INSTRUCTIONS

THE LAW AND APPROVED FORMS FOR FLORIDA

1965 Cumulative Supplement

BY
THE PUBLISHERS' EDITORIAL STAFF

Volume 2

Place in Pocket of Volume 2 of Main Set

THE MICHIE COMPANY
CHARLOTTESVILLE, VIRGINIA

INSTRUCTIONS

1965 CUMULATIVE SUPPLEMENT

Volume 2

HOMICIDE.

I. General Consideration.

§ 560a. Homicide Defined.

Homicide is the killing of one human being by another. Homicide is not in every instance a crime or unlawful. Our law makes two general classifications of homicide which are (a) lawful homicide and (b) unlawful homicide. The law recognizes two types of lawful homicide which are justifiable homicide, which is not involved in this case, and excusable homicide, which is

solely the result of accident. The law recognizes two types of unlawful homicide—murder and manslaughter. Murder is classified into three degrees; first degree, second degree and third degree. Brown v. State (record) (Fla.), 124 So. (2d) 481.

§ 560b. Unlawful Homicide and Manslaughter Distinguished.

Now, I will explain and define the various degrees of unlawful homicide and also manslaughter as found in the law. 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, is murder in the first degree. The unlawful killing of a human being, when perpetrated by an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree. The distinction between murder in the first degree and murder in the second degree, is that in the former the intention to take life is deliberate, while in the latter, though the intention may exist, it is without deliberation and coolness, or the intention is merely to do some great bodily harm, the malice being implied as distinguished from expressed. Though a murder was malicious it is not murder in the first degree unless it was deliberate and premeditated. Murder in the third degree can, in no wise, be applicable in this case. Now, a premeditated design to effect the death of a particular individual is a necessary ingredient in murder in the first degree; and this premeditated design to effect death must appear from the evidence, to the exclusion of and beyond a reasonable doubt, otherwise, the defendant cannot be convicted of murder in the first degree. The unlawful killing of a human being, when perpetrated by the act, procurement or culpable negligence of another, in cases where such unlawful killing is not justifiable nor excusable homicide nor murder in any of its degrees, is manslaughter. Brown v. State (record) (Fla.), 124 So. (2d) 481.

§ 560c. Essential Allegations Requiring Proof.

§ 560d. —— In General.

The essential component elements of crime, together with other matters that the state must prove beyond and to the exclusion of every reasonable doubt in this case, are three:

First: The fact of death of the person alleged to have been killed;

Second: That such death was caused by the criminal act or agency of another; and

Third: That the deceased was slain by the accused. Huntley

v. State (record) (Fla.), 66 So. (2d) 504; Fort v. State (record) (Fla.), 91 So. (2d) 637; Larry v. State (record) (Fla.), 104 So. (2d) 352.

The essential component elements of crime together with other matters which the state must prove beyond and to the exclusion of every reasonable doubt in this case are three:

First: The fact of death of the person alleged to have been killed;

Second: That such death was caused by the criminal act or agency of another; and

Third: That the deceased was slain by the accused.

In homicide cases, when proof of the essential elements of crime rests upon circumstances, and not upon direct proof, it must be established by the most convincing, satisfactory, and unequivocal proof compatible with the nature of the case. Every essential element of the offense must be proven beyond and to the exclusion of every reasonable doubt. Sanders v. State (record) (Fla.), 73 So. (2d) 292.

This instruction appears in paragraph 65 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.

§ 560e. —— Venue.

It is not necessary for the venue, the place of the commission of the crime, to be proven beyond a reasonable doubt. It is sufficient if the jury can reasonably infer from the evidence that the crime was committed in the alleged jurisdiction. Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

§ 561. Killing Either Murder, Manslaughter or Justifiable or Excusable Homicide.

For cases again giving 1st instruction in this section in original edition, see Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829; Land v. State (record) (Fla.), 156 So. (2d) 8.

For case again giving 3rd instruction in this section in original edition, see Fort v. State (record) (Fla.), 91 So. (2d) 637.

The killing of a human being is called homicide, and every homicide falls within one of four classifications; namely, (1) justifiable homicide, (2) excusable homicide, (3) murder, (4) manslaughter. Baugus v. State (record) (Fla.), 141 So. (2d) 264. The circumstances of each case determine whether a homicide is justifiable, excusable, murder, or manslaughter. Wilkins v. State (record) (Fla.), 155 So. (2d) 129. Justifiable homicides and excusable homicides are lawful; murder and manslaughter are unlawful and constitute a violation of the criminal law. Hunt-

ley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Larry v. State (record) (Fla.), 104 So. (2d) 352; Roberts v. State (record) (Fla.), 164 So. (2d) 817.

This instruction appears in paragraph 48 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 killing of a human being is either justifiable or excusable homicide, or murder, or manslaughter, according to the facts and circumstances of each case. Both justifiable and excusable homicides are lawful. Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

Gentlemen of the Jury, every homicide is not an unlawful homicide, but the killing of a human being is either justifiable or excusable homicide, or murder, or manslaughter, according to the circumstances of each case. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

§ 563. Accused Liable if Wound Inflicted Was Proximate Cause of Death.

§ 564. —— In General.

The Court instructs the jury that any unlawful act which probably may, and eventually does, result in another's death is sufficient to render the doer criminally liable. The form of death is immaterial. It is not indispensable that the wounds inflicted by the defendant as alleged in the indictment, if you believe that such wounds were inflicted by the defendant from the evidence beyond a reasonable doubt, were necessarily fatal and the direct cause of death. If such wounds caused the death of the deceased indirectly through a chain of natural effects and causes unchanged by human action it is sufficient. If no new, independent or intervening cause shall appear between the wound or wounds and the death, the defendant is liable to the same extent as though death had resulted immediately from the wound or wounds inflicted by him. Land v. State (record) (Fla.), 156 So. (2d) 8.

§ 564a. —— Burden of Proof.

The Court further instructs you that when a wound or wounds from which death might ensue have been inflicted and thereafter death occurs, the burden of proof is upon the party inflicting such wound or wounds to make it appear that the death did not result from the wound or wounds, but from some other cause or causes. Land v. State (record) (Fla.), 156 So. (2d) 8.

§ 566a. Person Killed as a Result of Own Act After Actual Assault or Threat of Violence by Another.

A person who by actual assault or threat of violence causes another person to do an act resulting in physical or corporal injury causing such other person's death is criminally responsible for the homicide. However, to render a person criminally responsible for the death of another under such circumstances, it must appear beyond and to the exclusion of every reasonable doubt (1) that the act or acts done by the deceased to avoid the danger brought about and caused by the defendant were such as a reasonable person would have taken under the circumstances, although it need not appear that there was no other way of avoiding the danger or escaping therefrom, (2) that the apprehension on the part of the deceased was of immediate danger of suffering death or great bodily harm, (3) that the apprehension on the part of the deceased of suffering death or great bodily harm was reasonable and well-grounded and (4) that the injuries received by the deceased which produced death were the natural and probable consequences of the acts of the defendant. In such cases, the defendant's responsibility or justification for such homicide is measured and determined by what would have been the case had the defendant killed such person at the time and place and under the circumstances of the original assault or threat of violence. Parrish v. State (Fla. App. 1st Dist.), 97 So. (2d) 356, holding that the instructions given were full, fair, complete and correct.

§ 566b. Killing in Sudden Transport of Passion.

You are hereby charged that a sudden transport of passion, caused by adequate provocation, if it suspends the exercise of judgment, and dominates volition, so as to exclude premeditation and a previously formed design, may not excuse or justify a homicide, but it may be sufficient to reduce a homicide below murder in the first degree, although the passion does not entirely dethrone the actor's reason. Mackiewicz v. State (record) (Fla.), 114 So. (2d) 684.

§ 570. Justifiable and Excusable Homicides Are Lawful.

For cases again giving the 1st instruction in this section in original edition, see Baugus v. State (record) (Fla.), 141 So. (2d) 264; Wilkins v. State (record) (Fla.), 155 So. (2d) 129; Land v. State (record) (Fla.), 156 So. (2d) 8; Roberts v. State (record) (Fla.), 164 So. (2d) 817.

As I have said, both justifiable and excusable homicides are lawful. All other homicides are unlawful, and constitute a violation of the criminal laws. Leach v. State (record) (Fla.), 132 So. (2d) 329.

Now, Gentlemen, as you will see by the instructions which I shall now give you, every homicide is not unlawful; but there are certain classes of homicides that are lawful and are known to the law either as "justifiable" or as "excusable". It is, therefore, the duty of the State of Florida, before the jury can convict either of the defendants in this case, to show by the evidence that the homicide in this particular trial is an unlawful homicide: and this fact must appear from the evidence to the exclusion of and beyond a reasonable doubt. If you have a reasonable doubt as to whether the homicide is lawful or not, then you Gentlemen, as jurors, must give the benefit of such doubt to the defendants and they must be acquitted. Leach v. State (record) (Fla.), 132 So. (2d) 329.

II. Justifiable and Excusable Homicide.

§ 571. When Homicide Justifiable.

For cases again giving the 2nd instruction in this section in original edition, see Ezzell v. State (record) (Fla.), 88 So. (2d) 280; Everett v. State (record) (Fla.), 97 So. (2d) 241; Land v. State (record) (Fla.), 156 So. (2d) 8.

Justifiable homicide is homicide when committed by a person in either of the following two cases:

1. When resisting any attempt to murder such person or his brother or to commit any felony upon him;

2. When committed in the lawful defense of such person or his brother when there shall be a reasonable ground 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. Huntley v. State (record) (Fla.), 66 So. (2d) 504.

Homicide is justifiable when committed by any person,

(1) when resisting any attempt to murder such person, or to commit any felony upon him, or upon or in any dwelling house in which such person shall be; or

(2) when committed in the lawful defense of such person, and there shall be a reasonable ground to apprehend a design to commit a felony upon or to do some great personal injury to such person and there shall be imminent danger of such design being accomplished. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

Homicide is justifiable when committed:

1. By any person when resisting any attempt to murder such person, or to commit any felony upon him, or upon or in any dwelling house in which such person shall be; or

2. When committed in the lawful defense of such person of his or her husband, wife, parent, grandparent, mother-in-law,

son-in-law, daughter-in-law, father-in-law, child, grandchild, sister, brother, uncle, aunt, niece, nephew, guardian, ward, master, mistress or servant, when there shall be a reasonable ground 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; or

3. When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

Justifiable homicide is homicide when committed by a person in either of the following two cases:

1. When resisting any attempt to murder such person or to commit any felony upon him;

2. When committed in the lawful defense of such person when there shall be a reasonable ground 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. Sanders v. State (record) (Fla.), 73 So. (2d) 292; Rhone v. State (record) (Fla.), 93 So. (2d) 80; Larry v. State (record) (Fla.), 104 So. (2d) 352; Leach v. State (record) (Fla.), 132 So. (2d) 329; Baugus v. State (record) (Fla.), 141 So. (2d) 264; Wilkins v. State (record) (Fla.), 155 So. (2d) 129; Roberts v. State (record) (Fla.), 164 So. (2d) 817.

This instruction appears in paragraph 49 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.

§ 572. When Homicide Excusable.

For cases again giving the 1st instruction in this section in original edition, see Ezzell v. State (record) (Fla.), 88 So. (2d) 280; Rhone v. State (record) (Fla.), 93 So. (2d) 80; Leach v. State (record) (Fla.), 132 So. (2d) 329; Land v. State (record) (Fla.), 156 So. (2d) 8.

Excusable homicide is homicide which is committed by accident and misfortune in doing any lawful act, by lawful means, with usual ordinary caution and without any unlawful intent. Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Hunt v. State (record) (Fla.), 87 So. (2d) 584; Fort v. State (record) (Fla.), 91 So. (2d) 637; Larry v. State (record) (Fla.), 104 So. (2d) 352; Baugus v. State (record) (Fla.), 141 So. (2d) 264; Wilkins v. State (record) (Fla.), 155 So. (2d) 129; Roberts v. State (record) (Fla.), 164 So. (2d) 817.

This instruction appears in paragraph 49 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.

Homicide is excusable when committed:

1. By accident and misfortune in lawfully correcting a child or servant; or,

2. In doing any other lawful act by lawful means with usual ordinary caution, and without any unlawful intent; or,

3. By accident and misfortune in the heat of passion, upon any sudden and sufficient provocation; or,

4. Upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner. Everett v. State (record) (Fla.), 97 So. (2d) 241; Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

Homicide is excusable when committed by accident and misfortune in doing any 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 or unusual manner. But the homicide is not excusable if the act causing it is unlawful, or if it is done in an unlawful or culpably negligent manner. Both justifiable and excusable homicide are lawful. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

§ 573. Evidence Must Show Homicide Not Justifiable or Excusable.

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

III. Murder.

A. In General.

§ 577. Degrees Distinguished by Statute.

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 perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, is murder in the first degree; the unlawful killing of a human being when perpetrated by an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree; the unlawful killing of a human being when perpetrated by an act, procurement, or culpable negligence of another, in cases where the killing

is not murder in any of its degrees, is manslaughter. Everett v. State (record) (Fla.), 97 So. (2d) 241.

§ 577a. First and Second Degree Murder Distinguished.

I have just given you a definition of a second degree murder in the language of the statute of this State. The main characteristic which distinguishes second degree murder from first degree murder is the absence of any premeditated design to take life. This does not mean necessarily the absence of any intention to kill, but the absence of a premeditated design to kill. A homicide caused by wanton or reckless act without intention to kill may be murder in the second degree where it was performed by a reckless and imminently dangerous act under circumstances indicating that the wrongdoer is of a depraved mind and is acting in disregard for the safety of human life. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

§ 577b. First, Second and Third Degree Murder Distinguished.

The distinction between murder in the first and second degrees is that in the former the killing must be done with premeditated design to effect death. In the latter premeditated design need not be established. In murder in the first degree the intention to take life is deliberate, while in murder in the second degree, though the intention is merely to do some great bodily harm, the malice being implied as distinct from expressed. When homicide is committed without any intent to kill by one engaged in the commission of any felony other than those referred to in the definition of murder in the first degree, it is murder in the third degree. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

B. MURDER IN THE FIRST DEGREE.

§ 582. What Constitutes Generally.

For cases again giving the 1st instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Rhone v. State (record) (Fla.), 93 So. (2d) 80; Leach v. State (record) (Fla.), 132 So. (2d) 329.

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 perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, is murder in the first degree. Ezzell v. State (record) (Fla.),

88 So. (2d) 280; Henderson v. State (record) (Fla.), 90 So. (2d) 447; Jefferson v. State (record) (Fla.), 128 So. (2d) 132; Baugus v. State (record) (Fla.), 141 So. (2d) 264; Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829; Wilkins v. State (record) (Fla.), 155 So. (2d) 129; Land v. State (record) (Fla.), 156 So. (2d) 8; Roberts v. State (record) (Fla.), 164 So. (2d) 817.

If the evidence in this case convinces the jury to the exclusion of and beyond a reasonable doubt that George Lowell Everett unlawfully killed Lou Ellen Jones while perpetrating or attempting to perpetrate robbery, rape or burglary, then and in that case it is not necessary for the state to prove a premeditated design to kill. That is to say, if you believe from the evidence beyond a reasonable doubt that George Lowell Everett unlawfully killed Lou Ellen Jones, and that at the time of such homicide the said George Lowell Everett was perpetrating or attempting to perpetrate rape, robbery or burglary in or upon the said Lou Ellen Jones, then it is not incumbent upon the state to prove a premeditated design. Everett v. State (record) (Fla.), 97 So. (2d) 241.

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 perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, shall be murder in the first degree. And the court instructs you that a homicide immediately following the commission of one of the crimes just enumerated, for the purpose of concealment, will be deemed to have been committed in the perpetration thereof. Frazier v. State (Fla.), 107 So. (2d) 16.

Ladies and gentlemen of the jury, you are further instructed if you find from the evidence in this case beyond a reasonable doubt that the defendant, anticipating arrest, prepared himself with a deadly weapon and truly formed a premeditated design to kill any officer who would attempt to take him into custody, and did actually kill an officer under these circumstances, then you must find the defendant guilty of murder in the first degree. Mackiewicz v. State (record) (Fla.), 114 So. (2d) 684.

In order that the defendant be found guilty of murder in the first degree the evidence must show beyond a reasonable doubt that Robert Lee Jefferson unlawfully killed Lawrence Russell Digsby by shooting him with a pistol, as charged, from a premeditated design to effect Lawrence Russell Digsby's death. There must not only be an intention to kill, but also a premeditated intent or design to kill. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

Murder in the first degree is divided into two distinct classes. The first class requires proof beyond a reasonable doubt that the killing was done with a premeditated design to effect the death of the person killed, or of some human being. The second class requires proof beyond a reasonable doubt that the killing was done in the perpetration of or attempt to perpetrate any arson, rape, robbery or burglary, but no premeditated design must necessarily exist. The perpetration, or attempt to perpetrate any of the felonies mentioned in the statute, during which perpetration or attempt, a homicide is committed, stands in lieu of and is the legal equivalent of the premeditated design to effect the death that otherwise is a necessary attribute of murder in the first degree. If the facts in evidence establish beyond a reasonable doubt that the homicide was committed in the perpetration, or attempt to perpetrate any of the felonies named in the statute, this will be sufficient to convict of murder in the first degree. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

If you believe from the evidence, beyond a reasonable doubt, that the defendants, Dan Wilkins and Tommie Lee Williams, hit, beat and unlawfully killed Henry Goodman in said Leon County, in the manner and by the means alleged in the said indictment, with a premeditated design to effect his death, then you should find the defendants guilty of murder in the first degree. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

§ 582a. Sufficiency of Indictment.

An indictment in the usual form charging murder to have been committed from a premeditated design to effect the death of the person slain, is sufficient to charge murder in the first degree, regardless of whether the murder was committed from a premeditated design to effect the death of the person killed or any human being or in the perpetration of or attempt to perpetrate any of the felonies mentioned in the statute, that is arson, rape, robbery or burglary, abominable and detestable crime against nature or kidnapping. The perpetration of, or attempt to perpetrate, any of such felonies, during which perpetration, or attempt, a homicide is committed, stands in lieu of and is the legal equivalent of that premeditated design to effect the death of the person killed or any human being that otherwise is a necessary attribute of murder in the first degree. Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

An indictment in the usual form charging murder to have been committed from a premeditated design to effect the death of the person slain, is sufficient to charge murder in the first degree regardless of whether the murder was committed in the perpetration of or in the attempt to perpetrate any of the felonies men-

tioned in the Statutes, that is arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnaping, or otherwise. The perpetration of, or attempt to perpetrate, any of such felonies during which perpetration or attempt, a homicide is committed stands in lieu of and is the legal equivalent of that premeditated design to effect the death of the person killed, or any human being, that otherwise is a necessary attribute of murder in the first degree. In such case it is only necessary to make the charge in the ordinary way to the effect that the homicide was committed from a premeditated design to effect the death of the person slain and then show the facts in evidence and if they establish beyond and to the exclusion of every reasonable doubt that the homicide was committed in the perpetration of, or the attempt to perpetrate, any of the felonies, arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnaping, this will be sufficient to convict of murder in the first degree. Land v. State (record) (Fla.), 156 So. (2d) 8.

§ 584. Killing in Commission of Robbery.

For case again giving the 1st instruction in this section in original edition, see Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

Before you can convict the defendant of murder in the first degree because of the unlawful killing of a human being committed in the attempt to perpetrate such a robbery, you must from the evidence beyond and to the exclusion of every reasonable doubt find that such killing was committed in the attempt to perpetrate such robbery, but it makes no difference at what stage of the attempted robbery the killing took place so long as such attempted robbery had progressed to some extent. Ezzell v. State (record) (Fla.), 88 So. (2d) 280; Land v. State (record) (Fla.), 156 So. (2d) 8.

See generally, Robbery (original edition and supplement).

Before you can convict the defendant of murder in the first degree because of the unlawful killing of a human being committed in the perpetration of a robbery, you must from the evidence beyond and to the exclusion of every reasonable doubt find that a robbery was committed. Ezzell v. State (record) (Fla.), 88 So. (2d) 280; Land v. State (record) (Fla.), 156 So. (2d) 8.

Murder in the first degree 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. The unlawful killing of a human being is also murder in the first degree when committed in the perpetration of or in the attempt to perpetrate any robbery or burglary even though there was no premeditation or even an intent to kill. Larry v. State (record) (Fla.), 104 So. (2d) 352.

If the evidence in this case convinces the jury to the exclusion of and beyond a reasonable doubt that Robert Lee Jefferson unlawfully killed Lawrence Russell Digsby while perpetrating or attempting to perpetrate robbery, then and in that case it is not necessary for the state to prove a premeditated design to kill. That is to say, if you believe from the evidence beyond a reasonable doubt that Robert Lee Jefferson unlawfully killed Lawrence Russell Digsby and that at the time of such homicide the said Robert Lee Jefferson was perpetrating or attempting to perpetrate robbery in or upon the said Lawrence Russell Digsby, then it is not incumbent upon the State to prove a premeditated design. I further charge you, gentlemen of the jury, that a homicide committed immediately following the commission of the crime of robbery, for the purpose of concealment, will be deemed to have been committed in the preparation thereof. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

With reference to the word, "robbery," I charge you that under the law of Florida any person who by force, violence or assault, or putting in fear, feloniously robs, steals and takes away from the person or custody of another, money or other property of another, shall be guilty of robbery. As to the meaning of the phrase, "in the perpetration of or in the attempt to perpetrate". I charge you that perpetrate means to do, perform or carry through, and "attempt" means to try or to make an effort to perform. Therefore, if one kills another while the one is trying to carry through any robbery, it may be said that the killing was in the perpetration of or in the attempt to perpetrate robbery. And this would be the same notwithstanding that the discharge or firing of a pistol by a person who is holding such pistol in his hand in furtherance of an attempt to perpetrate a robbery, which firing results in the death of the victim, was not intended but was then and there the result of an accident or misfortune. Schneider v. State (record) (Fla.), 152 So. (2d) 731.

If you should find from the evidence beyond a reasonable doubt that the defendant named in this indictment did kill Lawrence Russell Digsby, in the manner alleged in the indictment, and you also find from the evidence beyond a reasonable doubt that he had a premeditated design to take the life of the said Lawrence Russell Digsby, or of any other human being, formed before the act of killing, if you find that he did kill Lawrence Russell Digsby, or if you find from the evidence beyond a reasonable doubt that the defendant Robert Lee Jefferson unlawfully killed Lawrence Russell Digsby and that at the time of such homicide the said Robert Lee Jefferson was perpetrating or attempting to perpetrate robbery, in, upon or with the said Lawrence Russell Digsby, then it would be your duty to find the

defendant guilty of murder in the first degree. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

If you believe from the evidence beyond a reasonable doubt that the defendant, Tommie Lee Williams, in Leon County, State of Florida, prior to the finding of the indictment, and at the time and place mentioned therein and in the manner and by the means therein alleged, struck, beat and unlawfully killed the said Henry Goodman, as charged in said indictment, and at the time of said killing the said Tommie Lee Williams was engaged in the perpetration of robbery or burglary upon the said Henry Goodman, then it would be your duty to find the said Tommie Lee Williams guilty of murder in the first degree as charged in said indictment; and if you believe beyond a reasonable doubt that the said defendant, Dan Wilkins, was then and there unlawfully and feloniously present aiding, abetting, counseling and assisting the said robbery or burglary and that such killing was committed in the perpetration of said robbery or burglary, then it would be your duty to find the defendant, Dan Wilkins, also guilty of murder in the first degree as charged in said indictment. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

With regard to the definition which the Court has just given you of murder in the first degree, you are further instructed that in the case of an unlawful killing of a human being, when committed in the perpetration or—of or in the attempt to perpetrate the crime of robbery, it is not necessary that it be perpetrated from a premeditated design to effect the death of the person killed or any human being, but, where the unlawful killing of such human being is committed in the perpetration of the crime of robbery or attempted robbery, it shall be murder in the first degree even though there is an absence of a premeditated design to effect death. So, if you find from the evidence beyond and to the exclusion of every reasonable doubt that the defendants, Leland Roy Baugus and Nicholas J. Sikalis, also known as Joseph Patrick Hayes, in the County of Dade, and State of Florida, at or about the time stated in the indictment in this case, did kill the said Rudi Plauck by beating him on and about the head with a blunt instrument, as stated in the indictment, and at said time of said killing the said Leland Roy Baugus and Nicholas J. Sikalis, also known as Joseph Patrick Hayes, were engaged in the attempt to perpetrate a robbery or in the perpetration of a robbery, then it will be your duty to find the defendants guilty of murder in the first degree, as charged in the indictment. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

The law does not require proof of a premeditated design to kill as a prerequisite to conviction of the defendant of the crime of murder in the first degree in a case where the jury finds from the evidence beyond any reasonable doubt that the deceased was

killed while the defendant was engaged in the perpetration of or attempt to perpetrate a robbery. In such case, proof beyond a reasonable doubt of the perpetration or attempted perpetration by the defendant of a robbery in the course of which a person is killed is the legal equivalent of premeditation, and will satisfy the material allegation in the indictment that the killing was perpetrated from a premeditated design to effect the death of the person killed. Roberts v. State (record) (Fla.), 164 So. (2d) 817.

§ 584b. Killing in Commission of Arson.

With reference to the word "arson", I charge you that under the law of Florida any person who wilfully and maliciously sets fire to, burns or causes to be burned, or who aids, counsels or procures the burning of any dwelling house, whether occupied, unoccupied or vacant, whether the property of himself or of another, shall be guilty of arson. As to the meaning of the phrase "in the perpetration of or in the attempt to perpetrate", I charge you that perpetrate means to do, perform or carry through, and "attempt" means to try or to make an effort to perform. Therefore, if one kills another while the one is trying to carry through any arson, it may be said that the killing was in the perpetration of or in the attempt to perpetrate arson. State v. Carswell (record) (Fla.), 154 So. (2d) 829.

§ 585. Premeditated Design.

§ 585a. —— Defined.

Design means intent and premeditated means meditated or thought upon before hand. Such design must precede the killing by an appreciable length of time, but the time need not be long. It must be sufficient for some reflection or consideration upon the matter for choice to kill or not to kill, and for the formation of a definite purpose to kill. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

§ 586. —— Essential Element of Murder in First Degree.

For case again giving the 7th instruction in this section in original edition, see Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

There may be an intention to kill without a premeditated design to kill and unless the premeditated design to kill is present a slaying is not murder in the first degree. Sanders v. State (record) (Fla.), 73 So. (2d) 292.

Murder, unlike many other crimes, ceases upon the death of the party upon whom the act is directed. Any lack of intent at the time of the murder cannot be supplied after the death of the party

affected. In order that an act be murder in the first degree, the wounds inflicting death must have been inflicted with a premeditated design to effect death. Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

I charge you, gentlemen of the jury, that the existence of a premeditated design to effect the death of some human being is a necessary ingredient of murder in the first degree and this premeditated design to effect death must appear from the evidence to the exclusion of and beyond a reasonable doubt before the defendant can be convicted of murder in the first degree. Everett v. State (record) (Fla.), 97 So. (2d) 241; Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

Now, gentlemen, premeditated design to effect the death of a particular individual is a necessary ingredient in murder in the first degree, and this premeditated design to effect death must appear from the evidence to the exclusion of and beyond a reasonable doubt, otherwise the defendant cannot be convicted of murder in the first degree. Premeditated design to effect death as used in the statutes relating to homicide means an intent to kill formed before the act of killing and of which intent the killing is the result. There is no prescribed length of time necessary to constitute "premeditation." It is sufficient if there was a fully formed purpose to kill and enough time for thought for the mind of the defendant to have become fully conscious of the design to kill, formed before the act and that the act was the result of this design. Land v. State (record) (Fla.), 156 So. (2d) 8.

Before the defendants in this case can be found guilty of murder in the first degree, the evidence must show to the exclusion of and beyond a reasonable doubt that William Earl Leach and Joe Smith unlawfully killed Duke Delano Olsen by strangulation, as charged, from a premeditated design to effect the death of the said Duke Delano Olsen. There must not only be an intention to kill, but there must also be a premeditated design or intention to kill. Design means intent, and premeditated means meditated or thought upon beforehand. Such design must precede the killing by some appreciable length of time, but the time need not be long. It must be sufficient for some reflection or consideration upon the matter; for the choice to kill or not to kill; and, for the formation of a definite purpose to kill. There must be such an interval of time between the intent and the act as will repel the assumption that it was done upon sudden impulse, conceived and executed almost instantaneously.

But the human mind acts quickly at times; and, whether or not a premeditated design to kill was formed must be determined by the jury from all the circumstances of the case. If the evidence convinces the jury to the exclusion of and beyond a reasonable

doubt that the defendants, William Earl Leach and Joe Smith killed the said Duke Delano Olsen by strangulation, as charged, from such premeditated design to effect his death, as already defined, then the jury should find the defendant, or defendants, as the case may be, guilty of murder in the first degree. Leach v. State (record) (Fla.), 132 So. (2d) 329.

§ 587. —— What Constitutes.

For cases again giving the 1st instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Larry v. State (record) (Fla.), 104 So. (2d) 352; Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

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

A premeditated design to effect death as used in the statutes as relating to the homicide means an intent to kill formed before the act of killing and of which intent the killing was the result. In other words, there must have been formed in the mind of the accused before the killing a conscious purpose to take life. Everett v. State (record) (Fla.), 97 So. (2d) 241; Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

A "premeditated design" to kill is a fully formed, conscious purpose to take human life, formed upon reflection and entertainment in the mind before and at the time the homicide is committed. The law does not prescribe the exact period of time which must elapse between the formation of and the execution of the intent to take life in order to render the design a premeditated one. It may exist for only a few moments and yet be premeditated. And if the design was formed a sufficient length of time before its execution to admit of some reflection on the part of the one entertaining it and the party at the time of the execution of the intent is fully conscious of a settled and fixed purpose to kill and of the consequences of carrying such purpose into effect, where such state of mind exists, the intent or design is "premeditated" within the meaning of the law, although the execution follows closely upon the formation of the intent. Baugus v. State (record) (Fla.), 141 So. (2d) 264; Roberts v. State (record) (Fla.), 164 So. (2d) 817.

§ 588. —— No Presumption of Premeditated Design.

For case again giving the instruction in this section in original edition, see Sanders v. State (record) (Fla.), 73 So. (2d) 292.

§ 589. —— Need Not Have Existed for Any Particular Length of Time.

For cases again giving the 5th instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Everett v. State (record) (Fla.), 97 So. (2d) 241; Larry v. State (record) (Fla.), 104 So. (2d) 352.

For case again giving the 8th instruction in this section in original edition, see Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

For cases again giving the last instruction in this section in original edition, see Rhone v. State (record) (Fla.), 93 So. (2d) 80; Everett v. State (record) (Fla.), 97 So. (2d) 241.

The court instructs the jury that there must be such an interval of time between the intent and the act as will repel the assumption that it was done upon sudden impulse conceived and executed almost instantaneously. Rhone v. State (record) (Fla.), 93 So. (2d) 80.

Under the law, gentlemen, even though a killing appears to be intentional, it may not be murder in the first degree if it is done in the heat of passion or anger and following a sufficient provocation so closely in time as to raise the presumption that it was the result of sudden impulse and without premeditation. However, gentlemen, there must be an adequate or sufficient provocation to excite the anger or arouse the sudden impulse to kill in order to exclude the idea of premeditation or previously formed design, and an adequate provocation is one that would be calculated to excite such anger in an ordinary reasonable man. Rhone v. State (record) (Fla.), 93 So. (2d) 80.

The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the person entertaining it and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being and of the consequences of carrying such a purpose into execution the intent or design would be premeditated within the meaning of the law, although the execution followed closely upon the formation of the intent. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

In order that the defendants may be convicted of murder in the first degree, it is necessary that the evidence should convince

the jury beyond a reasonable doubt that the defendants acted from or in pursuance of a premeditated design to effect the death of the deceased. A mere intent to kill is not sufficient. The premeditation need not be for any particular length of time, but it must be of sufficient duration to enable the defendants under the circumstances as disclosed by the evidence in this case, to form a distinct and conscious intention to kill. There must be such an interval of time between the formation of the intent to kill and the act resulting in the death of the deceased as will repel the presumption that it was done upon a sudden impulse, conceived and executed almost simultaneously. Whether or not a premeditated design to kill was formed by the defendant, (should you find that they did kill the deceased), must be determined by you from all of the circumstances in evidence before you. In connection with premeditation the Court further charges you that at the request of the defendant, or defendants, a premeditated design to effect the death of a human being is more than a mere intention to kill. It is a fully formed and conscious purpose to take human life formed upon reflection and deliberation, entertained in the mind before and at the time of homicide. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

The law does not prescribe the exact period of time which must elapse between the formation of and the execution of the intent to take life, in order to render the design a premeditated one. It may exist for only a few moments and yet be premeditated, if the design was formed a sufficient length of time before its execution to admit of some reflection—some degree of cool deliberation—on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to kill and of the consequences of carrying such purpose into execution; where such state of mind exists, the intent or design would be "premeditated", within the meaning of the law, although the execution followed closely upon such formation of the intent. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

§ 590. —— Existence of Premeditated Design Determined by Jury.

For cases again giving the 1st instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

The human mind acts quickly at times and whether or not a premeditated design to kill was formed must be determined by the jury from all of the circumstances of the case. Rhone v. State (record) (Fla.), 93 So. (2d) 80.

The question of a premeditated design to effect the death of a human being, like every other material fact in the case, is a question of fact to be found by the jury from the evidence beyond a reasonable doubt; but the law does not require that such premeditated design to effect death be proven only by direct testimony. Everett v. State (record) (Fla.), 97 So. (2d) 241; Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

The question of premeditated design is a question of fact to be found by the jury from the evidence beyond a reasonable doubt, like every other material fact in the case, but the law does not require that a premeditated design be proved only by positive testimony. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

§ 591. —— May Be Proven by Circumstantial Evidence.

For cases again giving the 1st instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Everett v. State (record) (Fla.), 97 So. (2d) 241; Schneider v. State (record) (Fla.), 152 So. (2d) 731.

For cases again giving the 2nd instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

The question of premeditated design is a question of fact to be determined by the jury from the evidence like every other material fact in the case. The law does not require that a premeditated design be proved only by positive testimony. The existence of a premeditated design as well as its formation are operations of the mind as to which positive testimony may not always be obtained. Consequently the law recognizes that it may be proved by circumstantial evidence. But to the extent that any circumstantial evidence may be relied upon, it must be of a conclusive nature and tendency, leading to a reasonable and moral certainty of facts or matters to which it relates and which it tends to establish, and the circumstances must not only create a strong probability and be consistent with guilt, but they must be inconsistent with innocence. It will be sufficient proof of a premeditated design if the circumstances attending the homicide and the conduct of the accused convince you beyond a reasonable doubt and to a moral certainty of the existence of such premeditated design at the time of the homicide. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

The existence of a premeditated design to effect death, as well

as its formation, are operations of the mind as to which direct testimony cannot always be obtained, consequently the law recognizes that it may be proven by circumstantial evidence. It would be sufficient proof of such premeditated design if the circumstances proven to exist relating to the acts, declarations and conduct of the accused, the circumstances attending the homicide, and other circumstances proven by the evidence bearing upon the question, convinced the jury beyond a reasonable doubt and to a moral certainty of the existence of such design at the time of the homicide, if a homicide was committed, and that such homicide was committed in pursuance of such design. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

The existence of a premeditated design, as well as its formation, is an operation of the mind, as to which positive testimony cannot always be obtained; consequently the law recognizes that it may be proven by circumstantial evidence. It will be sufficient proof of such premeditated design if the circumstances attending the homicide and the conduct of the accused convince you beyond a reasonable doubt and to a moral certainty of the existence of such premeditated design at the time of the homicide. State v. Carswell (record) (Fla.), 154 So. (2d) 829.

§ 592. —— Sufficiency of Proof.

For cases again giving the 1st instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Schneider v. State (record) (Fla.), 152 So. (2d) 731.

For case again giving the 2nd instruction in this section in original edition, see Everett v. State (record) (Fla.), 97 So. (2d) 241.

In such case, it is only necessary to make the charge in the ordinary way, to the effect that the homicide was committed from a premeditated design to effect the death of the person slain, and then show the facts in evidence, and if they establish beyond a reasonable doubt that the homicide was committed from a premeditated design to effect the death of the person killed or any human being or in the perpetration of, or attempt to perpetrate, any of the felonies, arson, rape, robbery or burglary, abominable and detestable crime against nature or kidnapping, this will be sufficient to convict of murder in the first degree. Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

§ 592a. —— Intoxication Is Relevant Evidence.

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. Land v. State (record) (Fla.), 156 So. (2d) 8.

C. MURDER IN THE SECOND DEGREE.

§ 593. In General.

For cases again giving the 1st instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Ezzell v. State (record) (Fla.), 88 So. (2d) 280; Henderson v. State (record) (Fla.), 90 So. (2d) 447; Rhone v. State (record) (Fla.), 93 So. (2d) 80; Larry v. State (record) (Fla.), 104 So. (2d) 352; Jefferson v. State (record) (Fla.), 128 So. (2d) 132; Leach v. State (record) (Fla.), 132 So. (2d) 329; Baugus v. State (record) (Fla.), 141 So. (2d) 264; Wilkins v. State (record) (Fla.), 155 So. (2d) 129; Land v. State (record) (Fla.), 156 So. (2d) 8; Roberts v. State (record) (Fla.), 164 So. (2d) 817.

If you should find from the evidence beyond a reasonable doubt that the defendant named in the indictment, within two years prior to the filing of the indictment, which was filed on the 16th day of March 1960, did kill Lawrence Russell Digsby, in the manner alleged in this indictment, and also find from the evidence beyond a reasonable doubt that the killing was perpetrated by an act imminently dangerous to another and evincing

a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular person, then it would be your duty to find the defendant guilty of murder in the second degree. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

When perpetrated by any act imminently dangerous to another, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

D. MURDER IN THE THIRD DEGREE.

Editor's note.—In Johnson v. State (Fla.), 130 So. (2d) 599, 601, Justice Drew (concurring specially) stated that he now feels that the law of the State is that in a case where the death penalty may be imposed, it is not fundamental error if the jury is not instructed on murder in the third degree.

§ 594. In General.

The unlawful killing of a human being when perpetrated without any design to effect death, by a person engaged in the commission of any felony, other than arson, rape, robbery, burglary, the abominable and detestable crime against nature, or kidnapping, is murder in the third degree. Ezzell v. State (record) (Fla.), 88 So. (2d) 280; Wilkins v. State (record) (Fla.), 155 So. (2d) 129; Land v. State (record) (Fla.), 156 So. (2d) 8; Roberts v. State (record) (Fla.), 164 So. (2d) 817.

Murder in the third degree is when perpetrated without any design to effect death by a person engaged in the commission of any felony, other than arson, rape, robbery, burglary, the abominable and detestable crime against nature or kidnapping. Henderson v. State (record) (Fla.), 90 So. (2d) 447; Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

If you believe from the evidence, beyond a reasonable doubt, that the defendants unlawfully killed Henry Goodman at the time and place and by the means alleged in the indictment, and that such killing was perpetrated without any design to effect death while the defendants were engaged in the commission of a felony other than arson, rape, robbery, burglary, the abominable and detestable crime against nature, or kidnaping, then it would be your duty to find the defendants guilty of murder in the third degree. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

When perpetrated without any design to effect death, by a person engaged in the commission of any felony, other than arson, rape, robbery, burglary, the abominable and detestable crime

against nature, or kidnaping, it shall be murder in the third degree, and shall be punished by imprisonment in the State Prison not exceeding 20 years. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

IV. MANSLAUGHTER.

§ 595. What Constitutes Generally.

For cases again giving the 1st instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Fort v. State (record) (Fla.), 91 So. (2d) 637; Clowney v. State (record) (Fla.), 102 So. (2d) 619.

For case again giving the 2nd instruction in this section in original edition, see Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

Manslaughter is the killing of a human being by the act, procurement or culpable negligence of another in cases where such killing shall not be justifiable or excusable homicide, nor murder, according to the law as I have stated to you in this charge. Also, whoever shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt shall have failed, shall be deemed guilty of manslaughter. Ezzell v. State (record) (Fla.), 88 So. (2d) 280; Rhone v. State (record) (Fla.), 93 So. (2d) 80; Land v. State (record) (Fla.), 156 So. (2d) 8.

Manslaughter is defined as the killing of a human being by the act, procurement or culpable negligence of another in such cases where such killing shall not be justifiable or excusable homicide or murder in any of its degrees, first degree, second degree or third degree. That is, the killing of a human being by culpable negligence in cases where it is not justifiable or excusable or murder in any of the other degrees. Henderson v. State (record) (Fla.), 90 So. (2d) 447.

Manslaughter is the unlawful killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide or murder. Wilkins v. State (record) (Fla.), 155 So. (2d) 129; Roberts v. State (record) (Fla.), 164 So. (2d) 817. Manslaughter is also the unnecessary killing of another either while resisting an attempt by such other person to commit any felony or to do any other unlawful act or after such attempt shall have failed. Larry v. State (record) (Fla.), 104 So. (2d) 352.

The unlawful killing of a human being by the act, procurement, or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide, nor murder, is

manslaughter. Also, whoever shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt shall have failed, shall be deemed guilty of manslaughter. Leach v. State (record) (Fla.), 132 So. (2d) 329.

The killing of a human being by the act, procurement, or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide, nor murder in any of its degrees, shall be deemed manslaughter. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

Manslaughter is the unlawful killing of a human being by the act, procurement or culpable negligence of another in cases where such killing shall not be justifiable or excusable homicide or murder. The punishment prescribed by law for the crime of manslaughter is confinement in the State Penitentiary for a period of not exceeding 20 years or imprisonment in the County Jail not exceeding one year or by a fine not exceeding $5,000. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

If you believe from the evidence, beyond a reasonable doubt, that the defendants unlawfully killed Henry Goodman in Leon County, Florida, and that such killing was perpetrated by the act, procurement or culpable negligence of the defendants in such manner that it would not be either justifiable or excusable homicide, nor murder in any of said degrees, then it would be your duty to find the defendants guilty of manslaughter. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

If you should find from the evidence beyond a reasonable doubt that the defendant named in the indictment did kill Lawrence Russell Digsby without any premeditated design to effect death, but by the act, procurement, or culpable negligence of the defendant, and in such manner that the killing did not constitute murder in any of its degrees, as defined to you, then it would be your duty to find the defendant guilty of manslaughter. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

§ 595a. Intent to Kill Not Essential Element.

An intent to kill is not an essential element of manslaughter, and the fact that it did not occur to the defendant that the death of the deceased was a reasonable or probable result of the defendant's act does not prevent a conviction of manslaughter. Intent is not an element of manslaughter and need not be proven. Clowney v. State (record) (Fla.), 102 So. (2d) 619.

§ 596. Killing in Heat of Passion.

Manslaughter is also the unlawful killing of a human being in heat of blood and sudden passion, upon adequate provocation,

with the intent to kill, but not from a premeditated design to effect death. The provocation must arise at the time of the commission of the offense, and the passion be not the result of a former provocation. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

§ 598. Culpable Negligence.

§ 599. —— What Constitutes.

For cases again giving the instruction in this section in original edition, see Hunt v. State (record) (Fla.), 87 So. (2d) 584; Fort v. State (record) (Fla.), 91 So. (2d) 637.

I charge you as a matter of law that the killing of a human being by the act, procurement or culpable negligence of another in cases where such killing shall not be justified or excusable homicide or murder shall be deemed manslaughter, and any person or persons who are found guilty thereof would be subject to the penalties prescribed by law. You have heard, of course, that culpable negligence is charged against the defendant in the indictment. Culpable negligence as used in the manslaughter statutes of this state means more than simple negligence authorizing the recovery of compensatory, that is money, damages in a civil action brought to recover damages therefor, but it means gross, flagrant negligence, evincing a reckless disregard of human life or of the safety of persons exposed to its dangerous effects; or that shows an entire want of care, showing indifference by the party guilty of such want of care to the consequences that might result therefrom. Dunning v. State (record) (Fla.), 83 So. (2d) 702.

Culpable negligence, as used in § 782.07, F. S., such as is necessary to sustain proof of the crime of manslaughter, means something more than such simple negligence as would authorize the recovery of merely compensatory damages in a civil action at law. As used in this statute, culpable negligence means negligence of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of the person exposed to its dangerous effects, or that entire want of care which raises a presumption of indifference to consequences, or which shows such wantonness or recklessness, or gross disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. Henderson v. State (record) (Fla.), 90 So. (2d) 447.

The words "culpable negligence", as used in this information, mean more than simple negligence. It means more than an omission to do something which a reasonable, prudent and cautious man would do or to do something which such a person would not do under the circumstances of the particular

case; and to establish culpable negligence, you must find from the whole evidence submitted in this case that the negligence of the defendant, if he was negligent, was of such gross and flagrant character as to evince and show a reckless disregard of human life, or of the life and safety of the deceased Claude L. Todd, or to show that reckless indifference to the rights of the said Claude L. Todd, which would be equivalent to an intentional violation of such rights by the defendant, and unless you find that the negligence of the defendant was of that gross, flagrant, wanton and reckless character so defined, you would not be authorized to convict. As used in the information against the defendant in this case, the term and words "culpable negligence" in legal contemplation means that the negligence proven, if any, must be of a gross and flagrant character, evincing reckless disregard of human life or of the safety of a person exposed to its dangerous effects, or that there is that entire want of care which would raise the presumption of a conscious indifference of consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the person exposed thereto; or which shows that reckless indifference to the rights of others which is equivalent to an intentional violation of them. Unless you find that such reckless acts or omissions are such as to amount to culpable negligence, as so defined by the Court, and have been proven against the defendant beyond a reasonable doubt, you should acquit him. Clowney v. State (record) (Fla.), 102 So. (2d) 619.

V. DEFENSES.

A. SELF-DEFENSE.

§ 600. In General.

For cases again giving the 1st instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292.

If you find from the evidence that the defendant did shoot and kill the deceased, you must determine whether such homicide was lawful or unlawful, and if unlawful the degree of such unlawful homicide. If you believe from the evidence that the defendant was reasonably free from fault in bringing on the difficulty and was not the aggressor therein, and that he was assaulted by the deceased and that the deceased was at the time armed with a deadly weapon and that such assault was made under such circumstances that an ordinarily cautious and prudent man would believe, and the defendant did believe that he was in danger of death or great bodily harm at the hands of the deceased, and you further find that the circumstances as they

appeared to the defendant at the time were such that an ordinarily cautious and prudent man would believe, and the defendant did believe that it was necessary to fire the fatal shot in order to protect himself from such death or great bodily harm, then it would be your duty as jurors to find the defendant not guilty. In this connection I charge you that a deadly weapon is any weapon which is likely from the use made of it at the time to produce death or do great bodily harm. On the other hand, if you find from the evidence that the defendant did intentionally shoot and kill the deceased and that such killing was the result of anger, hatred or malice arising from a prior altercation between the parties and that at the time of the killing the circumstances were such that an ordinarily cautious and prudent man, in the position of the defendant would not have believed himself in danger of death or great bodily harm at the hands of the deceased and the defendant was not, in fact, in danger of death or great bodily harm at the hands of the deceased, or if you find that the circumstances were such that it was not necessary and an ordinarily cautious and prudent man would not have believed that it was necessary for the defendant to shoot the deceased in order to protect himself from death or great bodily harm, then the defense of self-defense has not been established and it would be your duty as jurors to find the defendant guilty of an unlawful homicide, and to determine from the evidence before you the degree of such unlawful homicide and state the same in your verdict. Sanders v. State (record) (Fla.), 73 So. (2d) 292.

A person has a right to go about his usual pursuits, even though he may anticipate an attack, and if in such pursuits the difficulty is renewed through no fault of his own, he may claim self-defense. Barnes v. State (Fla.), 93 So. (2d) 863, holding that it was error to refuse to give the foregoing instruction.

A homicide committed in self-defense, that is, in the defense of the life of the accused or to protect his person from imminent danger or great bodily harm is a lawful homicide and justifiable. The right of self-defense is recognized by law and surrounded by certain well established rules. In the first place, a person relying upon self-defense to justify a homicide must himself be reasonably free from fault in the inception of the difficulty in which such homicide may be committed and it must be necessary, either actual or apparent, to resort to the means used in the particular instance to protect his life or person from imminent danger of death or great bodily harm. Larry v. State (record) (Fla.), 104 So. (2d) 352.

This instruction in substance appears in paragraph 50 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.

§ 600a. "Imminent Danger" Defined.

In the definition of self-defense the words "imminent danger" mean near at hand, mediate rather than immediate, close rather than touching. Therefore, it is not necessary that an assault be made while the assailant is within striking distance if all the other elements of self-defense are present and further delay would, or reasonably might, increase the slayer's peril. Sanders v. State (record) (Fla.), 73 So. (2d) 292.

§ 602. Accused Must Have Believed Killing Necessary.

§ 603. —— Belief Must Have Been Reasonable.

If you find from the facts and all the circumstances in this case that the accused, or either of them, was surrounded by such a condition of affairs as made it, from their standpoint, reasonable for a cautious or prudent man to believe and they did believe that it was necessary to use the means employed to defend themselves against the deceased to prevent themselves or either of them from death or great bodily harm, then it will be your duty to find for the defendants. Huntley v. State (record) (Fla.), 66 So. (2d) 504.

To excuse homicide on the ground of self-defense, one must not only have believed, but must have had reason to believe (1) that he was in danger of death or great bodily harm; and (2) it must appear that what he did was what an ordinarily reasonable and prudent man might be expected to do in protecting himself from the hazards of death or great bodily harm. Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Larry v. State (record) (Fla.), 104 So. (2d) 352.

This instruction appears in paragraph 50 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.

When a man acting from the circumstances by which he is surrounded as they appear to him takes the life of his fellow man, he does so at his peril and he cannot justify such killing unless these circumstances are such as would induce a reasonably prudent and cautious man to believe it necessary to save his own life or to save himself from great bodily injury. Larry v. State (record) (Fla.), 104 So. (2d) 352.

This instruction appears in paragraph 50 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.

Though the danger need not be actual, nor the necessity to kill real, to justify a homicide in self-defense, yet the circumstances surrounding and as they appear to the slayer at the time he does take life must be such as would induce a reasonably cautious and prudent man to believe that the danger was actual and the necessity real, in order that the slayer may be justified in acting upon his own belief to that effect. Larry v. State (record) (Fla.), 104 So. (2d) 352.

This instruction appears in paragraph 50 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.

§ 604. —— But Necessity Need Not Have Been Real.

For cases again giving the 1st instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Larry v. State (record) (Fla.), 104 So. (2d) 352.

For case again giving the 4th instruction in this section in original edition, see Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

For cases again giving the last instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292.

§ 605. —— Although Person Acting on Appearances Does So at His Peril.

For cases again giving the 1st instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

§ 607. Accused Must Have Used Reasonable Means to Avoid Necessity of Killing.

For cases again giving the 1st instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Larry v. State (record) (Fla.), 104 So. (2d) 352.

If the necessity of taking human life in self-defense may be avoided by retreating, it is the duty of a person assaulted to retreat unless the circumstances are such that he believes, and a reasonable man so situated would believe, that to retreat would increase his peril. Sanders v. State (record) (Fla.), 73 So. (2d) 292.

§ 609. Self-Defense Where Accused Provoked Difficulty Resulting in Killing.

§ 610. —— Defense Not Available.

For cases again giving the 6th instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

For cases again giving the 9th instruction in this section, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Sanders v. State (record) (Fla.), 73 So. (2d) 292; Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Larry v. State (record) (Fla.), 104 So. (2d) 352.

§ 616. Threats.

§ 616a. —— In General.

In considering the defense of self-defense you may take into consideration all the evidence before you as to threats of one party against the other, prior encounters between the parties, the relative physical strength of the parties and all the facts and circumstances surrounding them at the time of the homicide in order to determine if the slayer acted as a reasonable man would act under the circumstances, whether the slaying was motivated by the impulse to defend the person of the slayer or by motives of anger or malice. Sanders v. State (record) (Fla.), 73 So. (2d) 292.

§ 317. —— Threatened Person under No Obligation to Alter Usual Course of Conduct.

A man who has been threatened by another has the lawful right to bear arms and to go about his lawful business and if wrongfully attacked may defend himself, even, if necessary, to the extent of taking the life of his assailant. But the fact that a man has been threatened does not justify him in becoming the aggressor in a subsequent combat. Sanders v. State (record) (Fla.), 73 So. (2d) 292.

§ 620. Reasonable Doubt as to Whether Accused Acted in Self-Defense.

It is not necessary for the defense of self-defense to be established beyond a reasonable doubt. It is sufficient if the evidence raises a reasonable doubt in the minds of the jury. Before a conviction is justified the jury, from a consideration of all the evidence, must be convinced beyond a reasonable doubt that the defendant did not act in lawful self-defense. Sanders v. State (record) (Fla.), 73 So. (2d) 292.

B. DEFENSE OF ANOTHER.

§ 621. In General.

A person has the same right to kill another in the lawful defense of his brother that he has in his own defense and a killing in defense of a brother is justifiable under the same conditions and subject to the same limitations as in defense of himself. Huntley v. State (record) (Fla.), 66 So. (2d) 504.

C. DEFENSE OF HABITATION AND PROPERTY.

§ 623. Person Attacked on Own Premises Need Not Retreat.

The court instructs the jury that when a man is on premises which are in his own lawful possession and is there wrongfully assaulted, he has no duty to retreat but may stand his ground and defend himself. Sanders v. State (record) (Fla.), 73 So. (2d) 292.

D. ACCIDENT.

§ 624. In General.

The defendant in this case has interposed the defense of killing the deceased by accident. To be a basis for excusable homicide, the accident must be encountered by the defendant while doing a lawful act by lawful means, with usual, ordinary care and caution, and due regard for the safety of others. The defendant is not required to establish the defense of accidental killing by a preponderance of the evidence but, if the evidence supports the asserted accident to the extent that it creates in your minds a reasonable doubt as to whether or not the defendant did kill the deceased as a result of such accident, then you must acquit him. Brown v. State (record) (Fla.), 124 So. (2d) 481.

VI. EVIDENCE.

B. WEIGHT AND SUFFICIENCY.

§ 634. Evidence Must Show Guilt Beyond a Reasonable Doubt.

§ 635. — In General.

If you should fail to find from the evidence beyond a reasonable doubt the existence of a premeditated design in the mind of the defendant, and if you fail to find from the evidence beyond a reasonable doubt that the defendant Robert Lee Jefferson, unlawfully killed Lawrence Russell Digsby while perpetrating or attempting to perpetrate robbery, in, upon or with the said Lawrence Russell Digsby, or if you should have a reasonable

doubt of the existence of such premeditated design in the mind of the defendant, or that the defendant Robert Lee Jefferson unlawfully killed Lawrence Russell Digsby while perpetrating or attempting to perpetrate robbery, in, upon or with the said Lawrence Russell Digsby then, you cannot convict the defendant of murder in the first degree. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

If you should fail to find from the evidence, beyond a reasonable doubt that the defendant is guilty of an unlawful homicide, or, if after a full and fair consideration of all the testimony, you have a reasonable doubt, as defined to you by the Court, as to the guilt of the defendant, then, it would be your duty to give the defendant the benefit of such doubt and acquit him. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

The defendant in every criminal case is presumed to be innocent until the State has by competent evidence shown his guilt to exclusion of and beyond a reasonable doubt, and before this presumption of innocence leaves the defendant, every material allegation of the indictment, except as to venue, that is, the place of the commission of the crime, 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, except as to venue, 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, and if any one of the material allegations of the indictment, except as to venue, is not proved to the exclusion of and beyond a reasonable doubt, you must give the defendant the benefit of such doubt, and acquit him or reduce the grade of the offense as the facts which you find from the evidence beyond and to the exclusion of every reasonable doubt may require. But, if you believe from the evidence beyond and to the exclusion of every reasonable doubt that the defendant is guilty of murder in the first degree as charged in the indictment, or of any offense within such indictment, then you should find the defendant guilty of such offense as the facts as you find them from the evidence may require. Land v. State (record) (Fla.), 156 So. (2d) 8.

§ 638. —— Circumstantial Evidence.

In homicide cases, when proof of the essential elements of crime rests upon circumstances and not upon direct proof, it must be established by the most convincing, satisfactory, and unequivocal proof compatible with the nature of the case. Every essential element of the offense must be proven beyond and to

the exclusion of every reasonable doubt. Huntley v. State (record) (Fla.), 66 So. (2d) 504.

This instruction appears in paragraph 65 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.

VII. VERDICT, SENTENCE AND PUNISHMENT.

§ 639. Form of Verdict.

Should you find the defendant guilty of murder in the first degree, the form of your verdict will be, "We, the jury, find the defendant guilty of murder in the first degree; so say we all." Or, if you find him guilty of murder in the second degree, you say, "We, the jury, find the defendant guilty of murder in the second degree; so say we all." Or, if you find him guilty of murder in the third degree you say, "We, the jury, find the defendant guilty of murder in the third degree; so say we all." Or, if you find him guilty of manslaughter, you say, "We, the jury, find the defendant guilty of manslaughter; so say we all." If you find him not guilty, you say: "We, the jury, find the defendant not guilty; so say we all." In either event, let one of your number sign the verdict as foreman. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

If you should find the defendant guilty of murder in the first degree the form of your verdict would be "We, the Jury, find the defendant guilty of murder in the first degree, so say we all." If you should find the defendant guilty of murder in the first degree and a majority of your number recommend him to the mercy of the Court, the form of your verdict would be "We, the Jury, find the defendant guilty of murder in the first degree, but recommend him to the mercy of the Court, so say we all." Should you find the defendant guilty of murder in the second degree the form of your verdict would be "We, the Jury, find the defendant guilty of murder in the second degree, so say we all." Should you find the defendant guilty of manslaughter, the form of your verdict would be "We, the Jury, find the defendant guilty of manslaughter, so say we all." Should you find the defendant not guilty, the form of your verdict would be "We, the Jury, find the defendant not guilty, so say we all." Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

Now, under the indictment in this case, the defendant may, if the evidence warrants it, be convicted of murder in the first degree, murder in the second degree, murder in the third degree, or manslaughter, or be acquitted. If you acquit the defendant because of insanity, you must state in your verdict that you find

defendant not guilty because of insanity. If you convict him of an unlawful homicide, you must say in your verdict of what degree of homicide you convict him; that is to say, if you convict him of murder in the first degree, you say in your verdict: "We, the jury, find the defendant guilty of murder in the first degree; so say we all;" if of murder in the second degree, you say: "We, the jury, find the defendant guilty of murder in the second degree; so say we all;" if of murder in the third degree you say: "We, the jury, find the defendant guilty of murder in the third degree; so say we all;" if of manslaughter, you say: "We, the jury, find the defendant guilty of manslaughter; so say we all." If you acquit the defendant, you say: "We, the jury, find the defendant not guilty; so say we all;" or, if you acquit the defendant because of insanity, you say: "We, the jury, find the defendant not guilty because of insanity; so say we all;" and in each instance the verdict is to be signed by one of your number as foreman, and dated at Jacksonville, Florida. Land v. State (record) (Fla.), 156 So. (2d) 8.

In the event you find both defendants guilty of one of the charges included in the indictment, and for the same offense, the form of your verdict should be "We, the jury, find both defendants guilty of" (naming the offense or degree of homicide of which you find them guilty). "So say we all," and let your foreman sign it. In the event you find both defendants guilty of murder in the first degree and recommend both to the mercy of the court, the form of your verdict should be "We, the jury, find both defendants guilty of murder in the first degree and a majority of our number recommend both of them to the mercy of the court. So say we all," and let your foreman sign it. In the event you find both of said defendants guilty of murder in the first degree and recommend only one to the mercy of the court, but not the other, then the form of your verdict should be "We, the jury, find both of said defendants guilty of murder in the first degree and a majority of our number recommended only the defendant" (naming him) "to the mercy of the court. So say we all," and let your foreman sign it. In the event you find one of the defendants guilty and the other defendant not guilty, the form of your verdict should be "We, the jury, find the defendant" (naming) "guilty of" (designating the offense of which you find him guilty) "and the other defendant" (naming him) "not guilty. So say we all," and let your foreman sign it. In the event you find one defendant guilty of one offense and the other defendant guilty of another offense, the form of your verdict should be, "We, the jury, find the defendant" (naming him) "guilty of the offense of" (designating the offense) "and the other defendant" (naming him) "guilty of the offense of" (designating the offense). "So

say we all," and let your foreman sign it. In the event you find both defendants not guilty, the form of your verdict should be "We, the jury, find both defendants not guilty. So say we all," and let one of your number sign as foreman. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

Under the indictment in this case, the defendants may, if the evidence warrants it, be convicted of murder in the first degree, murder in the second degree, or manslaughter, or, they may be acquitted; and the law requires that the jury, if they convict, to specify the degree of homicide of which they convict the defendant. That is, if you convict of murder in the first degree, you say in your verdict: "We, the Jury, find the defendant guilty of murder in the first degree. So say we all." If you convict him of murder in the second degree, you say in your verdict: "We, the Jury, find the defendant guilty of murder in the second degree. So say we all." If you convict him of manslaughter you say in your verdict: "We, the Jury, find the defendant guilty of manslaughter. So say we all." If you acquit him, you say in your verdict: "We, the Jury, find the defendant not guilty. So say we all." Under the law of this State, whoever is convicted of a capital offense, and recommended to the mercy of the Court by a majority of the jury in their verdict, shall be sentenced to imprisonment in the State Prison for life. If you convict the defendant of murder in the first degree and recommend him to the mercy of the Court, the form of your verdict shall be: "We, the Jury, find the defendant guilty of murder in the first degree, and a majority of the jury recommend him to the mercy of the Court. So say we all." If you acquit him on the ground of insanity, you will say in your verdict: "We, the Jury, find the defendant not guilty by reason of insanity. So say we all." Any verdict of guilty must be an unanimous verdict; that is, it must be concurred in by each of you, except as to the issue of mercy, in the event you convict either of the defendants of murder in the first degree. Separate verdicts must be entered by you as to each of the defendants. Any verdict you find must be signed by one of your number as foreman. Leach v. State (record) (Fla.), 132 So. (2d) 329.

If you find the defendant, Leland Roy Baugus, guilty of murder in the first degree, the form of your verdict will be: "We, the jury, find the defendant, Leland Roy Baugus, guilty of murder in the first degree, as charged in the indictment. So say we all." And if you find the defendant, Nicholas Joseph Sikalis, also known as Joseph Patrick Hayes, guilty of murder in the first degree, the form of your verdict will be: "We, the jury, find the defendant, Nicholas Joseph Sikalis, also known as Joseph Patrick Hayes, guilty of murder in the first degree, as

charged in the indictment. So say we all." Baugus v. State (record) (Fla.), 141 So. (2d) 264.

If you find the defendants, or either of them, guilty of murder in the second degree, the form of your verdict will be: "We, the jury, find the defendant, Leland Roy Baugus, guilty of murder in the second degree. So say we all." And, or: "We, the jury, find the defendant, Nicholas Joseph Sikalis, also known as Joseph Patrick Hayes, guilty of murder in the second degree. So say we all." If you find the defendants, or either of them, guilty of murder in the third degree, the form of your verdict will be: "We, the jury, find the defendant, Leland Roy Baugus, guilty of murder in the third degree. So say we all." And, or: "We, the jury, find the defendant, Nicholas Joseph Sikalis, also known as Joseph Patrick Hayes, guilty of murder in the third degree. So say we all." If you find the defendants, or either of them, guilty of manslaughter, the form of your verdict will be: "We, the jury, find the defendant, Leland Roy Baugus, guilty of manslaughter. So say we all." And, or: "We, the jury, find the defendant, Nicholas Joseph Sikalis, also known as Joseph Patrick Hayes, guilty of manslaughter. So say we all." If you find the defendants, or either of them, not guilty, the form of your verdict will be: "We, the jury, find the defendant, Leland Roy Baugus, not guilty. So say we all." And, or: "We, the jury, find the defendant, Nicholas Joseph Sikalis, also known as Joseph Patrick Hayes, not guilty. So say we all." Your verdict must be dated and signed by one of your number whom you shall appoint as your foreman. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

If you find either defendant guilty of murder in the first degree, the form of your verdict shall be: "We, the Jury, find the defendant (naming him) guilty of murder in the first degree, as charged in the indictment. So say we all." In the event you find either defendant guilty of murder in the first degree and a majority recommend him to the mercy of the court, the form of your verdict shall be: "We, the Jury, find the defendant (naming him) guilty of murder in the first degree as charged in the indictment; So say we all; and a majority of us recommend him to the mercy of the Court." If you find either defendant guilty of murder in the second degree, the form of your verdict shall be: "We, the Jury, find the defendant (naming him) guilty of murder in the second decree. So say we all." If you find either defendant guilty of murder in the third degree, the form of your verdict shall be: "We, the Jury, find the defendant (naming him) guilty of murder in the third degree. So say we all." If you find either defendant guilty of manslaughter, the form of your verdict shall be: "We, the Jury, find the defendant (naming him) guilty

of manslaughter. So say we all." If you find either defendant not guilty, the form of your verdict shall be: "We, the Jury, find the defendant (naming him) not guilty. So say we all." Whatever verdicts you find, they must be signed by one of your members as foreman. Roberts v. State (record) (Fla.), 164 So. (2d) 817.

§ 640. Specification of Degree of Offense.

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

For case again giving the 7th instruction in this section in original edition, see Roberts v. State (record) (Fla.), 164 So. (2d) 817.

If the verdict you propose to render on one count of the indictment is of a lesser degree of homicide than the verdict you propose to render on the other count of the indictment, it would be proper for you to render a verdict of guilty of the greater offense of which you find the defendant guilty, and not guilty of the lesser offense. Thomas v. State (Fla.), 65 So. (2d) 866.

If you convict the defendant of an unlawful homicide you must say in your verdict of what degree of unlawful homicide you find him guilty; that is, whether you find him guilty of murder in the first degree, find him guilty of murder in the second degree, or find him guilty of manslaughter. It, therefore, becomes necessary for the Court to define to you these degrees of unlawful homicide. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

In the event you find the defendants guilty, you should state in your verdict the degree of homicide of which you find them guilty, that is to say, whether you find them guilty of murder in the first degree, murder in the second degree, murder in the third degree, or of manslaughter. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

§ 641. Punishment.

The statute directs that I charge you the punishment provided by law for the various offenses included in the indictment against these defendants. The punishment provided by law for murder in the first degree is death unless a majority of the jury recommend mercy, in which event the punishment is life imprisonment. The punishment provided by law for murder in the second degree is imprisonment for life or for such term of years not less than 20 as shall be fixed by the court. The punishment provided by law for manslaughter is imprisonment in the state prison for not more than 20 years, or in the county jail for not more than 1 year or fine not exceeding $5,000.00. Huntley v. State (record) (Fla.), 66 So. (2d) 504.

The Court will now instruct you as to the penalty that attaches to any verdict of guilty that you might render in this case and therefore the Court advises and instructs you that if the defendant is found guilty of murder in the first degree and no recommendation of mercy is made by the jury the penalty for said crime is death. If the defendant is found guilty of murder in the first degree and a majority of the jury recommend him to the mercy of the Court, the penalty for the crime is life imprisonment. The penalty for the crime of murder in the second degree is imprisonment in the state prison for life or for any number of years not less than twenty years; and the penalty for the crime of manslaughter is imprisonment in the state prison for a term not exceeding twenty years or imprisonment in the county jail not exceeding one year or by fine not exceeding $5,000.00. Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

The penalty prescribed by law for the offense of murder in the first degree is death, unless a majority of the jurors recommend the defendant to the mercy of the Court, in which case the penalty for first degree murder is imprisonment for life in the State penitentiary. Punishment for murder in the second degree is confinement in the State Prison for a period of from 20 years to life imprisonment in the discretion of the Court. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

Incidentally, gentlemen of the jury, the penalty fixed for murder in the second degree is punishment by imprisonment in the State Prison for life or for any number of years not less than 20 years. The penalty fixed for manslaughter is imprisonment in the State Prison not exceeding 20 years, or imprisonment in the County Jail not exceeding one year or punishment by fine not exceeding $5,000.00. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

Under the law of this State, the penalty for murder in the first degree, without recommendation of mercy, is death; and if mercy is recommended in such case the penalty is imprisonment in the State Prison for life. The penalty for second degree murder is imprisonment in the State Prison for life, or for any number of years not less than 20 years. The penalty for manslaughter is imprisonment in the State Prison not exceeding 20 years, or imprisonment in the County Jail not exceeding 1 year, or a fine not exceeding $5,000.00. Leach v. State (record) (Fla.), 132 So. (2d) 329.

Murder in the first degree is punishable by death. Murder in the second degree is punishable by imprisonment in the State Prison for life, or for any number of years not less than twenty years. Murder in the third degree is punishable by imprisonment

in the State Prison not exceeding twenty years. Manslaughter is punishable by imprisonment in the State Prison not exceeding twenty years or imprisonment in the County Jail not exceeding one year, or by fine not exceeding $5,000.00. Whenever the punishment is prescribed to be fine or imprisonment (whether in the State Prison or County Jail) in the alternative, the Court may, in its discretion, proceed to punish by both fine and such imprisonment. Roberts v. State (record) (Fla.), 164 So. (2d) 817.

§ 642. Recommendation of Mercy.

For cases again giving the 6th instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504; Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Baugus v. State (record) (Fla.), 141 So. (2d) 264.

Should you find the defendant guilty of murder in the first degree as charged in the indictment, a majority of your number may in your verdict recommend him to mercy, which recommendation will have the effect of fixing the penalty of his offense at imprisonment for life; but any verdict as to his guilt or innocence must be concurred in by each of you. In such event, to the form of your verdict, as hereinbefore instructed, just after the words, "So say we all," you add the words, "and a majority of the jury recommend him to the mercy of the Court." Land v. State (record) (Fla.), 156 So. (2d) 8.

Should you find the defendant guilty of murder in the first degree, a majority of your number may, in your verdict, recommend him to mercy, which recommendation will have the effect of reducing the penalty of his offense from death to imprisonment for life; but any verdict as to his guilt or innocence must be concurred in by each of you. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

Any verdict, whether of guilt or acquittal, must be concurred in by each and all of you, but in the event you find the defendants, or either of them, guilty of murder in the first degree, a majority of your number have the right to recommend them, or either of them, as the case may be, to the mercy of the Court, which recommendation will have the effect of reducing the penalty provided for such offense from death to life imprisonment. The penalty fixed by law for the offense of murder in the first degree is death unless a majority of your number recommend the defendant or defendants, as the case may be, so convicted, to the mercy of the court. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

Under the law of this State, if you convict either defendant,

you may in your verdict recommend him to the mercy of the Court or to executive clemency. Such a recommendation, unless you find the defendant guilty of murder in the first degree, does not necessarily bind the Court or the Governor, but it is advisory and would be persuasive. Should you find either defendant guilty of murder in the first degree, and a majority of your number in your verdict, recommend him to mercy, this recommendation will have the effect of reducing the penalty of his offense from death to imprisonment for life; but any verdict as to his guilt or innocence shall be concurred in by each of you. Roberts v. State (record) (Fla.), 164 So. (2d) 817.

HUSBAND AND WIFE.

§ 643. Prosecution for Withholding Support.

§ 644. —— In General.

Section 88.04, F. S. '53, cited in note to this section in original edition, was repealed by Fla. Laws 1955, ch. 29901, § 31.

INDEPENDENT CONTRACTORS.

Cross Reference.

As to liability for negligence of independent contractor performing highway construction work, see Streets and Highways, §§ 1023a-1023b(3).

§ 656. Liability of Employer for Acts of Independent Contractor.

§ 657. —— In General.

In order to explain the theory of Jerry Vaughn's claim against Barth Construction Company it is necessary to explain the liability or nonliability of an employer for the negligent act of his employee and/or independent contractor. The general rule is that the employer is liable for the negligent act of his or its employee done within the performance of the duty of the employer. This is because it is presumed that the employer retained authority and control over the manner, means and method by which the work is to be performed, but no such liability exists where the employer merely engages another as an independent contractor to do particular work, but retains no right or power

to, and does not, direct or control the manner, means or method by which the result is to be accomplished. Vaughn v. Smith (record) (Fla.), 96 So. (2d) 143.

§ 658a. —— Where Employer Retains Control Over Portion of Independent Contractor's Work.

It has been determined through previous hearings in this case that in hauling gravel to Gulf Stream Realty Corporation premises for Barth Construction Company, one of the defendants, Nathan R. Cannon, was acting as an independent contractor. The Court instructs you that the previously stated rule that an employer is not liable for the negligent act of an independent contractor is not applicable as to any portion of the independent contractor's work over which the employer retains or assumes direction and control. Therefore, if you believe from the evidence that at the time of the accident Nathan Cannon was operating his truck under the direction and control of Barth Construction Company's employee, Claude Sanderson, and it has been established in this case that Claude Sanderson was a Barth Construction Company employee; and if you further find from the evidence that while so operating the truck under the direction or control of Claude Sanderson, Nathan Cannon negligently operated the truck so as to injure the plaintiff, then Barth Construction Company would be liable for any negligent operation of the truck by Nathan Cannon, that is at the time that Nathan Cannon was operating the truck in accordance with the direction or control of the Barth Construction Company employee, and if you further find that Claude Sanderson and Nathan Cannon negligently directed or controlled the truck so as to injure Jerry Vaughn, then the defendant Nathan Cannon and Barth Construction Company would be jointly liable to Jerry Vaughn for his injuries. Vaughn v. Smith (record) (Fla.), 96 So. (2d) 143.

§ 658b. —— Employer Retaining Control Not Relieved of Negligence by Independent Contractor Status.

The court further instructs you that the employment of Nathan Cannon as an independent contractor to haul rock to the construction job would not excuse the employer, Barth Construction Company, for its own negligence, if any. If you believe from the evidence that at the time of the accident Nathan Cannon was driving his truck in accordance with the direction and control of Claude Sanderson, and that Claude Sanderson negligently directed Nathan Cannon to operate the truck in

such a manner or direction whereby the truck ran into or over Jerry Vaughn, then Barth Construction Company would be liable to Jerry Vaughn for his injuries. Vaughn v. Smith (record) (Fla.), 96 So. (2d) 143.

§ 658c. —— General Contractor Under No Duty to Assume Control Over Independent Contractor.

I charge you that there is no duty upon a general contractor, such as defendant Barth Construction Company in this case, to assume direction and control over the manner in which an independent contractor, such as defendant Cannon, performs the work he has contracted to do. In fact, the term "independent contractor" denotes or means that the employer has no right or control over the manner in which the work is to be done. Vaughn v. Smith (record) (Fla.), 96 So. (2d) 143.

INDICTMENTS AND INFORMATIONS.

§ 660a. Prosecution Separate Where Defendants Are Charged in Same Indictment.

§ 659. Indictment or Information Not Evidence of Guilt.

For cases again giving the 3rd instruction in this section in original edition, see Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Albano v. State (record) (Fla.), 89 So. (2d) 342.

The fact that the defendant was indicted does not remove the presumption of innocence nor is it to be construed by you as evidence of guilt. Larry v. State (record) (Fla.), 104 So. (2d) 352.

Gentlemen, I now desire to explain the material allegations of the indictment upon which the defendant is being tried. And right here let me say that the indictment in this case is a mere formal charge, and is not in itself any evidence against the defendant. These are the material allegations of the indictment: That one Raymond Alexander Schneider did, in the County of Palm Beach and State of Florida, on the 28th day of July, A. D., 1961, unlawfully and from a premeditated design to effect the death of one Roger S. Hendry, did kill and murder said Roger S. Hendry in said County by shooting him with a pistol. Schneider v. State (record) (Fla.), 152 So. (2d) 731.

I charge you that indictment by a grand jury is the method prescribed by law for commencing prosecution of an individual for any capital offense, but the finding of the indictment and the fact that these defendants were indicted by a grand jury is not evidence of their guilt. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

For your information, Gentlemen, an information is a formal document that is used in this Court of Record to institute a charge against a person based on probable cause, it is under oath, and this information in and of itself is not evidence, it is not proof of anything, it doesn't prove a thing in the world, but it does set out sufficient allegations to charge a person with the violation of one or more criminal statutes. And in this particular case, as I have indicated to you, you have for your consideration just the first count of this information. Carter v. State (record) (Fla.), 155 So. (2d) 787.

Neither the indictment nor the plea of not guilty is to be considered by you as evidence. Neither is either to be allowed by you to influence you in any way in arriving at your verdict. Brown v. State (record) (Fla.), 124 So. (2d) 481.

§ 660. Conviction of Lesser Offense Than That Charged.

The defendant in this case is charged with unlawful homicide by indictment found and presented in this Court by a grand jury. This indictment charges the defendant with murder in the first degree in the killing of a human being whose name was Joe H. Driggers. However, the indictment includes all degrees of unlawful homicide and manslaughter. To this indictment the defendant has entered his plea of "not guilty." Thus the issue which you as jurors, must determine is whether or not the defendant is guilty of unlawful homicide under either of the definitions which are contained in the law. Brown v. State (record) (Fla.), 124 So. (2d) 481.

Now, under the indictment in this case, the defendant may, if evidence warrants it, be convicted either of murder in the first degree, or murder in the second degree, or murder in the third degree, or manslaughter, or be acquitted. If you convict him of an unlawful homicide, you must say in your verdict of what degree of homicide you convict him. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

§ 660a. Prosecution Separate Where Defendants Are Charged in Same Indictment.

In this case both defendants are charged in the same indictment. However, the prosecution is separate as to each defendant, and if you have a reasonable doubt as to the guilt of either of the defendants you must give the benefit of such reasonable doubt to the defendant as to whom you have it. You may convict one and acquit the other, convict both, or acquit both, as you shall find from the evidence. Roberts v. State (record) (Fla.), 164 So. (2d) 817.

INSANITY.

§ 669. Insanity as Defense to Crime Generally.

§ 670. —— In General.

I charge you, gentlemen, that section 917.02, Laws of Florida, provides, among other things, that when on a prosecution by indictment the existence of insanity on the part of the defendant at the time of the alleged commission of the offense charged becomes an issue in the cause, the Court may appoint one or more disinterested qualified experts, not exceeding three, to examine the defendant, and the appointment of experts by the Court shall not preclude the State or the defendant from calling other expert witnesses to testify at the trial. Everett v. State (record) (Fla.), 97 So. (2d) 241.

If a party commits an act denounced as a crime, while insane, the law does not hold him accountable, and he should be acquitted. If the party accused, at the time of committing the act, was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or about to do, or that it would be wrong to do it, he would be insane within the contemplation of the law, and should not be held accountable. But if at the time of committing the act the party possessed sufficient mental capacity to know right from wrong, to know the nature and quality of the act he was doing, or about to do, and that it would be wrong to do it, he is legally responsible for the act, even though he may have been at the time mentally weak, or even suffering from some other mental disorder or disease. If a person of sound mind commits an act which the law denounces as criminal, he cannot be excused on the ground that it was done under such an impulse of resentment, anger, hatred, or revenge as temporarily to dethrone the reason, as the law holds the person of sound mind, who acts criminally under such impulses, responsible. Leach v. State (record) (Fla.), 132 So. (2d) 329.

If the jury, upon a consideration of the whole evidence, have a reasonable doubt as to the sanity of a man charged with crime, at the time of the act, it is their duty to give him the benefit of such doubt, and to acquit him. Everett v. State (record) (Fla.), 97 So. (2d) 241.

This instruction appears in paragraph 68 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.

§ 670a. —— Burden of Proof.

If evidence is given tending to establish insanity, then the general question is presented to the jury whether the crime, if committed, was committed by a person responsible for his acts; and it then devolves upon the prosecution to prove beyond a reasonable doubt, every element of the crime, including the sanity of the person, because the legal presumption of his innocence ought to shield him from punishment unless and until it is clearly shown that he possessed sufficient reason to form a guilty intent. The burden of overthrowing the presumption of sanity and of showing insanity is upon the person who alleges it. If a reasonable doubt exists as to whether the defendant is sane or not, he is entitled to the benefit of the doubt, and to an acquittal. Everett v. State (record) (Fla.), 97 So. (2d) 241.

This instruction appears in paragraph 68 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

§ 670b. — Medical and Legal Insanity Distinguished.

There is such a thing as medical insanity, and there is also such a thing as legal insanity. That is to say, a medical expert may find in a subject a certain impairment of the mental faculties, or diseases of the mind, and from that standpoint would regard him as medically insane; but on the other hand, notwithstanding such medical defects, the law requires as a test of legal insanity, that unless such impairment of the mental faculties is of such a nature as to have prevented the defendant from knowing that he was doing a wrongful act, then in such case the defendant would be legally sane and legally responsible for his act. Land v. State (record) (Fla.), 156 So. (2d) 8.

§ 670c. — Moral Insanity Is No Defense.

Moral depravity or moral insanity, so called, which results not from any disease of the mind, but from a perverted condition of the moral system, where the person is mentally sane, does not exempt from responsibility for crime committed under its influence. Land v. State (record) (Fla.), 156 So. (2d) 8.

§ 671. —— Test of Criminal Responsibility.

For case again giving the instruction in this section in original edition, see Everett v. State (record) (Fla.), 97 So. (2d) 241.

§ 672. —— Presumption of Sanity.

Where a person is charged with a crime, the presumption of law is that such person was sane at the time of the alleged commission of the offense, and, in the absence of any evidence

to the contrary, the jury has a right to proceed on the presumption that sanity existed, but if, during the trial of the cause, evidence is adduced which tends to destroy such legal presumption of sanity and to show that a defendant was in fact insane at the time of the alleged commission of the act, or, if the evidence tends to raise a reasonable doubt in the minds of the jury as to whether he was sane or insane at the time of the alleged commission of the offense of which he stands charged, then such presumption of sanity no longer exists and the burden of proof is upon the State to establish by competent evidence, beyond a reasonable doubt, that such defendant was sane at the time of the alleged commission of the offense. Land v. State (record) (Fla.), 156 So. (2d) 8.

Now as the law presumes everyone sane and responsible, a question is, what is there in this case to show to the contrary as to this defendant's mental condition at the time of the commission of the act as alleged in the indictment if from the evidence in this case you believe beyond a reasonable doubt such act was committed. You are instructed that you are not warranted, as a jury, in inferring that a person is insane, from the mere fact alone of his committing a crime, or from the enormity of the crime, or from the mere absence of adequate motives for its commission, or from mere eccentricities or peculiarities of conduct, if the evidence shows that the accused knew what he was doing at the time and could distinguish between right and wrong. Land v. State (record) (Fla.), 156 So. (2d) 8.

Where a person is charged with a crime, the presumption of law is that such person was sane at the time of the alleged commission of the offense, and, in the absence of any evidence to the contrary, the jury has a right to proceed upon the theory that sanity exists. If, however, there arises from the evidence introduced by the State or by the defendants, or both, a reasonable doubt of the sanity of the accused, the presumption of sanity is overcome and the accused will be entitled to an acquittal, unless the State meets and overcomes this reasonable doubt arising in defendant's favor by evidence sufficient to convince you, beyond all reasonable doubt of the sanity of the accused at the time of the commission of the crime. If insanity of a permanent type or continuing nature, or characterized by an habitual or confirmed disorder of the mind, not temporary or occasional, is shown to have existed prior to the commission of the homicide, if one was committed, it would be presumed to continue up to and including the time the act was committed, unless that presumption is overcome by testimony sufficient to prove the contrary, beyond a reasonable doubt; but if partial insanity, that is, insanity not of a permanent type or continuing nature or characterized by an

habitual or confirmed disorder of the mind, but merely temporary and occasional, were shown to have existed before or after, or both before and after the homicide, if one was committed, then there would be no presumption of law that it existed at the time of the homicide; and in order to overcome the legal presumption of sanity in such case, it would be necessary for the evidence to show that insanity existed at the time of the homicide, or for it to show such facts bearing upon that question as would raise a reasonable doubt whether or not insanity existed at that time. Leach v. State (record) (Fla.), 132 So. (2d) 329.

Every man is presumed to be sane until the contrary is proved, and when insanity is set up by the defense, the burden of proof lies upon him to prove it. Everett v. State (record) (Fla.), 97 So. (2d) 241.

This instruction appears in paragraph 68 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.

Crimes can only be committed by human beings who are in a condition to be responsible for their acts. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state; hence the state may rest upon the presumption without other proof. The fact is deemed to be proven prima facie or to exist prima facie. Whoever denies this, or interposes a defense based upon its untruth, must prove it. Everett v. State (record) (Fla.), 97 So. (2d) 241.

This instruction appears in paragraph 68 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.

§ 675. —— Presumption That Insanity Continued to Time of Act.

If insanity of a permanent type or continuing nature, or characterized by a habitual and confirmed disorder of the mind, and not temporary or occasional, is shown to have existed prior to the commission of the act, it would be presumed to continue up to the commission of the act, unless the presumption be overcome by competent evidence. If, however, you find that insanity of a permanent type or continuing nature, or insanity characterized by a habitual and confirmed disorder of the mind, is not established from all the facts in this case, but that insanity of a temporary or occasional nature only is shown to have existed prior to the commission of the act, then this presumption of the continuance of such insanity does not exist. Everett v. State (record) (Fla.), 97 So. (2d) 241.

This instruction appears in paragraph 68 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.

§ 676. — What Jury to Consider in Determining Sanity.

You, gentlemen of the jury, are to determine from the evidence, whether at the time of the commission of the alleged offense, if from the evidence you believe such offense was committed, the defendant, James Matthew Land, had a sufficient degree of reason to know that he was doing an act that was wrong, whether at such time he was capable of distinguishing between right and wrong. If you believe from the evidence that he at such time had a sufficient degree of reason to know that he was doing an act that was wrong or that he was capable of distinguishing between right and wrong, you cannot acquit him upon the ground of insanity. But, gentlemen, if you have a reasonable doubt that he at such time had a sufficient degree of reason to know that he was doing an act that was wrong, or that he was incapable of distinguishing between right and wrong, it is your duty to acquit him upon the ground of insanity. Land v. State (record) (Fla.), 156 So. (2d) 8.

§ 677. —— Acquittal for Insanity Must Be Stated in Verdict.

If you are satisfied from the evidence that the defendant has committed the acts alleged at the time and place alleged and are satisfied of those facts beyond and to the exclusion of every reasonable doubt, but you have a reasonable doubt in your mind from the evidence in this case as to whether or not the defendant was sane or insane at the time of the commission of the offense, then you could return a verdict in the following form: "We, the Jury, find the defendant not guilty by reason of insanity. So say we all." Everett v. State (record) (Fla.), 97 So. (2d) 241.

If you should acquit the defendants, or either of them, on the ground of insanity, you should so state in your verdict. Leach v. State (record) (Fla.), 132 So. (2d) 329.

§ 678. Insanity as Defense to Homicide.

§ 679. —— In General.

In determining the question whether the defendants were sane when they killed Duke Delano Olsen, if you find from the evidence that they did kill him, you must determine from the evidence whether the defendants' minds were diseased at the time, and if so, whether diseased to that extent that the defendants did not know right from wrong, did not comprehend the nature and quality of their act, did not know it would be wrong to do it. If you should find from the evidence, beyond a reasonable doubt, that either of the defendants, at the time they killed Duke

Delano Olsen, if they did kill him, possessed sufficient mental capacity to know and appreciate the difference between right and wrong, to know and appreciate that it would be wrong to kill Duke Delano Olsen, and that they did know and appreciate these things, then you should not acquit on the ground of insanity. Leach v. State (record) (Fla.), 132 So. (2d) 329.

INSTRUCTIONS.

Editor's Note.—When a trial judge undertakes to define an offense for the conviction of which an accused might be sent to jail, it is the duty of the judge to instruct the jury on the law of the case and to cover each essential element of the offense charged. This responsibility includes the duty to advise the jury regarding lesser included offenses which the record will support. When the failure to do so is brought to the attention of the trial judge, it is error to refuse the charge. Goswick v. State (Fla.), 143 So. (2d) 817.

§ 682. Jury Must Accept Instructions as Correct.

In the trial of every jury case, the jury is the judge of the facts. You determine them for yourselves from the evidence. I, as Judge of the Court, have nothing to do with the determination of the facts. Nothing that I have said or done was intended as any indication of any views that I might have had. The judge's duty is to preside over the trial of the case, regulate the procedure, determine the legal questions, what is and what is not admissible in evidence, and to give you the law applicable to the facts, and it is your duty to take the law from me as Judge of the Court. Tampa Drug Co. v. Wait (record) (Fla.), 103 So. (2d) 603.

§ 685. And Requested Instructions Given Same Effect as Court's Own.

Gentlemen, in this case the State has requested some instructions, and the Court is granting these instructions, in one case I am not granting it, because I have already covered it in substance in what I have said in my instructions, but the requested instructions have the same weight and should be considered as the law in the case as well as any instructions the Court voluntarily gives you. I am going to give instruction number one as amended by the Court. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 685a. Cautionary Instructions.

§ 685b. —— Reaction or Opinion of Court.

I have tried in this case not to indicate in any way what my personal reaction to the evidence is; by any chance if some of

you know or think you know how I may feel about the case, disregard that. My views of the evidence of the case have no weight at all. You are the people to determine what the facts are. Don't let yourself be influenced in any way by any reaction of mine if such reaction should have become evident to you during the trial of the case. It is up to you to determine what the facts were. St. Petersburg Coca-Cola Bottling Co. v. Cuccinello (record) (Fla.), 44 So. (2d) 670.

It is not intended that any remarks or any particular instructions which the Court gives you indicate any conclusions of the Court or the Court's views on the facts involved in the case, as it is your province and yours alone to determine the facts. I also wish to caution you that you are not to take any particular charge given you and single it out and apply it to the case to the exclusion of all others, but you will take the law as contained in the entire charge, all of the charges, and not any single charge or group of charges, and apply the law of the entire charge as the law of the case, to the facts as you find them from the evidence presented to you from the witness stand. Chase & Co. v. Benefield (record) (Fla.), 64 So. (2d) 922.

§ 685c. —— Conduct of Attorney.

It is the duty of the attorneys here, as they see fit, to represent their clients. And it is the duty of the Court to see that this trial is conducted in accordance with the established rules. My remarks—let me say this—to Mr. Martin were no reflection whatsoever upon him. That is just a mannerism he has acquired, and something which this Court does not countenance with any attorney. There was no reflection intended on him, and even if it was, you couldn't consider it against his client whatsoever. He was merely performing his duty as he sees it, and there is not any reflection against his client nor any reflection against him, just applying the discretion of the Court in controlling the conduct of this case. Hughes v. State (Fla. App. 2nd Dist.), 103 So. (2d) 207.

INTOXICATING LIQUORS.

§ 690a. Duty of State Beverage Department.

You have been sworn to uphold the law, and it is your duty to do so. The State Beverage Department employees are likewise sworn to uphold the law, and it is their duty to enforce the beverage laws wherever they are being violated. Their duty is to determine if the beverage laws are being violated and to file charges in all cases where the evidence warrants such. Townsend v. State (Fla. App. 1st Dist.), 97 So. (2d) 712.

JURY.

§ 708. Function of the Jury.

First of all, the function of the jury is to try and determine the issues of fact. The issues of fact are those material allegations stated on one side and denied on the other by the written claims of the parties, previously filed in court, which we call the pleadings. The jury is the sole judge of the truth of the facts in issue. Your decision upon these facts must be based upon the evidence presented to you herein and upon this alone. You as jurors are to calmly, fairly, and dispassionately consider all of the evidence in the case and from it and from the law as given to you by the Court, arrive at your verdict. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

As to duty of jury in evaluating testimony, see Witnesses, §§ 1065-1076.

It is, of course, totally unnecessary for me to remind you, gentlemen of the jury, that yours is a grave and terrible responsibility. You are not responsible for what the law provides. That has been settled by the accumulated wisdom of the ages. Yours is the responsibility of determining from the evidence whether or not this defendant is guilty of the crime for which you have him in charge to determine. That you agree upon a verdict is important, both to the state and to the defendant, but not so important that any one of you should surrender an honest and conscientious conviction as to guilt or innocence derived from the evidence which you have heard during this trial. Irvin v. State (record) (Fla.), 66 So. (2d) 288.

You, as jurors, are to calmly, fairly and dispassionately consider all the evidence in the case, and from it, and from the law as charged you by this Court, arrive at your verdict. Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

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 think that your understanding, judgment and reason are well 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 proven to the exclusion of and beyond a reasonable doubt and it is your duty to convict. Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

You, as jurors, are to calmly, fairly, and dispassionately consider all the evidence in the case, and from it, and from the law as charged you by this Court, arrive at your verdict. You are not to be swayed from the performance of this duty by prejudice, sympathy or any other sentiment, but you must try this case fairly and impartially upon the evidence. Welch v. Moothart (record) (Fla.), 89 So. (2d) 485.

In the administration of justice, juries are entrusted with functions of supreme importance. They consider and weigh the evidence submitted, determine the credibility of the witnesses, and find from the evidence the facts upon which is based their verdict and upon which the Court passes its judgment. Everett v. State (record) (Fla.), 97 So. (2d) 241.

Gentlemen of the jury, a fair and impartial trial is absolutely essential to the due and proper administration of justice, and it is of prime importance that this truth be constantly borne in mind both by the juries and the presiding Judge. If the Courts are to retain the respect and the confidence of the people, and properly perform the important functions and duties and exercise the great powers invested in them by the Constitution, in accordance with its spirit and purpose, and carry out and perform the objects of their creation, then they must obey and abide by the constitutional command respecting fair and impartial trials. The Court and the juries must give to each and every case submitted to them for decision due, careful and conscientious consideration, basing their verdict and judgment only upon sworn, legal and credible evidence, uninfluenced by any other extraneous consideration. In the administration of justice, juries are entrusted with functions of supreme importance. They consider and weigh the evidence submitted, determine the credibility of the witnesses, and find from the evidence the facts upon which is based their verdict and upon which the Court passes its judgment. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

The attitude and conduct of jurors at the outset of their deliberation are of considerable importance. It is rarely, if ever, productive or good for a juror, on entering the jury room, to express emphatically his opinion or to announce his determination to stand unalterably for a certain verdict. When he does that at the outset he may hestitate late, because of a sense of pride, to recede from his announced position even though his fellow jurors show it to be wrong. Remember, gentlemen, that you are not partisans or advocates, but that you are judges. The quality of your service will lie in the verdict which you shall return and not in any opinion which a juror may entertain before he shall have considered and weighed the views and opinions of his fellow jurors. Bear in mind that you can and will make a definite contribution to the efficient administration of justice if you shall return a just and proper verdict. There will be no triumph of justice unless you shall find and declare the truth by your verdict. I suggest, therefore, that as you deliberate you recall the inscription above the bench, "We who labor here seek only truth." Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

It is your province, gentlemen of the jury, and yours alone

to pass on the disputed issues and questions of fact, as the factual aspects of the case are the exclusive problem of the jury, and it is the province of the Court to give you the law in charge to which you are to apply these facts as you may have found them in hearing them in the course of the trial and also any evidence that was introduced in the form of exhibits. Carter v. State (record) (Fla.), 155 So. (2d) 787.

The function of the Jury in the trial of a lawsuit is to try to determine the issues of fact. The issues of fact are those material allegations alleged on one side, and denied on the other side. La Porte v. Assoc. Independents (Fla.), 163 So. (2d) 267.

§ 709. Jury to Use Knowledge and Judgment of Everyday Affairs.

You are instructed that you may judge the speed or the manner of operation of the automobile from the physical facts and circumstances as stated in the evidence and such matters may be judged by you by the use of your common sense and everyday experience. Welch v. Moothart (record) (Fla.), 89 So. (2d) 485.

In weighing the testimony of any witness, you may consider the reasonableness or unreasonableness of his testimony as judged by your common sense and everyday experience. Any conflict or discrepancy as to material matters which you may find to exist in the testimony of the witness or the testimony of other witnesses whom you find to have testified truthfully and any corroborations in the testimony of witnesses whom you find to have testified truthfully. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

§ 710. Case Determined from the Evidence.

Your verdict should be based solely on the evidence produced at this trial. You should not be governed by passion, prejudice or sympathy, or by any motive whatever except the purpose to consider and weigh the evidence and decide the factual issues involved fairly, impartially and conscientiously. I do not mean that you should not be sympathetic with one who has lost, through death, his wife. It is only natural and human to be sympathetic with a husband who has suffered such a loss. I do instruct you, however, that you must not allow such sympathy to enter into your consideration of this case and to influence your verdict. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

In deliberating upon and endeavoring to reach a correct and conscientious verdict, you, the jurors, are required under the law to be guided solely by the sworn evidence in the case, to calmly and dispassionately weigh and consider it, uninfluenced by any impressions or opinions respecting the guilt or innocence

of the accused, and based entirely and exclusively upon such evidence. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

Gentlemen of the jury, you have now heard the evidence and the argument of counsel both for the State and for the defendants. It now remains for the court to give you the law in charge to which you are to apply the facts as you find them from the testimony before you, coming from the witnesses who have been sworn in the case. Leach v. State (record) (Fla.), 132 So. (2d) 329.

§ 711. And Jury Should Not Be Influenced by Prejudice, Sympathy, etc.

For cases again giving the 7th instruction in this section in original edition, see Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158; Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

A jury would not be justified in acquitting a defendant on account of the consequences to him or his family alone. They have nothing to do with questions of that kind. It is no defense that the consequences would be great to a defendant or his family. Neither would it be a defense that the party assaulted was not the proper kind of a man; that is to say, that he himself may have been a violator of the law. The law does not recognize defenses of that kind in cases of that character. You are to be governed by the evidence in the case, and your verdict is to be founded on the evidence. If the evidence convinces you beyond a reasonable doubt that the defendant is guilty of some one of the offenses charged in this indictment, under the law as you have received it from the court, then it is your duty to find him guilty, regardless of the consequences to him or his family; but if, on the other hand, the state has not proved that he is guilty of one of the offenses included in the indictment, it is the duty of the jury to find him not guilty. Lindsey v. State, 53 Fla. 56, 43 So. 87.

The presence of the defendant's family in court has nothing to do with the facts of this case, and in making up your verdict you should not permit their presence to have any influence whatever upon you. Day v. State, 54 Fla 25, 44 So. 715.

The court charges the jury to remain entirely away from any conversation between or with any individuals in relation to the case now on trial; and if anybody approaches you in connection with it I want you to let me know and I will do the balance. In order that you may understand fully why I caution you in this case so emphatically, it is proper for me to say that complaint has come to me of some outside influence said to be attempted to be worked upon some of the witnesses. I do not know what interests are especially concerned in this case, nor in any case. I am only

cautioning you gentlemen in this particular in order that you may understand the seriousness of the matter and govern yourselves with discretion. Walker v. State, 82 Fla. 465, 90 So. 376.

The court charged the jury that they must not only be absolutely free from improper influence, but they must conduct themselves so as to avoid any suspicion of improper influence; in other words, in language with which some of them were familiar, they must avoid the very appearance of evil. Walker v. State, 82 Fla. 465, 90 So. 376.

You are not to be swayed in the performance of this duty by prejudice, sympathy, or any other sentiment. You are the sole judges of the weight of the testimony and the credibility of the witnesses. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

§ 712. Juror Not to Yield Conscientious Convictions for Sake of Harmony.

Your verdict must be a unanimous verdict; that is, it must be concurred in by each and all of the jurors. Each juror should be guided and governed by his own independent judgment. I do not mean that he should not consider and weigh the views and opinions of his fellow jurors. I have already advised that he should do so. What I mean is that no juror should recede from and abandon his own independent judgment merely for the purpose of reaching some compromise verdict. Two forms of verdict have been prepared and will be handed you. You will use, of course, only the one form which shall express and evidence the verdict which you shall desire and intend to return. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 713. But Jury Should Agree on Verdict if Possible.

I want to give you this further charge before I send you back. I state merely that this case has occasioned a good bit of trouble and expense to the parties concerned and it is highly important both to the plaintiff as well as to the defendant that you should arrive at some verdict. You should arrive at a verdict if it is at all possible to do so. No juror from mere pride of opinion which may have been hastily formed or expressed should refuse to agree; nor, on the other hand, should he surrender any conscientious views founded on the evidence. It is the duty of each one of you, as jurors, to reason with your fellows concerning the facts with an honest desire to arrive at the truth with a view of arriving at a verdict. It should be the object of all of the jury to arrive at a common conclusion and to that end to deliberate together with calmness, and it is your duty to agree upon a verdict if that be possible without a violation of conscientious convictions by any of you. So the court is going to send you back and ask you to deliberate further, in an earnest effort to reach a verdict. Williston v. Cribbs (record) (Fla.), 82 So. (2d) 150.

The attitude and conduct of the jurors at the outset of their deliberations are of considerable importance. It is rarely productive of good for a juror, on entering the jury room, to express emphatically his opinion or to announce his determination to stand irrevocably for a certain verdict. When a juror does that at the outset, he may hesitate later because of a sense of pride to recede from his announced position, even if it be shown to be fallacious. Remember, gentlemen, that you are not partisans or advocates, but you are judges. The final test of the quality of your services will lie in the verdicts you return, not in the opinion you may entertain before you listened to and considered the views and opinions of your fellow jurors. You should bear in mind that you can and will make a definite contribution to the efficient, judicial administration if you shall arrive at just and proper verdicts in such cases as you are selected to decide. There would be no triumph of justice unless you find and declare the truth of your verdicts. Shearn v. Orlando Funeral Home, Inc. (record) (Fla.), 82 So. (2d) 866.

You shouldn't act in a bullheaded manner when you go into the jury room. The Court will explain. It's your duty to make up your own mind. It's your mind and you should express your individual self. If, however, the jurors are in disagreement, then you should sound out your own mind, your own conscience, look inwardly and see and satisfy yourself that the position you have taken is correct. Ask yourself this question: Is it possible I may be mistaken—I am taking the wrong attitude? And after giving consideration to all those things, then you arrive at a final conclusion what your verdict really is in your own mind, then, you, of course, will hold to that verdict. But you should deliberate among yourselves and think over all phases of it and then make up your mind as to what your verdict is. Welch v. Moothart (record) (Fla.), 89 So. (2d) 485.

The Court will request that you deliberate further on this case and see if you cannot after you further consider arrive at a unanimous verdict. There are numerous reasons why you should do so, if you can. Your function and purpose are to act as triers of the facts and with the benefit of the law as given you by the Court to decide the case by rendering a verdict. If you are not able finally to agree, further proceedings and trial will be necessary together with additional expense to the litigants and a duplication of the time and effort of the court officials and of other jurors who will retry the case and of the attorneys, and it means added delay to the litigants in having their case disposed of. While those elements of expense, inconvenience, duplication of work and delay are not of too great importance when weighed against the right of parties to a fair and proper trial before a jury

there is inherent in our system of courts and trials the principle that cases should be tried and disposed of as expeditiously as our court trials and business will permit, and that a final decision should be rendered without prolonged or repeated postponements or undue delays. I do not mean to advise you by what I have just said that a juror or jurors who may be in the minority and who have a firm and lasting conviction that their opinion or decision is correct after hearing and considering views and arguments of other jurors should waive their convictions. Your duty under your oath requires that you not waive or surrender any such firmly fixed conviction which you have, but before a juror who finds himself in the minority or holding views different from other jurors comes to the conclusion that he has a firm and abiding opinion which he cannot change or surrender, he should have gone through the process of consideration of the matter, particularly the views of the other jurors to the extent and in accordance with the practice or rules and the law the court has laid down as appropriate. This case is a very important case, as the lawyers explained to you. It is an important case as an individual case to the litigants, of course, and it is important in the law in the sense that it is a serious and important type of case. On the other hand, this calls for the jury to make a verdict on a single factual determination of the valuation of the property to be fixed by you based on the evidence in this case and with the benefit of the charges which were given you previously and with these additional instructions, I want to have you consider the case further and see if it isn't possible for you to arrive at a verdict in this case. Rott v. Miami Beach (record) (Fla.), 94 So. (2d) 168.

The attitude and conduct of jurors at the outset of their deliberations are of considerable importance. It is rarely productive of good for a juror, on entering the jury room, to express emphatically his opinion or to announce his determination to stand unalterably for a certain verdict. When a juror does that at the outset, he may hesitate later, because of a sense of pride, to recede from his announced position, even if it be shown to be erroneous. Thomason v. Miami Transit Co. (record) (Fla.), 100 So. (2d) 620.

The jury should agree upon a verdict if it is possible to do so without violating your consciences, based upon the evidence. It is the duty of each juror to reason with his fellow jurors with an honest desire to arrive at the truth and with a view of arriving at a verdict. No juror, from mere pride of opinion, hastily formed or expressed, should refuse to agree with his fellows; nor, on the other hand, should he surrender any conscientious view founded on the evidence. The jury should examine any differences of

opinion there may be among them in a spirit of fairness and candor, and you should reason together and talk over such differences and harmonize them if it is possible so to do. You will, therefore, return to your jury room and make an honest effort to agree upon a verdict. Bates v. State (Fla. App. 2nd Dist.), 102 So. (2d) 826.

LANDLORD AND TENANT.

§ 714a. Duty of Landlord to Make Repairs.

§ 714b. —— In General.

Under this lease the lessors were obligated, pursuant to their covenant, as to outside repairs. The lessees were obligated to make such repairs as were required on the inside of the premises. Further, the lessees took the premises in the condition in which they were. It has been called to your attention on the lease here that there were certain defects noted and that they could have repaired them. They were entitled, if they chose to repair them, to have them in a condition, or rather to have them not affected by a lack of exterior repair or a lack of waterproofing. So that the result would not be when they tried to repair them they were unable to repair them. Your problem will be to determine whether or not there was a breach of the covenant of the lease for the outside repairs by the lessors in the respects charged, and whether or not, if that is so, it had any effect on the inside rooms, and to what extent that effect was. Rosen v. Needelman (record) (Fla.), 83 So. (2d) 113.

§ 714c. —— Landlord Not Liable for Condition of Premises When Tenant Takes Premises as They Are.

I charge you that the lessors would not be responsible in damages to the lessees because of the poor condition of the rooms as they may have been at the time that the lessees took this property over, even though those conditions might last until today. The lessees having taken it that way could proceed operating the hotel with the rooms the way they were. Rosen v. Needelman (record) (Fla.), 83 So. (2d) 113.

§ 714d. —— But Tenant Generally Not Required to Repair at His Own Expense and Seek Recovery from Landlord.

While it is true the law generally is that a person is not required to repair, to stop damages, to repair at his own expense and seek to get it from the lessor, this lease expressly not only authorizes the lessee to make the repairs, if the lessor fails and refuses to do so when required of the lessee, but it also expressly permits the lessee upon doing that to deduct it from the rent. Rosen v. Needelman (record) (Fla.), 83 So. (2d) 113.

§ 714e. —— Damages for Failure of Landlord to Repair.

§ 714e(1). In General.

Gentlemen of the jury, I further charge you that, if you should find in favor of the plaintiffs, then you are to return a verdict in their favor and against the defendants for all of those damages which are the direct, natural, and proximate result of the defendant's failure to perform under the lease agreement and which were within the contemplation of the parties at the time of the signing of the lease. The plaintiffs in this regard have claimed as their damages the loss of profits which they have suffered and incurred because of the defendant's breach and failure to repair. If you should find that such losses of profit are the direct, natural and proximate result of the defendant's breach and which were within the contemplation of the parties at the time of the signing of the lease, then I charge you that you are to return a verdict in the plaintiff's favor for all of such losses of profit as you feel the plaintiffs may have sustained, and for all of which damages the plaintiffs are entitled to recover. Rosen v. Needelman (record) (Fla.), 83 So. (2d) 113.

§ 714e(2). Duty of Tenant to Minimize Damages.

If the plaintiffs are entitled to damages suffered in connection with the operation of these premises, the plaintiffs would not be entitled to sit back and let that pile up year after year. They haven't done that because, as I explained to you from reading these dates, this case itself has been pending since December of 1952; but, nevertheless, the time has elapsed since that suit was filed. Under this lease the lessees—the plaintiffs—in the event of a failure or breach of covenant of this character would be entitled to make the repairs themselves and to deduct it from the rent. The injured party must do what he can to minimize the damages and cannot go an unreasonable time without doing something of that kind. Rosen v. Needelman (record) (Fla.), 83 So. (2d) 113.

§ 714e(3). Damages Awarded for Reasonable Period.

So under the circumstances I would say that if you find in this case that the lessors failed to perform their covenant with respect to these repairs, that they were given written notice of that defect, and that they, within the time which we expected of them to comply with that request, failed to do so, then you would be entitled to find in favor of the plaintiffs and to award them damages of the character sought by them for certainly a reasonable period which, since the court must fix the limits of such a reasonable time, I would say would be at least through an entire year's season; but it would appear to me that under the law, if that was not accomplished within that season, that a party before going into another season should have minimized the damages in that respect, and the situation remains the same, and that still could be done. Rosen v. Needelman (record) (Fla.), 83 So. (2d) 113.

§ 714e(4). Damages for Loss of Profits by Lessee of Hotel Business.

The profits lost by a lessee of a hotel, whether those which were the immediate fruits of the business or those which were remote, if the contract was made with reference to them, are recoverable if they can be ascertained with reasonable certainty. The profits to be made out of a lease of a hotel in connection with the business thereof are within the contemplation of the parties to the lease. An injury to the hotel business consists mainly of a loss of profits, and, therefore, where a lessee conducts the business himself, it is competent for him to testify to the value of the business based upon the capacity of the hotel, the average number of guests, the rates charged, and the average daily profits. Rosen v. Needelman (record) (Fla.), 83 So. (2d) 113.

§ 714e(5). What Jury to Consider in Awarding Damages.

The law does not require impossibilities, and, therefore, does not require a higher degree of certainty than the nature of the case admits. Juries are allowed to act upon probable and inferential as well as direct and positive proofs, and when from the nature of the case the amount of damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all of the facts and circumstances of the case having any tendency to show damages, or their probable amount so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. Rosen v. Needelman (record) (Fla.), 83 So. (2d) 113.

LARCENY.

§ 716. Elements Generally.

Editor's Note.—Substitute for the state law reference as it appears after the 1st instruction in original edition, § 811.021, F. S. '63.

Larceny is defined to be the felonious stealing, taking and carrying away of the personal property of another without the owner's consent or knowledge and with intent to deprive the owner of his possession thereof. Hall v. State (record) (Fla.), 66 So. (2d) 863.

Felonious, as used in the definition of larceny, may be explained to mean that there is no color of right or excuse for the act and the intent must be to deprive the owner permanently of his property. Hall v. State (record) (Fla.), 66 So. (2d) 863.

Larceny is the taking and carrying away of the personal property of another by trespass with intent to deprive the owner of it permanently. Any personal property susceptible of ownership may be the subject of larceny. Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

A person who, with intent to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, takes from the possession of the true owner, or of any other person any money, personal property, goods and chattels, thing in action, evidence of debt, contract, or property, or article of value of any kind; steals such property and is guilty of larceny. Land v. State (record) (Fla.), 156 So. (2d) 8.

§ 717. The Taking.

§ 718. —— In General.

In the definition of the crime of larceny you find a requirement for a felonious intent, and you have already heard me state and define it, in the stealing, taking and carrying away of the personal property of another. There must be a movement of the property stolen, though it may be ever so slight, but there must be an actual taking into possession sufficiently to move to some extent that personal property which it is charged has been stolen. Hall v. State (record) (Fla.), 66 So. (2d) 863.

§ 723a. Larceny Where Property in Possession of One Though Legal Title in Another.

Larceny is the unlawful taking, stealing and carrying away of the personal property of another with the intent to deprive such

other person of his rights in or ownership of the property, and done with the unlawful intent to so deprive the owner. In that connection, the Court charges you that a person in the lawful possession, custody and control of personal property has such an interest in that property that it can be stolen from him by another, even though the legal title to the property might be in a third party. In other words, if you should find from the evidence in this case, with reference to these two tanks, that they were in the custody of L. W. Henderson and under his control and that the defendants unlawfully stole them, then you should find them guilty even though the legal title to the tanks might have been in some tank manufacturing concern or some distributing concern, because a person who has the custody of the property lawfully has such an ownership in it and right of possession thereto as to make it unlawful for another person to take it away from them. So that if you should find from the evidence in this case beyond a reasonable doubt that these defendants did unlawfully take, steal and carry away these two tanks described in this first count of the information, and if you should further find from the evidence that the value of them was Fifty Dollars or more, and if you should further find from the evidence that they were the property of or in the lawful custody of L. W. Henderson, then it would be your duty to find the defendants guilty under this first count of the information. The essential elements of larceny are an unlawful taking and carrying away, coupled with an unlawful intent to deprive the owner or the custodian of that property of his rights of possession or ownership therein. Olsen v. State (record) (Fla.), 75 So. (2d) 281.

§ 725. Larceny of Cattle.

§ 726. —— In General.

Proof of the property, that is, description of the property, which it is alleged has been stolen must be as stated in the information as to the matter of description of the goods, although such proof is not necessary as to quantity or the number of articles stolen. That is to say that the state must prove by competent testimony descriptions of these cattle reasonably close, close enough for identification by the information and to correspond with the information in all reasonable and usual respects as alleged. The number need not be proven just as stated in the information if you are satisfied that as much as one animal has been proven and identified in the state's testimony. As to proof of the ownership of the property alleged to have been stolen, it is sufficient if it appears to your satisfaction beyond a reasonable doubt that the party named in the indictment as the owner is actually the party who is its lawful custodian and entitled to its posses-

sion, care and management, and who has had the care and management of it even though the party may not have legal title to the property. Hall v. State (record) (Fla.), 66 So. (2d) 863.

As to possession of animals maliciously maimed as incident to larceny, see Animals, § 113b. As to possession of animals with mark fraudulently altered as incident to larceny, see Animals, §§ 113e-113f.

§ 729a. Larceny and Receiving, etc., Stolen Goods Separate and Distinct Offenses.

If you should find from the evidence beyond a reasonable doubt that the defendants, Victor S. Olsen and Alto L. Roberts, did unlawfully take, steal and carry away one acetylene tank and one oxygen tank of the value of Fifty Dollars or more of the property of L. W. Henderson or property in his lawful custody, and if you find that they did do that in Escambia County, Florida, at any time within two years prior to February 27th, 1953, and if you further find that they did so with the unlawful intent to deprive Henderson of his rights in the property, then you should find them guilty of grand larceny as charged in the first count of this information. On the other hand, if you should find that the defendants did not steal the property within the definition of larceny as I have given it to you, but that some other person stole it, and if you find beyond a reasonable doubt that the defendants did receive it from some other person who had stolen it, or that they did buy it, or that they did aid in its concealment, and if you further find that at the time they did so they knew that it was stolen property, then you should find them guilty of buying, receiving or aiding in the concealment of stolen property as charged in this second count. You cannot find the defendants guilty under both counts, that is to say, they could not be guilty of both larceny and receiving the same property, and so you must find them guilty either under the first or the second count. Now, you may find one defendant guilty under the first count of larceny and the other defendant guilty under the second count of receiving the property. In other words, that is to be determined from the evidence and of course you can find them both not guilty under both counts if justified by the evidence. So that if you should find both of them guilty of larceny, then you should find them both guilty under the first count. On the other hand, if you should find them both guilty of receiving the property or aiding in its concealment or buying it, then you should find them guilty under the second count and not under the first count. If you find one of them stole it and the other one received it, then you should find the one that you find stole it guilty under the first count and the one that you found guilty of receiving it guilty under the second count. In order to avoid confusion and because there are two defendants, the Court suggests that you bring in two ver-

dicts, one verdict applicable to the defendant Olsen, and the other verdict applicable to the defendant Roberts, and if you find the defendant Olsen guilty state in your verdict which count you find him guilty under, and the statement of finding him guilty under one count would automatically acquit him under the other, and the same would be true of the verdict as to Roberts. If you find him guilty under one of the counts be sure to state which of the counts you find him guilty under, and such statement would automatically acquit him under the other count. Olsen v. State (record) (Fla.), 75 So. (2d) 281.

§ 730. Possession of Recently Stolen Goods as Evidence of Guilt.

The unexplained possession of recently stolen property is sufficient basis for a verdict of guilty upon a charge of larceny of such goods. It is also the law that when a party is found in possession of goods recently stolen and directly gives a reasonable and credible account of how he came into such possession, or such an account as will raise a reasonable doubt in the minds of the jury who are the sole judges of its reasonableness, probability and credibility, then it becomes the duty of the state to prove that such account is false, otherwise there would be an acquittal. Hall v. State (record) (Fla.), 66 So. (2d) 863.

Any explanation given by the defendant as to the possession of recently stolen goods must be one that is reasonable and must be one that appeals to the reason of the jury. Hall v. State (record) (Fla.), 66 So. (2d) 863.

In connection with both the first count, which charges grand larceny, and the second count which charges that the defendants did buy or receive or aid in the concealment of stolen property, the Court charges you that where a person is found in the exclusive possession of goods and chattels which have been recently stolen the burden is upon such person to give directly a reasonable and credible account of how he came into such possession, or such an account as raises a reasonable doubt in the mind of the jury of such person's guilt. If such person does give a reasonable and credible account of his possession of the property, it then becomes the duty of the state to prove that the account is untrue. Such account must not only be reasonable but it must be credible also, that is to say, it must be worthy of belief or enough so as to raise a reasonable doubt in the minds of the jury, who are the sole judges of its reasonableness as well as of its credibility. If the defendants do give such an account of their possession of such property, then it becomes the duty of the state to prove such account is false beyond a reasonable doubt, and if the state so fails to prove such an account is false beyond a reasonable doubt the defendant should be acquitted. In other

words, you have a right to infer the guilt of the defendants if the evidence establishes that they were in the possession of recently stolen goods, unless they give a credible and reasonable account of their possession of the same. Olsen v. State (record) (Fla.), 75 So. (2d) 281.

The Court instructed the jury that the unexplained possession of recently stolen goods is sufficient basis for a verdict of guilty upon a charge of larceny of such goods. So it is the law that where a party is found in possession of property recently stolen and directly offers a reasonable and credible account of how he came into such possession or such an account as will raise a reasonable doubt in the minds of the jury, who are the sole judges of its reasonableness, probability, and credibility, then it becomes the duty of the state to prove that such account is false; otherwise, there should be an acquittal. If an explanation be offered on the part of the defendant, then the question of whether the explanation is reasonable and credible is one of fact to be considered by the jury in connection with all the other facts and circumstances submitted to them in the trial of the case. The court charged further that the account or explanation offered on behalf of a defendant who is alleged to have been found in possession of recently stolen property may be reasonable and highly plausible and yet if the jury do not believe it, they have the right to convict upon the evidence furnished by the possession of the stolen goods alone. Cone v. State (Fla.), 69 So. (2d) 175.

§ 731. Duty of Jury to Determine Value of Property.

§ 732. —— In General.

Editor's Note.—Substitute for the state law reference as it appears after the 1st instruction in original edition, § 811.021, F. S. '63.

LIBEL AND SLANDER.

§ 735. What Constitutes Libel.

§ 737a. —— Imputation That One Has Not Paid His Debts.

The Court instructs the jury that false words or utterances duly published imputing that the plaintiff did not pay his debts are actionable per se, that is, upon proof of such words. The plaintiff is not required by law to allege any special damages or prove any special damages before the jury. The law pre-

sumes injury to the plaintiff because of the publication of such words. Hartley & Parker, Inc. v. Copeland (record) (Fla.), 51 So. (2d) 789.

Plaintiff complains that on May 13th, 1949, defendants published of and concerning him the following libelous letter:

"W. S. Copeland, d/b/a Twin Pines failed to pay account of Hartley & Parker, Inc., Miami, invoice 4-28-49 of $98.49 and became delinquent May 13th, 1949.

"We have placed them on delinquent list."

and this was libelous in its nature as it was untrue, and charged upon and imputed to the plaintiff's insolvency, or conduct that would prejudice him in his business or trade, or be injurious to his standing and credit as a merchant or businessman, and would constitute a cause of action if it was published. Therefore, if you believe from the evidence that the defendants did, on or about May 13, 1949, publish of and concerning the plaintiff as a merchant in Fort Lauderdale, Florida, the said report, and that the matter before specified was false and calculated to have the effect as explained above, the defendants are liable to the plaintiff for damages unless you believe from the evidence in the case that said report was privileged. Hartley & Parker, Inc. v. Copeland (record) (Fla.), 51 So. (2d) 789.

§ 737b. What Constitutes Publication.

Publication as here spoken of is the preparation and delivery of a copy of an alleged libelous matter to some third person. To entitle the plaintiff to recover, it is not necessary to prove the issue or publication of numerous copies of said reports, and if you believe from the evidence that, at a time prior to the institution of this suit, the defendants prepared and delivered a copy of said report to the Director of the State Beverage Department of Florida, then there was a complete publication thereof in contemplation of law. Hartley & Parker, Inc. v. Copeland (record) (Fla.), 51 So. (2d) 789.

§ 738a. Necessity of Proving Malice.

The Court charges the jury that in order for the plaintiff to recover under the first count of the declaration he must prove to your reasonable satisfaction that the action of the defendant was prompted by malice; and if you find no evidence of malice on the part of the defendants in the filing of the report to the director of the State Beverage Department in Tallahassee, then your verdict must be for the defendants. Hartley & Parker, Inc. v. Copeland (record) (Fla.), 51 So. (2d) 789.

The Court charges the jury that if you believe from the evidence that the communication here involved was made without

actual malice toward the plaintiff, but was made by the defendants in good faith in the honest belief that they were reporting a true state of facts, then your verdict must be for defendants. Hartley & Parker, Inc. v. Copeland (record) (Fla.), 51 So. (2d) 789.

The Court charges the jury that if you find from the evidence that the report made concerning the plaintiff's allegedly unpaid account with the defendant, Hartley & Parker, Inc., was not filed with malice on the part of the defendants, your verdict must be for the defendants on count 1 of the declaration. Hartley & Parker, Inc. v. Copeland (record) (Fla.), 51 So. (2d) 789.

§ 739. Privileged Communications.

The Court charges the jury that where a communication is even qualifiedly or conditionally privileged, then there is a legal presumption that the communication was without malice. Hartley & Parker, Inc. v. Copeland (record) (Fla.), 51 So. (2d) 789.

The law imposes a duty on all wholesale liquor dealers to report retail liquor dealers who are delinquent in payment of their accounts, but in this case plaintiff was not delinquent in his account with defendants at the time defendants reported plaintiff as delinquent to the Director of the State Beverage Department of Florida and for that reason the communication from defendants to the Director of the State Beverage Department of Florida is not privileged. Hartley & Parker, Inc. v. Copeland (record) (Fla.), 51 So. (2d) 789.

The Court instructs the jury that in this case the plaintiff was not indebted to the defendants at the time the defendants reported plaintiff to the Director of the State Beverage Department of Florida as being delinquent in payment of his account and since plaintiff was not delinquent in his accounts with defendants, there was no duty on the part of defendants to report plaintiff to the Director of the State Beverage Department of Florida and under these circumstances the communication from defendants to the Director of the State Beverage Department of Florida was not privileged. Hartley & Parker, Inc. v. Copeland (record) (Fla.), 51 So. (2d) 789.

§ 741. Damages.

If you find that the article was published recklessly and without any investigation and is untrue, you may also award as other damages to prevent a repetition of the offense what are known as punitive or vindictive damages which in your judgment you may think proper. You are to judge of this question of damages fairly and temperately, without passion, as businessmen

or reasonable citizens. You are not obliged, if you so find that he was damaged, to allow any punitive damages whatever. That is a matter which under the law rests in your sound discretion and is to be guided largely by what you think are the requirements of justice in preventing a repetition of this kind of thing if you find it was wrong. Hartley & Parker, Inc. v. Copeland (record) (Fla.), 51 So. (2d) 789.

Erroneous Instruction on Punitive or Exemplary Damages.—In an action for damages for libel, instead of instructing the jury as to their right, in the exercise of informed discretion, to find for the plaintiff for punitive damages, the court instructed the jury, "If you should find for the plaintiff in this case, you have the duty also of finding that the plaintiff is entitled to recover punitive damages", and gave them to understand that the only check on their unbridled power to award such damages was the limit plaintiff had set in the petition. In reversing, the court said that on another trial the jury should be carefully instructed in regard to punitive damages: that they may, not that they must, award them; and that while the award is within their discretion, this discretion is not an unbridled, but a sound, one to be exercised on considerations of what, under the evidence, would be a reasonable and proper verdict. Crowell-Collier Pub. Co. v. Caldwell, 170 F. (2d) 941.

If you find from the evidence that the plaintiff is entitled to recovery in this action, it will then be your duty to assess the amount of damages which, in your judgment, he should recover. In assessing such damages you may take into consideration any mental suffering produced by the publication of the words contained in the report to the Director of the State Beverage Department of Florida on May 13, 1949, if you find from the evidence that any such suffering has been endured by plaintiff, and the injury, if any, to the plaintiff's character and reputation, which the evidence shows he has sustained as a proximate result of the publication of the alleged words and you should assess plaintiff's damages at such a sum as in your judgment will compensate him for an injury sustained as the proximate result of defendant's wrongful conduct as alleged in the complaint and as shown by the evidence in the cause. Hartley & Parker, Inc. v. Copeland (record) (Fla.), 51 So. (2d) 789.

LOGS AND LOGGING.

§ 747a. Damages Recoverable by Assignee of Timber Contract.

You will find for the plaintiff the sum of $125.00, which was the amount which plaintiff's assignor, Mason, paid to the Walton Land and Timber Company for the privilege of cutting the timber upon the lands described in the declaration. And the court being of the view that, while the plaintiff can recover no

more than Mason would have been entitled to recover under the contract which was entered into between Mason and Walton Land and Timber Company, yet the plaintiff, Long, is entitled to recover all such sums as Mason would have been entitled to if he had not assigned, but if he himself had acted in the way in which Long acted in attempting to carry out the contract and had taken the same steps in cutting the timber upon the lands that the plaintiff Long has taken in cutting the timber on the lands described in the declaration. Walton Land & Timber Co. v. Long (record), 135 Fla. 843, 185 So. 839.

There is evidence before you as to certain sums paid in satisfaction of a certain trespass upon the land [by plaintiff assignee] to the United States government. That is not the measure necessarily of the other item of damage, aside from the $125.00 regarding which I have already instructed you, which may be allowed to the plaintiff, but you may not allow the plaintiff any more than the amount which was paid to the United States of America in satisfaction of the trespass claim by the United States of America, in determining the amount to be allowed the plaintiff, Long, for reimbursement for that item. He is not permitted to settle with one claiming a trespass upon the land upon a basis of agreement made between himself and the owner or owners of the land, but will be confined to the measure of damages which would be allowed to the owner or owners of the land under a simple trespass, where innocently committed, and the measure of damage in such case is the market value of the logs or timber upon the land after it was cut and before it was manufactured into lumber, that is, the government, for an innocent trespass, would be entitled to claim at the hands of the trespasser upon its lands the same as a private individual would have the right to claim, that is, the market value of the property which had been taken from the land trespassed upon; and you will allow to the plaintiff as a reimbursement for the amount which he paid to the United States of America the market value at the time of the alleged trespass upon such lands of the trees as cut and felled upon the land, and for any trees which were not removed from the land the amount which should be allowed is that which is shown to have been injury to the lands, that is, where the trees are cut and not removed from the land; and for the value to the owner of the land, then the measure of damage is the injury done to the land by the cutting of the trees, and, lacking all other evidence, the jury may consider the injury and determine that amount by determining the value of the timber, that is, whatever the owner of the lands can recover by the use of the timber which is left upon the land. Walton Land & Timber Co. v. Long (record), 135 Fla. 843, 185 So. 839.

In order that the jury may have no misunderstanding as to the measure of damage for a trespass which the government may claim against plaintiff assignee for having trespassed upon the land—where one is an unintentional or mistaken trespasser, the measure of damage in such case is the value at the time and place of its first conversion, that is, under such circumstances, the owner of the land has a claim for the value at the time and place of the first conversion of the property, which, of course, under certain circumstances, would be the moving of the timber off the land of the United States government. Walton Land & Timber Co. v. Long (record), 135 Fla. 843, 185 So. 839.

LOST INSTRUMENTS.

§ 749a. Necessity of Proof of Lost Deed to Establish Title.

§ 749. Sufficiency of Proof of Lost Deed.

Proof of such deed can be made by positive evidence and surrounding circumstances which are satisfactory to the jury; the proof must be clear and convincing, not only that such a deed existed, but that it was a valid deed, that it had all of the essential parts which a deed should have, such as the name of the grantor, the granting clause, the land conveyed, the consideration for which conveyance was made, words of perpetuity, as we call it—that is, that the grant should be to someone and the heirs, in this instance that it should have been to W. D. J. Collins and his heirs, and that it should have been signed by the parties who conveyed the land, in this instance by Mints; that it should have been sealed by a scroll or scrawl or some other seal; that it should have been signed in the presence of witnesses. When all of these things are proven to your satisfaction by a preponderance of the testimony, then you would be entitled to find that such a deed existed, but, if any one of these essential facts is not proven to your satisfaction by a preponderance of the testimony, you cannot guess at it, and say because somebody saw a deed it was probably a deed to this land from Mints to Collins. You must be sure, in other words, not beyond the possibility of a doubt, but you must be sure as reasonable men, from the evidence produced in court in this case, that is, from the preponderating weight of that evidence, that about the time it is claimed in the testimony—that is, between 1860 and 1866—there did, in fact, exist a deed of the character which I have described to you, making a valid conveyance of the land in controversy, from the entryman, Mints, to W. D. J. Collins, the ancestor of the parties who conveyed to the defendant in this suit. Cross v. Aby, 55 Fla. 311, 45 So. 820.

See generally, Deeds (original edition).

§ 749a. Necessity of Proof of Lost Deed to Establish Title.

The mere fact, if it be a fact, that W. D. J. Collins paid taxes on the land in controversy, or that he claimed to own it, or that he cut logs or timber from it, or that the land was reputed in the community to belong to Collins, or that he built and maintained a log camp upon it, or that a part of the property was set apart to his widow for dower, would not and does not give him title to the land. If plaintiffs have shown a paper title in themselves for the land, tracing such title from James P. Mints, then they are entitled to recover in this suit, unless the defendants have produced clear and satisfactory evidence that James P. Mints in his lifetime by a deed executed in proper form and containing operative words of conveyance conveyed the property to W. D. J. Collins, and that said deed had been lost. Cross v. Aby, 55 Fla. 311, 45 So. 820.

If you should find from the evidence that plaintiffs have produced conveyances in proper form by which the property in controversy was conveyed by the United States to James P. Mints, and that he died intestate leaving heirs, and that thereafter his heirs conveyed by proper conveyances the land in controversy to the plaintiffs or to persons who subsequently conveyed to plaintiffs, then you should find for the plaintiffs, unless the defendants have produced clear and satisfactory evidence that James P. Mints in his lifetime by a deed executed in proper form and containing operative words of conveyance conveyed the property to W. D. J. Collins, and that said deed had been lost. Cross v. Aby, 55 Fla. 311, 45 So. 820.

MASTER AND SERVANT.

I. LIABILITY OF MASTER TO SERVANT FOR PERSONAL INJURIES.

A. In General.

§ 759. Duty of Master to Provide Safe Place to Work.

§ 760. —— In General.

The master has a non-delegable duty to use reasonable care

to furnish the servant with a reasonably safe place to work and sufficient and reasonably safe tools and appliances. McArthur v. Cook (record) (Fla.), 99 So. (2d) 565.

B. INJURIES FROM DEFECTIVE MACHINERY OR APPLIANCES.

§ 768. Duty of Master to Furnish Reasonably Safe Machinery and Appliances.

§ 769. —— In General.

The rule is well settled that among the positive duties resting upon the master to the servant is the obligation to exercise such reasonable care as prudence and the exigencies of the situation require in providing the servant with safe machinery and suitable instrumentalities. McArthur v. Cook (record) (Fla.), 99 So. (2d) 565.

The Court instructs the jury that a master, in this case B. B. McArthur, is by law bound to furnish appliances and equipment to his employee as are reasonably safe and suitable. In order to discharge this obligation, he must see that the instrumentalities which he furnished are in proper condition; that is to say in the condition that will not endanger the safety of his employee. McArthur v. Cook (record) (Fla.), 99 So. (2d) 565.

The Court charged the jury that defendant McArthur was charged with being negligent and failing to furnish the plaintiff reasonably safe equipment, and by reason thereof, the cincture strap of the saddle broke, causing the horse plaintiff was riding to fall to ground on the plaintiff, injuring him. What constitutes failure to furnish reasonably safe equipment as would constitute negligence by Mr. McArthur? Equipment that is not reasonably safe must be considered unsafe or dangerous or harmful. But that condition alone does not constitute negligence. To be found guilty of negligence, the equipment must not only have been in an unsafe, dangerous or harmful condition, but of such character and degree that Mr. McArthur knew, or should have known, as a man of ordinary prudence and foresight, that any person using the saddle would likely be injured thereby; and Mr. McArthur had opportunity to correct the condition and failed to do so. In other words, for Mr. McArthur to have been guilty of negligence to the plaintiff, you have to find from the evidence that:

1. The saddle was in an unsafe, harmful or dangerous condition.

2. Mr. McArthur knew or should have known of this condition.

3. Mr. McArthur knew or should have known that anyone

using the saddle would likely be injured on account of its condition.

4. Knowing all this, Mr. McArthur failed to do anything to correct the condition of the saddle or prevent the likelihood of injury.

If any of these four elements are unproved, the defendant cannot be found guilty of negligence. McArthur v. Cook (record) (Fla.), 99 So. (2d) 565.

As far as Mr. McArthur's responsibility in this matter is concerned, you are only called upon to decide whether or not the saddle in question was in an unsafe, dangerous or harmful condition, and that Mr. McArthur or his foreman knew or should have known that it might cause injury to anyone using it in the course of their duties. McArthur v. Cook (record) (Fla.), 99 So. (2d) 565.

If you find from the evidence that the defendant, B. B. McArthur, by himself and through his employees failed to observe for the protection of plaintiff, Otis Cook, that care and vigilance as the circumstances justly demanded and that the want of such care was the direct cause of plaintiff's injury, then I charge you to find for the plaintiff and assess his damages accordingly. McArthur v. Cook (record) (Fla.), 99 So. (2d) 565.

§ 769a. —— Master Liable for Nonperformance or Negligent Performance by Servant to Whom Duty Delegated.

The duties of a master to furnish reasonably safe machinery and appliances and a reasonably safe place to work are of a personal nature, and if delegated by the master to another servant, no matter what his title may be, nor what his grade or rank in the master's service, the master will be responsible for their nonperformance, or for their negligent performance, notwithstanding the master has exercised due care in the selection of the agent to whom such duties are intrusted. McArthur v. Cook (record) (Fla.) 99 So. (2d) 565.

If you find from the evidence presented before you that the saddle was in fact defective and that the person who had the responsibility of saddling the horse in question knew of such defect and informed the foreman of such defect, then as a matter of law, the knowledge of the foreman is imputable to the master, in this case the defendant, B. B McArthur, and if you find all this to be true, then you must find for the plaintiff, Otis Cook. McArthur v. Cook (record) (Fla.), 99 So. (2d) 565.

MAYHEM.

§ 791a. In General.

If you should find from the evidence beyond a reasonable doubt that James Garfield Smith unlawfully, feloniously and with a malicious intent did maim and disfigure one Maud Smith, and in and upon the said Maud Smith an assault did make with his fist, and did then and there beat, bruise and wound the said Maud Smith, and did then and there put out and destroy the right eye of the said Maud Smith, having then and there a malicious intent to maim and disfigure the said Maud Smith, it will be your duty to find the defendant guilty as charged in the indictment. Smith v. State (record), 87 Fla. 502, 100 So. 738, reversed for insufficiency of the evidence.

If you find from the evidence that James Garfield Smith unlawfully and feloniously with a premeditated design to maim and disfigure one Maud Smith, an assault did make with his fist and did then and there strike, beat, bruise and wound the said Maud Smith, and did then and there with his fist put out and destroy the right eye of the said Maud Smith, and that he, the said James Garfield Smith, then and there had a malicious intent to maim and disfigure the said Maud Smith, you should find him guilty. If you should have any reasonable doubt as to that being established, you should give him the benefit of that doubt, and acquit him. Smith v. State (record), 87 Fla. 502, 100 So. 738, reversed for insufficiency of the evidence.

§ 791b. Malicious Intent Necessary Element of Offense.

In order to convict a person of the crime of mayhem, it is incumbent on the prosecution to prove that the injury was inflicted by the defendant maliciously and intentionally. Smith v. State (record), 87 Fla. 502, 100 So. 738, reversed for insufficiency of the evidence.

MUNICIPAL CORPORATIONS.

§ 798a. Liability of City for Negligence of Employee.

§ 798b. —— In General.

The plaintiff in this case brings this suit against the city of Miami upon the theory that certain treatment which resulted in injury to her was rendered by an employee or by employees of

the city through its operation of the Jackson Memorial Hospital. In order to find for the plaintiff you must find not only that the plaintiff received the mentioned treatment at the Jackson Memorial Hospital, but also that the treatment was administered by a person employed by the hospital, or who was at such time acting for the hospital, and necessarily for the city of Miami. If you are not satisfied by a preponderance of the evidence that the person treating the plaintiff was an employee of the hospital, or if you find that the plaintiff was treated by a physician acting upon his own behalf and not as an employee of the city of Miami, then your verdict would have to be for the defendant. Miami v. Brooks (record) (Fla.), 70 So. (2d) 306.

NEGLIGENCE.

I. GENERAL CONSIDERATION.

§ 799. What Constitutes Negligence.

§ 800. —— In General.

For case again giving the 1st instruction in this section in original edition, see Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158.

As to negligence of druggists, see Drugs and Druggists, §§ 451b-451c(3). As to negligence in connection with explosives, see Explosives, §§ 497b-497d. As to negligence of physicians and surgeons, see Physicians and Surgeons, §§ 871b-871e. As to negligence in preparation and processing of food, see Food, §§ 522a-522d. As to negligence of telegraph and telephone companies, see Telegraphs and Telephones, §§ 1026a-1026b(1). As to negligence of theater operator, see Theaters and Shows, §§ 1026c-1026d(3).

For case again approving 4th instruction in this section in original edition, see Berger v. Nathan (Fla.), 66 So. (2d) 278 (instruction found in record only).

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

Negligence, in law, is the doing of an act or the failure to do an act by a person which would result in harm to another person and which an ordinarily prudent man would not do. I instruct you that negligence in law is a breach of duty. It is the failure to exercise that degree of care in a given circumstance which a person of ordinary prudence would exercise in similar circumstances. It is neglect to perform or the improper or insufficient performance of a legal duty. Povia v. Melvin (record) (Fla.), 66 So. (2d) 494.

Negligence in the law is defined to be the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation or doing what such a person under existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the situation as they were known to exist or should reasonably have been known or expected to exist from other known or existing facts and circumstances by the party charged with the fault. 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.

Negligence, or what is or is not negligent, depends upon the circumstances of each particular case. No two cases, generally, are alike. Negligence has been described or defined as the want of due care that the circumstances require, and the failure or want of which results in injury or damage to another. That is what we call actionable negligence. Another definition that is commonly used as a yardstick is what would a reasonably prudent person do under similar or like circumstances, and the

failure to do which results in damage or injury to another; or you might state it in reverse—what would a reasonably prudent, cautious person not do under the same or similar circumstances, and the doing of which results in damage or injury to another. You will notice that I say "the doing or not doing of which results in damage or injury to another." For a person to recover, for you to recover against someone else for negligence, that person, the defendant, must have been guilty of negligence and that negligence must be the proximate cause of your injury. You can understand, of course, that you can do something that is negligent and careless—and all of us at one time do something like that—but nobody is hurt, nobody is damaged, and, of course, you are not responsible in damages; but if you are guilty of a negligent act and that negligent act is the proximate cause of some injury, then, of course, you are responsible to that party in damages. So, for the plaintiff to recover from the defendant, the plaintiff must prove by what we call a fair preponderance of the evidence that the defendant is guilty of the negligence charged and that that negligence is the proximate cause of the injury suffered by the plaintiff. Tampa Drug Co. v. Wait (record) (Fla.), 103 So. (2d) 603.

Negligence constituting a cause for civil action is failure to observe for the protection of another's interest such care and vigilance as the circumstances justly demand and the want of which causes such other's injury. It is negligence which proximately causes or contributes to causing an injury or damage which creates legal liability. South Fla. Hospital Corp. v. McCrea (record) (Fla.), 118 So. (2d) 25.

Gentlemen of the jury, in order that you may more intelligently understand your responsibility, I further charge you that negligence is the failure to exercise such care as circumstances demand. Negligence is the failure to observe, for the protection of another's interest, such care and vigilance as the circumstances justly demand and the want of which causes injury. Actionable negligence arises where injury to one person is proximately caused by the failure of another to exercise such reasonable care and diligence as should have been exercised under the circumstances in view of the relation of the parties to each other at the time. The negligent act or omission for which a party is liable in damages is one that proximately, namely, in ordinary natural sequence, causes or contributes to causing an injury to another, when no independent efficient cause intervenes. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

Negligence is a violation of a duty to use due care. It is doing what a reasonable and prudent person would not do, or not doing what a reasonable and prudent person would do in the circum-

stances. It is obvious, therefore, that the answer to the question of whether or not there was negligence depends in each case on the circumstances disclosed by the evidence. Acts or omissions which in some circumstances would be considered reasonable and prudent would be considered unreasonable and imprudent in other circumstances. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 801. —— Intent Immaterial.

I further charge you that a party is liable for all of the consequences that reasonably flow from or follow his or its wrongful act or omission whether actually contemplated or not, and if the wrongful act or omission is established, the liability extends to all of the consequences that naturally, proximately and reasonably flow from and follow such act. Rainbow Enterprises v. Thompson (record) (Fla.), 81 So. (2d) 208.

§ 801a. —— One Against Whom Liability Is Asserted May Investigate Claim and Afford Medical Attention Without Admitting Liability.

You are further instructed that a person or a corporation against whom a claim is asserted has the right to investigate said claim and to afford medical examinations and attention in order to determine whether or not a basis for said claim exists. The investigation of said claim and the furnishing of medical attention are not to be construed as an admission of liability or responsibility on the part of the person or corporation against whom the claim is asserted. Whether the liability or responsibility for the claim so asserted rests upon the person or corporation is to be decided by you by the evidence in the case and the law as given to you by the court. Thomason v. Miami Transit Co. (record) (Fla.), 100 So. (2d) 620.

§ 802. What Constitutes Ordinary or Reasonable Care.

§ 804. —— Dependent on Circumstances of the Case.

For case again giving the 2nd instruction in this section in original edition, see Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158.

§ 804a. —— Degree of Care as to Children.

§ 804a(1). In General.

Now, gentlemen of the jury, the law recognizes and provides for infants. Children are necessarily lacking in the knowledge of physical causes and effects which is usually acquired by and only through experience. They must be expected to act upon

impulses and childish instincts and must be presumed by all others to have less ability to take care of themselves than adults have. Therefore, gentlemen, in cases where the safety of children of tender years is involved, more care is demanded than toward adults, and all persons who are chargeable with a duty of care and caution must consider this and take precautions accordingly. When an infant is discovered on or dangerously close to a railroad track, reasonable care strictly commensurate with the demands and exigencies of the situation must be exercised to avoid injuring the child. Atlantic Coast Line R. Co. v. Ward (record) (Fla.), 81 So. (2d) 476.

As to degree of care toward children when operating automobile, see Automobiles, § 161c.

Gentlemen, the plaintiff has requested that the Court instruct you as to the law of Florida applicable to the degree of care required to be exercised in the custody of young children. I charge you, gentlemen, upon this matter, that the duty or degree of care is that of the ordinary, reasonable everyday prudent man. Parents are not required or expected to restrain children by force or to keep them on a leash but are, as I have said, required under our law to exercise ordinary everyday reasonable care for the safety of their small children. And it is further the law that where small children are in the care and custody of others than their parents, that the same degree of care as above stated applies. Atlantic Coast Line R. Co. v. Ward (record) (Fla.), 81 So. (2d) 476.

In this case, should you find that the defendants severally were guilty of negligence in any of the particulars set out in the complaint but you further find that the defendants have proven the allegations of their affirmative defense, that is, that the defendants have established by the greater weight of the evidence that the death of the minor child of plaintiff was caused solely by the negligence of the plaintiff in placing the child in the charge of Daisy M. Eures and that the said Daisy M. Eures negligently failed to watch over and protect the said minor child and negligently permitted the said minor child to wander out of the house alone and unprotected and onto and across the tracks of the railroad company in the path of an approaching train, and such negligence was the proximate cause of the injuries to and death of said minor child, then your verdict should be for the defendants and against the plaintiff. Atlantic Coast Line R. Co. v. Ward (record) (Fla.), 81 So. (2d) 476.

§ 804a(2). Negligence of Agent Imputable to Parent.

In this connection, you are instructed if you find from the evidence that the plaintiff placed his minor child in the care and

custody of the said Daisy M. Eures and if you further find that the said Daisy M. Eures negligently and carelessly failed to watch over and protect said minor child and negligently permitted said minor child to wander out of the said house alone and unprotected, then you are instructed that the said Daisy M. Eures was the agent of the plaintiff and that the plaintiff is responsible for such negligence on the part of the said Daisy M. Eures and if the negligence of the said Daisy M. Eures was the sole proximate cause of the injuries to and death of the said minor child, then such negligence would be imputable to the plaintiff in this case and plaintiff would not be entitled to recover against the defendants and, in such situation, your verdict should be for the defendants and against the plaintiff. Atlantic Coast Line R. Co. v. Ward (record) (Fla.), 81 So. (2d) 476.

§ 804b. —— Degree of Care in Sudden Emergency.

Where a person is confronted with a sudden emergency not caused by his own negligence, without sufficient time to determine with certainty the best course to pursue, then such person is not held to the same degree of judgment as would be required of him under usual or ordinary circumstances. This would apply to both parties. Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.

As to degree of care in sudden emergency when operating automobile, see Automobiles, § 161b.

§ 805a. Right of Action Dependent on the Giving of Notice.

I instruct you that the law requires that before a suit can be maintained against the city of Miami, the defendant in this cause, for an action such as is before you in this case, written notice of the plaintiff's claim must be served upon the city attorney of the city of Miami with specifications as to time and place of injury within 60 days after the date of receiving the alleged injury. In this case the evidence of the plaintiff indicates that the injury which she received did not become apparent until some time after it was inflicted; and it is my instruction that there was no duty upon the plaintiff to give notice to the city of her intentions to claim damages until such time as she became aware of the fact that she had been injured, as she alleges, by the treatment administered her. I instruct you further that upon discovery of the injury, that it was then and there the duty of the plaintiff, if she intended to make a claim against the city, to serve notice of such intention upon the city of Miami within 60 days from the time she became aware that such injury resulted from the X-ray treatment referred to. If you find that the plaintiff failed to give notice to the city within

the 60 days after such discovery, then I instruct you that your verdict must be for the defendant. Miami v. Brooks (record) (Fla.), 70 So. (2d) 306.

Section 93 of the charter of the city of Miami provides: "No suit shall be maintained against the City for damages arising out of any tort, unless written notice of such claim was, within 60 days after the day of receiving the injury alleged, given to the City Attorney with specifications as to time and place of injury." If you find that it did not become evident or manifest to the plaintiff that the damage or injury to her heel was caused by the X-ray treatment administered at Jackson Memorial Hospital until some time late in 1949, and within 60 days prior to the date of the notice given, to-wit, September 2, 1949, given to the city by letter, then you should find that she did give notice to the city of Miami within the required 60 days and is entitled to maintain this suit against the city of Miami. Miami v. Brooks (record) (Fla.), 70 So. (2d) 306.

§ 806. No Liability for Injury Resulting from Unavoidable Accident.

If you find from the evidence to your satisfaction that the plaintiff was injured, but it was just one of those accidental things that happen that nobody expects to happen, that nobody was instrumental for it happening, just one of those unavoidable things that happen called accidents; if you believe that was the basis for this injury to the plaintiff, just an accident, then you should find for the defendant. Southern Pine Extracts Co. v. Bailey (record) (Fla.), 75 So. (2d) 774.

As to unavoidable accidents in automobile cases, see Automobiles, § 225a.

The Court instructs the jury that if you believe the damages claimed by the plaintiff were occasioned as the result of an unavoidable accident, then it will be your duty to find a verdict for the defendant. Welch v. Moothart (record) (Fla.), 89 So. (2d) 485.

You are instructed, if you find from the evidence in this case that the plaintiff's damages, if any, were the result of an unavoidable accident, that your verdict should be for the defendant. An unavoidable accident is one which happens without the fault of any person, and is without or beyond one's foresight or expectation. When both parties exercise ordinary care, an injury resulting to one of them is, relative to them, the result of an unavoidable accident. Stated differently, the law recognizes there may be a pure accident for which no person is responsible. Thomason v. Miami Transit Co. (record) (Fla.), 100 So. (2d) 620.

§ 807a. But Act of God Applies Only to Extraordinary Events.

I further charge you that as respect to floods the term "act of God" applies only to such extraordinary events in nature that history of climatic variations and other conditions in particular locality affords no reasonable warning thereof; and an unusual and excessive rainfall is not a correct definition of an act of God. So, in this case, even if you find that the accident occurred after an unusual and excessive rainfall, but you do not find that such excessive rainfall in that locality was one that had never happened before, or was such that history of climatic variations and other conditions afford no reasonable warning that such could have happened, then such excessive rainfall would not excuse the defendant. Smith Engineering & Constr. Co. v. Cohn (record) (Fla.), 94 So. (2d) 826.

II. DUTY OF OWNER OR OCCUPANT OF PREMISES.

§ 808. Duty of Owner or Occupant to Invitee.

§ 809a. —— Invitee Defined.

In this case the plaintiff is known as an invitee, and an invitee is a person who is invited or permitted to enter or remain upon the land or premises for purposes connected with the business which concerns the owner. Rainbow Enterprises v. Thompson (record) (Fla.), 81 So. (2d) 208.

§ 813. Knowledge of Defective Condition of Premises.

§ 814. —— Necessity of Owner's Knowledge.

If it appeared that any person other than employees and agents of the defendant put the foreign matter on the floor liability on the part of the defendant would follow "only in the event that the plaintiff * * * established that the foreign matter had remained * * * for a sufficient length of time * * * for the defendant to have discovered the same by the exercise of ordinary care" and to have remedied the condition before the injured person fell. Carls Markets, Inc. v. Meyer (Fla.), 69 So. (2d) 789, holding that it was error to refuse to give the foregoing instruction.

If you find from the evidence in this case that the plaintiff, Angelina T. Moroni, was injured as a result of a slippery condition or a fallen object on the surface of the store floor, or a combination of both, it is the obligation of the plaintiff under such circumstances to show by a preponderance of the evidence that defendant knew or in the exercise of reasonable care should have known of the existence of this condition. In other words,

the plaintiff must show that the defendant acting through its agents, servants and employees had actual notice of the slippery condition or that the slippery condition had existed for such a long period of time that they should have known of its condition. If, however, you find from the evidence that the defendant or its employees created the condition then and there existing, then the defendant is presumed to have notice of such condition. Food Fair Stores of Florida v. Moroni (Fla. App. 2nd Dist.), 113 So. (2d) 275.

§ 815. Right of Invitee to Assume Owner Will Perform Duty.

I charge you that one lawfully walking upon a stairway to which she has been invited is not bound, at her peril, to discover and guard against an unsafe condition of the stairs she is traversing, if you find that one existed, even though had her attention been directed to such unsafe condition she could have readily avoided it. The plaintiff had the right to act upon the assumption that the stairway maintained for her convenience was in a reasonably safe condition for travel, and to conduct herself accordingly. Rainbow Enterprises v. Thompson (record) (Fla.), 81 So. (2d) 208.

III. PROXIMATE CAUSE.

§ 815a. In General.

I have charged you that before you can find the defendants liable in this case you must find that their negligence proximately caused the injury to the child. The term proximate cause merely means direct cause, and negligence is said to have proximately caused injury when it directly produces the injury without the intervention of any other efficient cause. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

§ 816. Negligence Must Have Been Proximate Cause of Injury.

Negligence is a proximate cause of an injury or loss when in ordinary or natural sequence it causes or contributes to causing the injury or loss without any intervening independent efficient cause. A negligent person is answerable for all the consequences which may directly and naturally result from his conduct. South Fla. Hospital Corp. v. McCrea (record) (Fla.), 118 So. (2d) 25.

Negligence must be proximate cause of the injury in order to entitle an injured person to recover for the negligence of another. A party, gentlemen of the jury, is liable for all the consequences that reasonably flow from or follow his wrongful acts, whether

actually contemplated or not and the wrongful act being established, the liability extends to all the consequences that naturally, proximately and reasonably flow from such act. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

The first question which you should decide is 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 and of the death of the plaintiff's wife. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 817. What Constitutes Proximate Cause.

§ 819. —— That Which Naturally Produces the Injury.

For cases again giving the 1st instruction in this section in original edition, see Williston v. Cribbs (record) (Fla.), 82 So. (2d) 150; Mangan v. Amos (record) (Fla.), 98 So. (2d) 340; De La Concha v. Pinero (record) (Fla.), 104 So. (2d) 25; South Fla. Hospital Corp. v. McCrea (record) (Fla.), 118 So. (2d) 25.

You are instructed that a party is liable for all of the consequences that reasonably flow from or follow its wrongful acts, whether actually contemplated or not, and if the wrongful act as hereinbefore described in these instructions is established by a preponderance of the evidence, the liability then extends to all the consequences that naturally, proximately and reasonably flow from such act. Miami v. Brooks (record) (Fla.), 70 So. (2d) 306.

A proximate cause is one which produces the result in a continuous sequence and without which the result would not have occurred. It is defined as that cause which naturally leads to or produces a given result, such a result as might be expected directly and naturally to flow from such cause; such a result as naturally suggests itself to the mind of any reasonable and prudent man as likely to flow out of the performance or non-performance of any act. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

I further charge you that a party is liable for all of the consequences that reasonably flow from or follow his or their wrongful acts, whether actually contemplated or not and if the wrongful act is established, the liability extends to all the consequences that naturally, proximately and reasonably flow from and follow such acts. Springer v. Morris (record) (Fla.), 74 So. (2d) 781; Thomason v. Miami Transit Co. (record) (Fla.), 100 So. (2d) 620.

This instruction appears in paragraph 27 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.

§ 820. —— Without Intervention of Independent Efficient Cause.

For case again giving the 3rd instruction in this section in original edition, see Williston v. Cribbs (record) (Fla.), 82 So. (2d) 150.

Gentlemen, I further charge you that in an action of this character, the negligence charged against the defendant must be the proximate cause of the plaintiff's injury before the plaintiff is entitled to recover. The term "proximate cause" means that which causes or produces a given result without the intervention of any other independent means or act, the doing of which in it itself produces the result without the aid or intervention of another act or means. Proximate cause means direct cause. It is the thing done or failure to do that which of itself produces the result without the aid or intervention of any other independent act or means. Therefore, if you believe from the evidence in this cause that the plaintiff was injured through the aid or intervention of some other independent act or means other than the defendant's negligence, if any, the defendant's negligence would not then be the proximate cause, 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.

The proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any efficient cause, produces the injury, and without which the result would not have occurred. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

A negligent act or omission is a proximate cause of an accident when there is no intervening, independent and efficient cause and when the negligent act or omission produces, or contributes to the production of the accident and without which the accident would not occur. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

IIIa. ASSUMPTION OF RISK.

§ 822a. Doctrine Stated.

Gentlemen, where a party has full knowledge and appreciation of a dangerous situation for which the defendant is responsible, voluntarily exposes himself to that danger and as a consequence is injured, the injured party is held in law to have assumed the risk and therefore to have consented that the defendant shall not be held liable for any injury resulting therefrom; even though the defendant may have been negligent in causing or permitting such dangerous condition to exist. Therefore, if you find from a preponderance of the evidence that the deceased so assumed the risk of the charged wire or wires that produced his death, his widow,

the plaintiff, cannot recover in this action. Williston v. Cribbs (record) (Fla.), 82 So. (2d) 150.

As to assumption of risk in automobile cases, see Automobiles, § 229a. As to assumption of risk involving electricity, see Electricity, § 473a.

The Court charges you that the mere fact that the plaintiff's deceased husband may have known that the place in question was dangerous would not of itself deprive the plaintiff of the right of recovery, if in point of fact the death of the plaintiff's husband proximately resulted from the negligence of the defendant, and if plaintiff's deceased husband while on said roof and inspecting and measuring it at the time and place in question, exercised such care and caution as a man of ordinary care and prudence in his calling as a carpenter would exercise under like circumstances; and although he may have thought there was danger, yet if the danger was not such as to threaten injury to him, or if he might have reasonably supposed that he could safely inspect such roof at said time and place by the use of reasonable care and caution, then he cannot be said to have been guilty of contributory negligence or to have assumed the risk, if in so doing he in fact exercised reasonable care and caution for his own safety. Williston v. Cribbs (record) (Fla.), 82 So. (2d) 150.

IV. CONTRIBUTORY NEGLIGENCE IN GENERAL.

§ 823. Contributory Negligence Defined.

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

Gentlemen of the jury, I charge you that it is the law of Florida that it is not contributory negligence to fail to look out for danger when there is no reason to apprehend any. Rainbow Enterprises v. Thompson (record) (Fla.), 81 So. (2d) 208.

Contributory negligence is such negligence on the part of the plaintiff as directly or proximately contributes to causing an injury. Williston v. Cribbs (record) (Fla.), 82 So. (2d) 150.

Contributory negligence is such negligence on the part of the plaintiff as appreciably contributes to the proximate cause of the injury. The negligent act or omission for which a party is liable is one that proximately, that is in ordinary, natural sequence, causes or contributes to causing an injury to another when no independent, efficient cause intervenes. Mangan v. Amos (record) (Fla.), 98 So. (2d) 340.

§ 824. Contributory Negligence Bars Recovery.

The defense of contributory negligence is a complete defense

to an action of negligence. Even though you should find that the plaintiff has sustained, by the rule, all the allegations of the complaint, but you likewise find that the deceased was guilty of negligence that contributed in any degree to his own injury, the law says he cannot recover, and that would mean that his widow cannot recover. The law is that when two parties are guilty of negligence, neither one can recover from the other, and it does not matter the degree that one may be guilty more or less than the other. In other words, you do not, as we do in some cases, but not in cases of this kind, apportion damages. You would not, for instance, say, "Well, both sides are equally guilty, the damages would be one dollar, so we will give him fifty cents," and divide it that way. You do not do that. Contributory negligence, if you find the deceased was guilty of it and it contributed to his own injury, is a complete defense to an action of negligence. Tampa Drug Co. v. Wait (record) (Fla.), 103 So. (2d) 603.

In connection with that I tell you that, under contributory negligence, Mr. Bryan's contributory negligence would not bar Mr. Helwig from recovery and Mr. Helwig's contributory negligence would not bar Mr. Bryan from recovery. In other words, the contributory negligence only bars that person who is guilty of negligence. Redwing Carriers, Inc. v. Helwig (Fla. App. 2nd Dist.), 108 So. (2d) 620.

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 fatal accident and you shall further find that 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 such accident, it will be your duty to return a verdict in the defendant's favor, even though you shall find that her negligence was less than that of the defendant. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 825. And Negligence Cannot Be Apportioned.

For case again giving the 1st instruction in this section in original edition, see Rainbow Enterprises v. Thompson (record) (Fla.), 81 So. (2d) 208.

If you find, from a preponderance of the evidence, that the plaintiff was negligent and that negligence on her part proximately contributed to any injuries she may have sustained, your verdict should be for the defendants, even if you believe that they, too, were negligent. The law does not permit you to determine which party was the most negligent. If you find, from a preponderance of the evidence, that the plaintiff and the defendants were negligent, and that negligence on the part of the

plaintiff proximately helped to produce or bring about injury to her, then the law leaves the parties where it found them, and neither has any right to recover from the other. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

§ 826. Plaintiff Must Use Ordinary or Reasonable Care for His Own Safety.

§ 828. —— Illustrations of the Rule.

You are instructed that the defendant is charged with the duty of exercising ordinary care to keep its premises in a reasonably safe condition for the purposes to which they were adapted. You are further instructed that it was the duty of the plaintiff to exercise a reasonable degree of care for her own safety and to see that which would be obvious to her upon the ordinary use of her senses. If you find that the alleged dangerous condition of the steps was not a hidden condition and that the plaintiff could have seen such condition by the exercise of ordinary care, and if you find that she failed to comply with such duty and if such failure was the proximate cause of her alleged injuries, she would not be entitled to recover in this action. Rainbow Enterprises v. Thompson (record) (Fla.), 81 So. (2d) 208.

V. LAST CLEAR CHANCE.

§ 833. Rule Stated.

For case again giving the 1st instruction in this section in original edition, see Parker v. Perfection Cooperative Dairies (Fla. App. 2nd Dist.), 102 So. (2d) 645.

The last clear chance theory of law is not to be limited to the actual knowledge on the part of defendant Ryan as to the peril of the plaintiff which existed, but the driver Ryan may be liable if he saw or by the exercise of ordinary care could have seen the peril of plaintiff Parker in time to have avoided the accident by the exercise of ordinary care but failed to do so. Parker v. Perfection Cooperative Dairies (Fla. App. 2nd Dist.), 102 So. (2d) 645.

§ 834. Opportunity to Avert Injury.

If you find that Albert Parker was negligent in driving the car as he was, and you find that his negligence continued on to the collision, then you will not apply the doctrine of last clear chance unless you find that after Emery Ryan actually saw the car, he had a clear opportunity to avoid the collision by the use of ordinary care. Parker v. Perfection Cooperative Dairies (Fla. App. 2nd Dist.), 102 So. (2d) 645.

VII. JOINT AND SEVERAL LIABILITY.

§ 840. In General.

For case again approving the 1st instruction in this section in original edition, see Peninsula Telephone Co. v. Marks, 144 Fla. 652, 198 So. 330 (instruction found in record only).

Gentlemen of the jury, I further charge you that in an action of this nature where there are two defendants, their liability is joint and several, and if you should find that the injuries complained of were caused by the negligence of both defendants, then you should bring in a verdict in favor of the plaintiff and against both defendants, but if you should find that said injury was caused by the sole negligence of Mr. White, the driver of the automobile belonging to Barco Motors, Inc., and that the defendant H. E. Wolfe Construction Company, Inc., was not negligent and that Mrs. Ellison did not contribute to said negligence then you should find in favor of the defendant H. E. Wolfe Construction Company, Inc., and against the defendant Barco Motors, Inc., but on the other hand, if you should find that said injury was caused by the sole negligence of H. E. Wolfe Construction Company, Inc., and that Mr. White was not negligent and that Mrs. Ellison had not contributed to the negligence of Mr. White, then you should find for the plaintiff and against the defendant H. E. Wolfe Construction Company, Inc., and against the plaintiff and in favor of Barco Motors, Inc. H. E. Wolfe Constr. Co. v. Ellison, 127 Fla. 808, 174 So. 594.

The Court further charges you that it is the law of this state that where the concurring and combined negligence of two or more persons results in an injury to a third person, the third person may recover from either or all of them. Williston v. Cribbs (record) (Fla.), 82 So. (2d) 150.

IX. EVIDENCE.

§ 842. Burden of Proving Negligence.

§ 844a. —— Where Circumstantial Evidence Is Relied Upon.

You are instructed that where circumstantial evidence is relied upon by the plaintiffs to prove their case, it must amount to a preponderance of all reasonable inferences that can be drawn from the circumstances in evidence to the end that the evidence is not reasonably susceptible to two equally reasonable inferences. South Fla. Hospital Corp. v. McCrea (record) (Fla.), 118 So. (2d) 25.

§ 845a. —— Though Presumption Exists That Persons Act Reasonably.

I instruct you that under the law of the State of Florida it is presumed unless shown to the contrary that a person acts reasonably so as to avoid injury or death to himself under the circumstances which then and there exist. Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.

As to presumption of due care on part of automobile driver, see Automobiles, § 220a.

§ 846. —— Nor Can It Be Inferred from the Mere Happening of the Accident or Injury.

The mere fact that an injury occurred does not carry with it any presumption of negligence. To entitle the plaintiff to recover damages from the defendants, she must not only have proven that she was injured, but must also have proven, by a preponderance of the evidence, that the defendant Knowles was negligent, and that negligence on his part was the proximate cause of injury to him. Unless you find that the plaintiff has carried this burden of proof, your verdict should be for the defendants. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

The fact that an accident occurred or the fact that the plaintiff's decedent was fatally injured—if such facts you find—either or both, taken alone without other evidence, facts and circumstances, is not evidence of negligence. 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.

I further charge you, gentlemen of the jury, that the fact that an accident occurred or the fact that plaintiff may have received damages, if such fact you find, either or both, taken alone, without other evidence, facts and circumstances, is not evidence of negligence. When accidents happen as incidents to reasonable use and reasonable care, the law affords no redress. If any damages of the plaintiff were not caused by the negligence of the defendant, then the plaintiff would not be entitled to recover for such. Smith Engineering & Constr. Co. v. Cohn (record) (Fla.), 94 So. (2d) 826.

I further charge you, gentlemen of the jury, that the fact that an accident occurred or the fact that the plaintiff, Joseph H. Mangan, may have received personal injuries, if such fact you find, either or both, taken alone without other evidence of facts and circumstances, is not evidence of negligence. When accidents happen as incidents to reasonable use and reasonable care, the law affords no redress. If any injury of the plaintiff was

not caused by negligence of the defendant, plaintiff would not be entitled to recover for such. Mangan v. Amos (record) (Fla.), 98 So. (2d) 340.

§ 846a. —— But May Be Inferred Under Doctrine of Res Ipsa Loquitur.

§ 846a(1). Doctrine Stated.

If you do not find any specific acts of negligence, the plaintiff is not necessarily precluded from a case here, because there is the additional theory, on which the plaintiffs are proceeding, of res ipsa loquitur. Now, as to that, I charge you that is a rule of evidence which has been discussed a great deal in the law, and a brief definition or reference to it is as follows: That is, that when a thing which causes damage is under the control and management of defendants, and the occurrence is such that in the ordinary course of things does not happen if those who have management use ordinary care, it affords reasonable evidence in the absence of explanation by the defendant that the occurrence arose from a want of ordinary care. Now, restated that means this: That if you find from a preponderance of the evidence in this case that the factors in which and from which the damaging element arose were in control of the defendants, and if you find that what happened under the circumstances was something which ordinarily would not be expected to happen unless there had been a want of care on the part of the persons in control, then that may be taken by you as evidence of negligence. Now, I am going to charge you that that is not in itself negligence per se. You are still the judge of the evidence. You are entitled to draw an inference of negligence; you are entitled to consider it as evidence of negligence, unless it is explained in the sense of some showing sufficient to satisfy you in connection with it on the part of the defendants that they were without fault and without negligence in connection with the occurrence which you may find caused the damage. McKinney Supply Co. v. Orovitz (record) (Fla.), 96 So. (2d) 209, holding that the trial court's instructions could not have been better tailored to the evidence.

As to doctrine of res ipsa loquitur in connection with the negligent discharge of firearms, see § 516.

I further charge you, if you find that the little girl was injured by the automobile in this case under the circumstances as portrayed by the evidence, that you have the right to infer from that that the driver was negligent in running over or against her, if you find that he did run over her or against her. I am not charging you that you must find he was negligent from that, but you have the right to infer if she was injured by a motor vehicle on her father's property, you have the right to infer from that

that the driver of the motor vehicle was negligent and it would then be up to the driver of the motor vehicle or the other defendant in the case to produce evidence to satisfy you he was not negligent under the circumstances. St. Petersburg Coca-Cola Bottling Co. v. Cuccinello (record) (Fla.), 44 So. (2d) 670.

If you find from the evidence in this case that the plaintiff, Naomi McCrea, was injured while confined at the defendant's hospital and that her subsequent disability developed as a result of the injury, it will then be your duty to determine whether her injury was caused by the defendant's negligence. Concerning the issue of whether the defendant was guilty of negligence which caused the injury, I instruct you that when a person is injured by some means under the exclusive control of another, and the occurrence would not have happened in the ordinary course of events, had proper care been exercised, then the occurrence itself creates a presumption that the injury may be the result of the defendant's negligence. South Fla. Hospital Corp. v. McCrea (record) (Fla.), 118 So. (2d) 25.

§ 846a(2). Reliance on Doctrine as Well as on Specific Acts of Negligence.

The plaintiffs, although there wasn't a great deal said about it, proceeded in this case on the theory of specific negligence; that is, charged acts of negligence, as well as relying on a doctrine which the attorney discussed considerably before you in their arguments, of res ipsa loquitur. So, I charge you that if you find from the preponderance of the evidence in this case, that the defendants were guilty of acts of negligence, then you would be entitled to find for the plaintiffs against the defendants for that negligence. If you do not find any specific acts of negligence, the plaintiffs are not necessarily precluded from the case here because there is an additional theory upon which the plaintiffs are proceeding, of res ipsa loquitur. McKinney Supply Co. v. Orovitz (record) (Fla.), 96 So. (2d) 209, holding that the trial court's instructions could not have been better tailored to the evidence.

§ 847. Burden of Proving Contributory Negligence.

§ 848. —— Burden on Defendant.

The law presumes, in the absence of contrary evidence, that one injured by another's negligence did everything a reasonable, prudent man would have done under the circumstances to protect his own safety. Hence, the burden of proving contributory negligence is cast upon the defendant, unless the plaintiffs' evidence shows it. If the evidence on the question is evenly bal-

anced, the fact of contributory negligence as a contributing proximate cause of the injuries is not established, and upon this issue your verdict should be for the plaintiffs unless the evidence shows that they were guilty of contributory negligence. The burden of proving such defense rests upon the defendant. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

In this case the defendant, Werner Dorigo, has filed a plea alleging and charging that the plaintiff, Everett J. Higbee, is guilty of contributory negligence. Such a plea admits the negligence of the defendant, Werner Dorigo, and is therefore a plea in confession and avoidance. Such a plea puts the burden of proof upon the defendant, Werner Dorigo, to prove that the plaintiff, Everett J. Higbee, was contributorily negligent, which means that the defendant has the burden of proof of showing not only that the plaintiff was guilty of negligence or the failure to exercise reasonable care, but also that such conduct proximately contributed to the injuries and damages claimed. Higbee v. Dorigo (record) (Fla.), 66 So. (2d) 684.

In this case the defense has filed a plea alleging and charging that the plaintiff is guilty of contributory negligence. Such a plea admits the negligence of the defendants and is therefore a plea in confession and avoidance. Such a plea puts the burden of proof upon the defendants to prove that the plaintiff was contributorily negligent, which means that the defense has the burden of proof of showing not only that the plaintiff was guilty of negligence, or the failure to exercise reasonable care, but also they have the burden of proof to show that such conduct was a factor and proximately contributed to the injuries and damages claimed. Springer v. Morris (record) (Fla.), 74 So. (2d) 781.

The plea of contributory negligence is a plea asserted by the defendant and it is a plea which the defendant has the burden of establishing. However, any contributory negligence which should be developed or reflected from either the evidence of the plaintiff or the defendant should be accorded to the defendant. The benefit thereof reflected from either side should be accorded the defendant. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

§ 849a. —— Defendant Entitled to Benefit of Proof of Contributory Negligence Regardless of Side of Case It Came In.

I charge you further that this evidence does not necessarily have to be introduced by the defendant, but if such contributory negligence appears from the evidence in the case, whether introduced by the plaintiff or the defendant, so as to show that she

was guilty of contributory negligence because of her omission to act or acting as she did under the circumstances, then the defendant would be entitled to the benefit of that proof, regardless of which side of the case it came in. 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.

And, if it appears from the evidence of the plaintiff and the defendant or either of them that she was guilty of contributory negligence under the law as outlined to you, because of having entered that automobile and riding with the driver thereof, knowing or chargeable with knowledge because of the information she had that the driver was under the influence of intoxicating liquor and being under the influence of intoxicating liquor contributed to the collision complained of, then, of course, the defendant would be entitled to a verdict no matter whether the case was proven by the evidence introduced by the defendant or by the plaintiff. 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.

NOVATION.

§ 855a. In General.

The plaintiff in this case, by its testimony, has shown that during the transaction, the plaintiff accepted a note from the Lakeland Brick & Tile Manufacturing Company and that this note was for the amount due upon the presses at that time. The machinery at that time, plus an open account, I believe it is not disputed that the open account was for the sum of $55.00, and it is the contention of the plaintiff that the note was taken, not in payment of the amount due on the presses, but merely as evidence of the indebtedness of that amount. It is the contention of the defendant that that note was accepted in payment of the original contract. In other words, it is the contention of the defendant that the existence of this note, which was an ordinary bank note—an unconditional promise to pay, together with the costs of collection, and providing for the payment of interest—I say it is the contention of the defendant that that was a novation—what is known in law as a novation of the contract, and by novation I simply mean that the note took the place of the original contract. That's the contention of the defendant in this case. Now, the only issue that you are to determine, is whether or not the plaintiff, by accepting that note, waived or abandoned or novated its original contract of retention of title to the presses

—that's the thing you are to determine, gentlemen. Now, you are to determine that from the facts and circumstances, and the only way you can determine it is to determine what the parties intended at that time, and in arriving at the intention of the parties, you have the right to take into consideration the action of the parties and what they did. Lakeland Silex Brick Co. v. Jackson & Church Co. (record), 124 Fla. 347, 168 So. 411.

§ 856. Presumption of Novation.

In arriving and interpreting their intentions, I charge you that when a party takes a paper of this kind—such as this note—and puts himself in a better position than he was at first, or it puts the purchaser in a worse position than he was at first, that the presumption is that it was a novation, although the question of novation—the burden of proving novation is upon the party asserting it. However, if you find as a matter of fact, that this note placed the defendant in a worse position than it was at first, or that it placed the plaintiff in a better position than it was when the first contract was made, then there is a presumption that it was a novation. It is not a conclusion then; it's a presumption that may be rebutted, and the burden of rebutting that presumption under those conditions is upon the plaintiff. Lakeland Silex Brick Co. v. Jackson & Church Co. (record), 124 Fla. 347, 168 So. 411.

§ 856a. What Jury to Consider.

Now, you gentlemen have heard the evidence; the correspondence has been read to you, and you are the judges of this; you are to determine from the facts and circumstances of this case whether or not the plaintiff and the defendant novated that first contract and accepted the note in payment for the machinery; if they did that, then your verdict should be for the defendant. If they did not, then your verdict should be for the plaintiff, and that's all there is to this case. It is boiled down to that one issue. Did the plaintiff and the defendant novate that contract when they accepted that note? If they did, find for the defendant; if they did not, find for the plaintiff. As I have instructed you, you are to find their intentions from the evidence as it has come to you from this witness stand and from the correspondence that has been introduced in evidence; from the acts and doings of the parties; their subsequent conduct—all these things are for you to determine from. Lakeland Silex Brick Co. v. Jackson & Church Co. (record), 124 Fla. 347, 168 So. 411.

§ 856b. Damages.

If you find for the plaintiff, you must find the value of the special interest that the plaintiff has in this property, that is, the

amount that is due to the plaintiff on this property; you must also find the value of the property, and if you find that the plaintiff is entitled to damages for the retention of the property, your verdict should state the amount, and I charge you as a matter of law that the only criterion that is possible for you to fix the amount of that damage is to first fix the value of the property and the lawful interest on that value as you fix it, from the date that the suit was instituted—June 25, 1934, to the present time. If you find for the defendant, the form of your verdict is simply, "We, the jury, find for the defendant, and that the defendant is entitled to the possession of the property described in the declaration". Lakeland Silex Brick Co. v. Jackson & Church Co. (record), 124 Fla. 347, 168 So. 411.

NUISANCES.

§ 856c. Keeping a Disorderly House.

§ 856d. —— In General.

If you find from the evidence beyond a reasonable doubt that the defendant, J. Q. Powell, at diverse times within a period of a year prior to the date of the filing of the information in this case, did unlawfully keep a disorderly house within the definition of those terms as I have given them to you, and that in said house he did cause and procure evil-disposed persons of evil name and conversation to come together at frequent intervals, and that he did permit and suffer persons to remain in said house drinking, tippling, cursing, swearing, quarreling or otherwise misbehaving themselves and that such act or acts constituted a public nuisance injurious to the public morals, health, convenience or safety within the definition of the words "public nuisance" that I have given you, then you should find the defendant guilty as charged, under this first count of the information. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

As to keeping house of ill fame, see Prostitution, §§ 881a-881i.

§ 856e. —— Disorderly House Defined.

A place to be a disorderly place is a disorderly place if the

keeper thereof permits evil-disposed persons of evil name and conversation to come together at frequent intervals over a substantial period of time or if the keeper of such place permits such class of people to remain there drinking, tippling, cursing, swearing or quarreling, or otherwise misbehaving themselves to the common nuisance of the neighborhood. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

A disorderly house within the contemplation of the law is a house in which people abide or to which people resort to the disturbance of the neighborhood or for purposes which are injurious to public morals, health, convenience or safety. Such a house must constitute a common or public nuisance to be a disorderly house. The physical characteristics of the house or place or premises are not material. It may be any place, building, or part of a building or it may be a single room or set of rooms or a dwelling house or a dance hall, so long as it has a measure of fixity and localization. Such a place in order to be a disorderly place must be a place of public resort or one to which the public or a class of the public are admitted. It is not necessary however, that the house or place be a public place as distinguished from a private place. The distinguishing characteristic is that it is such a place where the public, or a portion thereof, is admitted or invited by the operator. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

A place may be a disorderly place in two ways. First, it may be a disorderly place by the use to which it is put; and, second, it may be a disorderly place by the manner in which it is kept or operated. The use to which it is put will render it disorderly if it is such as is of necessity hurtful to the community. That is to say, it is a disorderly house because it is a common nuisance and the disorder must be such as will give it the character of common nuisance. Therefore, generally speaking, any mode or use will render a house disorderly which is of such a character as to injure or annoy the public, and which is of such frequent occurrence as to be termed habitual. Furthermore, it is essential that the disorder either annoy or injure the public generally, and it is not a disorderly house within the meaning of the law if the disorder is a nuisance to a few particular individuals or to one particular individual; that is to say, it must be a nuisance to a large portion of the public. This does not mean, however, that the entire public must be annoyed or disturbed to constitute a disorderly house. It is sufficient if the neighborhood generally or the passers-by on the highway are disturbed, because they constitute the public in that locality; that is to say, the neighbors in the neighborhood or the passers-by that travel the highway upon which the place is located or situated. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

§ 856f. —— Knowledge of Disorderly Use and Control of Premises Essential to Conviction.

Before the defendant could be convicted under this first count of the information the house or place must not only have been of the character that I have just described to you but it is also necessary that the defendant have knowledge of the disorder or improper use to which the house is put and that he have the management or control of the house or place. The gist of the offense is the keeping or managing of such a house to the public detriment. It is not necessary to convict the defendant of this offense that he be the owner of the place but he would be guilty of the offense if he had the control or management of the place. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

§ 856g. —— Disorderly Use Must Be Frequent, Customary, Common or Habitual.

The disorder or improper use of the place which will render it a disorderly house must be frequent, customary, common or habitual. It is not necessary, however, that the disorder or use be continued at all times for it is sufficient if it occurs at frequent intervals over a substantial period of time. A single instance of disorder is not sufficient to constitute the place a disorderly house. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

§ 856h. —— But Sufficient if One Kind of Disorder Charged Be Proved.

It is not necessary to constitute the first offense charged in the information that all of the kinds of disorder set forth in the information be proved by the state for the defendant would be guilty of the offense if the evidence established, beyond a reasonable doubt, that any one of the kind of disorderly acts or conduct took place in the house and at frequent intervals over a substantial period of time. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

§ 856i. —— Attempting to Prevent Disorder No Defense to Charge.

If the evidence establishes beyond a reasonable doubt that the character of the house was a disorderly house within the definition I have given you and if the evidence establishes beyond a reasonable doubt that the defendant either owned, managed or controlled such house and had knowledge of the disorder or improper use to which it was put, the fact that he might have tried to prevent disorder in the house would be no defense to the charge. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

OBSTRUCTING JUSTICE.

§ 856j. In General.

If you find from the evidence beyond a reasonable doubt, that sheriff Musgrove went to the defendant's place of business for the purpose of arresting a man who had committed a felony, and that the defendant resisted the sheriff by offering to do violence to his person, then it would be your duty to return a verdict of guilty. Goodman v. State (record), 132 Fla. 672, 181 So. 892.

As to resisting arrest, see Arrest (original edition). §§ 119-121.

PARTNERSHIP.

§ 861. Determination of Existence of Partnership.

The case is now proceeding against Silver Springs Fruit Company and J. C. Merrill. Mr. Merrill has filed a plea denying that there was ever any partnership between him and Mr. Smythe. Therefore, the question you are to determine is whether or not there was a partnership between Mr. Merrill and Mr. Smythe, or whether or not Mr. Merrill, individually, is responsible to the Silver Lake Estates Corp., for the fruit alleged to have been sold. If you believe, by a preponderance of the evidence in this case, that the Silver Lake Estates Corp., sold the fruit to Mr. Smythe and Mr. Merrill, or the Silver Springs Fruit Company—if you are satisfied by a preponderance of the evidence that that is true, then it will be your duty to find a verdict against Mr. Merrill and the Silver Springs Fruit Company for such an amount as the evidence shows you to be due to the Silver Lake Estates Corp. If you are not so satisfied, by a preponderance of the evidence, then it will be your duty to find a verdict for the defendant. Silver Lake Estates Corp. v. Merrill (record), 120 Fla. 467, 163 So. 7.

Gentlemen of the jury, if you find that from the evidence in this case that the defendant, J. C. Merrill, by his conduct or by his words induced the plaintiff, Silver Lake Estates Corp. to believe that he was interested in this partnership, or that he was acting as a partner of A. J. Smythe & Co., then, of course, the defendant would be bound by it. If there was no act or word on the part of J. C. Merrill upon which the plaintiff relied in making the sale, then, of course, he would not be bound by it. In order to bind the defendant, the plaintiff must have been induced to enter into the contract or agreement by some act or word on the part of the defendant. You will have to take the circumstances of the case from the evidence, as you have heard it, to decide whether or not such is true; and, before you can

find the defendant guilty, you will have to believe that the plaintiff relied upon the facts or statements made by J. C. Merrill, or some act on his part. Silver Lake Estates Corp. v. Merrill (record), 120 Fla. 467, 163 So. 7.

PHYSICIANS AND SURGEONS.

§ 871a. Performance of Operation by Surgeon Without Consent.

The general rule that a surgeon operates at his peril without first obtaining the consent of his patient or someone legally authorized to consent for him, is qualified in its application in Florida in cases of emergency or unanticipated conditions where some immediate action is found necessary for the preservation of the life or health of the patient, and it is impractical to first obtain consent to the operation or treatment which the surgeon deems to be immediately necessary. It has been said, too, that the rules of professional conduct of trained and expert surgeons must be fixed to reasonably fit complex modern conditions, and that such a surgeon, confronted by an emergency, must be permitted, after a fair and careful examination of the patient, to exercise his best professional judgment as to the necessity for immediate operation or treatment or anesthetic procedure without waiting for the consent ordinarily required. In such a case, where the emergency endangers the life or health of the patient, it is the surgeon's duty to do that which the case demands, within the usual and customary practice among physicians and surgeons in the same or similar localities, without the consent of the patient or his parents. Chambers v. Nottebaum (Fla. App. 3rd Dist.), 96 So. (2d) 716.

§ 871b. Liability for Malpractice.

§ 871c. —— In General.

Gentlemen of the jury, I charge you that this is what is known as a "malpractice" case. In order for a plaintiff to recover in such a case it is necessary for the plaintiff to show, by a pre-

ponderance of the evidence in the case that the defendant-physician did not exercise such care and diligence as is generally exercised by physicians of average skill and learning in the area in which the injury occurred, and that the failure to exercise this degree of skill directly or proximately produced the injury complained of. In other words, the gravamen or basis of the plaintiff's charge is negligence, and negligence on the part of a physician is not established unless it is shown by a preponderance of the evidence that he failed to exercise the care and diligence ordinarily and usually exercised by physicians of average skill and learning in the community where the injury occurred; and to entitle plaintiff to recover, the plaintiff must also establish by a preponderance of the evidence that such negligence on the part of the physician directly or proximately produced the injury complained of, and that such injury did not result from other causes beyond the control of the physician in the exercise of the degree of care and diligence to which the plaintiff was entitled under the law. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

If you find from the evidence that the defendants, Dr. Montgomery and Dr. Buchanan, were employed by the parents of the plaintiff, Cynthia Ann Stary, to render any necessary care in connection with the birth of Cynthia Ann Stary, and immediately thereafter, and to attend her as physician and surgeon; and that they entered upon and undertook such employment and did assume charge of any treatment which Cynthia Ann Stary might need; then Cynthia Ann Stary was entitled to receive from the defendants that degree of care, skill and attention which physicians and surgeons generally have and exercise in the community in which she was born, or in similar communities in like cases under the same or similar circumstances, where the same medical standards apply and the same facilities are available. And if you believe from the evidence that the plaintiff did not receive from the defendants such care, skill and attention, and that in consequence of not receiving the same, and as a proximate result thereof, suffered an injury, then you are instructed that the defendants are liable and you will render a verdict for the plaintiff and assess her damages claimed in the complaint. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

§ 871d. —— Degree of Care Required of Physician or Surgeon.

I charge you that it is not negligence for a physician to use a method which is generally recognized by the profession, or by one recognized school of thought in the profession, as a proper one. Nor is it necessary for a physician to use the method which

is most generally used if there are several approved methods, and he may use any of such approved methods in the exercise of due care. So, if you find from the evidence in this case that the defendants, or either of them, used a generally recognized method of restoring circulation to the arm of the child, or if you find that the method used was recognized by one school of thought in the profession as a proper treatment for the restoration of circulation, then I charge you that the defendants were not negligent in the selection of such method, even though there was some other treatment which also might have been employed, or even one which was more frequently used by members of the profession. It is the right and duty of the physician to select the treatment which he considers to be the most likely to produce a good result, and he cannot be held for negligence in selecting such treatment if it is generally recognized or admitted by one school of thought in the profession. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

I charge you that a physician or surgeon is bound to bring to bear upon the case only such skill or care as is ordinarily practiced by others of the same profession in a like situation, and it is the law that in determining what constitutes reasonable and ordinary care, skill and diligence, the test is that which physicians and surgeons in the same general neighborhood ordinarily have and exercise at the time in like cases. In this case I charge you that if the defendants were confronted with an unusual medical problem, one which has rarely been presented, and, if you believe from the evidence that the defendants exercised a bona fide judgment and their best skill under the circumstances and that the course which they followed would have been approved by other physicians in like communities under like circumstances in exercise of their best skill and judgment, then the defendants were not guilty of negligence, even if you find from the evidence that injury resulted from the treatment the infant received. The law is that a physician is not an insurer of the correctness of his judgment and, therefore, you cannot return a verdict against the defendants merely because some other course of treatment possibly, or probably, would have procured better results. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

I shall attempt to define for you the terms which I have used in outlining the duty owing by the physician to the patient in a case of this kind. I have stated that "negligence" in a case of this kind may be defined as a failure to exercise that degree of care and diligence generally and ordinarily exercised by a physician of average skill and learning in the area or community in which the injury occurred. And in this connection, it appears

from the evidence that defendants are general practitioners and not specialists in any particular field, including the field of obstetrics, and consequently their conduct should be measured by the degree of care ordinarily exercised by general practitioners of average skill and learning in the area, and not by specialists in the field of obstetrics or any other field. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

§ 871e. —— Liability Where Joint or Concurrent Negligence.

When two independent practitioners are caring for a patient, each is liable not only for his own acts, but for the negligent act of the other, which he has observed or should have observed. In this case, if you find that Dr. Buchanan was employed to give medical care to the plaintiff, and that he observed and concurred in the treatment given plaintiff, and if you find such treatment was negligent, then Dr. Buchanan is liable, even though he may not have physically placed any of the towels on the plaintiff's arm. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

You are instructed, where a person is damaged by the joint or concurrent negligence of two or more persons, he does not have to show that one was more or less negligent than the other; and it is no defense on the part of either of the ones negligent to show that one was more negligent than the other. Thus, in this case, if you find that Cynthia Ann Stary was negligently injured by a course of treatment given, or approved, by Dr. Montgomery and Dr. Buchanan, then it is no defense on the part of either Dr. Montgomery or Dr. Buchanan to show that one was more negligent than the other, and you should find for the plaintiff and against both the defendants. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

§ 871f. Criminal Liability for Unlawfully Prescribing Narcotics.

§ 871g. —— In General.

I further charge you, gentlemen of the jury, that the precise or exact dates alleged in this information as the dates of the commission of the offenses are not necessary to be proven, but before the defendant can be convicted of the offenses charged or of any one of the offenses charged, it must be proven by the evidence beyond a reasonable doubt that such offense, or offenses, was committed by the defendant in the manner and by the means and at the place alleged, at some period of time within two years immediately preceding the filing of this information in this case. Therefore, if you should believe and find from the evidence in this case, beyond a reasonable doubt, that the defendant, at any

time within two years immediately preceding the filing of this information, which was filed on the 9th day of March 1955, did unlawfully and feloniously prescribe narcotic drugs, to-wit, hyoscine, morphine and cactus, being commonly known as "H.M.C.", not in good faith and not in the course of his professional practice, then it would be your duty to find the defendant guilty of the offenses charged, if you so find. Winstead v. State (record) (Fla.), 91 So. (2d) 809.

See §§ 398.01-398.24, F. S. 1957.

I further charge you, gentlemen of the jury, that there has been permitted to go before you in the trial of this case certain testimony showing or tending to show, if you find such evidence to be true, that the defendant, G. A. Winstead, issued certain prescriptions for narcotics to Mabel Holmes. I charge you that the defendant is not charged in this case with the commission of any act or offense against or upon Mabel Holmes, or any other person, other than the prescriptions issued, as described in the information, and it is upon these charges and these charges alone, set forth in the information in this case, that you are sworn to try the defendant. Such evidence with respect to this defendant issuing other prescriptions to Mabel Holmes, if you believe such evidence to be true, must be considered by you only upon the question of defendant's plan or design, if you find from the evidence that he had a plan or design. The Court charges you that you must consider all the evidence in this case in connection with the charges the defendant is being tried on and no other. Winstead v. State (record) (Fla.), 91 So. (2d) 809.

§ 871h. —— Criminal Intent Must Be Proved.

I further charge you that the charges against the defendant herein require the state to prove a criminal intent on the part of the defendant at the time that he prescribed the narcotics mentioned in the information. If the defendant prescribed them under the belief that they were proper treatment for the person for whom they were prescribed, then the state has failed to prove a crime was committed by the defendant and you should find him not guilty. Further, if you have a reasonable doubt as to whether or not the defendant was of the opinion that the physical condition of the person for whom the narcotics were prescribed, at the time he so prescribed them, was such which would suggest that narcotics might be used in accordance with good medical practice, then the defendant would be entitled to the benefit of such doubt, and you should find him not guilty. Winstead v. State (record) (Fla.), 91 So. (2d) 809.

§ 871i. —— Effect of Patient's Condition on Question of Intent.

I further charge you that it is the duty of the state to prove, beyond a reasonable doubt, that the person for whom the alleged narcotic drugs were prescribed, was not suffering from a physical condition which would suggest that narcotics might be used in accordance with good medical practice, and if the state fails to so prove that such person was not suffering from a physical condition which would suggest that narcotics might be used in accordance with good medical practice, then you should find the defendant not guilty. In considering this question the opinions of medical experts are to be considered by you in connection with all the other evidence in the case; but you are not bound to act upon them to the exclusion of other testimony. Taking into consideration their opinions, and giving them just weight, you and you alone are to determine for yourselves, from the whole evidence whether the person for whom the narcotics were prescribed was in such a physical condition as would suggest that narcotics might be used in accordance with good medical practice, yielding to the defendant the benefit of a reasonable doubt, if such arises in your mind from the evidence in this case. Winstead v. State (record) (Fla.), 91 So. (2d) 809.

§ 871j. —— Meaning of "Good Faith" as Used in Statute Defining Offense.

I charge you in the prosecution of a physician for unlawfully prescribing narcotics the term "good faith" as used in the information and in the statute, defining the offense, means honest intention that the person to whom the narcotic was prescribed was actually suffering from a physical condition, suggesting that narcotics might be used in good medical practice. Winstead v. State (record) (Fla.), 91 So. (2d) 809.

See § 398.08. F. S. 1957.

I instruct you that the charge against the defendant in this case is that he acted "not in good faith" and "not in the course of his professional practice." You are further instructed that, when a physician attends a patient, it is presumed that whatever treatment he gives is given in good faith, which means good intentions and honest exercise of best judgment as to patient's needs. Errors of judgment are not evidence of lack of good faith. So if unless you find that the state has proven beyond a reasonable doubt that the defendant did not act in good faith in prescribing the narcotic drugs mentioned in the information in this case, you should give the defendant the benefit of the presumption of innocence, which the law requires you to do, and find the defendant not guilty. Winstead v. State (record) (Fla.), 91 So. (2d) 809.

PLEADING.

§ 871k. Pleading Generally.

The pleading by which the plaintiffs state their complaint or claim is called the complaint. The pleading by which the defendant presents his defense to the plaintiffs' claim or complaint is called the answer. It follows that the answer here, which denies all or some substantial part of the averments of fact or admits them to be true, alleges new facts which obviate or repeal their legal effect. Such an answer as the latter is known as an affirmative defense, because it admits an apparent right in the plaintiffs, but sets up new matter not before disclosed, and relies upon the new matter to defeat that apparent right. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

PRESUMPTIONS AND BURDEN OF PROOF.

I. PRESUMPTIONS.

§ 872. Presumption That Person Intends the Consequences of His Acts.

In arriving, gentlemen, at the intention, if any, that the defendant had, or may have had, or did not have to attempt to commit an abortion as charged in this information, the jury is justified in assuming that every man intends the natural and probable consequences and results of his voluntary act. In determining the intention, if any, of the defendant in this case, you should not be governed by imagination or speculation, but you should consider the facts of the case in the light of all of the surrounding facts and circumstances. Carter v. State (record) (Fla.), 155 So. (2d) 787.

II. BURDEN OF PROOF.

§ 874. Plaintiff Must Prove His Case by a Preponderance of Evidence.

§ 875. —— In General.

While it is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegation by a preponderance of the evidence, this rule does not require demonstration, that is, such degree of proof as, excluding possibility of errors produces absolute certainty; because such proof is

§ 871i. —— Effect of Patient's Condition on Question of Intent.

I further charge you that it is the duty of the state to prove, beyond a reasonable doubt, that the person for whom the alleged narcotic drugs were prescribed, was not suffering from a physical condition which would suggest that narcotics might be used in accordance with good medical practice, and if the state fails to so prove that such person was not suffering from a physical condition which would suggest that narcotics might be used in accordance with good medical practice, then you should find the defendant not guilty. In considering this question the opinions of medical experts are to be considered by you in connection with all the other evidence in the case; but you are not bound to act upon them to the exclusion of other testimony. Taking into consideration their opinions, and giving them just weight, you and you alone are to determine for yourselves, from the whole evidence whether the person for whom the narcotics were prescribed was in such a physical condition as would suggest that narcotics might be used in accordance with good medical practice, yielding to the defendant the benefit of a reasonable doubt, if such arises in your mind from the evidence in this case. Winstead v. State (record) (Fla.), 91 So. (2d) 809.

§ 871j. —— Meaning of "Good Faith" as Used in Statute Defining Offense.

I charge you in the prosecution of a physician for unlawfully prescribing narcotics the term "good faith" as used in the information and in the statute, defining the offense, means honest intention that the person to whom the narcotic was prescribed was actually suffering from a physical condition, suggesting that narcotics might be used in good medical practice. Winstead v. State (record) (Fla.), 91 So. (2d) 809.

See § 398.08, F. S. 1957.

I instruct you that the charge against the defendant in this case is that he acted "not in good faith" and "not in the course of his professional practice." You are further instructed that, when a physician attends a patient, it is presumed that whatever treatment he gives is given in good faith, which means good intentions and honest exercise of best judgment as to patient's needs. Errors of judgment are not evidence of lack of good faith. So if unless you find that the state has proven beyond a reasonable doubt that the defendant did not act in good faith in prescribing the narcotic drugs mentioned in the information in this case, you should give the defendant the benefit of the presumption of innocence, which the law requires you to do, and find the defendant not guilty. Winstead v. State (record) (Fla.), 91 So. (2d) 809.

PLEADING.

§ 871k. Pleading Generally.

The pleading by which the plaintiffs state their complaint or claim is called the complaint. The pleading by which the defendant presents his defense to the plaintiffs' claim or complaint is called the answer. It follows that the answer here, which denies all or some substantial part of the averments of fact or admits them to be true, alleges new facts which obviate or repeal their legal effect. Such an answer as the latter is known as an affirmative defense, because it admits an apparent right in the plaintiffs, but sets up new matter not before disclosed, and relies upon the new matter to defeat that apparent right. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

PRESUMPTIONS AND BURDEN OF PROOF.

I. PRESUMPTIONS.

§ 872. Presumption That Person Intends the Consequences of His Acts.

In arriving, gentlemen, at the intention, if any, that the defendant had, or may have had, or did not have to attempt to commit an abortion as charged in this information, the jury is justified in assuming that every man intends the natural and probable consequences and results of his voluntary act. In determining the intention, if any, of the defendant in this case, you should not be governed by imagination or speculation, but you should consider the facts of the case in the light of all of the surrounding facts and circumstances. Carter v. State (record) (Fla.), 155 So. (2d) 787.

II. BURDEN OF PROOF.

§ 874. Plaintiff Must Prove His Case by a Preponderance of Evidence.

§ 875. —— In General.

While it is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegation by a preponderance of the evidence, this rule does not require demonstration, that is, such degree of proof as, excluding possibility of errors produces absolute certainty; because such proof is

rarely possible. Rainbow Enterprises v. Thompson (record) (Fla.), 81 So. (2d) 208.

I instructed you that it is first your duty to determine whether or not the plaintiffs have established by a preponderance of the evidence that either of the defendants was guilty of negligence as I have defined those terms to you. And if you should find that the plaintiffs have established that one or both of the defendants were guilty of negligence in the treatment or handling of the child, it should then become your duty to determine whether or not such negligence on the part of one or both of the defendants did proximately produce the injury of which the child complains without the intervention of any other efficient cause. And if you find that the plaintiffs have proved by a fair preponderance of the evidence both the negligence of the defendants, or one of them, and that such negligence proximately caused the injury to the child, then it will be your duty to find against such defendant or defendants. But if you find that the plaintiffs have failed to prove by a fair preponderance of the evidence either the negligence of the defendant, or that any conduct on his part actually and proximately caused the injury to the child, then your verdict must be for the defendants. On these issues, the plaintiffs have the burden of proof, and they must establish both the fact of negligence and that such negligence proximately caused the injury in order for them to make a recovery. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

If you find from the evidence that the plaintiffs have proved their case as made in the complaint by a preponderance of the evidence, then you should find for the plaintiffs. Unless the evidence preponderates in favor of the plaintiffs, you should find for the defendant. South Fla. Hospital Corp. v. McCrea (record) (Fla.), 118 So. (2d) 25.

§ 876. —— Must Prove Material Allegations of His Declaration.

In this connection it is necessary that the plaintiffs prove all of the material allegations of their complaints by a fair preponderance of the evidence. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

§ 877a. Burden of Proving Affirmative Defense.

The burden of proof in regard to proving any affirmative defense is upon the defendant. If, in the consideration of the evidence you find that the plaintiffs have by a fair preponderance of the evidence proved the allegations of the complaint, then you may consider whether or not the defendant has proved by a fair preponderance of the evidence any of the affirmative defenses in the case, and the burden of the proceeding or going forward with

the proof shifts to the defendant. After the plaintiffs have proved the complaint by a fair preponderance of the evidence, the defendant must then prove any one or more of the affirmative defenses by a fair preponderance of the evidence; and if you then find that the defendant has proved by a fair preponderance of the evidence any one of the defenses in the case, then your verdict would be for the defendant. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

If, after consideration of the evidence, you find that the plaintiff has, by a fair preponderance of the evidence, proven the allegations of her declaration, then you may consider whether or not the defendant has proven, by a fair preponderance of the evidence, any one of the other pleas in the case, which are known as affirmative pleas, and the burden of proof shifts to the defendant after the plaintiff has proven her declaration by a fair preponderance of the evidence—then the burden of proof shifts to the defendant to prove any one or more of the affirmative pleas in the case, and if you find he has proven, by a fair preponderance of the evidence, any one of the affirmative pleas in the case, then your verdict would be for the defendant. Heitman v. Davis, 127 Fla. 1, 172 So. 705.

§ 878. What Constitutes a Preponderance of the Evidence.

§ 879. —— In General.

For case again approving the 1st instruction in this section in original edition, see Berger v. Nathan (Fla.), 66 So. (2d) 278 (instruction found in record only).

In a civil action, such as the one we are now trying, it is proper to find that a party has succeeded in carrying his burden of proof on an issue of fact, if the evidence favoring his side of the question is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that on such issue the truth favors that party. Rainbow Enterprises v. Thompson (record) (Fla.), 81 So. (2d) 208.

The Court will here explain to you what is meant by the term preponderance of the evidence. You remember I told you that the plaintiff, to recover, would have to prove his case by a preponderance of the evidence and that the defendant, interposing a defense of contributory negligence, would have to prove its plea of contributory negligence by a preponderance of the evidence before it would be available as a defense. Where an issue is to be proved by a preponderance of the evidence, that means that the testimony produced in favor of the issue must have greater weight than the testimony against such issue. And the weight of testimony is measured, not necessarily by the number of wit-

nesses testifying, nor by the amount of testimony produced for or against the issue to be proved, but it is measured by its convincing power upon the minds of reasonable people. It follows, then, that an issue is proved before you by a preponderance of the evidence, when the evidence before you jurors in favor of the issue is such that it has a greater convincing power upon your minds than does the evidence before you against such issue. And if the evidence is evenly balanced in favor of an issue on one side and against the issue on the other side, then the issue has not been proved by a preponderance of the evidence. Townsend Sash Door & Lumber Co. v. Silas (record) (Fla.), 82 So. (2d) 158.

The burden of proof in regard to proving the issues of fact is upon the plaintiff. You might say here that the same charges will apply to both cases that you are trying at this time. You understand, also, that you are trying two cases at once. The plaintiff in regard to the issues in fact in order to be entitled to a verdict from you must prove by a preponderance of the evidence those material allegations which are denied. To illustrate what is meant by preponderance of evidence, it may be assumed we have a set of scales like the scales that are often depicted by painters or illustrators as the scales of Justice, or those scales consisting of two saucer-like receptacles suspended from opposite ends of a bar which are equally and evenly balanced by a fulcrum in the center and so constructed that they are used by placing a weight at one end of the scales and the object to be weighed on the other end, which if of equal weight, will cause the scales to be balanced. If you will assume you have such a pair of scales, and that the evidence is susceptible of being accurately weighed, and you consider the evidence worthy of belief and supporting the issues on behalf of the plaintiff on one side of these scales, and you then consider the evidence worthy of belief and supporting the issues on behalf of the opposing side on the opposite ends of such scale, then the evidence of greater weight balanced against the evidence of lesser weight, will cause the scales to become unbalanced and it may properly be said that the preponderance of evidence is on that side which shows the greater weight. If the scales should be evenly and equally balanced after placing the evidence as suggested, then there would be no preponderance of evidence. By a preponderance of the evidence is meant the greater weight of the evidence; that is, that the evidence taken as a whole inclines more to one side than it does to the other. In weighing the evidence you may consider the appearance and conduct of the witness on the stand; his or her manner while testifying; the interest, if any, or lack of interest which the witness has or may have

in the result of the suit; the opportunity which the witness had of knowing the facts concerning which they testify; their candor or want of candor; their apparent intelligence or lack of it; and the reasonableness or unreasonableness of their testimony; and from these and all other facts and circumstances in the evidence, reach your conclusion as to where the truth of the matter lies. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

Where an issue is to be proved by a preponderance of the evidence, that means that the testimony produced in favor of the issue must have greater weight than the testimony against such issue, and the weight of testimony is measured not necessarily by the number of witnesses testifying, nor by the amount of the testimony produced for or against the issue to be proved, but it is measured by its convincing power upon the minds of reasonable people. It follows, then, that an issue is proved before you by a preponderance of the evidence when the evidence before you jurors in favor of the issue is such that it has a greater convincing power upon your minds than does the evidence before you against such issue. And if the evidence is evenly balanced in favor of an issue on one side and against the issue on the other side, then the issue has not been proved by a preponderance of the evidence. Welch v. Moothart (record) (Fla.), 89 So. (2d) 485.

A fair preponderance of the evidence is not a technical term. It means what it says, generally speaking. It means that testimony which preponderates in favor of one side or the other, the testimony which on one side outweighs the testimony on the other; that testimony which has the greater weight, is more convincing and more satisfactory to you gentlemen of the jury. One of the illustrations frequently used is a pair of scales that is equally balanced, and you put a weight on one side and it will carry down in favor of that side. That is what we mean by "preponderance of the evidence." So, for the plaintiff to recover in this case, she must prove by a fair preponderance of the evidence the material allegations of what we call her complaint. That is the basis of her charge against the defendant. Tampa Drug Co. v. Wait (record) (Fla.), 103 So. (2d) 603.

In advising you as to the measure of proof required to sustain the plaintiff's charge, I have spoken of preponderance of evidence. By preponderance of evidence is meant the greater weight of the evidence. If the evidence on any factual issue inclines more to one side than to the other, there is a preponderance. The greater number of witnesses does not necessarily produce a preponderance of evidence. It frequently happens that there are more witnesses on one side than on the other; and in such a case it is the greater weight of the evidence which counts. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

§ 880. —— Does Not Mean Greater Number of Witnesses.

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

For case again giving the 2nd instruction in this section in original edition, see Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

A preponderance of the evidence merely means the greater weight of the evidence. It does not necessarily mean the greater number of witnesses because there are frequently more witnesses on one side than on the other; but it does mean the evidence which is more convincing to your minds. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

PROSTITUTION.

§ 881a. Keeping House of Ill Fame.

§ 881b. —— In General.

Gentlemen of the jury, the defendant, Charlie Campbell, is on trial before you on an information charging him with the offense of unlawfully keeping and operating a house of ill fame resorted to for the purpose of prostitution and lewdness. The court charges you that before you can convict him of an offense under this information, the jury must find from the evidence, beyond a reasonable doubt and to a moral certainty, that the offense, if an offense was committed, was committed in Walton County, Florida, at sometime within two years next prior to the filing of the information in this court. The information was filed in this court on the 12th day of May, 1941. Campbell v. State (record), 149 Fla. 701, 6 So. (2d) 828.

See §§ 796.01-796.07, F. S. 1957.

As to keeping a disorderly house, see Nuisance, §§ 856c-856i.

The second count of the information charges him with keeping a house of prostitution, in that he did on the 6th day of April, 1945, and at diverse times within a period of one year

prior to the filing of the information in this case, in Escambia County, Florida, maintain and operate a certain place, to wit: a place known as the Horseshoe Swimming Pool, for the purpose of lewdness, assignation and prostitution. And under this count of the information the court charges you must not consider any evidence beyond one year prior to June 1, 1945. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

Before you can find the defendant guilty of this charge in the second count of the information the evidence must establish, beyond a reasonable doubt, that the defendant did keep, set up, maintain or operate a place, structure or building for the purpose of lewdness, assignation or prostitution, and that he knowingly did keep, set up, maintain and operate such a place for such purpose or purposes. It is not necessary, however, that under this count of the information for the state to prove any particular act of prostitution or lewdness or assignation as having been committed in the place. For if you find from the evidence, beyond a reasonable doubt, that the particular place had a general reputation in the community as being a place of prostitution or lewdness or assignation, you will be justified in finding the defendant guilty. In other words, it is not necessary for the state to prove any particular act of prostitution or assignation took place, but if the evidence establishes beyond a reasonable doubt that the place had the general reputation in the community as such you would be justified in finding the defendant guilty under the second count, if that fact is proved beyond a reasonable doubt. If you find from the evidence that this place was resorted to by prostitutes and lewd persons and that the defendant knew that they were prostitutes and lewd persons, and that he did know that they did resort to that place for the purpose of prostitution and assignation, you would be justified in finding the place was a place of assignation and prostitution and you should find the defendant guilty under this charge. Of course, the gist of the charge under this offense as it is under the first count is that he did knowingly operate or permit this place to be used as a place of assignation or prostitution. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

§ 881c. —— Elements of Offense.

The court charges you that under the law of Florida whoever keeps a house of ill fame, that is to say, whoever keeps a house of prostitution, assignation or a house for purposes of prostitution, assignation or lewdness, is guilty of an offense which is denounced by our statutes. For the law of Florida makes it unlawful to keep, set up, maintain or operate any place, structure, building or conveyance for the purposes of lewdness,

assignation or prostitution. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

See § 796.01, F. S. 1957.

Under our law, whoever keeps a house of ill fame, resorted to for purposes of prostitution and lewdness, commits the offense charged in the information. Campbell v. State (record), 149 Fla. 701, 6 So. (2d) 828.

§ 881d. —— House of Ill Fame Defined.

A house of ill fame is a place where people customarily resort for the purpose and is maintained for the purpose of prostitution. Campbell v. State (record), 149 Fla. 701, 6 So. (2d) 828.

§ 881e. —— Offense Not Committed by Occasional Acts of Sexual Immorality.

The court charges you that occasional acts of sexual immorality will not constitute the offense of maintaining a house of ill fame, but in order to constitute the offense the house must be kept for the purpose of being resorted to by its patrons for the purpose of lewdness or prostitution. Campbell v. State (record), 149 Fla. 701, 6 So. (2d) 828.

§ 881f. —— But May Be Committed by a Single Act in House Kept for That Purpose.

The court charges you that where a house is kept by anyone for the purpose of prostitution, that the offense, under the information, might be committed by a single act, where two people resorted to it for that purpose, provided the house was maintained and kept for that purpose, and he knowingly permitted this to be done there and maintained the house for that sole purpose. Campbell v. State (record), 149 Fla. 701, 6 So. (2d) 828.

§ 881g. —— Prostitution Defined.

The word prostitution means the giving or receiving of the body for sexual intercourse for hire and also it includes the giving or receiving of the body for licentious sexual intercourse without hire. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

See § 796.07(1)(a), F. S. 1957.

§ 881h. —— Lewdness Defined.

The term lewdness means any indecent or obscene act, an act which is lecherous and tending to excite lustful thoughts. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

See § 796.07(1)(b), F. S. 1957.

§ 881i. —— Assignation Defined.

The word assignation includes the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement. Powell v. State (record), 156 Fla. 563, 23 So. (2d) 727.

See § 796.07(1)(c), F. S. 1957.

RAILROADS.

II. LIABILITY FOR INJURY TO THIRD PERSONS.

§ 906. Presumption against Railroad.

The statute speaks of the presumption being against the railroad company when an injury has occurred by the running of the cars or other machinery; that presumption of the statute is that if a person is injured by the running of cars or other machinery of a railroad—then the law creates the presumption that the injury was caused by the negligence of the railroad: this presumption ceases when the company makes it appear that its agents have exercised all ordinary and reasonable care and diligence; in the presence of such proof by the railroad company, if such proof has been adduced, the jury do not take any presumption with them to the jury room in weighing the evidence and in coming to a determination, as the statute does not create such a presumption as will outweigh proof or will require any greater or stronger or more convincing proof than any other question at issue. All that the statute does is to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence and here the statutory presumption ends. Louisville & Nashville Ry. Co. v. Willis (record), 58 Fla. 307, 51 So. 134.

Where a plaintiff shows by evidence that he has sustained damage and injury by the running of the cars of a railroad company he is entitled to recover therefor against the company, unless the company makes it appear by a preponderance of evidence or unless it should appear from the whole of the evidence that the injury was not due to the negligence of the agents of the company. Louisville & Nashville Ry. Co. v. Willis (record), 58 Fla. 307, 51 So. 134.

Before you can apply the statutory presumption of negligence against the company, you must believe from the evidence that the injury was caused by the running of the cars or train of the defendant. If the injury was the result of a mere accident, or was caused entirely by the plaintiff's own want of care, you should find for the defendant. Louisville & Nashville Ry. Co. v. Willis (record), 58 Fla. 307, 51 So. 134.

§ 907. Contributory Negligence.

§ 909. —— Right to Assume That Adult Person Will Avoid Train.

The engineer and fireman of a locomotive have the right to presume that an adult person on or near the track ahead of the moving engine will obey the instinct of self-preservation by getting off the track if already on it or by staying off it. Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.

A railroad is entitled to assume that automobile travelers on the highway will exercise reasonable care and that motorists will adopt a rate of speed and be as vigilant to avoid collisions at crossings as the conditions warrant. Martin v. Makris (Fla. App. 3rd Dist.), 101 So. (2d) 172.

RAPE.

§ 925a. Material Allegations Requiring Proof.

§ 925. Elements Generally.

Whoever ravishes and carnally knows a female of the age of ten years or more, by force and against her will, is guilty of rape. Everett v. State (record) (Fla.), 97 So. (2d) 241.

Whoever ravishes and carnally knows a female of the age of ten years or more, by force and against her will, is guilty of rape; such a crime is a felony. Irvin v. State (record) (Fla.), 66 So. (2d) 288.

§ 925a. Material Allegations Requiring Proof.

The material allegations of an indictment charging rape are: 1st. That the alleged act was done within the county of Lake and State of Florida, as alleged in the indictment; 2nd. That there was a penetration of the private parts of the female by the private parts of the male, and 3rd. That it was done forcibly and against the will of such female. Now force may be supplied by any act or acts done by the defendant, which so puts in fear of death or great bodily harm the prosecuting witness in case of refusal or resistance on her part that she is thereby compelled to submit to the act. Each of these necessary allegations must be proven by the testimony, except that of venue, the place of the alleged commission of the alleged crime, to the exclusion of and beyond a reasonable doubt. Irvin v. State (record) (Fla.), 66 So. (2d) 288.

If the evidence is such that the jury cannot reasonably infer therefrom that the alleged crime was committed in Lake County, Florida, or if any of the other material allegations of the indictment are not shown by the evidence beyond a reasonable doubt, you cannot find the defendant guilty of rape as charged in the in-

dictment. But, if you can, from the evidence, reasonably infer that the alleged crime was committed as alleged in Lake County, Florida; and you further find from the evidence, beyond and to the exclusion of every reasonable doubt, that there was a penetration of the parts of the female, Norma Padgette, by the private parts of the defendant, Walter Irvin, named in the indictment, and that it was done by force upon the part of such defendant, or another, or others then and there present aiding and abetting the defendant, and against the will of the said Norma Padgette, then you should find the defendant guilty of rape. Irvin v. State (record) (Fla.), 66 So. (2d) 288.

§ 926. Necessity of Penetration.

The proof must show penetration of the female private parts to some extent by the male organ of the defendant. It is not necessary to prove emission of seed. Of course, the fact of penetration, like every other material fact, must be shown by the evidence to the exclusion of and beyond a reasonable doubt, although the slightest penetration is sufficient. Irvin v. State (record) (Fla.), 66 So. (2d) 288.

To constitute carnal intercourse there must have been actual contact of the male organ with the female organ, resulting in penetration of the female by the male organ to some extent, but not necessarily to the extent of puncturing the hymen. It is also unnecessary for the state to prove emission of seed. Harris v. State, 72 Fla. 128, 72 So. 520.

§ 939. Verdict.

§ 941. —— Recommendation of Mercy.

The Statutes of Florida provide that whoever is convicted of rape shall be punished by death unless a majority of the jury return with the verdict of conviction a recommendation to the Court for mercy, in which event, that is, upon such recommendation, the punishment shall be by imprisonment for life, or for a term of years less than life, in the discretion of the Court. Irvin v. State (record) (Fla.), 66 So. (2d) 288.

Should you convict the defendant, and majority of your number desire to make such recommendation of mercy, you may insert such recommendation into your verdict by writing: "A majority recommend mercy", or other wording to properly express such recommendation. Irvin v. State (record) (Fla.), 66 So. (2d) 288.

REASONABLE DOUBT.

§ 954a. Doubt Defined.

Gentlemen, a doubt, as laymen may know it and use in their daily lives, means an unsettled state of opinion, or a condition in your mind concerning a reality or truth of something, where you have lack of certainty you have a doubt. It may be defined, according to the dictionary, the mental state of being uncertain or unsettled as the result of a mental process that we human beings have as to the existence or non-existence of a fact or series of facts you have. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 955. What Constitutes a Reasonable Doubt.

§ 955a. —— In General.

As you gentlemen know, and as I have stated and I am sure the attorneys have stated in their preliminary questioning of the jury panel, that in every criminal case the defendant, or a defendant, is presumed to be innocent until the State has by competent evidence shown or proven his guilt beyond a reasonable doubt. The law of Florida is such, gentlemen, with reference to this proof beyond a reasonable doubt, that the State is not required to prove the defendant's guilt absolutely, or beyond all doubt, or to a mathematical certainty, but the State of Florida in its presentation of the case, in order to obtain a conviction, must prove the defendant's guilt, and also the material allegations of the charge set out in the information, beyond and to the exclusion of a reasonable doubt, as I define that term to you. Carter v. State (record) (Fla.), 155 So. (2d) 787.

A reasonable doubt, gentlemen, is one conformable to reason—a doubt which a reasonable man would entertain. It is that state of the case which, after the entire comparison and consideration of all testimony, or from the lack of testimony, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. Such doubt, however, gentlemen, as its name implies, must be a doubt that is reasonable, and one which arises from the evidence or lack of evidence in the case. It does not mean a mere possible doubt, or a speculative, imaginary, or forced doubt, because anything relating to human affairs and depending upon moral evidence, is open to some possible or imaginary doubt. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

A doubt which is not suggested by or does not arise from the testimony, or from the want of testimony, is not a reasonable doubt and should never be considered, or, in other words, if the testimony produces a conviction of the character which I have indicated and stated as being sufficient to prove the charge to the exclusion of a reasonable doubt, the jury has no right to go outside of the testimony for doubts of any kind. Roberts v. State (record) (Fla.), 164 So. (2d) 817.

§ 956. ——— Doubt Conformable to Reason—One a Reasonable Man Would Entertain.

Now, in criminal law the proof has to be beyond a reasonable doubt, and let me define that term to you as it is known in the criminal law. A reasonable doubt, gentlemen, is one that is conformable to reason, it is predicated upon reason, it is based on reason, it's a doubt which a reasonable man would entertain in his mind, and it does not mean a mere possible doubt; because, gentlemen, everything relating to human affairs and depending upon moral evidence is open and subject to some possible doubt. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 957. ——— One Which Precludes an Abiding Conviction to a Moral Certainty of Accused's Guilt.

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 6th instruction in this section in original edition, see Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

A reasonable doubt, gentlemen of the jury, is not a mere, flimsy, shadowy doubt, amounting to the bare possibility that the defendant is innocent, but it is such a substantial doubt arising out of the evidence, or lack of evidence, in this case that after you have given all of the testimony in the case full consideration, and, upon a full consideration of all the testimony in the case, your minds as Jurors, are in that condition that you cannot say that you have an abiding conviction to a moral certainty of the guilt of the defendant. If, after a full and fair consideration of all the evidence in this case, you, gentlemen of the jury, have had produced by the evidence an abiding conviction to a moral certainty that the charge against the defendant is true and that he is guilty of the offense charged, then you would have no reasonable doubt within the meaning of the law and it would be your duty to find the defendant guilty as charged. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

A reasonable doubt may be defined, gentlemen, as that state

of the case, which, after consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral or a reasonable certainty of the truth of the charge. Now, gentlemen, applying these abstract principles to the case that you have heard these past few days, if after a full and fair comparison and consideration of all of the evidence among yourselves as reasonable and intelligent jurors, you find that you have in your minds an abiding conviction to a moral or a reasonable certainty that the charge against the defendant is true, then you have no reasonable doubt, and under those conditions and circumstances it would be your duty, gentlemen, to render a verdict of conviction of the defendant as charged. And conversely, gentlemen, if after a full, and fair and intelligent comparison and consideration of all of the evidence that you have heard among yourselves as jurors, you as intelligent and reasonable men find in your minds that you do not have an abiding conviction to a moral or a reasonable certainty that the charge against the defendant is true, then you have a reasonable doubt, and under the law it would be your duty to render a verdict of acquittal of the defendant as charged in the information. Carter v. State (record) (Fla.), 155 So. (2d) 787.

Keeping this in mind, as jurors charged with the solemn duty in hand, you must carefully, impartially and conscientiously consider and weigh all the evidence, and if, after doing so, your judgment and reason are well satisfied and convinced by the evidence to the extent of having a full, firm and abiding conviction to a moral certainty that the charge laid in the indictment is true, then you may consider the charge to have been proved to the exclusion of and beyond a reasonable doubt, and it will be your duty to find the defendants guilty. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

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 think that your understanding, judgment and reason are well 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 proven to the exclusion of and beyond a reasonable doubt, and it is your duty to convict. Roberts v. State (record) (Fla.), 164 So. (2d) 817.

§ 958. —— Must Be Suggested by or Arise from the Evidence or Lack of Evidence.

For case again giving the 3rd instruction in this section in original edition, see Huntley v. State (record) (Fla.), 66 So. (2d) 504.

§ 961. ——— Nor a Speculative, Imaginary or Forced Doubt.

A doubt which is a mere possibility, or a speculative, imaginary or forced doubt is not a reasonable doubt, because almost everything relating to human affairs is open to doubt of this character. On the other hand, if after carefully considering all of the testimony there is not an abiding conviction to a moral certainty of the truth of the charge, then it has not been proved beyond a reasonable doubt, and it will be your duty to acquit the defendants. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

A doubt which is a mere possible doubt or a speculative, imaginary or forced doubt, is not a reasonable, but an unreasonable doubt; and for the reason that everything relating to human affairs is open to doubt of this character such a doubt ought not to control or influence the jury to return a verdict of acquittal where they have abiding conviction of the truth of the charge as I have stated herein. On the other hand, if, after carefully considering, comparing and weighing all of the testimony, there is not an abiding conviction to a reasonable and moral certainty of the truth of the charge, or if, having a conviction, it is yet one which is not abiding or stable, but wavers and vacillates, or is one with respect to which there is not a moral certainty, then the truth of the charge is not made out beyond a reasonable doubt, and there must be an acquittal because the doubt is reasonable. Wilkins v. State (record) (Fla.), 155 So. (2d) 129; Roberts v. State (record) (Fla.), 164 So. (2d) 817.

§ 962. ——— Nor One Which Is Vague, Flimsy or Shadowy.

Gentlemen, a reasonable doubt is not a mere shadowy, flimsy doubt amounting to the bare possibility that a defendant may be innocent, but it is a doubt which a reasonable and intelligent man would have in his mind after a full and fair comparison and consideration of all of the evidence. In a trial such as this, a reasonable doubt should arise from the evidence and not from any sympathy, or passion or pity that, as the Juror or collectively as the jury, might have for any defendant or this particular defendant. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 963. Accused Entitled to Benefit of Reasonable Doubt.

If you are not convinced from the evidence produced before you in this case and beyond a reasonable doubt that the defendant is guilty of one of said three crimes, murder in the first degree, murder in the second degree, or manslaughter, then you should find the defendant not guilty. Barwicks v. State (record) (Fla.), 82 So. (2d) 356.

If you should fail to find from the evidence or lack of evidence beyond a reasonable doubt that the defendant is guilty of the offense charged, or of a lesser offense contained in the offense charged, or, if after a full and fair consideration of all the testimony, there remains in your minds, a reasonable doubt, as heretofore defined to you, as to the guilt of the defendant, then, it would be your duty to give to the defendant the benefit of such doubt and acquit him. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

If you have a reasonable doubt as to the guilt of either or both of the defendants of any of the charges included in the indictment upon which they are being tried, you should give him or them the benefit thereof and acquit him or them, as the case may be, of any and every charge as to which you have a reasonable doubt. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

§ 964. Guilt Must Be Proved Beyond a Reasonable Doubt.

If, after having heard and carefully considered all the evidence in the case, you have any resonable doubt in your minds as to the defendants' guilt of any crime within the charge, then it will be your duty to acquit them. If on the other hand, you are satisfied beyond such reasonable doubt as to their guilt, then it will be your duty to convict them of such crime as to which you are satisfied beyond a reasonable doubt, you being the sole judges of the testimony and the credibility of the witnesses. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

If any one of the material allegations of the indictment is not proved to the exclusion of and beyond a reasonable doubt, you must give the defendants the benefit of such doubt and acquit them, unless such allegation has been admitted or you may reduce the grade of the offense as the facts which you find from the evidence may require. But if you find from the evidence beyond and to the exclusion of every reasonable doubt that the defendants are guilty of the crime charged in the indictment, or of any offense within such indictment, then you should find the defendants guilty of such offense as the facts that you find from the evidence may require. Baugus v. State (record) (Fla.), 141 So. (2d) 264; Roberts v. State (record) (Fla.), 164 So. (2d) 817.

If any one of the material allegations of the indictment is not proved to the exclusion of and beyond a reasonable doubt, you must give him the benefit of such doubt and acquit him, or reduce the grade of the offense in keeping with the facts, ascertained and found by you from the evidence. But, if you find from the evidence beyond and to the exclusion of every reasonable doubt that the defendant is guilty of the crime charged in the indictment, or of any offense within such indictment, then

you should find the defendant guilty of such offense as the facts, ascertained and found by you from the evidence, may require. There is no burden resting on the defendants, or either of them, to prove or otherwise establish their innocence. The burden of proving the defendant or defendants guilty of the offenses charged, beyond a reasonable doubt, is upon the State. Before there can be a conviction of the defendant or defendants, as the case may be, the State must prove all the material elements of the offense alleged. If from the evidence introduced, or from the lack of evidence, you entertain a reasonable doubt as to whether or not the defendant or defendants committed said offense, you should acquit him or them, accordingly. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

§ 965. And Every Essential Fact Must Be Established Beyond a Reasonable Doubt.

The essential component elements of the crime charged, together with other matters that the State must prove beyond and to the exclusion of every reasonable doubt in this case are these: First, the fact of the death of the person alleged to have been killed; Second, that such death was caused by the criminal act or agency of another; Third, that the deceased was slain by the accused; Fourth, that the act took place in Dade County; Fifth, as to first degree murder, that the act was committed from a premeditated design to effect the death of the person slain or some other person, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestible crime against nature or kidnaping. As to the other homicides included within this charge, it is necessary to establish the conditions and circumstances applicable thereto, as outlined previously. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

RECEIVING STOLEN PROPERTY.

§ 967. Elements of Offense Generally.

The crime of buying, receiving and aiding in the concealment of stolen goods is a threefold proposition. The state does not it may prove two or it may prove any one. In other words, it can prove that the defendant bought it. If you believe from the evidence that the defendant did buy it, then you wouldn't need to go any further. Or, if you believed from the evidence that the defendant concealed it or aided in its concealment, you wouldn't need to go any further than that one, or, if you believed from the evidence that the defendant received it. Guarino v. State (record) (Fla.), 67 So. (2d) 650.

The charge against these defendants, both Olsen and Roberts, is that they did buy, receive or aid in the concealment of stolen property, and this means that they must have done some affirmative act, such as buying it, or receiving it, or taking possession of it, or must have in some way helped in the concealment of the property. It is not sufficient that the defendants see another in the possession of stolen property, nor is it sufficient that the defendant learns or knows from the evidence of his senses or otherwise that he has stolen property in his possession, but before he can be guilty he must do some affirmative act to do or assist in doing the things which are denounced by the statute, that is, buying, receiving or aiding in the concealment thereof. Olsen v. State (record) (Fla.), 75 So. (2d) 281.

The second count of the information charges that the defendants did unlawfully buy or receive or aid in the concealment of these two pieces of property described in the first count, and that at the time they knew the property was stolen property and that they did so buy or receive or aid in the concealment of the property knowing that it was stolen property. In that connection, the Court charges you that under the law of Florida, whoever buys or receives or aids in the concealment of stolen personal property and who at the time knows that the same is stolen is guilty of the offense denounced by the statute under which this second count is framed. The essential elements of this offense which must be proven by the state beyond a reasonable doubt are, first, the property must have been stolen, taken and carried away by someone, not necessarily the defendants; second, the defendants must have either bought, received or aided in the concealment of such property, and, third, the defendants must have had knowledge at the time that the property in question was stolen at the time that they did buy it, or receive it, or aid in its concealment. Olsen v. State (record) (Fla.), 75 So. (2d) 281.

I further charge you that one commits no crime against the law of Florida merely by knowing that a crime has been committed and failing to report to the proper authorities the fact that another has stolen property in his possession. Olsen v. State (record) (Fla.), 75 So. (2d) 281.

§ 968. Knowledge That Goods Received Were Stolen.

§ 969. —— Necessary for Conviction.

The defendant must have had knowledge that it was stolen property, or must have been acquainted with facts which would be the equivalent to knowledge. Now, I can't give you any rule and say what facts are equivalent to knowledge. You have to gain that from your own experience as men of affairs. You must be able to determine and must determine from your own knowl-

edge of things that certain facts which the defendant knew, if there were certain facts, were the equivalent of knowledge or actually knowing. The rule is that the defendant must know, or must have knowledge of facts sufficient to put a prudent person upon inquiry and if he, in the face of those facts, if he doesn't inquire, that's what's considered to be guilty knowledge. Guarino v. State (record) (Fla.), 67 So. (2d) 650.

It is essential for the conviction of the defendants under this count of the information that they knew that the property was stolen property. Olsen v. State (record) (Fla.), 75 So. (2d) 281.

§ 970. —— May Be Shown by Circumstances.

Such knowledge on the part of the defendants may be proven by direct evidence or by circumstantial evidence, if such circumstantial evidence is strong enough to convince you beyond a reasonable doubt that the defendants did have such knowledge. And it is within the province of the jury to infer the existence of such guilty knowledge from evidence in the case which proves beyond all reasonable doubt that the circumstances of the transaction were sufficiently suspicious to put a person of ordinary intelligence and caution, situated as the defendants were, upon inquiry, and which is sufficient to convince you, the jury, beyond all reasonable doubt that the defendants knew that the property was stolen property. However, if there be reasonable doubt in your minds as to such guilty knowledge on the part of the defendants of the stolen character of the property or reasonable doubt in your minds as to whether the defendants had knowledge of subsidiary facts of such a nature as would put them as men of ordinary intelligence and caution on inquiry as to the stolen character of the property so as to warrant an inference against them to be drawn that he must have known the goods involved were stolen goods, then you should give the benefit of that reasonable doubt to the defendants and acquit them, if that be true. Olsen v. State (record) (Fla.), 75 So. (2d) 281.

§ 971. —— Knowledge of Facts Sufficient to Put Accused on Inquiry.

In connection with guilty knowledge of the fact that the property was stolen property, the Court further charges you that wilful ignorance on the part of a defendant of the fact that the property was stolen property would not constitute lack of guilty knowledge, and if you find from the evidence that lack of guilty knowledge on the part of these defendants was a result of wilful ignorance on the part of the defendants, then the same would not excuse such defendant. In further connection with that, the Court

charges you that it is not necessary that the actual thief, whoever he may be, be convicted of stealing the goods before the defendant may be convicted of buying, receiving or aiding in the concealment of it, nor is it necessary that the defendants knew who had stolen the property, so long as they did know that it was stolen property at the time they bought it or received it or aided in its concealment. So, if the state fails to prove either one of these essential elements, that is to say, first, that the property was stolen property, second, that the defendants either bought, received or aided in the concealment of it, or, third, that the defendants had knowledge that it was stolen property at the time they so bought it, received it or aided in its concealment—if the state fails to prove either one of those essential elements beyond a reasonable doubt, then you should acquit the defendants. Olsen v. State (record) (Fla.), 75 So. (2d) 281.

REPLEVIN.

§ 976a. In General.

Any person, when his goods or chattels may be wrongfully detained from him by any other person, has a right, under the circumstances, and in the manner provided by law, to bring an action of replevin for the recovery thereof, and for the recovery of the damages sustained by reason of the wrongful taking or detention of the same. Younglove v. Knox (record), 44 Fla. 743, 33 So. 427.

See §§ 78.01-78.21, F. S. 1957.

In deciding this case you have nothing to do with the question of whether the United Grocery Co., owed Bibb any money or whether Mr. Bibb owed the United Grocery Co., any money, for such damages under the law cannot be recovered in an action of replevin. If as a result of the business transactions between these parties, either one owed the other any sum of money by way of an accounting, shortage or what not, the party to whom it is owed, whether it be the United Grocery Co., or Mr. Bibb, may bring a separate suit to recover such sum of money, and

judgment in this case will have no bearing whatever upon that right. Bibb v. United Grocery Co., 73 Fla. 589, 74 So. 880.

The primary question in this case is not title to the car but who is entitled to possession of the car. This is an action known as suit in replevin, an action in replevin, wherein a person who claims he is entitled to possession of the property brings a suit to have possession returned to him. You can all conceive of situations where persons might own property and not be entitled to possession of it. If you sold me an electric sewing machine on retain title contract, the title is in you but the possession is in me as long as I comply with the terms of the contract, but ordinarily the possession follows the title to the property. It is your duty to decide who has the right to possession, not to decide the question of title, but who has the right to possession of the property at the time the suit was instituted. Woods v. Thompson (record), 159 Fla. 112, 31 So. (2d) 62.

This action is one in replevin, in which the plaintiff alleges the wrongful detention of the goods and was begun by the plaintiff filing his complaint. Wood v. Weeks (record) (Fla.), 81 So. (2d) 498.

§ 976b. Necessity and Effect of Right to Possession.

In this action in order that the plaintiff may recover, it must appear from the evidence that he was entitled to the possession of the property sued for, or some of it, at the time that suit was brought. Younglove v. Knox (record), 44 Fla. 743, 33 So. 427.

If you find from the evidence that the plaintiff at the time the suit was brought was not entitled to the possession of the property sued for, or any portion thereof, you should find the defendants not guilty. Younglove v. Knox (record), 44 Fla. 743, 33 So. 427.

If you find from the evidence that the plaintiff was at the time of the institution of this suit entitled to possession of any part of the goods replevined, then it will be your duty to find a verdict in favor of the plaintiff. Bibb v. United Grocery Co. (record), 73 Fla. 589, 74 So. 880.

I further charge you, gentlemen, that under the oath taken by you, the only issue in this case for you to determine is which of these parties was entitled to the possession of the merchandise and fixtures on the 30th day of March, 1914, and if you find for the plaintiff to fix the value of said merchandise and fixtures, which under the evidence admittedly belonged to the plaintiff, and if you find for the defendant to fix the value of his special property in the said merchandise and fixtures, if any he had. Bibb v. United Grocery Co., 73 Fla. 589, 74 So. 880.

I further charge you that if you believe from the evidence un-

der the instructions of the court that the plaintiff, United Grocery Co., was the owner of the merchandise and fixtures described in the declaration, and entitled to the possession of it, and that the defendant wrongfully withheld the said merchandise and fixtures from the possession of the plaintiff, then in that event, the plaintiff is entitled to a verdict at your hands; and in this connection I charge you that because the plaintiff voluntarily put the defendant in possession of the merchandise and fixtures, it does not necessarily follow that the defendant was entitled to retain possession thereof for all time, and in determining this, you must look to the agreement that existed between the parties at the time of the alleged wrongful detention by the defendant. Bibb v. United Grocery Co. (record), 73 Fla. 589, 74 So. 880.

I charge you that ordinarily the ownership of personal property carries with it the right to possession thereof. This right of possession may be transferred by the owner to another without transferring title, but in this event the person to whom possession is transferred has only such rights as are given him by agreement of the parties, and if he attempts to exercise other rights over the property than were conferred upon him under such an agreement with the owner, then he violates a condition of the agreement, and if the owner so elects, possession of the personal property in question may be recovered back. If you find from the evidence that such was the case in the transaction between the United Grocery Co., and this defendant, then it will be your duty to find in favor of the plaintiff. Bibb v. United Grocery Co. (record), 73 Fla. 589, 74 So. 880.

I further charge you, gentlemen of the jury, that if you find from the evidence which has been submitted to you in the trial of this case, that the title to the automobile in question was in the plaintiff at the time when this action was started, then the plaintiff is entitled to a verdict for the possession of that automobile. Woods v. Thompson (record), 159 Fla. 112, 31 So. (2d) 62.

I charge you the material issues of fact in this case are simply this, in layman's language—if you believe from the evidence that Owen B. Wood is entitled to the possession of the tractor bulldozer, then your verdict should be for plaintiff. If you believe that the defendant, Howard J. Weeks, is entitled to right of possession, then your verdict should be for the defendant and that verdict is to be based upon the evidence here as to what you have heard as to who has possession. As I explained, title is not in issue here, merely possession. Wood v. Weeks (record) (Fla.), 81 So. (2d) 498.

§ 976c. Right to Possession Where Property Stolen.

I further charge you, gentlemen of the jury, that if you find

from the evidence which has been presented to you in this case, that the automobile which defendant bought from Richard Abner, or Abner Richard, was stolen property, and that the man who delivered this automobile to the defendant had no title to the property and no right of possession thereto, then the defendant in this case who received this automobile from Richard Abner, or Abner Richard, received no better title or right of possession to the property than the man he received it from had, and if you find that such a condition did exist, then your verdict should be in favor of the plaintiff. Woods v. Thompson (record), 159 Fla. 112, 31 So. (2d) 62.

§ 976d. Wrongful Taking and Detention in Issue.

The defendant, Howard J. Weeks, has filed certain defenses. The defense is that the defendant is not guilty and under this plea puts in issue not only right of possession, but wrongful taking and detention thereof. Wood v. Weeks (record) (Fla.). 81 So. (2d) 498.

The defendant has interposed a plea of not guilty to plaintiff's complaint. Such a plea under the Florida law puts in issue only the right of the plaintiff to the possession of the property described in the complaint and the wrongful detention thereof. If the plaintiff has established by a preponderance of the evidence that he is entitled to the immediate possession of the bulldozer which is the subject matter of this suit as against the defendant and that at the commencement of this action said bulldozer was in the possession of the defendant the plaintiff is entitled to recover from the defendant the bulldozer. Wood v. Weeks (record) (Fla.), 81 So. (2d) 498.

§ 976e. Defenses.

§ 976f. —— Sale of Property.

If you believe from the evidence that the plaintiff sold and delivered to the defendants the property in controversy, and that under and in pursuance of such sale and delivery the defendants were in possession of the property at the time that this suit was begun, then you must find for the defendants. Younglove v. Knox (record), 44 Fla. 743, 33 So. 427.

§ 976g. —— Special Property Interest.

Before you can find a verdict in favor of the defendants, the evidence in this case must produce in your minds the belief that first: on the 30th day of March, 1914, the defendant was entitled to possession of the goods replevined, and second: that the right to continue in possession arose directly out of some special property that the defendant had in the goods replevined, and

third: that this special property in the goods had a definite money value, and what the amount of that value was. Bibb v. United Grocery Co., 73 Fla. 589, 74 So. 880.

§ 976h. —— Settlement of Existing Indebtedness.

If you believe from the evidence that the plaintiff, prior to the commencement of this suit, delivered possession of the property in controversy to the defendants, in settlement of an existing indebtedness due by the plaintiff to the defendants, then the title to the property and the right of possession passed from the plaintiff to the defendants and the plaintiff cannot recover in this action. Younglove v. Knox (record), 44 Fla. 743, 33 So. 427.

§ 976i. —— Mortgage on Property.

You are instructed that, although you may believe from the evidence that Knox owed Younglove & Son money upon the mortgage, and in account, and that Younglove & Son held a mortgage upon the property, yet the fact of such debt and of the mortgage gave no right to G. D. Younglove & Son to take possession of said property without Knox's consent. In order to find a verdict for Younglove & Son you must be satisfied from the evidence that Knox actually sold and delivered to them the property. Younglove v. Knox (record), 44 Fla. 743, 33 So. 427.

§ 976j. —— Right of Possession in Third Party.

The Court further charges you that in this suit the defendant may take advantage of the right of possession of the property involved being in a third party and therefore if you find that Owen A. Wood was entitled to possession, or if you find that the defendant, Howard J. Weeks, was entitled to possession at the time suit was brought, then in either event, you must find in favor of the defendant, Howard J. Weeks. Wood v. Weeks (record) (Fla.), 81 So. (2d) 498.

§ 976k. Damages Generally.

If the jury find a verdict for the plaintiff, Knox, you will in your verdict find the value of all the property mentioned in the declaration, giving the separate value of each article which plaintiff is entitled to recover. You will also find such amount for the damages which you believe the plaintiff has sustained by reason of the detention of the property, the measure of the damages being the value of the property at the time of the taking, and 8 per cent interest thereon, from that date until the present time. Younglove v. Knox (record), 44 Fla. 743, 33 So. 427.

I further charge you that if you should find a verdict in favor of the defendants, when you come to fix the value of the property, you are not to find the whole value of the merchandise and

fixtures described in the declaration because under the evidence in this case all of that property actually belonged to United Grocery Co. Therefore, in such event, you can only find the value of the defendant's special interest in that property, and not what the property itself was worth. Bibb v. United Grocery Co., 73 Fla. 589, 74 So. 880.

Gentlemen, in this case evidence has been presented to you as to the use value of the bulldozer in question. If you find that the defendant was entitled to the possession of the bulldozer, then he is entitled to his damages during the time he was wrongfully deprived of possession, that is, from Nov. 4, 1953, to date. Wood v. Weeks (record) (Fla.), 81 So. (2d) 498.

§ 976l. Consequential Damages.

In this action consequential damages which do not necessarily and naturally result from the wrongful acts complained of cannot be recovered unless specially pleaded; as no such damages are specially pleaded in this case, they cannot be recovered. The general claim for damages at the conclusion of the declaration in this case is sufficient to entitle the plaintiff to recover all such damages at 8 per cent interest on the value of the property from the time of taking until the present time. Younglove v. Knox (record), 44 Fla. 743, 33 So. 427.

ROBBERY.

§ 976m. Robbery Defined.

I further charge you that whoever, by force, violence or assault or putting in fear, feloniously robs, steals and takes away from the person or custody of another, money or other property which may be the subject of larceny, is guilty of robbery. Ezzell v. State (record) (Fla.), 88 So. (2d) 280; Everett v. State (record) (Fla.), 97 So. (2d) 241; Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

See § 813.011, F. S. 1961.

Robbery is the stealing and taking away from the person or custody of another any money or other property which may be the subject of larceny by force, violence, assault or putting in fear the person robbed. Larry v. State (record) (Fla.), 104 So. (2d) 352.

The Court instructs you, the jury, that the term "robbery" as mentioned in these instructions, means whoever by force, vio-

lence or assault, or putting in fear, feloniously robs, steals and takes away from the person or custody of another, money or other property, which may be the subject of larceny and shall be punished by imprisonment in the State Prison for life, or for any lesser degree of years, at the discretion of the Court. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

Whoever, by force, violence or assault or putting in fear, feloniously robs, steals and takes away from the person or custody of another, money or other property which may be the subject of larceny, is guilty of robbery. Land v. State (record) (Fla.), 156 So. (2d) 8.

The term robbery as used in these instructions means the felonious taking of the money or personal property of another from his person, or in his presence and against his will, either by violence to his person, or by putting him in fear of some immediate injury to his person, with the intent to permanently deprive the owner of such money or property, and without any honest claim to it. Roberts v. State (record) (Fla.), 164 So. (2d) 817.

§ 976n. Meaning of "from the Person."

The words in the definition of robbery given you, "from the person", mean not only a taking immediately from the person of another, but they include a taking, by force, violence or assault or putting in fear, of property of another in the presence and under the immediate control and possession of the victim. Ezzell v. State (record) (Fla.), 88 So. (2d) 280.

§ 976o. Specific Intent Is an Essential Element.

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. However, if one who intends to commit a robbery becomes voluntarily intoxicated for the purpose of carrying out such intention, the intoxication will have no effect upon the act and intent thus carried out. Land v. State (record) (Fla.), 156 So. (2d) 8.

§ 976p. Intoxication as a Defense.

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 the specific intent to

rob which is a defense to robbery. Land v. State (record) (Fla.), 156 So. (2d) 8.

§ 977. Armed Robbery.

§ 978. —— Statutory Definition.

Amendment of Section.—Section 813.011, F. S. '53, was amended by Fla. Laws 1953, ch. 28217, § 1, and Fla. Laws 1955, ch. 29930. § 1 and appears in F. S. 1961 as follows: "Robbery defined; penalties.—Whoever, by force, violence or assault or putting in fear, feloniously robs, steals and takes away from the person or custody of another, money or other property which may be the subject of larceny, shall be punished by imprisonment in the state prison for life or for any lesser term of years, at the discretion of the court."

SALES.

§ 982a. Delivery of Property to Buyer Sufficient to Pass Title of Personalty.

In order to constitute a sale of personal property it is not necessary that there should have been any writing or bill of sale therefor. A delivery of the property into the possession of the buyer is sufficient to transfer the title to the property. Younglove v. Knox (record), 44 Fla. 743, 33 So. 427.

§ 998a. Passage of Title to Personalty Under Retain Title Contract with Express or Implied Authority to Sell.

Where owner consigns personalty to dealer with express or implied authority to sell, or delivers to another personalty with indicia of ownership or authority to sell, but with title reserved in owner until payment of price, purchaser, who pays value for goods and gets possession without notice of terms of original delivery, obtains good title as against original owner. Woods v. Thompson (record), 159 Fla. 112, 31 So. (2d) 62.

§ 998b. Warranties.

§ 998c. —— Warranties in Sale of Seeds.

§ 998c(1). Implied Warranty as to Variety.

Gentlemen of the jury, this is a suit for breach of implied warranty as to the variety of tomato seeds sold by the defendant to the plaintiff through the medium of an agent. The law is that when one sells another seed of a vegetable as being of a certain variety, and the crop raised turns out to be not of that variety, but of a different variety or of a mixture of varieties, and the purchaser is damaged thereby, he is entitled to recover from the seller the damages attributable to the variance of the crop raised from the variety of seed sold by the seller and purchased by the buyer. This damage must be limited solely to the failure of the seed to produce true to the variety which was the subject of the sale. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

Gentlemen of the jury, if a man sells seed to a farmer or to someone else, and it does not come true to a variety which he sold, there has been a breach of the implied warranty which was given along when he sold the seed, and if that's so, that man's entitled to a verdict from the hands of a jury for at least nominal damages if there has been such a breach of warranty. A purchaser is entitled to receive the variety he calls for and pays for, and if what he receives is a different variety, there is a breach of warranty which entitles the buyer to recover damages, and as I just said, at least nominal damages. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

I charge you that a seller of seed may not escape liability for varietal difference between seed represented for sale, and seed actually purchased by the buyer. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

You are instructed that, in order that the plaintiff may recover in this action, he must satisfy you by a preponderance of the evidence:

First, that he ordered of the defendant, or asked the defendant to deliver to him, one certain kind or variety of tomato seed; and

Second, that the defendant, in response thereto, delivered to the plaintiff a different kind or variety of tomato seed; and that the plaintiff has sustained damages by reason of such varietal difference. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

The Court instructs you, gentlemen of the jury, that if you believe from the evidence that the tomato seed sold and delivered by the defendant in response to the telegram to it from Stevenson's Seed Store, dated January 10, 1950, in evidence as plaintiff's Exhibit One, were purchased and planted by the plaintiff, and tomatoes were grown for commercial purposes therefrom,

and that said seed yielded tomatoes of a different variety from that named on the label of the seed packages, the defendant is liable, and it will be your duty to render a verdict in favor of the plaintiff. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

I charge you that if the telegram ordering the seed called for Grothen's Globe, and defendant issued a sales ticket and invoice describing the seed as Grothen's Globe, but described them on the packages as Grothen's New Red Globe, and if the plaintiff accepted and used the seed because he understood and believed them to be the same as Grothen's Globe, the defendant is estopped and cannot now be heard to say that Grothen's New Red Globe is a different variety from Grothen's Globe tomato seed. Jackson Grain Co. v. Hoskins (record) (Fla.). 75 So. (2d) 306.

The Court charges you, gentlemen of the jury, that evidence adduced in this case shows that there are different strains of tomatoes known to the commercial world as Grothen's Globe, resulting from trial tests or runnings and selections in the field made by different producers or growers of tomato seed planted in such field derived from the foundation stock or variety known as Grothen's Globe tomatoes. If you believe from the evidence that the tomato seed ordered and received by the plaintiff from the defendant was Grothen's Globe tomato seed, as known to the commercial world, but contained a strain of such kind or variety of seed which the plaintiff had never planted before or knew nothing about, such fact would not make the defendant liable unless the strain departed from the variety known as Grothen's Globe. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

In other words, if you find, from a fair preponderance of the evidence, that the seed sold were not of the labeled variety, but that the fruit produced from it was of a quality equal to the labeled variety, before you can find a verdict for the plaintiff, you must also find that the plaintiff has established, by a fair preponderance of the evidence, that the failure of the plants produced from such seed to produce fruit of the size and in the number normally produced was due entirely to the varietal variance. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

I charge you that if you find that the plaintiff has established, by a fair preponderance of the evidence, that the seed involved were not of the labeled variety, before you can return a verdict for the plaintiff in any amount, you must determine in what amount he was damaged by the varietal variance. There is testimony in this case that some of the fruit grown from such

seed were of a good quality and equal to the quality normally produced from the labeled variety. If you find from the evidence that this is true, before you could find a verdict for the plaintiff, you would also have to find that the failure of the plants produced from such seed to produce tomatoes equal in size and quantity to that normally produced by the labeled variety was due to the varietal variance, and not to climatic conditions, rainfall, or the lack of rainfall, or any other cultural deficiency. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

§ 998c(2). Damages for Breach.

I charge you, gentlemen of the jury, that before the plaintiff would be entitled to recover damages for the failure of the defendant to deliver to him the kind or variety of tomato seed which he ordered from the defendant, there must be evidence adduced showing the quantity of tomatoes and the value thereof which would have been raised by the plaintiff if he had received the kind or variety of tomato seed that he ordered from the defendant. In other words, the measure of damages would be the difference between the value of the crop of tomatoes which the plaintiff raised and a similar crop of the variety corresponding with the description of the seed ordered of the defendant by the plaintiff. If you believe from the evidence that the plaintiff has failed to establish any damages according to this measure of damages I have just mentioned to you, then you should find for the defendant. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

If you find for the plaintiff, you will come to the question of how much damage he suffered by reason of the seed not being true to name. It is impossible for the plaintiff or you or anyone to determine exactly how much damage plaintiff sustained, but it becomes your duty to consider all of the evidence and determine from the evidence, as best you can, what is the net difference between the market value of the crop raised and the crop that would have been raised from the seed ordered, and allow the plaintiff the amount so determined. That you are to do that if you find that the damage that you are giving comes solely from the difference in variety, and not from other causes. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

I charge you, in arriving at the value of the crop the buyer would have raised, you cannot speculate or conjecture, but your conclusions must be a reasonable approximation, based upon the evidence and common sense. In other words, in this case, gentlemen of the jury, if you determine, first, that the buyer here, Mr. Hoskins, got Grothen Globe tomato seed, you stop

right there and write a verdict for the defendant in this case. If you determine that he did not get Grothen Globe tomato seed, then you go a step further. You would give him a nominal amount of damages on that factor alone. If you find that he bargained to get Grothen Globe tomato seed and didn't get them, then you go further, and determine what his other damages were, or what we would call his actual damages, by a yardstick which the law sets up as the value of the crop which he would have raised had he gotten Grothen Globe tomato seed instead of raising the crop which he did. The difference between the value of those two crops would be his measure of damages, provided, in making your calculation, you determine that the failure to get the right variety of seed was the real cause of his raising an inferior crop, and not other things like poor cultivation, poor fertilization, poor spraying, or something entirely foreign to the question of the variety of the seed. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

I further charge you, the aim of your verdict, if it be for the plaintiff, should be to give him such damages as will put him in the same position he would have been in if the seed delivered had been the variety ordered, and you are not concerned with the question of the amount—that is, whether it be large or small, but you should find the true amount as best you can from the evidence, and allow that amount regardless of its size. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

The measure of damages beyond nominal damages is the difference between the value of the crop he would have raised of the variety he bargained for and the value of the crop which he actually raised from the seed which he received. I charge you that the damage must arise from the fact that the seed he got was a different variety from the seed he bargained to get, and a crop of tomatoes different from the crop he would have grown had he gotten the variety he ordered, and which he was entitled to get. If the inferiority of the crop which grew comes from other factors than the difference in the variety of seed—in other words, if it comes from such factors as improper cultural practices, fertilization, spraying, or the like—I charge you that the seller of the seed is not liable for that, but he is liable only for the loss the purchaser has received attributable solely to the fact that the crop he raised proved to be a different variety from the variety he purchased, or was not the particular variety which he purchased. In other words, it could be a different variety, or it could be a mixture of varieties. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

I charge you that, gentlemen of the jury, bearing in mind

that I charged you that there was that breach of the implied warranty by giving them a different seed from the seed they ordered, he would be entitled to nominal damages in all events. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

§ 998d. —— Warranties in Sale of Animals.

§ 998d(1). In General.

When the seller knows the use the purchaser intends to make of an animal, the sale for such use or purpose at a sound price carries an implied warranty that the animal is free from hidden defects or diseases which would impair its usefulness for such purpose; now, if you find from the preponderance of the testimony in this cause that the dog sold by the defendant to the plaintiff was at the time of such sale possessed of hidden defects or was infected with any disease which would impair its usefulness for the purpose for which it was purchased, your verdict in this cause would be for the plaintiff. Brown v. Faircloth (Fla.), 66 So. (2d) 232.

If the plaintiff has carried that burden by proving by a fair preponderance of the evidence that the dog was sold on an implied warranty — that it was sound when he knew it was not— and if you find the dog was not sound, you will find in favor of the plaintiff. If the plaintiff did not establish the right to recovery by a fair preponderance of the evidence, or if the testimony preponderates in favor of the defendant in support of his plea that he sold the dog only on an expressed warranty that the dog could run for three hours, and instead of being induced to buy the dog you find that Faircloth induced Brown to sell him the dog with the only warranty that it was a three-hour dog; and if you find by the testimony that a three-hour dog meant only that the dog was capable and could run three hours without weakening; and that there was no misrepresentation, your verdict would be for the defendant, Brown In the event your verdict is for the defendant your verdict would be, "We the jury find for the defendant, Brown." Brown v. Faircloth (Fla.), 66 So. (2d) 232.

If you find from a preponderance of the testimony in this cause that the defendant, T. L. Brown, sold to the plaintiff, R. E. Faircloth, the pointer dog, Pegasus Florida Major, here involved, for a sound purchase price; that, at the time of sale, the seller knew that the purchaser was purchasing said dog for the purpose and with the intent of running or campaigning said dog on the major bird dog field trial circuit in competition with other bird dogs, and that in some such stakes or events the competing dogs are required to run braces or heats of three hours duration; that, at the time of sale, the seller warranted unto the purchaser that said dog was a "three-hour dog"; that, at the time of sale,

the seller did also warrant unto the purchaser that said dog was "finished on his game"; that, at the time of sale, the seller did further warrant unto the purchaser that said dog was in a sound physical condition; and, if you further find from a preponderance of the testimony in this cause that said dog was not a "three-hour dog" or that said dog was not "finished on his game" or that said dog at the time of sale was not in a sound physical condition, your verdict in this cause will be for the plaintiff, R. E. Faircloth, providing you also find from the testimony herein that said plaintiff did, within a reasonable time, return or offer to return said dog to the defendant and did demand back the purchase price thereof and that the defendant did refuse to receive back said dog and to return the purchase price thereof to the plaintiff. Brown v. Faircloth (record) (Fla.), 66 So. (2d) 232.

If you find from a preponderance of the testimony in this case that the plaintiff, R. E. Faircloth, purchased from the defendant, T. L. Brown, the pointer bird dog, Pegasus Florida Major, here involved, paying therefor a sound price; that at the time of sale defendant knew that plaintiff was purchasing said dog for the intended use and purpose of running or campaigning said dog in bird dog field trials on the major field trial circuit; that in some such field trials a dog is required to run races or heats of three hours duration, which fact was known to the defendant at the time of sale, that at the time of sale defendant represented to plaintiff that said dog was a "three-hour dog," meaning thereby that the dog was capable of running a three hour race or heat in a manner necessary to win such trials; that defendant further represented to plaintiff that said dog was finished on his game, meaning thereby that said dog was so trained in such style in handling or pointing birds found by him as to be capable of winning field trials on the major field trial circuit; that the defendant also represented to plaintiff that said dog was in sound physical condition; that plaintiff had no opportunity of trying out or inspecting said dog, but was induced to rely upon, and did rely upon, such representations of the defendant; and you also find from a preponderance of the evidence in this cause that within a reasonable time after said sale the plaintiff caused said dog to be worked or tried out by skilled professional field trial handlers or bird dog trainers and it was found that said dog was not a "three-hour dog," that he was not "finished on his game," and was not a dog of such qualities and training as are required of a bird dog in order to win three-hour heats or braces on the major field trial circuit, or one which could be reasonably expected to win on the major field trial circuit in accordance with the intent of the plaintiff in purchasing said dog as was known to the defendant at the time of said sale; that promptly thereafter plaintiff returned,

or offered to return said dog to defendant and demanded of defendant that he refund to plaintiff the purchase price of said dog, but that defendant refused to accept the return of said dog and refused to refund the purchase price of said dog to plaintiff; and if you find further from a preponderance of the testimony in this cause that said dog, at the time of his sale by defendant to plaintiff, was infected with the disease known as "Smart worms" and was, therefore, unsound, your verdict in this cause will be for the plaintiff, R. E. Faircloth. Brown v. Faircloth (record) (Fla.), 66 So. (2d) 232.

If you find from a preponderance of the testimony in this case that the defendant, T. L. Brown, sold to the plaintiff, R. E. Faircloth, the pointer bird dog here involved with the knowledge and understanding that the dog was being purchased by Mr. Faircloth with the intent or the purpose of campaigning or running said dog in field trials upon the major field trial circuit; that at the time of the sale it was understood and agreed between the parties that Mr. Faircloth was purchasing said dog upon a thirty-day trial period subject to the approval of one E. A. Weddle, a professional field trial handler, as a dog of such qualities and training as to be able to successfully compete in field trials in the major field trial circuit and especially in trials which ran heats or braces of three hours duration; and you also find that a fair trial of said dog was made by this said E. A. Weddle through running or working said dog on different occasions and for various periods up to three hours or longer, and that having so done the said E. A. Weddle did conclude that said dog was not of such qualities or training as to be able to successfully compete on the major field trial circuit, and especially in those trials which required heats or braces of three hours duration; and you also find that as a result of such findings and conclusions by the said E. A. Weddle that the plaintiff, R. E. Faircloth, did within the thirty-day trial period advise the defendant, T. D. Brown, that the dog was not, in the sound judgment and opinion of the said E. A. Weddle, a "three-hour dog" or of such qualities and training as to be able to successfully compete on the major field trial circuit, and especially in trials where the stakes or braces were of three hours duration, and the said plaintiff did, within the said thirty-day trial period, offer to return said dog to the defendant and did demand of the defendant a refund of the purchase price of said dog, your verdict in this cause will be for the plaintiff, unless, of course, the parties made some other agreement at that time, which is covered here by the next instruction. Brown v. Faircloth (record) (Fla.), 66 So. (2d) 232.

If you find from the preponderance of the testimony in this cause that the plaintiff, R. E. Faircloth, purchased from the de-

fendant, T. L. Brown, the pointer dog, Pegasus Florida Major, here involved, upon the expressed understanding and agreement that said dog would be forthwith delivered over to one E. A. Weddle, a professional field trainer, for a thirty-day trial period in order that the said E. A. Weddle might run or work said dog so as to determine whether or not the said dog, in the opinion of said E. A. Weddle, was a "three-hour dog" as that term is generally known and understood in the field trial circuit, and if the said E. A. Weddle, after reasonably and fairly working or running said dog did, in his sound judgment and discretion determine that said dog was not a "three-hour dog" and after so concluding did advise the plaintiff thereof; that said plaintiff did thereupon communicate such facts to the defendant and did offer to return said dog to the defendant and did demand of the defendant the return of the purchase price of said dog; and you further find from the evidence in this cause that at the time of so offering the return of the said dog to the defendant, the plaintiff and the defendant agreed that said dog would be turned over to one John S. Gates, a professional field trial handler, for the purpose of having said John S. Gates work or try out said dog, and that at said time the defendant agreed with the plaintiff that if said dog did not prove to the satisfaction of the said John S. Gates that it was a dog of such abilities and training as to successfully compete on the major field trial circuit, or that said dog was not a "three-hour dog" as that term is generally understood in field trial circles, then the said defendant would retake possession of said dog and would refund the purchase price thereof to the plaintiff; and if you also find from the testimony herein that said dog was thereupon delivered over to the said John S. Gates and was by him duly worked or tried out and as a result thereof the said John S. Gates did conclude that said dog was not of such abilities and training as to successfully compete on the major field trial circuit, or was not a "three-hour dog" as that term is generally understood in the field trial circles, and that forthwith thereafter the plaintiff did offer to return said dog to the defendant and did demand of the defendant the return of the purchase price of said dog, your verdict in this cause will be for the plaintiff. Brown v. Faircloth (record) (Fla.), 66 So. (2d) 232.

§ 998d(2). Rescission for Breach.

The defendant has admitted that in selling the dog to the plaintiff he warranted that the dog was a "three-hour dog." Now, if you find from a preponderance of the evidence in this cause that the dog was not a "three-hour dog" as that term or designation is generally understood in field trial circles, you will find

that the plaintiff was entitled to rescind the sale and your verdict should be for the plaintiff. Brown v. Faircloth (record) (Fla.), 66 So. (2d) 232.

§ 998d(3). Damages for Breach.

In the event that your verdict in this cause shall be for the plaintiff, you will find that the plaintiff is entitled to recover from the defendant the full purchase price of said dog together with such costs, charges and expenses as the proof herein shows to have been accrued by the plaintiff in connection with the boarding, care, treatment and training, including cost of transportation and the expenses incurred by the plaintiff in connection with his endeavor to return said dog to the defendant, and that in addition thereto plaintiff is also entitled to recover interest on such sum or sums of money from the time of payment thereof to the present time at the rate of six per cent per annum thereof, and in assessing the damages of the plaintiff, you shall be governed accordingly. Brown v. Faircloth (record) (Fla.), 66 So. (2d) 232.

As I told you, if the plaintiff has established by a fair preponderance of the testimony that the dog was sold to him on the expressed warranties alleged in his pleadings and on the thirty-day trial period within which to see if the dog measured up to those warranties; if, as he says, another was to be final arbiter, as set forth in the pleadings; if he further established that the dog did not measure up to these expressed warranties; and that he returned the dog, and the defendant, Brown, failed to accept or refund money, your verdict would be in favor of the plaintiff, and the amount of the recovery would be the full purchase price he paid for the dog with interest, also such sum as he paid out for the care and keep of the dog. The form of your verdict would be, "We, the jury find in favor of the plaintiff and against the defendant and assess damage at," and then find the sum to cover. Brown v. Faircloth (record) (Fla.), 66 So. (2d) 232.

SENTENCE AND PUNISHMENT.

§ 1005a. Jury May Recommend Defendant to Mercy of the Court or to Executive Clemency.

§ 1005. Court's Province to Award Punishment.

In the event of a conviction in this case, the maximum penalty would be five years in the state prison or a fine of $1000. The Court is also empowered under the law to suspend imposition of sentence or to place the defendant on probation, if it should appear to the Court from consideration of all the circumstances

that such treatment would be to the best interest of society and of the defendant. Cason v. State, 159 Fla. 294, 31 So. (2d) 274.

Duty of Court to Charge on Penalty.

In accord with 1st paragraph of note in original edition. See McClure v. State (Fla. App. 3rd Dist.), 104 So. (2d) 601.

Now, you gentlemen should not concern yourselves with the penalty. That has nothing whatever to do with the guilt of the accused. If they are guilty, the determination of what penalty is imposed upon them, if any, is entirely the province of the Court. The Court cannot invade your province and say what witnesses told the truth and what witness hasn't or what has been proved and what has not. That's your responsibility and yours alone. The Court cannot invade that province. You have no more right to decide that if you believe a person is guilty that you will turn him loose because you think the penalty is too severe. If you do that, you are violating your oath because you have left the law to the Court and that's part of the law. You should not concern yourselves, therefore, with that. Your question is to determine whether or not the state has proved the accused guilty and if it has, to find them guilty, and if it hasn't to find them not guilty. Chacon v. State (record) (Fla.), 102 So. (2d) 578.

§ 1005a. Jury May Recommend Defendant to Mercy of the Court or to Executive Clemency.

Under the law of this state, if you convict the defendant, you may in your verdict recommend him to the mercy of the Court or to executive clemency. Such a recommendation in a case like this does not necessarily bind the Court or the Governor, but it is advisory and would be persuasive. Cason v. State, 159 Fla. 294, 31 So. (2d) 274.

STATUTE OF FRAUDS.

§ 1006a. Operation with Respect to Promise to Pay Debt of Another.

I charge you that the law provides that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement or promise upon which action should be brought, or some note or memorandum be in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized; but where there is an independent and unconditional promise by one person to pay the debt of another, and such promise is made for a

valuable consideration, which is subsequently paid or executed by the promisee, and is of direct pecuniary value to the promisor, the transaction is not within the statute of frauds and may be an enforceable contract. Peterson v. Paxton-Pavey Lumber Co. (record), 102 Fla. 89, 135 So. 501.

Editor's Note.—The instructions in this section were neither approved nor expressly disapproved. They are included for consideration in connection with all Florida decisions on the point.

Gentlemen, I charge you that if you should find that the defendant, Peterson, merely guaranteed the payment of this account, then you should find for the defendant, because that would be required by the statute of frauds. This statute of frauds, gentlemen, is designed for the purpose of preventing fraud and perjury. A straight promise to pay another's debt is not enforceable unless it is signed by the person to be charged or some person lawfully authorized to sign it. Peterson v. Paxton-Pavey Lumber Co. (record), 102 Fla. 89, 135 So. 501.

If you find in this case that the plaintiff was under obligation or was under contract to furnish the material to the Home Builders Company, and that the Home Builders Company had failed to pay for the material, and that the defendant was notified that they would not furnish the material until it was paid for, and that in pursuance of such notice, the defendant in this case promised and agreed to pay this account; that he was interested in the project, and in pursuance of such promise and undertaking the plaintiff continued to furnish the material that was described in the declaration; that the defendant was interested in the hotel and that it was to his direct pecuniary benefit that the material be furnished, if you find that and the burden of proof is upon the plaintiff to prove that, then you should find for the plaintiff. Peterson v. Paxton-Pavey Lumber Co. (record), 102 Fla. 89, 135 So. 501.

If you should find that that is not true, that any of those elements are not true, then you shoud find for the defendant. In other words, gentlemen, if you should find that the defendant in this case had no pecuniary interest in this matter; that the material was not furnished upon his representation that the contractor was indebted to the plaintiff for this material, and that the defendant merely paid this payment to the account of the Home Builders concern and did not agree to pay the balance of this account, or did not agree to pay for the future material that was to be delivered; in other words, did not assume to pay for these things, then you should find for the defendant in this case. Peterson v. Paxton-Pavey Lumber Co. (record), 102 Fla. 89, 135 So. 501.

If you believe from a preponderance of the evidence that the

defendant entered into an agreement with the plaintiff as the plaintiff has alleged in its declaration, and promised the plaintiff that if he would continue to furnish the material for the completion of the hotel, as alleged, that the defendant would pay to the plaintiff the balance owing to it by the contractor, the Home Builders Company, as well as the other materials to be furnished by the plaintiff, and that in pursuance of such promise, and in consideration thereof, the plaintiff furnished to the defendant materials to complete the said hotel, then I charge you that the defendant would be bound by such agreement and the plaintiff would be entitled to recover the balance due by the contractor and the value of such other material as may have been furnished in pursuance of such agreement and your verdict should be for the plaintiff, if you find those conditions to exist. Peterson v. Paxton-Pavey Lumber Co. (record), 102 Fla. 89, 135 So. 501.

STREETS AND HIGHWAYS.

§ 1013. Liability of City for Injuries Resulting from Defective Streets and Sidewalks.

§ 1014. —— Liability for Negligence Generally.

In actions against municipal corporations for personal injuries resulting from failure to repair sidewalks, the gist of the action is negligence on the part of the corporation; that such corporations are required to exercise reasonable diligence in repairing defects in sidewalks after the unsafe condition thereof is known or ought to have been known to them or their officers having authority to act for them. Key West v. Baldwin (record), 69 Fla. 136, 67 So. 808.

§ 1015. —— City Not Insurer of Safety of Persons Using Sidewalks.

While it is the duty of municipal corporations to keep the highways, including sidewalks, in a reasonably safe condition for ordinary travel by those using them for proper purposes, the municipal corporation is never regarded as an insurer of the

safety of a person. Key West v. Baldwin (record), 69 Fla. 136, 67 So. 808.

§ 1017. —— Duty of City to Maintain Streets and Sidewalks in Reasonably Safe Condition.

Under the laws of the State of Florida municipal corporations have the power to regulate and control the grading, construction and repairs of all streets, pavements and sidewalks in such municipalities, respectively, and as a result of this power they are required to exercise reasonable diligence in repairing defects in streets and sidewalks after the unsafe condition is known, or ought to have been known, to them or to their officers having authority to act for them; and the municipality is liable in damages for negligent nonperformance of this duty. Key West v. Baldwin (record), 69 Fla. 136, 67 So. 808.

The duty to keep the sidewalks in safe condition rests upon the city of Key West and it is liable for injuries caused by its negligence or omission to keep the sidewalks in repair as well as for those caused by defects occasioned by the wrongful acts of others, but as the basis of the action is negligence, notice to the city of the defective sidewalk which caused the injury, or of facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability. Key West v. Baldwin (record), 69 Fla. 136, 67 So. 808.

Under section 26, chapter 5812, the city council of the city of Key West has power to regulate and provide by ordinance for the grading and constructing of sidewalks and the paving and repair of the same by the owners of the property abutting thereon, and if the owner or owners of said abutting lots, which shall be so required by ordinance to be constructed and paved as aforesaid, shall fail to comply with the provisions of the ordinance relating to grading and construction of sidewalks within such time as may be prescribed by said ordinance and in accordance with the plans and specifications prescribed by such ordinance, it is the duty of the board of public works, acting for and on behalf of the city of Key West, to contract for the construction, grading, paving or repairing of such sidewalks as the case may be, and the cost thereof becomes a lien upon the abutting property. Key West v. Baldwin, 69 Fla. 136, 67 So. 808.

§ 1017a. —— City Not Relieved of Duty by Statute Authorizing Such Work to Be Done by Abutting Owners.

Where a statute authorizes the city to regulate and provide

by ordinance for the grading and construction of sidewalks and the paving of the same, and the repair thereof, by the owners of the property alongside and abutting thereon, it does not relieve the city of its duty to exercise reasonable diligence in repairing defects in sidewalks, or its liability for negligence in the discharge of this duty. Key West v. Baldwin (record), 69 Fla. 136, 67 So. 808.

§ 1023a. Liability of Contractor Performing Highway Construction Work.

§ 1023b. —— Liability for Negligence as to Travelers.

§ 1023b(1). In General.

The Court instructs the jury that it is the duty of any corporation or person who constructs and maintains a barricade upon the public highway of this state to use such reasonable care and caution in the construction and maintenance of said barricade as will not result in injury to persons lawfully using said highway in the usual and customary manner and if you believe from a preponderance of the evidence in this case that the defendant, H. E. Wolfe Construction Company, did construct and maintain a barricade upon the public highway, as charged in the plaintiff's declaration, then you are instructed, as a matter of law, that in arriving at a conclusion of whether or not said defendant did use reasonable care and caution in the construction and maintenance of said barricade, you should consider the manner of construction of said barricade, the materials used in the construction, the warnings, if any, placed upon or near said barricade, the sufficiency of said warnings, if any, to persons in the lawful use of said highway, the kind and amount of traffic, if any, upon said highway, the speed or lack of speed with which traffic, if any, ordinarily moved upon said highway at point of said barricade, the width and surface of the highway at and near said barricade, the curves or lack of curves in the highway near said barricade, the lights or lack of lights upon or near said barricade, the sufficiency or insufficiency of said lights, if any, to give warnings of the presence and location of said barricade, together with all the other facts in the case as shown by the evidence in determining the question of negligence or lack of negligence on the part of the defendant, H. E. Wolfe Construction Company, in this case. H. E. Wolfe Constr. Co. v. Ellison, 127 Fla. 808, 174 So. 594.

I charge you that a contractor performing highway construction work is bound to act reasonably and with due regard for rights of persons lawfully using the way, and is liable for injuries and damages resulting from his negligence in performance of

his work. In this case there is no denial of the fact that the plaintiff was lawfully using the highway, at the time and place mentioned, and so if you find that the plaintiff has proved, by a preponderance of the evidence, that he suffered damages because of the negligence of the defendant, in that the defendant permitted such part of the highway to become and remain in such a weakened condition and of insufficient strength to uphold the weight of loaded motor vehicles such as that of the plaintiff and that the plaintiff was damaged as a result of such negligence, then the plaintiff is entitled to recover, and you should find a verdict for the plaintiff for such damages as he is entitled to under the evidence and the instructions of the Court. Smith Engineering & Constr. Co. v. Cohn (record) (Fla.), 94 So. (2d) 826.

I further charge you that a traveler on a highway is not ordinarily deemed negligent in continuing to travel on the highway in the face of road signs notifying the public that the road ahead is under construction and that one electing to proceed along highway does so at his own risk; provided traveler maintains close lookout ahead and exercises caution commensurate with observed dangers. So, in this case, even though you find that signs were placed along the highway notifying the public that the road was being repaired or was under construction and that one electing to proceed along the highway did so at his own risk, such signs would not excuse the defendant in negligently permitting the road to become and remain in a weakened condition and of insufficient strength to uphold the weight of loaded vehicles such as that of the plaintiff, and if you find, from a preponderance of the evidence, that the defendant did negligently permit the said highway to become and remain in such a weakened condition and that the plaintiff's vehicle was maintaining a close lookout and was exercising due caution but was damaged because of such weakened condition of the highway, then under those circumstances you should find a verdict for the plaintiff. Smith Engineering & Constr. Co. v. Cohn (record) (Fla.), 94 So. (2d) 826.

§ 1023b(2). Effect of Warning Lights or Flares.

I further charge you that even if the defendant had placed light pots, or flares, along the highway, and that they, or some of them, were burning at the time, that would not excuse the defendant if it was guilty of not maintaining the highway in a reasonably safe condition for the passage of traffic over it, as it is not contended that the lights constituted a closing of the road. The keeping of the road open by the defendant made it necessary for the defendant to maintain it in a reasonably safe condi-

tion and the placing of lights or flares along the highway would not excuse the defendant if it failed to maintain the road in such a condition that it was of sufficient strength to uphold the weight of loaded motor vehicles, such as that of the plaintiff in this case. The lights would be for the purpose of informing the traveling public that the road was under construction and to travel with caution. So if you find, from the evidence, that the driver of the plaintiff's vehicle was traveling with due caution at the time and place, then the fact that lights were burning at or near the place would not excuse the defendant. Smith Engineering & Constr. Co. v. Cohn (record) (Fla.), 94 So. (2d) 826.

§ 1023b(3). Effect of Act of God.

I further charge you that the fact that the accident happened soon after a heavy rainfall or flood, and that such rainfall or flood had caused or helped to cause, the weakened condition of the said highway, is no defense to the plaintiff's claim for damages, and would not excuse the defendant from liability therefor unless you find that such rainfall was a providential occurrence or extraordinary manifestation of the forces of nature, which could not have been foreseen and the effect thereof avoided by reasonable prudence and care or by the use of those means which the situation renders reasonable to employ. While an act of God could be a defense to an accident, it must be such a one that could not have been foreseen and the effect thereof avoided by reasonable prudence and care or by the use of those means which the situation renders reasonable to employ. Although a rainfall may be more than ordinary, yet if it be such as has occasionally occurred, and it may be at irregular intervals, it is to be foreseen that it will occur again and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it, and a duty is upon the defendant to do more than keep the highway safe from ordinary floods but to keep it safe from such extraordinary floods as it should be anticipated would occasionally occur in the future, because they had occasionally occurred at intervals, though of irregular duration, in the past. So even if you find that the accident involved herein happened soon after an extraordinary, heavy rainfall or flood, and one of rare occurrence, but that similar rainfalls had occurred in the past, and it should have been anticipated that they would occasionally occur in the future, then such extraordinary rainfall would not excuse the defendant in its failing to properly maintain the said highway in a safe condition for the passage of motor vehicles such as the plaintiff's vehicle involved herein, and the defendant is liable for such damages as its negligence in failing to so maintain the

highway caused the plaintiff to sustain, and you should render a verdict for the plaintiff for such amount as you find him entitled to under the evidence and the charge of the Court. Smith Engineering & Constr. Co. v. Cohn (record) (Fla.), 94 So. (2d) 826.

TELEGRAPHS AND TELEPHONES.

§ 1026a. Liability of Telegraph and Telephone Companies for Injury to Persons or Property.

§ 1026b. —— On or Adjacent to Streets and Highways.

§ 1026b(1). Duty as to Location of Poles.

In this case the law gave the defendant company the right to erect its telephone poles within the highway right-of-way—the road right-of-way of the state and within the street right-of-way of the city, provided they are given permission by the particular city in question, and so long as they are so erected as not to interfere with the ordinary uses of the street. In this case there is no question about the defendant having had permission from the city and therefore having the right to erect its telephone poles. However, gentlemen, that right or that statute is subject to this requirement or regulation—they must not locate those telephone poles in such manner as to constitute negligence or the violation or the omission to perform their duty, which is not only their duty, but the duty of all other persons to act with ordinary and reasonable care and caution in the carrying on of their work or the doing of this particular act or the location of the poles, as it happens to be in this particular case so as to not be chargeable with negligence for locating them where it's reasonable to assume that they may cause injury. 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.

In this case, it is charged in the declaration that the pole was erected at or near the beginning of the curve. I charge you, gentlemen, that the meaning of that would be that meaning which was commonly and ordinarily accepted or what would commonly and ordinarily be accepted as the beginning of the curve in the road. The plaintiff's case here is predicated on the doctrine or theory or principle that the defendant is negligent in this particular case in erecting and maintaining the pole because it was

erected so close to or near to the paved portion of the highway at or near a curve of the character claimed here, and where the surrounding circumstances and conditions were such that though it might not be negligence to erect the pole elsewhere that close to the highway, that it would be failure to use ordinary, reasonable care to protect the public against injury from its erection and maintenance to put it that close to the highway at this particular point under the particular circumstances of this case. And, of course, it is encumbent upon the plaintiff to prove that there was negligence under this allegation before you could bring in a verdict for the plaintiff, and if she has proven that to your satisfaction by a fair preponderance of the evidence and there is no contributory negligence found to exist on the part of the plaintiff, then, of course, you would bring in a verdict for the plaintiff. 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.

The law in this case, therefore, the Court will charge you would be this, that if you find in this case, from all of the circumstances and because of the particular circumstances and situations surrounding the particular spot and place in the road and highway where this pole was placed and maintained, is such that an ordinarily, reasonable, prudent person would have reasonably anticipated that it might reasonably be expected to cause injury to members of the public using that highway, then the defendant would be guilty of negligence in placing and maintaining its pole there and you would then determine—if you determine those are the facts and that it is guilty of negligence, of course,—then you would proceed to the determination of the other questions—whether or not it caused the injury or whether or not something else caused it, or what did cause it. 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.

As I said a moment ago, the evidence in the case, before you can find a verdict for the plaintiff, must not only show the defendant is guilty of negligence in the erecting and maintaining of this pole at the particular point in question, but it must appear that it was either the sole cause or that it, together with the negligent act of some other person or persons other than the plaintiff, was the proximate cause of the injury complained of. If the negligence of the driver of the automobile in not driving his car with due care and caution was the sole cause of the injury, then, of course, the defendant would not be liable because the defendant would not have had anything to do with the injury if the plaintiff's driver's negligence was the sole cause of the injury. 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.

If you believe from the evidence and to that degree of proof which I have heretofore charged you, that the defendant in this cause, the Peninsula Telephone Company, was guilty of negligence in erecting and maintaining its telephone pole in such close proximity to the paved and traveled portion of Tenth Street in the city of Haines City at the particular place where this pole was so erected, considering the type of the terrain and the sharp turn in the street, and that its negligence in so permitting said telephone pole to be so erected and maintained concurred as a direct and proximate cause of the injury sustained by the plaintiff, Evelyn Bielling Marks, when the car in which she was riding as a passenger collided therewith, and that the plaintiff herself was free from fault and had used ordinary prudence and care, considering her age and all other surrounding circumstances, you should find for the plaintiff even though you should also believe from the evidence that the negligence of the driver of the car had concurred with the negligence of the defendant company in producing the injury complained of, for in that case both the defendant company and the said J. F. Crum, or either of them, would be liable to the plaintiff. 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.

THEATERS AND SHOWS.

§ 1026c. Duty and Liability of Proprietors.

§ 1026d. —— Duty to Patrons and Invitees.

§ 1026d(1). In General.

A theater does owe its patrons the duty of using ordinary care to maintain its premises in a reasonably safe condition. By ordinary care, the court means that degree of care which would be exercised by an ordinarily careful man under the same or similar circumstances. The care must be proportionate to the dangers known or to be reasonably apprehended. As already instructed, failure to anticipate and guard against dangers which are improbable and which could not reasonably be anticipated is not required on the part of the operator, and should injuries result from sources which could not reasonably be anticipated

and over which the theater had no control, no liability is imposed upon an operator for such injuries. Central Theaters v. Wilkinson (record), 154 Fla. 589, 18 So. (2d) 755.

The court further charges the jury that the defendant was required to use all reasonable care to supervise and guard its theater so as to prevent injuries to patrons from any source which might reasonably be anticipated and can only be held liable for injuries arising as a proximate result of its failure to use such care. Thus, even should you find that the defendant failed to guard the theater, this would not in itself constitute negligence, unless the plaintiff was injured as a result of some act which the defendant should have anticipated and guarded against, and such injuries were the proximate result of the failure of the defendant to anticipate and guard against such act. Central Theaters v. Wilkinson (record), 154 Fla. 589, 18 So. (2d) 755.

The operator of a public resort owes to his patrons a duty to maintain the premises in a reasonably safe condition, and to discharge such duty the operator of the resort is obligated to exercise that degree of care and prudence which an ordinarily prudent person would ordinarily exercise under such circumstances. Rainbow Enterprises v. Thompson (record) (Fla.), 81 So. (2d) 208.

§ 1026d(2). Proprietor Not an Insurer.

The court further instructs the jury that an operator of a theater is not an insurer of the safety of its patrons and it is not responsible in damages for all accidents or injuries to persons entering the theater. Central Theaters v. Wilkinson (record), 154 Fla. 589, 18 So. (2d) 755.

§ 1026d(3). Duty as to Protection of Patrons from Assaults.

The court further charges you that it was the duty of the defendant to exercise all reasonable care and diligence at the time of the injury complained of to protect all of its patrons, including the plaintiff, from any wanton or unprovoked attacks or assaults upon the patrons of the theater, including the plaintiff, and if the defendant failed to provide such protection then it would be guilty of actionable negligence, if you find that a reasonably cautious and prudent person, in the operation of that place of business, should have and would have anticipated an injury or assault of the nature and kind complained of in this case. In other words, the defendant was bound to use all reasonable care and diligence in the protection of its patrons from the unwarranted and unprovoked assaults similar to that complained of. But if you find that he did use all reasonable care and diligence, that is, such as

a reasonably cautious and prudent person would have used under the same circumstances, then he was not guilty of actionable negligence and your verdict would be for the defendant. Central Theaters v. Wilkinson (record), 154 Fla. 589, 18 So. (2d) 755.

Now in this case, the plaintiff alleges that the defendant at the time of the injury complained of failed to properly supervise and guard its patrons, including the plaintiff, by having at its place of business guards sufficient to prevent its patrons, including the plaintiff, from an unprovoked assault by boisterous persons that might be in or about the theater. Central Theaters v. Wilkinson (record), 154 Fla. 589, 18 So. (2d) 755.

If you find from the preponderance of the testimony in this case that the defendant at the time of the injury complained of was negligent in that manner, that it failed to provide such guard and supervision as was necessary or reasonably seemed to be necessary in order to protect its patrons from assault by boisterous persons, then the defendant in this case would be guilty of the negligence complained of in the second count of the declaration, and your verdict should be for the plaintiff. On the other hand, if you find from the testimony that a reasonably cautious and prudent person operating the theater at that time would not have provided any greater guard or supervision, would not have deemed it necessary to provide any greater protection for its patrons than the defendant at that time provided, then the plaintiff would not be guilty of actionable negligence as alleged in the declaration. Central Theaters v. Wilkinson (record), 154 Fla. 589, 18 So. (2d) 755.

TRESPASS.

§ 1028a. Criminal Trespass.

§ 1028b. —— Trespass and Injury to Realty.

§ 1028b(1). In General.

The information in this case charges the defendant Ann Duke with substantive felony, in this county, on the 4th day of August of this year, as an accessory before the fact to the felony of unlawfully and willfully in and upon the lands of the Peninsula Realty Investment Company, a corporation, to wit: (description of lands); that she, the defendant, did commit a trespass by cutting and carrying away therefrom pine and cypress timber then

and there standing and growing, of the value of $500.00, property of the Peninsula Realty Investment Company, a corporation, and that at the same time (naming several individuals) unlawfully and willfully in and upon the lands described of the Peninsula Realty Investment Company, a corporation, did commit a trespass by cutting and carrying away therefrom pine and cypress timber then and there standing and growing of the value of $500.00 of the property of Peninsula Realty Investment Co., a corporation; charges that the defendant at the same time and before the commission of the felony by the others named in the information, that she, the defendant, Ann Duke, unlawfully and feloniously did counsel, hire, move, procure and encourage, command, incite and in other ways procure the others named, to wit, (naming other persons), to do and commit the said felony. Duke v. State (record), 137 Fla. 513, 188 So. 124.

See § 821.11 F. S. 1957.

In order to convict the defendant in this case the jury must find from the testimony that the defendant had an unlawful intent, that is, an intent to trespass upon the property described in the information, an intent to cause and to procure the principals named in the information to go upon the premises described in the information and cut thereon standing timber—if you believe from the testimony in this case that this defendant, knowingly, willfully and intentionally and without right, went upon or caused the persons named in the information to go upon the premises described in the information to cut standing timber thereon of greater value than $50 00 and you further believe that the principals themselves went upon and cut timber thereon of greater value than $50.00 and unlawfully entered thereon, then you will find the defendant guilty as charged in the information. Duke v. State (record), 137 Fla. 513, 188 So. 124.

If the jury believes from the testimony in this case beyond a reasonable doubt that the principals named in the information in this case entered upon the property described therein, at the time alleged in the information, or within two years next before the filing thereof, which was on the 3rd day of November of this year —if you believe the principals named in the information went upon the property described in the information, willfully, intentionally and unlawfully and cut standing timber thereon as alleged in the information, of greater value than $50.00, and if you further believe from the testimony in this case beyond a reasonable doubt that before the principals named in the information went upon the property as charged in the information, that the defendant Ann Duke, procured, encouraged, commanded, incited or in any other manner caused or procured these principals named in the information to go upon the property described

therein and to cut the timber or any timber thereon of greater value than $50.00, and at the same time she so procured or caused the principals to go thereon that she, the defendant, knew that she was committing a trespass by inciting them who committed such trespass, then the jury will find the defendant guilty as charged. Duke v. State (record), 137 Fla. 513, 188 So. 124.

§ 1028b(2). Requirement of Criminal Intent.

One of the issues for you gentlemen to pass upon, and in this case if you find that the principals named in the information unlawfully went upon the premises and cut standing timber of greater value than $50.00, then you will determine and decide from the testimony in this case whether, even though you believe that the defendant caused the principals named in the information to go upon the premises, whether the defendant herself entertained a criminal intent, that is, an intent to trespass and go upon the premises for the purposes of taking timber therefrom, or cause it to be done as alleged in the information. Duke v. State (record), 137 Fla. 513, 188 So. 124.

If you believe the defendant caused and procured the cutting of timber thereon as alleged in the information, with an intent that timber should be taken therefrom, against the consent of the owners, and knowingly and willfully procured it to be done, then the defendant would be guilty. On the other hand, if you believe from the testimony in this case that the defendant, if you believe she procured the cutting thereon, did so innocently and from an honest mistake, then she would not be guilty, or if you have a reasonable doubt on the issue, you should give her the benefit of the doubt, and find her not guilty. Duke v. State (record), 137 Fla. 513, 188 So. 124.

§ 1028b(3). Effect of Bona Fide Claim of Right.

If the jury find and believe in this case that the defendant went upon the premises described in the information under a bona fide claim of right and in good faith, or caused the principals named in the information to go upon the premises described therein in good faith and under a bona fide claim of right, although mistaken as to the ownership thereof, then the defendant would not have a criminal intent and the jury should not convict the defendant. Duke v. State (record), 137 Fla. 513, 188 So. 124.

§ 1028b(4). Determining Value of Property Injured.

In passing upon and determining the value of the standing timber cut upon the premises described in the information, the jury will consider only such timber as you find was cut by the parties named, or principals, named in the information. Duke v. State (record), 137 Fla. 513, 188 So. 124.

TROVER AND CONVERSION.

§ 1030. What Constitutes Conversion.

§ 1033a. —— Necessity of Showing Right to Possession and Use of Nonnegotiable Instrument.

The court further instructs you that one who has a special or a general interest in personal property such as a nonnegotiable promissory note, described in the first count of the plaintiff's revised declaration, can maintain an action for conversion thereof, provided such party can show that at the time of the wrongful act complained of he is entitled to the possession and use of such instrument. One who accepts from another a promissory note describing another note as collateral security for the payment of the note then made takes the security note as pledgee, and acquires a special property interest in the security note sufficient to maintain an action of trover and conversion such as is involved in the present case. Alford v. Barnett Nat. Bank (record), 137 Fla. 564, 188 So. 322.

§ 1038. Measure of Damages for Conversion.

§ 1039. —— Value of Property at Time of Conversion.

The court further instructs you that the general rule in regard to interest in an action of this sort is that interest begins to run on the value of the property converted from the date of the conversion. Alford v. Barnett Nat. Bank (record), 137 Fla. 564, 188 So. 322.

§ 1039a. —— Value of Special Interest in Note Pledged as Security.

If you find the issues in favor of the plaintiff under the instructions already given you, then it will be your duty to determine the amount of damages which the plaintiff is entitled to recover. If the evidence in this case shows that the Avondale Company note had a greater value than the amount of Brown's note given to the plaintiff, then the said Brown, maker of the said note accepted by the plaintiff, had an equity in the Avondale Company note. In such a case a pledgee such as the plaintiff was of the Avondale Company note, can, in an action of this sort, upon a finding of the issues in favor of the plaintiff, recover only the value of the

pledgee's special interest in the note or other property pledged as security. The value of such interest in such a case is measured by the amount of the plaintiff's debt against the pledgor. Alford v. Barnett Nat. Bank (record), 137 Fla. 564, 188 So. 322.

VENUE.

§ 1044. Accused Should Be Acquitted if Act Done in Jurisdiction Other Than That Alleged.

As to venue in prosecution for gaming, see Gaming, § 546b. As to venue in homicide cases, see Homicide, § 560c.

§ 1045. But Venue Need Not Be Proved Beyond Reasonable Doubt.

It is not necessary for the venue, the place of the commission of the crime to be proven beyond a reasonable doubt. It is sufficient if the jury can reasonably infer from the evidence that the crime was committed in the alleged jurisdiction. Land v. State (record) (Fla.), 156 So. (2d) 8.

VERDICT.

§ 1046. Form of Verdict Generally.

In the event, gentlemen, you should find for the plaintiff, the form of your verdict should be, "We, the Jury, find for the plaintiff and assess her damage at .....," stating the amount of damage to assessed, "So say we all," and let one of your number sign as foreman. In the event you find for the defendant, the form of your verdict should be, "We, the Jury, find the defendant not guilty. So say we all," and let one of you number sign as foreman. Forms of verdict have been prepared by the Court and by agreement of counsel, if such is arrived at, will be submitted to you gentlemen for your convenience. Use the form, Gentlemen, only which coincides with your finding and with your verdict. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

§ 1047. Verdict Must Be Founded on Law and Evidence.

Now, one last statement, gentlemen. You understand that this is a case with which you are charged with the responsibility of determining whether or not the plaintiff should recover or whether or not the defendant should be found not guilty. Remember you should consider your verdict fairly, justly and dispassionately. You should base your verdict entirely upon the sworn testimony adduced from the witness stand and upon no other basis other than the facts justifying and convincing you of the

appropriate verdict to be found and returned in the case. Let your verdict coincide with your findings as jurors and with the evidence and not upon anything beyond or outside the evidence and not upon any emotional background or because of any sympathy. Of course, everyone has sympathy. But the verdict is one for you to determine. If you believe from the evidence the plaintiff should fairly and justly recover, award a recovery. If you are not satisfied from the evidence that she should fairly and justly recover under the evidence and law applicable to the case, find for the defendant. You, of course, understand that each and every one of you must agree upon your verdict, whether the same be for the plaintiff or for the defendant. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

The Court charges you that it is upon the testimony and any evidentiary exhibits that were introduced in the course of the trial, that you must make up your verdict. You, as jurors, under your oaths which you took as the trial jury immediately after you were selected to hear the case, are to consider calmly, and firmly and dispassionately all of the evidence and the testimony in the case, and from it and from the law as given you by the Court reach your verdict. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 1048. Must be Concurred in by Each Juror.

Your verdict must be unanimous, that is, it must be the verdict of each and every juror, each juror being responsible for his own verdict, and you must concur before you can find any verdict in the case. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

Any verdict reached by you must be concurred in by all of your number, and must be signed by one of you, whom you shall elect, as foreman. You may take the case and render your verdict. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

§ 1049. And Must Be Signed by Foreman.

Your verdict must be dated and it must be signed by your foreman, who should be chosen by you at the outset of your deliberation. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

Your first duty upon retiring will be the selection of one of your number as foreman, who will preside over your deliberations and sign the verdict after it has been determined. Schneider v. State (record) (Fla.), 152 So. (2d) 731.

Now, gentlemen, when you retire to the jury room your first order of business, which is important, is to select one of your number as foreman, because a jury needs a foreman to preside over your deliberations and also to sign the appropriate verdict form, which represents the unanimous decision of all six of you.

What I just said, and I think you realize therefore, that when you do reach a verdict it must be unanimous, all six of you concur in it, and whichever verdict you do reach, either guilty or not guilty, whichever that might be, the appropriate verdict form which represents your decision of unanimity, must be signed by the person you select as your foreman. And sometimes if a jury doesn't select a foreman promptly, why they flounder around like a ship without a captain, so your first order of business is to select a foreman and then deliberate and when you do reach a verdict, why the verdict form should be signed by your foreman. Carter v. State (record) (Fla.), 155 So. (2d) 787.

WAREHOUSES AND WAREHOUSEMEN.

§ 1051a. Duty of Warehousemen as to Goods Entrusted to Him.

If, under the facts in this case, at the time of the alleged damage to plaintiff's baggage the defendant had ceased to be a carrier but had taken on the character of a warehouseman, I charge you that a warehouseman is not required by law to construct its buildings secure from all possible contingencies, but they are sufficient if reasonably and ordinarily safe against ordinary and common occurrences. It is only required of a warehouseman that he should exercise reasonable and ordinary diligence in the keeping and preservation of objects entrusted to him, such as men exercise in their own private affairs; and if you find from the evidence in this case that the plaintiff's baggage was damaged by sudden and extraordinary storm, and that the defendant exercised reasonable diligence to prevent such damage, I charge you that under your duty and oath as jurors, you must find for the defendant. Florida East Coast R. Co. v. Anderson (record), 110 Fla. 290, 148 So. 553.

As to liability of carrier as that of warehouseman, see Carriers, § 309d.

§ 1051b. But Not Liable for Losses Caused by an Act of God.

The liability of a common carrier of baggage, or of a warehouseman, does not embrace losses caused by the act of God; it is a complete defense to an action for the loss of baggage to show that the loss was occasioned by inevitable accident or by the act of God. If in this case the evidence has shown you that the damage to the baggage of the plaintiff was occasioned exclusively by the violence of nature, that is, by that kind of force of the elements

which human ability could not have foreseen or prevented, and that the defendant was free from negligence, you will find your verdict for the defendant. Florida East Coast R. Co. v. Anderson (record), 110 Fla. 290, 148 So. 553.

If the evidence shows you that the rain and windstorm that occurred on October 20, 1926, was one of unprecedented violence, and the defendant used reasonable care to protect the baggage of plaintiff and others, and no negligence is shown on its part, it is not liable. Florida East Coast R. Co. v. Anderson (record), 110 Fla. 290, 148 So. 553.

WEAPONS.

§ 1063. What Constitutes Deadly Weapon.

A deadly weapon or a deadly instrument is one which in the manner used is liable to produce death. Williamson v. State (record), 92 Fla. 980, 111 So. 124.

§ 1063a. Automobile as Deadly Weapon.

An automobile may be a deadly instrument or a deadly weapon if used in a manner and driven in a manner that would be liable to produce the death of anyone that it might be driven against. Williamson v. State (record), 92 Fla. 980, 111 So. 124.

WITNESSES.

§ 1063b. Duty of Counsel to Talk to Prospective Witnesses.

The Court further instructs you that it is proper and, being proper, it is the duty of counsel in a case to talk to all persons who have information or knowledge as to the facts involved in the case, and who are expected to be called as witnesses to testify at the trial. It is only in this way that any lawyer can properly and intelligently prepare to try any case. There is no obligation on the state to seek to compel the witnesses to talk to counsel and, if they care to do so, they may refuse to talk to him. Albano v. State (record) (Fla.), 89 So. (2d) 342.

§ 1063c. Party Calling Witness Vouches for His Veracity.

The court charges you as a matter of law that where a party to a suit calls a witness to testify in his or its behalf, the party calling the witness vouches for the veracity of the witness and for the truth of his or her testimony from the witness stand, unless the witness be called as an adverse witness by permission of the court. Williston v. Cribbs (record) (Fla.), 82 So. (2d) 150.

§ 1063d. Position of Witness at the Time of Event May Be Considered.

You may consider the position of the witness at the time of the happening of the event about which he testifies and the opportunity which he had of knowing the facts about which he testifies. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

§ 1065. Jury Is Judge of Credibility of Witnesses.

Gentlemen, in this case in weighing the evidence and in determining the credibility of the witnesses that you heard in this trial you should use and apply the same common sense, and judgment and general knowledge of men and their affairs that you use in your daily lives. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 1066. And May Reject Testimony Believed to be Untrue.

For cases again giving the 1st instruction in this section in the original edition, see Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

§ 1068. Right to Disregard Whole Testimony Where False in Part.

For case again giving the 1st instruction in this section in the original edition, see Henderson v. State (record) (Fla.), 90 So. (2d) 447.

§ 1069. Duty of Jury to Reconcile Testimony.

If you find the testimony to be conflicting, you should try to reconcile the conflict, if any, without imputing perjury to any witness, but in the event you fail to reconcile the conflicts in the testimony, then it is within your province to reject such testimony as you find to be untrue and to accept and rely upon such testimony as you find to be worthy of belief. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

This instruction appears in paragraph 12 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.

You are the sole judges of the evidence, the weight of the same and the credibility of the witnesses who have testified before you. It is your duty to take the testimony of all the witnesses in the case, and if you can, reconcile it so as to make them all speak the truth. But if after a fair, careful and conscientious consideration of the evidence, you cannot reconcile the testimony of the different witnesses, gentlemen, then it becomes your duty under your oath as jurors to decide, as between the different witnesses, which have testified truthfully as to material facts and which have not and you must make your verdict upon the testimony you believe to be true. In the consideration of the testimony, you should consider the manner of the witness on the witness stand in the giving of his or her testimony, the bias or prejudice, if any, of the witness, and the interest, if any, of the witness in the result of his or her testimony. Townsend Sash Door & Lumber Co. v Silas (record) (Fla.), 82 So. (2d) 158; Barwicks v. State (record) (Fla.), 82 So. (2d) 356; Welch v. Moothart (record (Fla.), 89 So. (2d) 485.

Gentlemen of the jury, you have heard the evidence in this case and the argument of counsel. It becomes the Court's duty to instruct you what the law is governing the case. The function of the jury in a trial of a lawsuit is to try and determine the issues of fact. The issues of fact are those material allegations alleged on the one side and denied on the other. You are the sole judges of the truth of the facts in issue. You are the sole judges of the weight of the testimony and of the credibility of the witnesses. If you find the testimony to be conflicting, you should try and reconcile the conflict, if any, without imputing perjury to any witness. But in the event you fail to reconcile the conflict in the testimony, then it is within your province to reject such testimony as you find to be untrue and to accept and rely upon such testimony as you find to be worthy of belief. Montgomery v. Stary (record) (Fla.), 84 So. (2d) 34.

As I said, the jury is the sole judge of the evidence and its weight and its credibility. That is for you to determine from the attitude and demeanor of the witness on the stand, his or her opportunities for seeing and hearing the things testified to, the degree of intelligence of the witness, the interest as bias or prejudice, if any, the witness may show, and in determining those things you, of course, use your own experience, your common, everyday judgment and sense. In many cases—in fact, most cases—there is a conflict in the testimony. The law says for you to reconcile the conflict if you can, because, presumably the witnesses are speaking the truth. Just because there is a difference does not mean that a witness is falsifying his or her testimony. Where you can reconcile a conflict in the testimony, you do so.

If you cannot, then the law says to disregard that testimony which you do not believe and return your verdict on the testimony that you do believe. Tampa Drug Co. v. Wait (record) (Fla.), 103 So. (2d) 603.

You may reconcile, if you can, conflicts in the testimony; but, if you shall find irreconcilable conflicts, you may and should reject such testimony as you shall find unworthy of credence. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

You are the sole judges of the facts and of the testimony, the weight of the testimony and the credibility of the witnesses. It is your duty to reconcile the testimony of all witnesses, if possible, in such a way as to make each of the witnesses speak the truth and not to impute a want of veracity to any witness, but if the testimony of a witness is such that it cannot be reconciled, it is solely for you to decide which testimony you should believe and which testimony you do not believe. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

You are the sole judges of the testimony and the credibility of the witnesses, gentlemen. It is your duty to reconcile the testimony of all the witnesses in such a way as to make the witnesses speak the truth and not to impute a want of veracity of any witness, if this can be done; but if the testimony cannot be reconciled, it is solely for you to judge which testimony you will believe and which you do not believe, and in doing this you may take into consideration not only what a witness says upon the stand, but his or her manner and demeanor on the witness stand and the reasonableness or unreasonableness of his or her testimony and of the surrounding facts and circumstances as shown by the whole of the evidence in the case. Roberts v. State (record) (Fla.), 164 So. (2d) 817. You may also consider the bias or prejudice of the witness, if any; his or her apparent fairness or lack of fairness; the interest, if any, of the witness in the result of his or her testimony; the intelligence or otherwise of the witness, in order that you may judge of the correctness of his or her observation and his or her ability to correctly and intelligently detail what he or she has observed; the position of the witness, both at the time of the giving of his or her testimony and at the time of the happening of the events testified about. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

Now, Gentlemen, as I have explained and you know that you, as the jury in this case, trial jury, are the sole judges of the facts, the evidence, the weight of the evidence and of the credit, and by that is meant the extent of belief that you wish to accord the different witnesses who testified before you. As the trial jury, Gentlemen, you should reconcile all the evidence, if you can, and endeavor to make all of the witnesses speak the

truth, but if you cannot reconcile all the evidence then you, as the trial jury, are to say which witness, or witnesses, you deem worthy of belief and which you deem worthy of no belief, and base your verdict on what you find to be the testimony of the credible witness, or witnesses, that you heard in the trial. Carter v. State (record) (Fla.), 155 So. (2d) 787.

You are the sole judges of the evidence, the weight of the same, and the credibility of the witnesses who have testified before you. It is your duty to take the testimony of all the witnesses testifying in the case, and, if you can, reconcile it so as to make them all speak the truth, but if, after a careful, fair and conscientious consideration of the evidence, you cannot reconcile the testimony of the different witnesses, then it becomes your duty, under your oaths as jurors to decide as between the different witnesses which witness or set of witnessess has testified truthfully as to material facts, and make your verdict on the testimony you believe to be true. And, in the consideration of the testimony, you should consider the manner of the witness on the witness stand in the giving of his or her testimony; the bias or prejudice, if any, of the witness; the interest, if any, of the witness in the result of his or her testimony; the intelligence or otherwise of the witness, in order that you may judge the correctness of his or her observations, and his or her ability to detail intelligently what he or she has observed; the position of the witness, both at the time of the happening of the event testified about, and at the time of the giving of his or her testimony; the reasonableness or otherwise of his or her testimony as judged by your common-sense, every-day experience; any conflict or discrepancy as to material questions which you may find to exist in the testimony of the witness and the testimony of any other witness or witnesses whom you may believe t. have testified truthfully; any corroboration or corroborations which you may find to exist in the testimony of the witness and the testimony of any other witness, or witnesses, whom you may believe to have testified truthfully; and, in fact, gentlemen, it is your sole province to consider all the surroundings of the witness bearing upon his or her credibility or otherwise, in arriving at the weight that you will attach to his or her testimony. You must do this carefully, fairly and impartially under your oaths as jurors empanelled to try this case. If, in the consideration of the testimony of any particular witness, as judged by the rules above stated, you believe it is untrue, you have the right to ignore such testimony as you believe to be untrue in making up your verdict. Land v. State (record) (Fla.), 156 So. (2d) 8.

You are the sole judges of the truth of the facts in the case. You are the sole judges of the weight of the testimony, and of

the credibility of the witnesses. If you find the testimony to be conflicting, you should try and reconcile the conflicts, if any, without imputing perjury to any witness, but in the event you fail to reconcile conflicts in the testimony, then it is within your province to reject any testimony you find to be untrue, and to accept and rely upon such testimony as you find to be worthy of belief. La Porte v. Assoc. Independents (Fla.), 163 So. (2d) 267.

§ 1073. What Jury to Consider in Weighing and Determining Credibility of Testimony.

§ 1074. —— In General.

In determining the credence and weight to be accorded the testimony of a witness, you may consider his or her intelligence so you may fairly judge whether he or she has the ability to testify correctly his or her observations. You may also consider his or her interest, if any, in the litigation or its outcome, his or her bias or prejudice, if any, and the reasonableness or unreasonableness of his or her testimony, all as judged by your everyday experience. Berger v. Nathan (record) (Fla.), 66 So. (2d) 278.

I charge you, gentlemen of the jury, that you are the sole judges of the evidence, of the weight of the evidence, and of the credibility of the witnesses; and in weighing the testimony of a witness and in passing upon his or her credibility, you may take into consideration the manner and demeanor of the witness upon the stand; the witness' opportunity for knowing the things about which he or she is testifying; the reasonableness and probability of the testimony being true; the interest or lack of interest, if any, of the witness in the outcome of the prosecution; the relationship or non-relationship of the witness to anyone who may be interested in the outcome of the prosecution; and to all these things just apply your common knowledge of men and affairs in every day life; in other words, just use the same judgment, reason and common sense in weighing the evidence and arriving at your verdict in this case that you would use in your everyday affairs. I further charge you, gentlemen of the jury, that it is your duty, if you can reasonably do so, to reconcile any conflicts that you may find in the testimony so as to make all of the witnesses speak the truth; but if you cannot so reconcile the testimony, then, it is your province to discard from your consideration any and all testimony that you deem unworthy of belief and base your verdict solely upon that testimony that you believe to be true. It is the province of the jury to say who is and who is not speaking the truth in this case. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

You are the sole and exclusive judges of the weight of the evidence and the credibility of the witnesses and you should try

and reconcile all the evidence introduced from the witness stand so as to have the same to speak the truth as a whole on the theory that each and every witness has testified to the truth; but, if after carefully weighing and considering all of the evidence and each and every part thereof, you find yourselves unable to reconcile the same so as to speak the truth as a whole, then you have the right to reject or discard so much of the evidence which appears to you incredible or unworthy of belief and to accept such part thereof as you believe to be true and base your verdict thereupon accordingly. Among other ways in considering the veracity of a witness, you may consider his or her demeanor on the witness stand, his or her means and opportunities for knowing the facts to which he or she testifies, the interest, lack of interest, bias, or prejudice, if any, of the witness with respect to the outcome of the issue on trial, the reasonablenesss or unreasonableness of the evidence or testimony recited by the witness, the relationship of the parties, if any; and in addition to all of those things you may consider the reasonableness of the evidence recited by the witness, the probability or improbability of the truth of the evidence recited. Tyus v. Apalachicola Northern R. R. Co. (record) (Fla.), 130 So. (2d) 580.

In passing upon the credibility of a witness, it is proper that you take into consideration the manner of the witness on the witness stand, his candor, or want of candor, his intelligence or otherwise, the reasonableness or unreasonableness of his statement, his interest, if any he has, and all the circumstances surrounding such witness at the time of the giving of his testimony and at the time of the happening of the event testified about. Leach v. State (record) (Fla.), 132 So. (2d) 329.

You alone are to decide what credence and weight shall be given the testimony of each of the witnesses. In making such decision you may consider the manner and demeanor of the witness; his or her interest, if any, in the outcome of the litigation; his or her bias or prejudice, if any; the intelligence of the witness and his or her ability to relate or detail correctly the matters or facts concerning which he or she has testified; and the reasonableneses or unreasonableness of his or her testimony. Douglas v. Hackney (record) (Fla.), 133 So. (2d) 301.

In weighing the testimony of witnesses you may consider the manner of a witness on the stand, any bias or prejudice which such witness may have or show, the interest, if any, which the witness may have in the result of the trial, the frankness and fairness of his testimony, or the contrary, if it appears, the maturity or immaturity of the witness, and the intelligence of the witness or the lack of it, in order that you may judge the correctness of his observations and his ability to accurately and in-

telligently tell what he has observed. Baugus v. State (record) (Fla.), 141 So. (2d) 264.

In the consideration of the testimony, you should consider the manner of the witness on the witness stand in the giving of his testimony; the bias or prejudice, if any, of the witness; his apparent fairness or want of fairness; the interest, if any, of the witness in the result of his testimony; the intelligence or otherwise of the witness, in order that you may judge of the correctness of his observation and his ability to detail correctly and intelligently what he has observed; the position of the witness, both at the time of the giving of his testimony and at the time of the happening of the event testified about; the reasonableness or otherwise of his testimony, as judged by your common sense and everyday experience; and also any conflict or discrepancy or corroboration as to material questions which you may find to exist in the testimony. And, further, gentlemen, in weighing and considering the evidence, you should use the same common sense, judgment and reason, and general knowledge of men and affairs, as you have and use in everyday life. Schneider v. State (record) (Fla.), 152 So. (2d) 731; State v. Carswell (record) (Fla.), 154 So. (2d) 829.

You may also consider the reasonableness or unreasonableness of his or her testimony, as judge by your common sense and every day experience; any conflict or discrepancy as to material matters which you may find to exist in the testimony of the witness or the testimony of other witnesses whom you find to have testified truthfully; and any corroborations in the testimony of witnesses whom you find to have testified truthfully. Wilkins v. State (record) (Fla.), 155 So. (2d) 129.

Gentlemen, her are some guides that might assist you in weighing the evidence and determining the credibility of the witnesses, and you will take into consideration the interest, if any, of the witness in the outcome of the case, the manner and demeanor of the witness upon the stand while he or she testified here before you, the relationship, if any, of the witness to any of the parties interested in the case, the apparent fairness or want of fairness of the testimony that was given by the witness, the apparent intelligence or lack of intelligence of the witness, the bias or prejudice, if any, of the witness for or against any party to the cause, the reasonableness or unreasonableness of his or her testimony, the circumstances surrounding the witness at the time concerning which he or she testifies, and the means and opportunity of his or her knowing the facts about which he or she testifies and the probability or improbability of the truth of such facts. You should also consider, gentlemen, all of the other testimony which you find to be credible, and which would tend to corroborate or

contradict a witness' testimony. Carter v. State (record) (Fla.), 155 So. (2d) 787.

§ 1075a. Testimony by Deposition.

In the present action, testimony of absent witnesses was read to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as in the testimony of witnesses who have confronted you on the witness stand. Jackson Grain Co. v. Hoskins (record) (Fla.), 75 So. (2d) 306.

§ 1075b. Hypothetical Questions.

Lady and gentlemen of the jury, you are not to take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true. Upon the contrary, you are to carefully scrutinize the evidence, and from tha' determine what, if any, of the averments are true, and what, i any, are not true. Should you find from the evidence that som of the material statements therein contained are not correct, and they are of such a character as to entirely destroy the reliability of opinions based upon the hypothesis stated, you may attach no weight whatever to the opinions based thereon. Clowney v. State (record) (Fla.), 102 So. (2d) 619.

You are to determine from all the evidence what the real facts are, and whether they are correctly or not stated in the hypothetical question or questions. I need hardly remind you, for it will suggest itself to your minds, that an opinion based upon an hypothesis wholly incorrect assumed or incorrect in its material facts, and to such an extent as to impair the value of the opinion, is of little or no weight. Upon the matters stated in these hypothetical questions, and which are involved in this investigation, you are to give the defendant the benefit of all reasonable doubt, if any there should be, and where there is a reasonable doubt as to the truth of any one of the material facts stated, resolve it in the defendant's favor. Clowney v. State (record) (Fla.), 102 So. (2d) 619.

§ 1075c. Weight of Expert Testimony.

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 conclu-

sions 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. Jefferson v. State (record) (Fla.), 128 So. (2d) 132.

WORDS AND PHRASES.

§ 1076a. "And/or" Defined.

The court charges you that where the term "and/or" is used, as in the assignment filed in evidence in this case, it refers to all or either, and, as used in the assignment referred to, it refers to either one or all of the persons named to be indebted to the Silver Lake Estates, a corporation. It does not necessarily recite that each of the persons therein named is indebted to said corporation. Silver Lake Estates Corp. v. Merrill (record), 120 Fla. 467, 163 So. 7.

§ 1076b. "Evident" and "Manifest" Defined.

The word "evident" has been defined as clear to the understanding and satisfying to the judgment. Its synonyms are manifest, clear, plain, obvious, conclusive. The word "manifest" means to put beyond question of a doubt. Miami v. Brooks (record) (Fla.), 70 So. (2d) 306.

§ 1076c. "Indicia" Defined.

The court further instructs you that the word "indicia" is a term much used in common law of signs or marks of identity; for example, in replevin it is said that the property must have indicia, or earmarks, by which to distinguish it from other property of the same kind. The term is further defined as signs, marks, conjectures which result from circumstances not absolutely certain and necessary, but merely probable, and which may turn out not to be true, though they have the appearance of truth. Woods v. Thompson (record), 159 Fla. 112, 31 So. (2d) 62.

Index

A

G

H

L

LANDLORD AND TENANT.
Duty of landlord to make repairs.
Damages for failure to repair.
Awarded for reasonable period. § 714e(3).
Duty of tenant to minimize damages, § 714e(2).
Generally, § 714e(1).
Loss of profits by lessee of hotel business, § 714e(4).
What jury to consider in awarding damages. § 714e(5).
Generally § 714b.
Landlord not liable for condition of premises when tenant takes premises as they are, § 714c.
Tenant generally not required to repair at his own expense and seek recovery from landlord. § 714d.

LARCENY.
Property in possession of one though legal title in another, § 723a
Separate and distinct offense from receiving, etc., stolen goods. § 729a.

LEWDNESS.
Houses of ill fame §§ 881a-881i.
See Prostitution.

LIBEL AND SLANDER.
Malice.
Necessity of proving, § 738a.
One has not paid his debts.
Imputation. § 737a.
Publication.
What constitutes, § 737b.
What constitutes libel.
Imputation that one has not paid his debts, § 737a.
What constitutes publication, § 737b.

LIENS.
Automobile liens. § 232b.

LOGS AND LOGGING.
Damages.
Recoverable by assignee of timber contract. § 747a.

LOST INSTRUMENTS.
Deeds.
Necessity of proof of lost deed to establish title, § 749a.

LOTTERIES.
Generally. § 550(½).
Lottery ticket defined, § 549a.
Possession of implements used in gambling. § 550(2).

M

MALICE.
Libel and slander.
Necessity of proving, § 738a.

MASTER AND SERVANT.
Defective machinery or appliances.
Duty of master to furnish reasonable safe machinery and appliances.
Master liable for nonperformance or negligent performance by servant to whom duty delegated. § 769a.

THEATERS AND SHOWS.
Proprietors.
Patrons and invitees.
Duty of proprietor generally, § 1026d(1).
Proprietor not an insurer, § 1026d(2).
Protection of patrons from assaults, § 1026d(3).

TRESPASS.
Criminal trespass.
Injury to realty.
Determining value of property injured, § 1028b(4).
Effect of bona fide claim of right, § 1028b(3).
Generally, § 1028b(1).
Requirement of criminal intent, § 1028b(2).

TRESPASSERS.
Passengers, guests and trespassers.
Motor vehicles.
See Motor Vehicles.

TRIAL.
Indictments and Informations.
Prosecution separate where defendants charged in same indictment, § 660a.

TROVER AND CONVERSION.
Damages.
Measure for conversion.
Value of special interest in note pledged as security. § 1039a.
Nonnegotiable instrument.
Conversion.
Necessity of showing right to possession and use, § 1033a.
What constitutes conversion.
Nonnegotiable instrument.
Necessity of showing right to possession and use, § 1033a.

V

VENUE.
Gaming.
Essential allegations requiring proof. § 546b.
Homicide.
Burden of proof, § 560e.
Essential allegations requiring proof, § 560c.

VERDICT.
Eminent domain.
Compensation.
Value to be determined as of time of verdict, § 489j.
Condemnation proceedings.
Generally, § 489s.
Should be unanimous, § 489t.

W

WAREHOUSES AND WAREHOUSEMEN.
Carriers.
Carriers of goods.
Goods left in baggage room.
Duty of passenger to call for baggage.
Carrier liable as warehouseman upon failure to do so. § 309d.