law.

DRUGS AND DRUGGISTS.

§ 451a. Germination of Cannabis.
§ 451b. Civil Liability of Manufacturing Druggist.
§ 451c. —— Duty as to Labeling Product.
§ 451c(1). In General.
§ 451c(2) Degree of Care Required.
§ 451c(3). Evidence to Be Considered by Jury.

§ 450. Unlawful Sale of Narcotics.

The information here charges that the defendant unlawfully and feloniously did possess and have possession of certain nar-

cotics, and then describes it, without being licensed or authorized by law to have said narcotic drug in his possession. The Court further charges you that if you find from the evidence that the defendant did have possession of narcotic drugs as charged in this information, then the duty would devolve upon the defendant of showing you that he had the right to have it under the law. Escobio v. State (record) (Fla.), 64 So. (2d) 766.

The count which comes before you charges that on the 4th of May, 1951, in Hillsborough County, Florida, the defendant, Gilbert Rubio Escobio, unlawfully and feloniously did possess and have control of a certain narcotic drug, to-wit: six cigarettes containing cannabis sativa L., commonly known as marijuana, without being licensed or authorized by law to have a narcotic drug in his possession. Gentlemen, the statute denounces in substantially the language of the information the possession of this drug by persons unauthorized to have it. That is a violation of the law and it is a felony. Escobio v. State (record) (Fla.), 64 So. (2d) 766.

§ 451a. Germination of Cannabis.

Gentlemen, there has been quite a little discussion of the element of germination with respect to cannabis sativa L. The statute which defines this drug is somewhat long and I'm not going to burden you in an effort, or burden you with an interpretation upon your own behalf. It's my duty and obligation to interpret the law to you. The Court is of the opinion and you are instructed that the question of the capability or incapability of germination as referred to in the statute is limited only to the seed of the plant. Escobio v. State (record) (Fla.), 64 So. (2d) 766.

§ 451b. Civil Liability of Manufacturing Druggist.

§ 451c. —— Duty as to Labeling Product.

§ 451c(1). In General.

Among the things that you are to determine—and this is in line with all the rest that you've got to do—is whether or not carbon tetrachloride is an economic poison highly toxic to man and whether the label required additional warning or whether the warning rule by the Secretary of Agriculture for insecticides containing carbon tetrachloride of ten per cent or more was sufficient, in view of what the harmful effects of carbon tetrachloride might be. Tampa Drug Co. v. Wait (record) (Fla.), 103 So. (2d) 603.

§ 451c(2). Degree of Care Required.

Gentlemen, this case might kind of boil down to whether or not the defendant, the Tampa Drug Company, has done or failed

to do something which a reasonable, prudent and cautious person, with knowledge of the facts and circumstances, would have done under like circumstances. In determining this, you, of course, should consider the standard adopted by the trade generally, provided, of course, that you find that the label that the trade used generally was sufficient for the purpose intended; and, of course, in doing that, I say again that you will have to determine the harmful effects of carbon tetrachloride, if any, and, if so, to what degree. Tampa Drug Co. v. Wait (record) (Fla.), 103 So. (2d) 603.

What you are concerned with, gentlemen, primarily in this case, and they are questions of fact for you to determine, is the degree of toxicity, if I may use that term—I think you know what I mean by it; whether carbon tetrachloride is inherently fatal to man, whether it is poisonous, or the degree of danger or harm that it might be, and whether or not the label used by the defendant was sufficient, consistent with the facts and circumstances, to warn the public generally of what harm, if any, may follow its use. For that purpose, a number of labels were offered in evidence and, in addition, a description of some were read to you in evidence. These are all for your consideration as a rule or guide for what might be a standard to be used by the trade and by the Tampa Drug Company in warning the public generally of what dangers might follow the use of this product, and in determining that you will bear in mind that the defendant is not what we call an insurer of the safety of the public. The law provides in certain circumstances different degrees of care—reasonable, high, or highest. The dispenser, the Tampa Drug Company in this case, of carbon tetrachloride, as I said, is not an insurer, but it is under a duty and obligation to use such reasonable care and caution as the circumstances of the case require, and in determining or using that yardstick you will bear in mind the public generally, not any exceptional or individual case; in other words, not somebody who might be, as was testified, I believe, hypersensitive or especially allergic, if I may use that term, or unduly susceptible to an article. You must consider the use of the article by the public generally, bearing in mind, of course, the degree of danger that you find the article to be and the uses to which it might be put. Tampa Drug Co. v. Wait (record) (Fla.), 103 So. (2d) 603.

§ 451c(3). Evidence to Be Considered by Jury.

Among the various labels read into the record was one by the Department of Agriculture of the Federal Government. That was admitted into evidence along with all the rest of them and, of course, in considering the labels and their use, you should consider all of them, and you should likewise consider the label in

its entirety, not any particular one line, but whether the entire label is sufficient for the purposes for which it was intended. In so far as the Government label is concerned, there are, in addition, certain regulations or provisions under the Federal Act, under which the Secretary of the Department of Agriculture issues or authorizes these warnings. Title 7 of the United States Code deals with this particular subject—that is just a matter of reference—which covers insecticides, defines an insecticide as an economic poison, and provides that it is unlawful to sell such economic poison which contains any substance or substances in question that are highly toxic to man. It also provides that if it is highly toxic to man, the label shall bear, in addition to any other matter, the following:

(1) The skull and crossbones;

(2) The word "Poison" prominently in red on a background of distinctive contrasting color;

(3) A statement of the antidote for such economic poison.

That provides that such economic poison should be registered, and authorizes the Secretary of Agriculture to make rules and regulations for carrying out the provisions of the Act. The Secretary of Agriculture is authorized, in addition, after opportunity to determine the economic poison and substances contained which are highly toxic to man; that the Secretary did make certain rules and regulations regarding the procedure necessary to register such economic poisons, including insecticides. Tampa Drug Co. v. Wait (record) (Fla.), 103 So. (2d) 603.

DRUNKENNESS.

§ 451d. Intoxication Defined.

Cross References.

As to driving while under the influence of intoxicating liquor, see Automobiles, § 166c.

§ 451d. Intoxication Defined.

Intoxication, lady and gentlemen, I charge you, as used in the second count of the information, means under the influence of intoxicating liquor to such an extent as to deprive one of the normal control of one's body or mental faculties, or both. Clowney v. State (Fla.), 102 So. (2d) 619.

§ 455. Intoxication as Defense to Homicide.

§ 456. —— In General.

If one who intends to kill another becomes voluntarily intoxicated for the purpose of carrying out the intention, the intoxication will have no effect upon the act and intent thus carried out,

but where a person without a previous intent to kill another is too intoxicated at the time of such killing to be capable of forming an essential particular intent, such intent cannot exist, and consequently the offense of which it is a necessary element cannot be perpetrated. Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

§ 457. —— Murder in the First Degree.

Where a premeditated design to effect the death of the person killed, or some human being, is essential to the offense of murder in the first degree, as it is in this state, intoxication, although voluntary, is relevant evidence to be considered by you, gentlemen of the jury, as to its effect upon the ability of the accused at the time of the killing to form or entertain such a design. If you find from the evidence that the accused was so intoxicated as to be incapable of forming such a design and yet that but for such incapacity he would be guilty of murder in the first degree, and that he had not previous to such intoxication formed the intent to kill the deceased and become intoxicated for the purpose of carrying out the intention, you cannot find him guilty of murder in that degree because such a design is an essential element of murder in the first degree. Such intoxication and effect thereof will not render anything a sufficient provocation to reduce a killing to manslaughter that would not be such in the mere absence of such intoxication; on the contrary, as between murder in any degree below the first degree and manslaughter, such intoxication plays no part. The only purpose for which it is admissible is to show an absence of a premeditated design to kill, or that the killing was not murder in the first degree, and the only effect of proof of intoxication rendering the accused incapable of forming or entertaining such design will be to reduce the killing to murder in the second degree. Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

As heretofore charged you, in cases in which a specific or particular intent is an essential or constituent element of the offense, intoxication, although voluntary, becomes a matter for your consideration with reference to the ability of the accused to form or entertain such intent. A specific intent is an essential element of the offense of robbery and the court charges you that if a person is so intoxicated as to be mentally incapable of forming an intent to steal the property of another by force, violence, or assault or putting in fear, he could not commit the offense of robbery. Intoxication in itself is not a defense to the crime of robbery, but it is only intoxication to such a degree as to produce in a person the mental incapacity to entertain a specific intent to rob which is a defense to robbery. Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

In cases in which a specific or particular intent is an essential or constituent element of intent, as it is in murder in the first degree, intoxication, although voluntary, becomes a matter for your consideration with reference to the ability of the accused to form or entertain such an intent. If one who intends to kill another becomes voluntarily intoxicated for the purpose of carrying out the intention, the intoxication will have no effect upon the act and intent thus carried out. But where a person without a previous intent to kill another is too intoxicated at the time of such killing to be capable of forming an essential particular intent, such intent cannot exist and, consequently, the offense of which it is a necessary element cannot be perpetrated. Land v. State (record) (Fla.), 156 So. (2d) 8.

Where a premeditated design to effect the death of the person killed or some human being is essential to murder in the first degree, as it is in this case, intoxication, although voluntary, is relevant evidence to be considered by you gentlemen of the jury as to its affect upon the ability of the accused at the time of the killing to form or entertain such design. If you find from the evidence that the accused was so intoxicated as to be incapable of forming such a design, and yet that, but for such incapacity, he would be guilty of murder in the first degree and he had not previous to such intoxication formed the intent to kill the deceased and became intoxicated for the purpose of carrying out the intention, you cannot find him guilty of murder in that degree because such a design is an essential element of murder in the first degree. Rhone v. State (record) (Fla.), 93 So. (2d) 80.

§ 458. —— Habitual Intoxication Producing Insanity.

For case holding that it was error to refuse to give the 1st instruction in this section in original edition, see Griffin v. State (Fla.), 96 So. (2d) 424.

You are instructed, gentlemen, that if you believe from the evidence beyond a reasonable doubt that the defendant beat and wounded the deceased, and if you further believe from the evidence beyond a reasonable doubt, the defendant, at the time he so beat and wounded the deceased, was in such a state of fixed or settled frenzy, or mental insanity, induced by antecedent and long continued use of intoxicating drinks or liquors, and not produced by the immediate effects of intoxicating drinks or liquors, as not to have been conscious of what he was doing, or that the act was wrong, you will find the defendant not guilty. Land v. State (record) (Fla.), 156 So. (2d) 8.

EJECTMENT.

§ 462. Purpose of Suit.

In this case, gentlemen of the jury, the plaintiffs, Mrs. Poston and her husband, sued the Bagdad Land and Lumber Company, to recover the possession of certain lands in this county which have been described in the declaration in what is called an ejectment suit, that is, a suit where one person is in possession of certain parcel of land and another person claims the title a right of possession of the land. They bring suit to recover possession of the land and to declare the title as between the parties and this is a suit of this kind. The Bagdad Land and Lumber Company is in possession of this three hundred and twenty and a fraction acres of land described in the declaration; the plaintiffs claim that they have title to the land and are entitled to possession and have brought this suit to settle the question. The defendant pleads that it is not guilty, which plea puts in issue the title and right of possession of the plaintiffs and you try the issue as jurors. Bagdad Land & Lumber Co. v. Poston (record), 69 Fla. 340, 68 So. 180.

§ 463. Plaintiff Must Recover on Strength of His Own Title.

The court charges you that the defendant has not shown any title to the land at all. There is a rule of law, however, applicable to suits of this kind, that the defendant is entitled to prevail in an action of ejectment unless the plaintiff shows by a preponderance of the evidence, prima facie title, that is, shows title and right of possession strong enough to put the defendant to proof of a better title. Bagdad Land & Lumber Co. v. Poston (record), 69 Fla. 340, 68 So. 180.

§ 468. Sufficiency of Proof of Title.

§ 469. —— In General.

In order to recover in this suit the plaintiffs must show only one fact by a preponderance of the evidence, and that is, that Mrs. Poston is the daughter of William Young, the man who patented, or who got this patent from the government of the United States, that is. that she is the legitimate child of the William Young who patented the land. If the plaintiffs have shown this, she is entitled to the title and right of possession because as I say the defendant has not shown any title at all, and that is the sole point you gentlemen have to consider in reaching your verdict, is Mrs. Poston the daughter of the man, William Young, whom the United States government issued the patent to, that is, is she the lawful child, born in lawful wedlock, because

it is shown by testimony that she is the only child of her father, who is dead, and that she is sole heir, and as sole heir, would be entitled to succeed to all his rights. Therefore, if Mrs. Ella Poston is William Young's daughter and sole heir she will succeed to his lands and she would be entitled to a verdict in this case. Bagdad Land & Lumber Co. v. Poston (record), 69 Fla. 340, 68 So. 180.

ELECTRICITY.

§ 473a. But Distributor Not Liable Where Injured Party Assumed Risk.

§ 473. Degree of Care Required of Distributor of Electricity.

Electricity is an invisible force, highly dangerous in its use. Therefore, those who undertake to manufacture and distribute electrical current must exercise a high degree of care to avoid injury to persons who might reasonably be expected to come in contact with the lines of distribution, by providing adequate insulation or by locating and maintaining the lines in a safe position or by giving adequate warning of the danger. The degree of care required in this regard must be in proportion to the danger involved and must amount to all that human care, vigilance, and foresight can reasonably do for the protection of those who use the electricity or may reasonably be expected to come in contact with any of the lines of distribution, consistent with the practical operation of the manufacturing plant and the system of distribution. Now, failure to use that degree of care would constitute negligence, and if injury to a person be proximately caused thereby the party so transmitting the electric current would be liable for any damages inflicted; provided, of course, the person injured was free of negligence on his part that proximately contributed to his own injury, and had not assumed the risk of a known hazardous situation. Williston v. Cribbs (record) (Fla.), 82 So. (2d) 150.

The court charges you that wires charged with electric current may be harmless or they may be in the highest degree dangerous. The difference in this respect is not apparent to ordinary observation and the public, therefore, while presumed to know that danger may be present are not bound to know its degree in any particular case. The company, however, which uses such dangerous agent is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to its wires and liable to come accidentally or otherwise in contact with them. Williston v. Cribbs (record) (Fla.), 82 So. (2d) 150.

The court charges you that all persons or corporations who

operate a force of great inherent danger to the lives and safety of others, such as electricity, are held by law to a high degree of care in operating the same, to the end that other persons shall not be hurt by the same while such other persons are rightfully attending to their own business. The degree of care required is measured by and equal to the danger. When anyone operates a force of utmost danger a very great degree of care is required. What would be care in operating a force of little danger might not be care in operating a force of great danger. As the danger increases, so the degree of care increases which is required of persons or corporations who are operating the force; in other words, the degree of care required is proportionate to the danger of the force. Williston v. Cribbs (record) (Fla.), 82 So. (2d) 150.

Even though a company furnishing electricity is held to a high degree of care in the maintenance of its power lines, commensurate with the practical operation of a system distributing such a necessary commodity, it is not an insurer of the safety of any person who might come in contact with its wires. Williston v. Cribbs (record) (Fla.), 82 So. (2d) 150.

§ 473a. But Distributor Not Liable Where Injured Party Assumed Risk.

The court charges you that if you believe from a preponderance of the evidence that plaintiff's deceased husband knew of the risks of injury from contact with said power line, yet he voluntarily chose a route for his own purpose in which he might contact said line, and that there were other routes available to him to accomplish the end he set out to do without coming in proximity with said line, then he assumed the risk of such injury as he might receive in contact with said power line and such assumption of risk on his part will bar the plaintiff from recovery in this suit and you must find for the defendant and return a verdict of not guilty. Williston v. Cribbs (record) (Fla.), 82 So. (2d) 150.

EMBEZZLEMENT.

§ 484. Embezzlement by Agent, Servant or Employe.

An agent engaged in the employment of another person or corporation or firm at selling goods, and who is authorized to make collections on his sales, will be guilty of embezzlement in appropriating to his own use money so collected, when by the terms of his employment he is required to remit or send the money collected or checks paid to him to his employer, and not permitted to use same. Eatman v. State, 48 Fla. 21, 37 So. 576.

EMINENT DOMAIN.

I. AUTHORITY TO CONDEMN.

§ 489a. In General.

Gentlemen of the jury, this Court has already determined that the petitioner, Miami Shores Village, is entitled to condemn the property involved in this cause, and, therefore, the sole question to be determined by you is the amount of money to be paid to the defendant as just compensation. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

See §§ 73.01-73.25, F. S. 1957.

This instruction appears in paragraph 30 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida,* 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

II. COMPENSATION.

§ 489b. Constitutional Provisions.

The controlling law governing the appropriation of the property of another for a public purpose is found in the Constitution

of this state [Art. 16, § 29], which requires compensation shall be paid before taking property and reads as follows:

"No private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law." Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 31 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

§ 489c. Measure and Elements of Full Compensation.

§ 489d. —— In General.

The court instructs the jury that, since the power of eminent domain is necessary for the public good, it would be unjust to the public if the petitioner should be required to give the owners more than a fair indemnity for the loss that they sustained by the appropriation of their property for the general good. On the other hand, the owners being compelled by law to part with their property whether they desire to sell or not, the law allows them full compensation therefor. Central Hanover Bank & Trust Co. v. Pan American Airways (record), 137 Fla. 808, 188 So. 820; Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 32 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

§ 489e. —— Must Be Full and Fair Equivalent.

Under our Constitution no private property shall be appropriated to a public use unless a full and exact equivalent for it be returned to the owner. That equivalent is the market value of the property at the time of its taking, contemporaneously paid in money. Central Hanover Bank & Trust Co. v. Pan American Airways (record), 137 Fla. 808, 188 So. 820.

In determining the compensation to be paid to the defendants for the property which is being taken from them by the Pan American Airways, Inc., the court charges you that under the Constitution of this state the defendants are entitled as a matter of right to receive full compensation for the property taken; that is to say, the amount which you are to determine shall be

paid to the defendants for the property must be an amount which represents the full and perfect equivalent of the property taken. In order to arrive at what is a full and perfect equivalent, the court charges you that you are to determine from the evidence the present market value of the property, and for that purpose you may consider the present general market value of other property in the same locality as the property in question, although the general market value of that other property is not to be taken by you as a criterion for determining the compensation to be paid to the defendants. Central Hanover Bank & Trust Co. v. Pan American Airways (record), 137 Fla. 808, 188 So. 820.

In order to arrive at what is a full and perfect equivalent, the Court charges you that you are to determine from the evidence the present fair market value of the property, and for that purpose you may consider the present general market value of other property in the same locality as the property in question together with all the other evidence and circumstances. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 42 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

§ 489f. —— Fair Market Value as Measure.

§ 489f(1). In General.

I charge you that such compensation consists of the fair market value of the property which is to be taken by petitioner from the defendant, and in addition thereto, a reasonable attorney's fee. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 30 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

§ 489f(2). Determination of Fair Market Value.

You are instructed that the market value means the fair value of the property as between one who wants to purchase and one who wants to sell, not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained, nor its speculative value; not a value obtained from the necessities of another, nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale when one party wants to sell and the other to buy. Doty v. Jacksonville (record), 106 Fla. 1, 142 So. 599.

You are instructed that the term fair market value means the value of the property as between one who wants to purchase and one who wants to sell, not what could be obtained for it under peculiar circumstances when a greater than its fair price could be obtained, nor its speculative value, not the value obtained from the necessities of another; nor, on the other hand, is it to be limited to that price which the property would bring at forced auction under the hammer. It is what it would bring at a fair sale when one party wanted to sell and the other to buy. Central Hanover Bank & Trust Co. v. Pan American Airways (record), 137 Fla. 808, 188 So. 820.

You are instructed that the term fair market value means the value of the property as between one who wants to purchase and one who wants to sell, not what could be obtained for it under peculiar circumstances when a greater than its fair price could be obtained. The fair market value is not the speculative value of the land, and it is not the value obtained from the necessities of another; nor, on the other hand is it to be limited to that price which the property would bring at forced auction under the hammer. It is what it would bring at a fair sale when one party wants to sell and the other to buy, neither acting under compulsion or necessity. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 34 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

The value of the property may be deemed to be that sum which, considering all of the circumstances, would be arrived at by fair negotiations between an owner willing to sell and a purchaser willing to buy, neither being under any pressure. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those facts of such general notoriety as to require no proof. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

§ 489f(3). Test Is What Has Owner Lost.

The value of the property to the petitioner for its particular use is not the test for determining its market value. The defendant must be compensated for what is taken from him, and that is done when he is paid the fair market value of the property for all available uses and purposes. The test for determining the fair market value of the land taken by condemnation is: What

has the owner lost? Not, what has the taker gained? Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 35 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

§ 489g. —— Jury to Fix Actual Cash Value of Land Taken.

You are instructed that, in considering the compensation to be made to the defendant for the land about to be taken, you are to fix the actual cash value of the land taken, as of the 16th day of May, 1929, and you are further instructed that you are not to consider the price at which the property will sell for under special or extraordinary circumstances, but its fair cash market value if sold in the market under ordinary circumstances for cash, and not on time, and assuming that the owners are willing to sell and the purchasers willing to buy. Doty v. Jacksonville (record), 106 Fla. 1, 142 So. 599.

You are instructed that in considering the compensation to be paid to the defendant for the land about to be taken, you are to fix the actual cash value of the land taken, that is, the actual money value, and you are further instructed that you are not to consider the price at which the property will sell under special or extraordinary circumstances, but it is the fair market value in money if sold in the market under ordinary circumstances, and assuming that the owner is willing to sell and the purchaser is ready to buy. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 33 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

§ 489h. —— Use of Land to Be Considered.

§ 489h(1). In General.

The court further charges you that in fixing the fair market value of the land involved in this suit, you should take into consideration the existing wants of the community, or such as may be reasonably expected in the immediate future. In other words, a prospective future use may be taken into consideration, insofar as such prospective future use may bear upon the present market value of the property. Doty v. Jacksonville (record), 106 Fla. 1, 142 So. 599.

You are instructed that in determining the question of the amount of compensation which should be awarded the defendant, you must take into consideration the value of the land to be

taken, and in that connection the uses to which it was, or might reasonably be, applied and any damage to the defendant's adjacent remaining lands. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 40 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

§ 489h(2). Damage to Remaining Adjacent Land.

You are instructed that the owner is entitled to full compensation for the property taken, and that the term "full compensation" includes not only the fair cash value of the land actually taken, but also such damage as the owner's remaining adjacent lands may suffer by reason of the taking, and by the uses to which such lands so taken are to be put. You will therefore take into consideration the uses to which it is intended to put the land being taken and the damage, if any, which the remaining adjacent lands of the owner may sustain by reason of such use, and you will award to the owner such amount of money as will compensate him for any such damage, in addition to the amount which you find to be the fair cash value of the lands actually taken. This means the use of the land taken and not the speculative use of the public property already owned by the Petitioner, Miami Shores Village. This, of course, can only refer to the probably increased traffic of the public across the proposed passageway, as proposed by the Petitioner, and under no circumstances are you to consider as an established fact that an American Legion Home, which has been proposed, will be placed on the Village land. Owners of private land adjacent to public lands must always run the risk of proper public use of the same, which in some instances may be more obnoxious than the witnesses have testified concerning the erection of an American Legion Home. In other words, the question of the American Legion Home is one which should not be determined by you, but you should take into consideration all of the probable public uses to which this property may be put by Miami Shores Village in a proper and legal manner, thereby increasing the traffic over this street probably a great deal more than traffic is there now. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

§ 489h(3). Damage to Improvements.

In determining the amount of compensation to be awarded to defendant, Doty, three elements are involved in the event you find from the evidence that the remnants of said lots can be put to any profitable use: First, the value of property sought to be

condemned; second, the damage to the improvements now located upon the property, if you find that such improvements will be damaged; third, the damage that will be done to the remnants of the lots involved in this suit,—that is to say, the parts of said lots that the defendant, Doty, will own after the city takes a part of each lot that it is seeking to condemn. In this connection, the court charges you that the defendant, Doty, has no right to remove any part of either of the buildings located upon said lots that is situated on the portion that the city is seeking to condemn. Doty v. Jacksonville (record), 106 Fla. 1, 142 So. 599.

§ 489i. —— Damage to Business to Be Considered.

If you find from the evidence that the effect of the taking of the property involved may injure, damage or destroy an established business of more than five years' standing, owned by the defendant whose lands are sought to be taken, located upon the lands sought to be taken, and lands adjacent or contiguous thereto, then you shall consider the probable effect the use of the property so taken may have upon said business, and assess in addition to the amount to be awarded for the taking, the probable damages to such business which the use of the property so taken may reasonably cause. If you find from the evidence that the defendant owns an established business located on the lands taken, you should consider the nature and extent of such business in arriving at the value of such lands. You must not award additional damages on account of the destruction of such business, as the nature and extent thereof are to be taken into consideration in fixing the value of the right of way taken. If any part of such business is located on adjoining, adjacent or contiguous lands owned or held by said defendants, that are not being condemned in this action, and if the taking of the property involved may injure, damage or destroy such portion of such business, then you will consider the probable effect the use of the property so taken may have upon such business, and assess in addition to the amount to be awarded for the taking, the probable damages to such business which the taking and use of property taken for right-of-way purposes may reasonably cause. However, unless it is reasonable to suppose that the defendant will suffer an actual loss in that portion of his said business located on such adjoining, adjacent or contiguous lands because of the taking and use of the property taken for right-of-way purposes, then you will not assess any damages to such business located upon the adjoining, adjacent or contiguous lands. Tampa v. Texas Co. (Fla. App. 2nd Dist.), 107 So. (2d) 216.

This instruction appears in paragraph 43 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

§ 489j. —— Value to Be Determined as of Time of Verdict.

The Court charges you that the value of the property sought to be condemned shall be determined by you as of the time of the verdict. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

III. CONDEMNATION PROCEEDINGS.

§ 489k. Assessment of Compensation by Jury.

§ 489l. —— Jury to Utilize Common Knowledge, et

You are not required to disregard such information as yo may have as a matter of common knowledge, nor to accept true testimony that is against reason and human experience. You may use such knowledge as you may have gained by your view of the property and its surroundings in assisting you in interpreting and weighing the testimony of the witnesses, when conflicting, as to value and damage. You should reconcile the testimony if possible; but you are the judges of the testimony and the credibility of the witnesses. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 38 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

§ 489m. —— View of Premises.

You have had a view of the property involved here, the purpose of which was to acquaint you with its physical situation, conditions and surrounding so as to enable you to better understand and apply the evidence that came to you from the witness stand, and to aid you in interpreting and weighing the evidence on any question of value and damage and the application of your common sense. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 39 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

Instruction Held Erroneous.—By order of the court, and with the consent of the parties, you went upon the premises and viewed them so that you might have a more intelligent understanding of the evidence from knowing the lay of the land and the location of the proposed improvements, and you may and should use your own observation and

judgment, together with all other evidence in the case. The opinions of witnesses are to aid and assist you, if possible, in arriving at a just conclusion; but you are not to lay aside your own observation and judgment, and accept the conclusions of witnesses if you think them extravagant in being either too high or too low or incorrect. It is entirely a question for the exercise of your best judgment, adapting the testimony of the witnesses to the land, as you saw it, and also using your own judgment and knowledge in the matter. Doty v. Jacksonville, 106 Fla. 1, 142 So. 599.

§ 489n. —— Consideration of Expert Testimony.

In considering and weighing the testimony of the real estate experts called by both sides, you may consider the experience and familiarity of the witnesses with local conditions affecting the real estate market, and you may give to the testimony of each witness such weight as you find to be proper in the light of such experience and familiarity and its credibility in general. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 37 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida,* 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

§ 489o. Attorneys' Fees.

§ 489p. —— In General.

Under the law, the petitioner is obligated to pay to the defendant a reasonable attorney's fee which shall be fixed by your verdict. Such fee is to be determined by you from the evidence in such an amount as an ordinary prudent defendant would be required to expend in the employment of competent, sufficient and adequate counsel to defend such a suit as this, with all the facts and circumstances considered. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 44 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida,* 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

§ 489q. —— Determination.

In determining what a reasonable attorney's fee is the Court charges you that you may consider the following matters: The time and labor required of the attorneys; the novelty and difficulty of the questions involved and the skill required to properly conduct the case on behalf of the defendant; the customary charges of other lawyers for similar services; the amount involved in this suit and the benefits which result to the defendant from the services rendered by its attorneys. The Court charges you that no one of these several matters is in itself

controlling; they are merely guides to aid you in ascertaining the reasonable value of the services of the attorney for the defendant. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 45 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

§ 489r. Verdict.

§ 489s. —— In General.

There is one verdict which you can render in this case. The verdict has been prepared. It describes the land to be taken, and there is a provision for the compensation to be paid for the taking of this property, and also any damage which you find the taking of this property may render to the defendant's remaining land, and also a provision for attorney's fees. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

§ 489t. —— Should Be Unanimous.

The law requires that you render a unanimous verdict. In arriving at your verdict you should not agree that you shall be bound by adding up the various sums which each individual juryman thinks the value should be, and dividing the aggregate by the number of the jury. Expressed in another way, your verdict is to be based upon a consideration of all of the evidence, and upon the instructions of the Court, and you are not under any circumstances to arrive at a verdict simply by striking an average between the contentions of the parties. Edwards v. Miami Shores Village (record) (Fla.), 40 So. (2d) 360.

This instruction appears in paragraph 47 in *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 MIAMI LAW QUARTERLY 147 (1953), prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns.

ESTOPPEL.

§ 489u. In General.

Under the undisputed evidence in this case, gentlemen, the plaintiff holds the legal title to the land from its predecessor in title, The Florida East Coast Railway Company, but the defendants say that it cannot set up that title as against the defendants because it is equitably estopped from doing so. Those words are technical and I will define them in a few minutes. The plaintiff replies in kind to the defendants, "No, you cannot set

up this equitable estoppel, because you, yourselves, are equitably estopped from setting that up and the law says where there are two estoppels, one against the other, it is said that neither side can claim an estoppel, and the plaintiff having the legal title, your verdict must be for the plaintiff." I will explain that a little more in detail but that is the situation that you gentlemen are to try, the question of whether or not these estoppels or either of them arise. If you find the first estoppel arises and there is no second estoppel your verdict must be for the defendants in this case, but if you find that the first estoppel has been made out and the second estoppel has also been made out, from the evidence, then your verdict must be for the plaintiff. The doctrine back of estoppel is this: It is the preclusion of a person from asserting a fact by previous conduct inconsistent therewith on his own part, or on the part of those under whom he claims. Florida Land Investment Co. v. Williams (record) (Fla.), 116 So. 642.

EVIDENCE.

§ 490. Jury Determines Weight, Credibility and Sufficiency of Evidence.

You are the sole judges of the evidence, its weight and sufficiency, and of the credibility of the witnesses. It is your duty to seek to reconcile the testimony of all the witnesses, so as to make each witness speak the truth; but if after a full and fair consideration of all the testimony, you find an irreconcilable conflict in the testimony, then you must determine what testimony is true, and reject such testimony as you believe to be untrue; and from the testimony you believe to be true, you should find your verdict. Leach v. State (record) (Fla.), 132 So. (2d) 329.

§ 492. Jury Not to Consider Evidence Excluded by the Court.

This Court has granted a severance as to the defendant, Carol Bernice Dobson, and therefore you are not concerned with the allegations of the indictment as to her, nor are you concerned with any evidence about her. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

Instruction Held Inadequate.—"Gentlemen, the State has asked leave to withdraw those questions that they asked the defendant here on the stand, reading from that paper, and those questions, on motion of the State, are withdrawn from your consideration, and that matter will

not be pursued any more, as I understand it." This instruction was held inadequate, since it should be specific enough in any case, civil or criminal, to eradicate from the minds of the jury of laymen not only the offending evidence itself but the imputations and inferences which might be drawn therefrom. Williams v. State (Fla.), 74 So. (2d) 797.

§ 492a. View by Jury Not Evidence.

You have viewed the premises, gentlemen, and a view of the premises, as the Court told you, is not any evidence in this case. It is merely to help you to better understand the evidence which you have heard from the witness stand and seen from the exhibits introduced before you in evidence. Peninsula Telephone Co. v. Marks (record), 144 Fla. 652, 198 So. 330, holding that the trial court well and ably presented the law of the case to the jury.

§ 492b. Documentary Evidence.

§ 492c. —— Entries or Books Made or Kept in Cours of Business.

The Court further charges you, gentlemen of the jury, that certain records of the Adrian Seed Growing Company, of Adrian, Michigan, were received in evidence in this case for the purpose of proving the proof of the matters set forth in them, and to which your attention has been called, and particularly for the limited purpose of proving to be true what those records show, as to the kind or variety of tomato seed in connection with all the evidence adduced in this case, as to the identity of the kind or variety of tomato seed received by the plaintiff of the defendant, the identity of which is involved in this action. Those records were admitted in evidence only after a necessary foundational showing that the records were made in the regular course of business to which they relate, and that the entries and data in them were made or posted respectively at or near the times of the acts, commissions, events or transactions which such entries and data purport to record. If you should find that the records were made in the manner described, then they are in evidence, and carry a presumption of truthfulness, and they will support a finding in accord with any showing made by them within the limited purpose for which they were received; but that presumption is rebuttable; it may be discredited or refuted by other evidence; and it is for you to determine from all the evidence wherein the truth lies, whether in accord or in conflict with such records, having in mind, as previously stated, that when a presumption is not controverted, the jury must find in accordance with it. If it is controverted, you should find against it. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

§ 492d. —— Effect of Admission of Judgment as Against One Not Party to Former Suit.

The record of a suit in the state court in Lake County has been introduced in evidence and the court charges you that that would prima facie fix the amount of indebtedness from Hardee to the plaintiff, but that would not be absolutely binding upon the defendant here for the reason that the defendant here was not a party to that suit and it only establishes prima facie the amount that is due, but it is not binding here because this defendant was not a party to that suit, and it can only be bound by the judgment in a case in which it was a party, and you can consider that judgment along with all the other evidence in determining where the preponderance of evidence lies. Lake County v. Massachusetts Bonding & Ins. Co., 84 F. (2d) 115.

EXECUTIONS.

§ 492e. Possession of Property Seized Prima Facie Evidence of Ownership Thereof.

If the goods seized were in the possession of plaintiffs at the time of seizure, it is prima facie evidence that the ownership was in them, and it devolves upon defendant to establish the contrary. Mayer v. Wilkins, 37 Fla. 244, 19 So. 632.

§ 492f. Property Subject to Levy.

§ 492g. —— Goods Fraudulently Assigned, Commingled and Confused May Be Levied Upon.

If you find from the evidence that Mayer & Ellis made a fraudulent assignment of the stock of goods to Joseph Ollinger, as assignee, and that the plaintiffs knew that the assignment was fraudulent, and, with such knowledge, purchased the goods from Ollinger and mingled them with goods purchased by them from other persons, so that they could not be separated therefrom, and that, after such mingling, defendant, as sheriff, and under a writ of execution against Mayer & Ellis, levied upon the whole, and that the levy was not excessive, he would be justified in such levy and would not be responsible therefor to the plaintiffs. Mayer v. Wilkins, 37 Fla. 244, 19 So. 632.

§ 492h. —— But Not Where Title to Property Taken in Name of Third Persons.

If you believe from the evidence that the defendant, on or about the ..... day of February, 1887, under an execution in favor of A. Adler & Co. v. Mayer & Ellis, levied on and sold a stock of goods and merchandise which was bought by plaintiffs with money of R. Mayer, but the title thereto was taken in the name of plaintiffs, then said goods and merchandise were not subject to levy under said execution, and you should find for the plaintiffs. Mayer v. Wilkins, 37 Fla. 244, 19 So. 632.

EXEMPLARY DAMAGES.

Cross Reference.

As to exemplary damages in cases of assault, see Assault, § 147.

EXPERT AND OPINION EVIDENCE.

§ 497a. Weight to Be Given Expert Evidence.

§ 497. When Opinion of Witness Received.

Gentlemen of the jury, the rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence, but exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience, has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any subject matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it, and you have the right, as I charged you a moment ago, gentlemen of the jury, to disregard it altogether, if you so want to, from the other facts in the case. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

I want to charge you, we've had in this case some expert witnesses, and that's the only kind of witness we ever hear from and take his opinion, or even let him give his opinion. They are people who, from long study and experience and preparation, are supposed to know more about the subject about which they are testifying than the ordinary man could know. Consequently, we take their opinion in the evidence, but you're not bound by their opinion, gentlemen of the jury; a jury can offset the testimony of an expert by the testimony of a layman, or he can use his own experience to offset the testimony of an expert; you are not bound by the testimony of any expert. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

The rules of evidence ordinarily do not permit the opinion of

a witness to be received as evidence. But an exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience, has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. Shearn v. Orlando Funeral Home, Inc. (record) (Fla.), 82 So. (2d) 866.

§ 497a. Weight to Be Given Expert Evidence.

Certain witnesses have been called who testified as expert witnesses. You are not required to take the opinion of experts as binding upon you, but they are to be used to aid you in coming to a proper conclusion. Their testimony is received as that of persons who are learned by reason of special investigation and study or experience along lines not of general knowledge, and the conclusions of such persons may be of value. You may adopt, or not, their conclusions, according to your own best judgment, giving in each instance such weight as you think should be given under all the facts and circumstances of the case. Everett v. State (record) (Fla.), 97 So. (2d) 241.

You are to understand distinctly that you are to consider the testimony of all of the medical experts who have testified before you in this case without discrimination by reason of the fact that the Court, acting in conformity with the aforesaid statute, appointed two experts to examine the defendant. Everett v. State (record) (Fla.), 97 So. (2d) 241.

See § 917.01, F. S. 1957.

The fact that two of the experts were appointed by the Court does not and of itself give any more weight or credibility to their testimony than that of any other medical expert that may have testified before you in this cause. Everett v. State (record) (Fla.), 97 So. (2d) 241.

EXPLOSIVES.

§ 497b. In General.

If you believe from the evidence that the defendant furnished this man this dynamite, caps and fuse for use in blowing out these stumps, that they instructed him the safe way to keep it and maintain it, and the safe way to use it, and you find from a preponderance of the evidence that he complied with all those directions, and that even though he did, that for some reason

there was a defect in this fuse of some sort, kind or character which caused it to burn more rapidly than it ordinarily would had not the defect been present therein, and that as a result of that there was a premature explosion and the plaintiff was injured as a result thereof by flying pieces of stump, and lost an eye and suffered the injuries complained of, and you believe that to be the fact from a preponderance of the evidence, then you should find a verdict for the plaintiff in such sum as you think he is entitled to not to exceed the amount claimed. Further, you must believe by a preponderance of the evidence that the plaintiff was guilty of no negligence—not some, not a little bit, but no negligence that contributed to his injury. If any negligence of his, however small, contributed to his injury and brought it about, and it could have been avoided had not that negligence intervened, then he would not be entitled to recover at all. That, gentlemen, in as brief manner as possible constitutes the basis on which this plaintiff can recover, if a all. Now, let's turn the picture over to the defendant. If you find by a preponderance of the evidence, if the evidence preponderates in favor of the conclusion that the defendant was guilty of no negligence in connection with the injuries of the plaintiff, that there was no defect in this fuse, that it was a good fuse and that any injury the plaintiff suffered was because of some negligence of his, or that he failed to follow explicitly the instructions given him by the defendant company for his protection against injury by a substance which everybody knows is dangerous; if you find that to be the case, then find for the defendant. Southern Pine Extracts Co. v. Bailey (record) (Fla.), 75 So. (2d) 774.

§ 497c. Liability of Retailer for Injuries.

§ 497d. —— As Based on Implied Warranty.

Under the particular circumstances of this case, gentlemen, if the plaintiff is to recover in this case he must do so upon the basis of what is known as a conditional implied warranty. It appears that the defendant company was engaged in the processing of pine stumps, and that this plaintiff was a contractor procuring and bringing into their plant pine stumps that they owned, and they paid him for after he brought them in, and that in connection with that work it was necessary to blow those stumps up, and that they used dynamite, caps and fuse with which to do it. It appears that the company kept a supply of dynamite, caps and fuse on hand at their plant which they had selected for use in their business, and that they sold it to this plaintiff for that use, and that in doing so they gave to him a conditional warranty that that dynamite, fuse and caps was a

proper explosive to use in that particular business provided that he use it according to their instructions and took care of the dynamite, caps and fuse while it was in his possession in manner and form as he was directed to do, that is, to keep it dry and keep it so that it would not be injured by weather conditions or other conditions which he could prevent from happening by taking care of these articles in manner and form as he was directed by the company to do in connection with its possession and use. Southern Pine Extracts Co. v. Bailey (record) (Fla.), 75 So. (2d) 774.

FOOD.

§ 522a. Civil Liability of Manufacturer or Processor of Food Products.

§ 522b. —— As Based on Implied Warranty.

You are instructed that the bottler or manufacturer of bottled drinks for sale to the public for human consumption impliedly warrants the fitness of the product for the use intended. If you believe from the evidence that the plaintiff purchased a bottled drink, which was bottled for sale by the defendant, from said defendant as alleged, and in drinking the same the plaintiff sustained personal injuries from a foreign substance contained within the bottle, then you should return a verdict for the plaintiff assessing her damages under the facts of injury proved and the instructions given you by the court on the point provided that you believe from the preponderance of the evidence that the foreign substance, if any there was, found its way into the bottle in question while it was in the custody or under the control of the defendant, its agents, employees or servants. Miami Coca Cola Bottling Co. v. Todd (record) (Fla.), 101 So. (2d) 34.

Now, gentlemen, as I have stated to you, it is the law that any company or firm which sells its product for human consumption, it is the law, that that company or the seller of that product gives an implied warranty to the person who purchases it, that it is wholesome; that it will not have any detrimental effect upon the health of the user; that it can be used safely and that it contains no substance that will be detrimental. That is certainly common sense and is the law as you all understand it. If the person who sells that product does permit an unwholesome product to be sold, if he does permit a foreign substance to get into the product, and if that foreign substance causes physical suffering or injury, then that defendant is liable for

the damages which it has caused; bearing in mind that in order to prevail in each case, the one who brings the claim must prove the charge by a preponderance of the evidence or the greater weight of the evidence. Miami Coca Cola Bottling Co. v. Todd (record) (Fla.), 101 So. (2d) 34.

FORGERY.

§ 526a. Forgery of Public Record.

You are further instructed that if you find from the testimony and evidence in this case that certain applications for a motor vehicle operator's license were used to secure such a license for the witnesses, Ike Wilson, or James Wiggins, or both, and that the form of the application was identical to the form of the application for a motor vehicle driver's license then in use by the Department of Public Safety of the State of Florida, then you must find that the application is a public record and proper subject for the charge of forgery. Hodges v. State (Fla. App. 2nd Dist.), 107 So. (2d) 794.

FRAUD AND DECEIT.

§ 534a. Knowingly Making, Issuing, etc., Worthless Checks.

The other count in the information is what is known as the uttering of a bad check. The statute on that question is: "It shall be unlawful for any person, firm or corporation to draw, make, utter, issue or deliver to another any check, draft, or other written order on any bank or depository for the payment of money or its equivalent, knowing at the time of the drawing, making, uttering, issuing or delivering such check or draft that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same on presentation; provided, that this section shall not apply to any check where the payee or holder knows or has been expressly notified prior to the drawing or uttering of the same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment as aforesaid, nor shall this section apply to any postdated check." The law also provides that the drawee, that is, the bank upon which the check or draft is drawn, or the individual, must note thereon by a stamp, writing, or otherwise, some sort of

endorsement on the check as to the reason why the check was not paid, or the draft was not paid, when presented, and the fact that the check bears that sort of an endorsement is prima facie evidence, that is to say it speaks for itself, that the maker of the check or draft or order did not have money on hand sufficient to pay the check or draft when it was presented. By prima facie evidence, it means that when that is done, the State has established its part of the case and it is up to the defendant to meet the other provisions of the statute, that he either has the money there or that the man he gave the check to knew he didn't have it there and was forewarned to that effect. Ennis v. State (record) (Fla.), 95 So. (2d) 20.

See § 832.04, § 832.05, F. S. 1963.

§ 534b. Defendant Liable for Fraud Even Though Founded on Information Equally Accessible to Plaintiff.

If you believe from the evidence that the defendant, by active deceit or fraud or by use of any artifice or deception, caused the plaintiff to accept $5,186.70 as a credit on the substituted jalousie windows used in the Douglas Primary School instead of the $14,151.60, and that by such artifice and deception the plaintiff was lulled into a false sense of security, the defendant is liable for its fraud even though the information might have been as accessible to the plaintiff as it was to the defendant. Therefore, each of the parties to the contract must take care not to say or do anything tending to impose upon the other. Board of Public Instruction of Dade County v. Everett W. Martin & Son, Inc. (Fla.), 97 So. (2d) 21, holding that it was error to refuse to give the foregoing instruction.

GAMING.

§ 546a. Essential Allegations Requiring Proof.

§ 546b. —— Venue.

We will discuss first the question of venue. That is the geography of the situation. Unless the offense happened in Hillsborough County, Florida, this Court is without jurisdiction

to try it. So, the first thing that must be established by the state is the venue, that is, that the offense happened in Hillsborough County, if it happened at all. And that must be proved to your satisfaction. It does not have to be proved with that high degree of proof known as beyond a reasonable doubt. Albano v. State (record) (Fla.), 89 So. (2d) 342.

See generally, Venue.

The venue—that is the place—the state must prove that the events here charged happened in Hillsborough County and that is the venue. Now, those things must be proved to your satisfaction. All the remaining things must be proved beyond a reasonable doubt. Chacon v. State (record) (Fla.), 102 So. (2d) 578.

§ 546c. —— Time of Commission.

Now, with respect to the time element, there is a time bracket alleged in the information. The Court is of the opinion that that, like every other time situation in an information which has no been made of the essence by proceedings antecedent to the tri is the period of the statute of limitations. So, the state is oblig to prove that the events charged in these several counts happen within the period of the statute of limitations or two years before the 23rd day of May, 1953, and any time during that period of time. Albano v. State (record) (Fla.), 89 So. (2d) 342.

The material elements of each of these counts must be proved beyond a reasonable doubt. The time is said to be the 13th of November, 1954. The information was filed on the 19th of November, 1954. Therefore, the state must prove that the events here charged happened within the period of two years before the filing of the information. That is the time limitation. Chacon v. State (record) (Fla.), 102 So. (2d) 578.

§ 546d. Gambling Defined.

Gambling means playing for money, betting on the result of a game; the playing of a game of chance or skill for profit. Gambling is a contract between two or more persons by which they agree to play by certain rules at cards, dice, or other contrivance, and that one shall be the loser and the other the winner. Turner v. State (record) (Fla.), 74 So. (2d) 891.

See §§ 849.01-849.46, F. S. 1957.

§ 547. Keeping Gambling House or Room.

If you believe from the evidence in this case beyond a reasonable doubt that the defendant, James Turner, alias Little Jim Turner, in the County of Orange and State of Florida, on the 7th day of August, 1953, or at any time within two years prior to the date of the information, which was filed on November

7, 1953, in Orange County, Florida, did unlawfully and feloniously by himself, his servants, agents and clerks, and in other manner, have, keep, exercise and maintain a certain place, a gambling room, gaming implements and apparatus, house, booth, tent, shelter, or other place, at and in the building and place of business, known as Jim Turner's Sport Shop, located at 134 West Church Street, Orlando, Orange County, Florida, for the purpose of gaming and gambling, then it would be your duty to find the defendant guilty as charged in Count No. 1 of the information. Turner v. State (record) (Fla.), 74 So. (2d) 891.

§ 547a. Gambling House May Be Operated by Agent.

A gambling house may be operated by one through an agent, servant or employee, and a crime may be committed by one acting through another. In such a case, the principal or master may be criminally liable, notwithstanding the guilt of an agent or servant, provided the principal or master is present at any time the crime is committed by the agent. Hyde v. State (record), 139 Fla. 280, 190 So. 497.

§ 548. Lotteries.

§ 549. —— Lottery Defined.

A lottery is a scheme for the distribution of money or things of value by lot or chance among persons who have paid or agreed to pay a valuable consideration for a chance to obtain a prize, or a game of hazard in which small sums of money are ventured for the chance of obtaining a larger value in money or other articles. Wheeler v. State (record) (Fla.), 72 So. (2d) 364.

Lottery means a scheme for the distribution of money, prizes, or things of value by lot or chance among persons who have paid, or agreed to pay, a valuable consideration for a chance to obtain a prize, or is a game of hazard in which small sums of money are ventured for the chance of obtaining larger value in money or other articles. Turner v. State (record) (Fla.), 74 So. (2d) 891.

A lottery is any scheme for the distribution of prizes or things of value by lot or chance among persons who have paid or agreed to pay a valuable consideration for a chance to win a prize, or is a game of chance in which small sums of money are ventured for the chance of obtaining a larger value in money or other thing of value. Chacon v. State (record) (Fla.), 102 So. (2d) 578.

§ 549a. —— Lottery Ticket Defined.

A lottery ticket is a paper containing a number or numbers which would entitle the holder upon the happening of a certain

contingency in a lottery to receive money or things of value. Wheeler v. State (record) (Fla.), 72 So. (2d) 364; Turner v. State (record) (Fla.), 74 So. (2d) 891.

A lottery ticket is any device whatsoever by which money or other thing is to be paid or delivered on the happening of a future event or contingency in the nature of a lottery. Chacon v. State (record) (Fla.), 102 So. (2d) 578.

§ 550. —— Conducting Lottery.

§ 550(½). In General.

If you find, from the evidence in this case beyond a reasonable doubt, that this defendant in said county and state, at any time within two years prior to the date of filing of this information, as aforesaid, did unlawfully set up and promote a lottery for money, commonly known as Bolita and Cuba, then it would be your duty to find him guilty as charged in the third Count of the information. Turner v. State (record) (Fla.), 74 So. (2d 891.

If you find from the evidence in this case beyond a reasonab doubt, that said defendant in said county and state, at any tim within two years prior to the date of the filing of the information, did unlawfully aid and assist in setting up, promoting, and conducting of a lottery and lottery drawing, and was interested in and connected with a lottery drawing and that the lottery was for money and was commonly known as Bolita and Cuba, then it would be your duty to find him guilty as charged in the fourth Count of the information. Turner v. State (record) (Fla.), 74 So. (2d) 891.

In the first count the state must prove that the defendant set up and promoted or conducted a lottery for money known as Bolita or Cuba. Now, it is not incumbent upon the state to produce testimony as to every single, solitary act that is necessary to be done in the conducting of a lottery. It would perhaps not be within the knowledge of anybody within the courtroom as to what every essential act of those things would have to be. The preparation, the buying, the having, of pencils; the printing and cutting of paper; the arrangement for distribution, collection, and the like. There must, however, be a sufficient proof to show that a lottery was conducted and that this defendant was the principal operator in it; that he was the one backing the conduct of it. An operation of this character probably couldn't be conducted by one man. Just, Mr. Sowell, as your business couldn't be conducted by one man, but you are the operator of it, nonetheless, and that's true of every other one of you gentlemen in the box who operates a business. So, the directing head, the moving spirit in it, the state must prove

that is the defendant. Albano v. State (record) (Fla.), 89 So. (2d) 342.

In the second count, the state must prove that by and through his operations the defendant did dispose of or did cause money to be disposed of by means of a lottery known as Bolita or Cuba. Albano v. State (record) (Fla.), 89 So. (2d) 342.

You are further instructed that the burden is on the state to prove beyond and to the exclusion of every reasonable doubt that a lottery was promoted or conducted by the defendant and such lottery, if it was so conducted, was conducted for money or other thing of value. Albano v. State (record) (Fla.), 89 So. (2d) 342.

Under the first count, it must be proved that the defendants aided or assisted in setting up or promoting a lottery or conducting a lottery for money, or that they were unlawfully interested in and connected with a lottery by having in their possession certain records containing and showing shares and interests in a lottery. Chacon v. State (record) (Fla.), 102 So. (2d) 578.

§ 550(2). Possession of Implements Used in Gambling.

In the third count, it must prove that the defendant was in possession of certain implements or devices used for conducting a lottery. Now, it does not mean that the state must prove that he was in possession of implements or devices which could be used only for a lottery or the conduct of a lottery and for nothing else. Just as a hammer is a very useful article to men of trade and a chisel to some, those things can be used unlawfully—as well as a screwdriver—to pick open a window. It is a useful thing to have with you for other purposes than opening windows. You can open your own with them with impunity. If you go to open other people's with them, you have a burglar tool. So, it is the use to which something is put, rather than the particular characteristic of it. An adding machine can be a part of the operation of a lottery; pads or paper; pencils can be; money can be. Money can be most anything except goods. Albano v. State (record) (Fla.), 89 So. (2d) 342.

What are Bolita implements? That has heavy play in the third count. Anything that can be used in the conduct or promotion of a lottery is an implement or device used in the promotion of a lottery, if it is so used. Just as an innocent screwdriver which is in everybody's household can be a burglar tool, so can an adding machine or a typewriter or a telephone be a part of the equipment used in the promotion of a lottery, if it is so used. Paper, pencils, pens, paper clips, money, most anything you can think of that is used, if it is used, is an implement

used in the conduct of a lottery, if it is so used. Chacon v. State (record) (Fla.), 102 So. (2d) 578.

Under the second count, there is little difficulty with respect to possession and possession also applies in the third count. In offenses where possession is a crime, such possession is usually defined as having personal charge of or exercising right of ownership, management, or control of the thing said to have been possessed. To constitute possession, there need not necessarily be an actual manucaption—that's holding in your hand—of the thing possessed, nor is it necessary that it be otherwise actually upon the person of the possessor. There must, however, be a conscious and substantial possession by the accused, as distinguished from a mere involuntary or superficial possession. Whether or not the accused was in conscious and substantial possession of the things alleged to have been found in the house of one of them and on the person of others may be lawfully inferred by the surrounding circumstances, especially the absence of contrary or exculpatory evidence. Chacon State (record) (Fla.), 102 So. (2d) 578.

§ 551. —— Possession of Lottery Tickets.

Now, if you believe from the evidence in this case that the defendant in said county and state, on the 7th day of August, 1953, or at any time within two years prior to the date of the filing of this second information which was filed on November 20, 1953, in Orange County, Florida, did unlawfully and feloniously have in his possession certain tickets in a certain lottery, commonly known as Cuba and Bolita, which said lottery was then and there conducted for money, a further description to the solicitor unknown, then it would be your duty to find him guilty as charged in Count Five of the information. Turner v. State (record) (Fla.), 74 So. (2d) 891.

The Court further charges you that before you may convict the defendant of the offenses charged against him in the information in counts three and four, namely, that the defendant was in possession of lottery tickets which were found by the deputy sheriff in the open shed adjacent to the defendant's grocery store, the evidence must establish beyond and to the exclusion of every reasonable doubt that said lottery tickets were written within the two years immediately preceding the date upon which the offense is said to have happened. Albano v. State (record) (Fla.), 89 So. (2d) 342.

In the fourth count there is charged possession of Bolita tickets and that's what it must be—Cuba or Bolita tickets. All those elements must be proved to you beyond a reasonable doubt. Albano v. State (record) (Fla.), 89 So. (2d) 342.

§ 552. —— Sale of Lottery Tickets.

§ 552(2). Proof Necessary for Conviction.

In General.—If you find, from the evidence in this case beyond a reasonable doubt, that the defendant in said county and state, at any time within two years prior to the filing of this information, as aforesaid, did unlawfully sell, offer for sale, and transmit, tickets, shares and interest in a lottery for money, the aforesaid lottery commonly known as Bolita and Cuba, then it would be your duty to find the defendant guilty as charged in the second Count of the information. Turner v. State (record) (Fla.), 74 So. (2d) 891.