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Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida

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OATHS AND STANDARD CHARGES TO JURY IN CIVIL, EMINENT DOMAIN AND CAPITAL CASES IN FLORIDA* -- **

JURY OATHS

1. Voir Dire
2. To Try Issue
3. Claim Cases
4. Condemnation Proceedings
5. Unlawful Detainer
6. Forcible Entry
7. Criminal Cases
8. Oath of Bailiff in Charge

CHARGES TO JURY IN CIVIL CASES

9. Function of Jury
10. Issues of Fact
11. Sole Judges of Truth
12. Conflict of Testimony
13. Burden of Proof
14. Proof by a Preponderance of Evidence
15. Preponderance of Evidence
16. Testimony—Weight
17. Intersection—Right of Way
18. Violation of Ordinance
19. Concurrent Causes of Single Injury
20. Contributory Negligence
21. Last Clear Chance—Sudden Peril
22. Master and Servant—Ordinary Care as to Place and Appliances
23. Duty to Business Invitee
24. Duty to Licensee
25. Permanent Injury—Present Money Value
26. Wrongful Death
27. Consequences
28. Tort to Wife
29. Future Losses—Present Value

EMINENT DOMAIN

30. Right
31. Constitutional Provision
32. Fair Indemnity
33. Actual Cash Value
34. Fair Market Value
35. Test—Owner's Loss
36. Enhancement by Proposed Improvements
37. Experts
38. Common Knowledge
39. View of the Property
40. Use of Land
41. Test—Negotiation
42. Value in Locality
43. Damage to Business
44. Attorney's Fees—Entitlement
45. Attorney's Fees—Fixing
46. Value at Time of Verdict
47. Unanimous Verdict

CAPITAL CASES

48. Degrees

*Prepared by Judge George E. Holt, Senior Judge Eleventh Judicial Circuit, and Judge Paul D. Barns. The authors wish to acknowledge their debt to Mr. Gerard Ehrich, student in the University of Miami Law School, for his valuable assistance in the preparation of these charges.

**Portions of this material were revised from charges appearing in 30 FLA. LAW JOURNAL (1946).

49. Lawful Homicide
50. Self Defense
51. Murder in the First Degree
52. Murder in the Second Degree
53. Manslaughter
54. Rape—Female Over Age of Ten Years
55. Rape—Female Under Age of Ten Years
56. Principals in First and Second Degree
57. Principals in Second Degree
58. Premeditated Design—As to Principals
59. Constructive Presence
60. If Principals in First and Second Degree Charged
61. Premeditated Design
62. Presumption of Innocence
63. Reasonable Doubt
64. Circumstantial Evidence
65. Corpus Delicti
66. Credibility of Defendant Witness
67. Confessions—Extra-Judicial
68. Insanity
69. Delusions
70. Verdict
71. Form of Verdict—Murder

JURY OATHS

1. Voir Dire

You do solemnly swear (or affirm under pains and penalties of perjury) that you will true answer make to such questions as may be put to you by the court or its authority, so help you God.

2. To Try Issue

You and each of you do solemnly swear that you will well and truly try this issue, wherein . . . is plaintiff and . . . is defendant, and a true verdict give according to the evidence. So help you God.

3. Claim Cases

You and each of you do solemnly swear that you will well and truly try this claim interposed by . . . to the property levied upon by virtue of an execution in favor of . . . against . . . and a true verdict give according to the law and the evidence, and that you will also give to the plaintiff such damages as may appear reasonable and right, in case it should appear that such claim was interposed for delay. So help you God.

4. Condemnation Proceedings

You and each of you do solemnly swear that you will well and truly try the issue as to what compensation shall be made to the defendants for the property sought to be appropriated, irrespective of any benefit from any improvement proposed by the petitioner.

5. Unlawful Detainer

You do solemnly swear (or affirm under the pains and penalties of perjury) that you will well and truly try whether the defendant, against the consent of the plaintiff, wrongfully holds possession of the real estate mentioned in the complaint; whether the said defendant has so held possession thereof against the consent of the plaintiff within three years next before the exhibition of the complaint; and whether the plaintiff

has the right of possession in the tenement aforesaid, and to assess such damages as may be recoverable according to the evidence, so help you God.

6. Forcible Entry

You do solemnly swear (or affirm under the pains and penalty of perjury) that you will well and truly try whether the defendant at any time within three years before the filing of the complaint, did forcibly or unlawfully enter upon the property in the complaint mentioned and turn the plaintiff out of the possession thereof and whether the defendant continued to hold possession thereof at the time of filing the complaint, and to assess such damages as may be recoverable according to the evidence, so help you God.

7. Criminal Cases

You do solemnly swear (or affirm) that you will well and truly try the issues between the State of Florida and the defendant whom you shall have in charge and a true verdict render according to the law and the evidence, so help you God.

8. Oath of Bailiff in Charge

You do solemnly swear that you will not suffer any person to speak to, or to communicate with, the jurors concerning the case which they now have under consideration and will not do so yourself. So help you God.

CHARGES TO JURY IN CIVIL CASES

9. Function of Jury

The function of a jury in the trial of a law suit is to try and determine the issues of fact.

10. Issues of Fact

The issues of fact are those material allegations alleged on one side and denied on the other side.

11. Sole Judges of Truth

You are the sole judges of the truth of the facts in issue.

12. Conflict of Testimony

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 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.

13. Burden of Proof

The burden of proof in regard to proving the issues of fact is upon the plaintiff.

14. Proof by a Preponderance of Evidence

The plaintiff in regard to the issues of fact in order to be entitled to a verdict from you must prove by a *preponderance of evidence* those material allegations which are denied.

15. Preponderance of Evidence

To illustrate what is meant by *preponderance of evidence*, it may be assumed that we have a set of scales like the scales of justice often depicted by painters and illustrators, 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 in one end of the scales and the object to be weighed in 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 such scales, and you then consider the evidence worthy of belief and supporting the issues on behalf of the opposing side on the opposite end of such scales, then the evidence of greater weight balanced against the evidence of a 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 the evidence.

16. Testimony—Weight

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 witnesses 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 from all other facts and circumstances in the evidence, reach your conclusion as to where the truth of the matter lies.

You are further instructed that the term "preponderance of evidence" as here used does not necessarily mean the greater number of witnesses, for it frequently happens that there are more witnsses on one side than on the other, and in all such cases it is the *weight of the evidence* that counts and should govern the findings of a jury.

17. Intersection—Right of Way

The Court charges you that the vehicle first at the intersection or crossing ordinarily has the right of way across, but such a right of way is not an absolute one, exercisable arbitrarily, or without regard to other conditions present or the rights or safety of others, but is to be exercised

with due regard to the rights of others, the character of traffic, and other conditions.

18. Violation of Ordinance

You are further instructed that if you should find from the preponderance of evidence that the defendant immediately prior to the alleged collision, violated any ordinance or state statute where the alleged collision is said to have occurred, then I charge you that the mere fact that he may have violated said ordinance or state statute does not in itself standing alone, establish negligence unless such violation of such ordinance or state statute was the proximate cause of the alleged injury, and before you can find the defendant guilty of negligence by reason of the violation of any ordinance or state statute you should find by the preponderance of evidence that he did violate such ordinance or state statute and that such violation proximately contributed to the cause of the accident, and that in failing to observe said ordinance or state statute and as a proximate result thereof the alleged collision (accident) occurred.

19. Concurrent Causes of Single Injury

It is negligence which proximately causes or contributes to causing an injury or damage which creates legal liability. There may be concurrent causes of a single injury which, operating contemporaneously, together constitute the efficient proximate cause of the injury inflicted, and without either one of which the harm would not have been done. But if two distinct causes are successive and unrelated in their operation, they cannot be concurrent. One would be proximate and the other remote cause.

If you find that one act or omission is a direct and self-sufficient and proximate cause and the other act or omission a remote and antecedent cause, you shall disregard such remote, insufficient and antecedent cause; and should the defendant be found guilty of the proximate, self-sufficient, proximate cause, not united with an act or omission of the plaintiff in producing the injuries complained of, then the defendant would be negligent and your verdict should be for the plaintiff.

If you find that there were two causes of the accident which, operating contemporaneously, constituted the efficient proximate cause of the injury inflicted and that the act or omission of the plaintiff produced one and that the act or omission of the defendant produced the other, then the plaintiff cannot recover because he had contributed to his own injury.

20. Contributory Negligence

Should you find the defendant guilty of negligence resulting in and causing plaintiff's injury, you may then proceed to determine whether or not the plaintiff was guilty of such negligence proximately contributing to his own injury.

If you find that the plaintiff has been guilty of contributory negligence which proximately contributed to plaintiff's injury then there can be no recovery, because an injured person can not in law recover when he

himself was guilty of contributory negligence. For loss from mutual negligence neither party can recover.

If you find the plaintiff to have been guilty of negligence directly and proximately contributing to his injury, even in a slight degree, he should not recover and your verdict in that event should be for the defendant.

The law does not allow you to find both parties guilty of negligence and that the defendant was guilty of greater negligence than the plaintiff and then allow you to find a verdict upon those findings for the plaintiff. For losses resulting from such mutual negligence neither party can recover, and the law leaves them where it finds them.

21. Last Clear Chance—Sudden Peril

I charge you further that when one negligently places himself in a position of peril and such perilous condition becomes known to another, that it then becomes the duty of such other to use reasonable care and caution to avoid injury to the one found in such perilous condition, it being recognized by law, however, that one being suddenly confronted with a dangerous or perilous situation is not required to exercise a greater degree of care or caution than the exigencies of the situation permit. One required to act quickly is not supposed to act with the judgment of one who can deliberate.

22. Master and Servant—Ordinary Care as to Place and Appliances

The master is not an insurer of the servant's safety in the use of tools, machinery and appliances employed in his business, and he does not guarantee the safety of the place in which the servant works, but is only required to exercise such ordinary care and diligence as may be reasonable in view of the work to be performed and the dangers incident to the employment.

In determining the liability of the master as in other cases in which it becomes a question of whether or not ordinary care and diligence has been exercised, there is no absolute standard to which the conduct of the master must have conformed, but the question is always one to be determined with reference to the facts of the particular case, regard being had to the exigencies requiring vigilance and attention and the character of the business or undertaking in which the parties are engaged. The master cannot be held liable in the absence of negligence on his part.

When such reasonable and ordinary care has been taken to protect servants from injury as a reasonably prudent man would take under the circumstances, the master has performed the full measure of his duty. (He is not an insurer of his servants' safety).

23. Duty to Business Invitee

Toward the business visitor, the possessor owes the additional duty to exercise reasonable care to make the premises reasonably safe for the reception of his visitor.

One who holds his premises open for the reception of business visitors is under a greater duty in respect to its physical condition than a possessor who holds his premises open to the visits of a gratuitous licensee. The possessor has no financial interest in the entry of a gratuitous licensee; and, therefore, such a licensee is entitled to expect nothing more than an honest disclosure of the dangers which are known to the possessor. On the other hand, the visit of a business visitor is or may be financially beneficial to the possessor. Such a visitor is entitled to expect that the possessor will take reasonable care to discover the actual condition of the premises and either make them reasonably safe or warn him of dangerous conditions.

24. Duty to Licensee

As to hazards which are natural to the known facts and circumstances, and such as are apparent to any one acquainted with the nature of the enterprise and are to be expected by reason of the known condition of affairs and as to which hazards the licensor has exercised ordinary care and prudence there is no liability.

Hazards of which the licensor is advised and of which the licensee is not advised, and which the licensee in the exercise of ordinary care and prudence would not assume to exist, the licensor should exercise reasonable care according to the circumstances to warn a licensee of the existence of such hazards so that he can protect himself against harm or injury.

One who is privileged to go upon the premises of another to further his interest and not that of the owner or licensor, is a licensee and he assumes the same risks and hazards of an owner; however such licensee does not assume the risk of unknown and concealed hazards of which the licensor knew and of which the licensee did not know.

As to hazards which are apparent or known as likely to exist in the exercise of ordinary care and prudence, a licensee assumes the risk of such hazards and the licensor is not liable by reason of injury flowing from such hazards.

25. Permanent Injury—Present Money Value

If you find from the evidence that the plaintiff is entitled to recover, then you will be required to determine the amount of the damages he has sustained; and in estimating the damages you will take into consideration the plaintiff's bodily pain and suffering, if any, occasioned by the injury complained of; sickness resulting from the injury, if any; his age, his health and condition before the injury complained of, and the effect on his health and condition by reason of the injury complained of, if any; the money he was making in his business or occupation or by his labor and his loss of time, if any; and the effect, if any, of the injury in the future upon the health of the plaintiff and upon the plaintiff in attending to his affairs generally (in pursuing his business or calling) and allow him such

damages from all the facts and circumstances in evidence, as will be a fair and just compensation for the injury he has sustained.

In case you find that the plaintiff has been to any extent permanently injured or disabled, all such damages which you may allow therefor must be by you reduced to its present money value.

26. Wrongful Death

Where the widow sues for damages for the death of her husband by the wrongful act of another, in estimating her pecuniary loss the jury may properly take into consideration her loss of the comfort, protection, and society of the husband in the light of all the evidence in the case relating to the character, habits and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death; and they may also consider his services in assisting her in the care of the family, if any; but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the injury. She is also entitled to recover reasonable compensation for the loss of support which her husband was legally bound to give her, based upon his probable future earnings and other acquisitions, and the station or condition in society which he would probably have occupied, according to his past history in that respect, and his reasonable expectations in the future; his earnings and acquisitions to be estimated upon the basis of deceased's age, health, business capacity, habits, experience, energy, and his present and future prospects for business success at the time of his death—all these elements to be based upon the probable joint lives of the widow and husband. She is also entitled to compensation for loss of whatever she might reasonably have expected to receive in the way of dower or legacies from her husband's estate, in case her life expectancy be greater than his. The sum total of all these elements to be reduced to a money value, and its present worth to be given as damages. Within these limits the jury exercises a reasonable discretion as to the amount to be awarded, based upon the facts in evidence, and the knowledge and experience possessed by you in relation to matters of common knowledge.

27. Consequences

A party 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.

28. Tort to Wife

If you find from the preponderance of the evidence that the plaintiff husband is entitled to recover for the injury to his wife, then you are instructed that he is entitled to recover for any loss of services of his wife from the time of the accident down to this date, and for any future

loss of services of his wife and for a reasonable expenditure of money or debts incurred for medicine, doctor bills or treatment.

29. Future Losses—Present Value

In case you find that the plaintiff is entitled to damages for losses to accrue in the future then as to such damages you must reduce them to their present money value and include them in your verdict at such value.

EMINENT DOMAIN

30. Right

This Court has already determined that the petitioner is entitled to condemn the property involved in this cause, and therefore, the sole question to be determined by you is the amount of money to be paid to the defendant as just compensation. I charge you that such compensation consists of the fair market value of the property which is to be taken by petitioner from the defendant and in addition thereto a reasonable attorney's fee.

31. Constitutional Provision

The controlling law governing the appropriation of the property of another for a public purpose is found in the Constitution of this State, which requires compensation shall be paid before taking property, and reads as follows:

> No private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law.

32. Fair Indemnity

The court instructs you that since the power of eminent domain is necessary for the public good, it would be unjust to the public if the petitioner should be required to give the owner more than a fair indemnity for the loss that he sustains by the appropriation of his property for the general good. On the other hand, the owner being compelled by law to part with his property whether he desires to sell or not, the law allows him full compensation therefor.

33. Actual Cash Value

You are instructed that in considering the compensation to be paid to the defendant for the land about to be taken, you are to fix actual cash value of the land taken, that is, the actual money value, and you are further instructed that you are not to consider the price at which the property will sell under special or extraordinary circumstances, but it is the fair market value in money if sold in the market under ordinary circumstances, and assuming that the owner is willing to sell and the purchaser is ready to buy.

34. Fair Market Value

You are instructed that the term "fair market value" means the value of the property as between one who wants to purchase and one who wants to sell, not what could be obtained for it under peculiar circumstances when a greater than its fair price could be obtained. The fair market value is not the speculative value of the land, and it is not the value obtained from the necessities of another; nor, on the other hand, is it to be limited to that price which the property would bring at forced auction under the hammer. It is what it would bring at a fair sale when one party wanted to sell and the other to buy, neither acting under compulsion or necessity.

35. Test—Owner's Loss

The value of the property to the petitioner for its particular use is not the test for determining its market value. The defendant must be compensated for what is taken from him, and that is done when he is paid the fair market value of the property for all available uses and purposes. The test for determining the fair market value of land taken by condemnation is: What has the owner lost? Not, what has the taker gained?

36. Enhancement by Proposed Improvements

You are instructed that the issue submitted to you is what is "full compensation" for the property to be taken at the present fair actual value, irrespective of or without regard to any benefits that may accrue to the defendants from any improvements proposed by the petitioners, but the law does not deny to the owner any real and reasonable enhancement in the market value "of the property to be taken" by reason of any improvement proposed. If the property naturally, or in common with other property similarly conditioned, increased in market value in anticipation of the proposed improvement, before the appropriation or taking, the compensation therefor is the fair actual market value at the time of the lawful appropriation.

37. Experts

In considering and weighing the testimony of the real estate experts called by both sides, you may consider the experience and familiarity of the witnesses with local conditions affecting the real estate market, and you may give to the testimony of each witness such weight as you find to be proper in the light of such experience and familiarity and its credibility in general.

38. Common Knowledge

You are not required to disregard such information as you may have as a matter of common knowledge, nor to accept as true testimony that is against reason and human experience. You may use such knowledge as you may have gained by your view of the property and its surroundings in assisting you in interpreting and weighing the testimony of the witnesses, when conflicting, as to value and damage. You should reconcile the

testimony if possible; but you are the judges of the testimony and the credibility of the witnesses.

39. View of the Property

You have had a view of the property involved here, the purpose of which was to acquaint you with its physical situation, conditions and surrounding so as to enable you to better understand and apply the evidence that came to you from the witness stand and to aid you in interpreting and weighing the evidence on any question of value and damage and the application of your common sense.

40. Use of Land

You are instructed that in determining the question of the amount of compensation which should be awarded the defendants, you must take into consideration the value of the land to be taken, and in that connection the uses to which it was, or might reasonably be, applied (and any damage to the defendants' adjacent remaining lands).

41. Test—Negotiation

The value of the property may be deemed to be that sum which, considering all of the circumstances, would be arrived at by fair negotiations between an owner willing to sell and a purchaser willing to buy, neither being under any pressure. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargining. The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those facts of such general notoriety as to require no proof.

42. Value in Locality

In order to arrive at what is a full and perfect equivalent, the Court charges you that you are to determine from the evidence the present fair market value of the property, and for that purpose you may consider the present general market value of other property in the same locality as the property in question together with all the other evidence and circumstances.

43. Damage to Business

If you find from the evidence that the effect of the taking of the property involved may injure, damage or destroy an established business of more than five years standing, owned by the defendant whose lands are sought to be taken, located upon the lands sought to be taken, and lands adjacent or contiguous thereto, then you shall consider the probable effect the use of the property so taken may have upon said business, and assess in addition to the amount to be awarded for the taking, the probable damages to such business which the use of the property so taken may reasonably cause.

If you find from the evidence that the defendant owns an established business located on the lands taken, you should consider the nature and

extent of such business in arriving at the value of such lands. You must not award additional damages on account of the destruction of such business, as the nature and extent thereof are to be taken into consideration in fixing the value of the right of way taken.

If any part of such business is located on adjoining, adjacent or contiguous lands owned or held by said defendants, that are not being condemned in this action, and if the taking of the property involved may injure, damage or destroy such portion of such business, then you will consider the probable effect the use of the property so taken may have upon such business, and assess in addition to the amount to be awarded for the taking, the probable damages to such business which the taking and use of the property taken for right-of-way purposes may reasonably cause. However, unless it is reasonable to suppose that the defendant will suffer an actual loss in that portion of his said business located on such adjoining, adjacent or contiguous lands because of the taking and use of the property taken for right-of-way purposes, then you will not assess any damages to such business located upon the adjoining, adjacent or contiguous lands.

44. Attorney's Fees—Entitlement

Under the law, the petitioner is obligated to pay the defendant a reasonable attorney's fee which shall be fixed by your verdict. Such fee is to be determined by you from the evidence in such an amount as an ordinary prudent defendant would be required to expend in the employment of competent, sufficient and adequate counsel to defend such a suit as this, with all the facts and circumstances considered.

45. Attorney's Fees—Fixing

In determining what a reasonable attorney's fee is the Court charges you that you may consider the following matters: The time and labor required of the attorneys; the novelty and difficulty of the questions involved and the skill required to properly conduct the case on behalf of the defendant; the customary charges of other lawyers for similar services; the amount involved in this suit, and the benefits which result to the defendant from the services rendered by its attorneys.

46. Value at Time of Verdict

The Court charges you that no one of these several matters is in itself controlling. They are merely guides to aid you in ascertaining the reasonable value of the services of the attorneys for the defendant.

47. Unanimous Verdict

The law requires that you render a unanimous verdict. In arriving at your verdict you should not agree that you shall be bound by adding up the various sums which each individual juryman thinks the value should be, and dividing the aggregate by the number of the jury. Expressed in another way, your verdict is to be based upon a consideration of all of the evidence, and upon the instructions of the Court, and you are not

under any circumstances to arrive at a verdict simply by striking an average between the contentions of the parties.

CAPITAL CASES

48. Degrees

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, and (4) manslaughter.

The circumstances of each case determine whether a homicide is justifiable, excusable, murder, or manslaughter.

Justifiable homicides and excusable homicides are lawful; murder and manslaughter are unlawful and constitute a violation of the criminal law.

49. Lawful Homicide

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.

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.

50. Self-Defense

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 of 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 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.

The necessity to take life, however, need not be actual. If the circumstances surrounding the accused were such as would induce the ordinary prudent man to believe that he was in danger of death or great bodily harm, that is sufficient, although there was no danger in fact.

One cannot by his own act provoke a difficulty with his adversary, and having provoked such difficulty, act under the necessity produced by this difficulty, and kill his adversary and justify homicide under the plea of self-defense.

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.

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.

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.

In order to justify the taking of human life, the accused must have used all reasonable means within his power and consistent with his own safety to avoid the danger and to avert the necessity of taking human life.

51. Murder in the First Degree

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.

52. Murder in the Second Degree

Murder in the second degree is the unlawful killing of a human being when perpretrated 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.

53. Manslaughter

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.

54. Rape—Female Over Age of Ten Years

The definition, under the statute, of the crime of which the defendant stands charged is as follows:

> Whoever ravishes or carnally knows a female of the age of ten years or more, by force and against her will, is guilty of the charge of the crime of rape as charged in the indictment.

The proof must show penetration of the female sexual organ to some extent by the male sexual organ. 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. The material allegations of the offense charged in this case are:

First: That the alleged act was done within the County of ——— and State of Florida, as alleged in said indictment.

Second: That there was penetration of the sexual organ of the said ———— by the sexual organ of the said male, ————, and

Third: That said act was by force and against the will of said female, and

Fourth: That the said female was over the age of ten years.

Before you can find the defendant guilty of rape as charged in the indictment, each one of these necessary allegations must be proven by the testimony to the exclusion of and beyond a reasonable doubt, and if the evidence is such as to leave in your minds a reasonable doubt as to whether the crime was committed within ——— County and the State of Florida, or that there was a penetration of the sexual organ of the female by the sexual organ of the male, or that said act was by force and against the will of the said female, or that the female was over the age of ten years, you must give the benefit of any such doubt to the defendant and acquit him.

55. Rape—Female Under Age of Ten Years

The definition under the statute of the crime of which the defendant stands charged is as follows:

> Whoever unlawfully or carnally knows and abuses a female under the age of ten years is guilty as charged in the indictment.

The proof must show penetration of the female sexual organ to some extent by the male sexual organ. 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. The material allegations of the offense charged in this case are:

First: That the alleged act was done within the County of ———— and State of Florida, as alleged in said indictment.

Second: That there was a penetration of the sexual organ of the said ————— by the sexual organ of the said male,—————, and

Third: That the said female was under the age of ten years.

Before you can find the defendant guilty of rape as charged in the indictment, each one of these necessary allegations must be proved by the testimony to the exclusion of and beyond a reasonable doubt, and if the evidence is such as to leave in your minds a reasonable doubt as to whether the crime was committed within ———— County in the State of Florida, or that there was a penetration of the sexual organ of the female by the sexual organ of the male, or that the female was under the age of ten years you must give the benefit of any such doubt to the defendant and acquit him.

56. Principal in First and Second Degree

A principal in the first degree and a principal in the second degree are

both principals and are punishable alike. The degrees are designed merely to indicate that one actually committed the felonious act, and that the other was present (actually or constructively) aiding and abetting the felonious act. Both are equally guilty; and it is not material which one is alleged to have actually committed the felonious act, if it is duly proven that one committed the act, and that the other was present and aided and abetted the alleged felony.

57. Principle in Second Degree

(a) Essentials

To constitute a principal in the second degree to the commission of a felony, there must be (1) an actual or constructive presence at the place where and when a felony is committed, (2) sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act, and if the crime alleged to have been commited by the principal in the first degree is that of murder in the first degree, then the principal in the second degree must have known or believed that the actual perpetrator intended to kill from a premeditated design or in an attempt to perpetrate arson, rape, robbery or burglary.

It is further essential that to constitute a principal in the second degree to the commission of a felony there must be (1) a participation in the felonious design of the perpetrator and (2) the offense must be within the compass of the original intention or natural and reasonable consequences of the acts aided or encouraged.

(b) When Preconcert Necessary

Where the participation is by act or word, in neither of these cases is there need of preconcert; it is sufficient that the same criminal intent existed in the minds of both, and that the aider and abettor gave assistance by word or deed to the actual perpetrator at the time of the commission of the offense. But where the aid given consists in presence, actual or constructive, on the part of the aider or abettor, inspiring confidence in the actual criminal, there must be preconcert, or at least a knowledge on the part of the latter of the presence and readiness to assist of the former.

(c) Presence — What Is

While a principal in a murder trial must either have actually committed the felonious act or else have been present aiding and abetting his partner in the crime, the presence of the aider and abettor need not have been actual, but it is sufficient if he was constructively present, providing the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission.

(d) Personal Participation Unnecessary

Personal participation in the crime is not necessary, but to stand by counseling or encouraging or standing by ready to aid or assist by word

or deed so as to lend confidence to the principal criminal in carrying out the intent shared in common between the actor and the one standing by, is sufficient to make the one so standing by accountable to the same extent as if he were the actual perpetrator of the crime.

(e) Mere presence

Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval sufficient, nor passive acquiescence or consent. But it suffices to make one an aider and abettor that he is present by preconcert or with the knowledge of the actual perpetrator, with a view to render aid if it becomes necessary.

A person may aid and abet another in the commission of a crime without having previously entered into an agreement or conspiracy with the actual perpetrator to commit it. And a person who knowingly contributes to the commission of an offense is an aider and abettor even though the actual perpetrator has not communicated his purpose to him. But if there is no prearrangement or preconcert, mere presence even with the intent to aid, if necessary, is not aiding or abetting unless the principal has knowledge of such presence and intent.

58. Premeditated Design—As to Principals

Principal in second degree — When essential

To sustain a conviction of one charged with being principal in the second degree to murder in the first degree, it is necessary to prove that the defendant actually entertained a premeditated design to kill the deceased, or knew that the person being aided entertained such design.

In order to hold one guilty of murder in the first degree who is not the actual perpetrator of the crime, he must not only be present when the crime is committed, but he must be aiding, abetting, advising, encouraging, or assisting another to commit it, having himself a premeditated design to effect the death of the person killed, or knowing or believing that such other person intends to kill the deceased.

— When Not Essential

In a prosecution for murder in the first degree of one who is being tried as a principal in the first degree and as principal in the second degree by being present aiding and abetting a murder perpetrated in committing arson, rape, robbery or burglary, it is not necessary to prove that either of the principals premeditated the murder that was committed by the principal felon in perpetrating the robbery.

59. Constructive Presence

I further charge you that while a principal must either have actually committed the felonious act or else have been present aiding and abetting his partner in the crime, the presence of the aider and abettor need not have been actual, but it is sufficient if he was constructively present, provided the aider, pursuant to a previous understanding, is sufficiently

near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission.

60. If Principals in First and Second Degree Charged

In an indictment against two or more persons charging that one of them committed a felony, and that the other was present, aiding and abetting in the commission thereof, all are indictable and a conviction will be sustained against all of them on proper proof—that is, proof beyond a reasonable doubt—that either one committed the felony, and that the other was present either actually or constructively, in the manner as I have just explained, and aiding and abetting in the commission of the same.

61. Premeditated Design

A "premeditated design" to kill is a fully formed, conscious purpose to take human life, formed upon reflection and entertained 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, if the design was formed a sufficient length of time before its execution to admit of some reflection 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 is "premeditated" within the meaning of the law, although the execution followed closely upon the formation of the intent.

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 can not always be obtained, consequently the law recognizes that it may be proved 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.

62. Presumption of Innocence

The defendant in every criminal case is presumed to be innocent until the State has by competent evidence, shown his guilt to the exclusion of and beyond a reasonable doubt. Before this presumption of innocence leaves the defendant, every material allegation of the indictment must be proved by the evidence to the exclusion of and beyond a reasonable

doubt, and this presumption of innocence accompanies and abides with the defendant as to each and every material allegation in the indictment, through each stage of the trial, until it has been so met and overcome by the evidence to the exclusion of and beyond a reasonable doubt.

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 as the facts, as you find them from the evidence, may require. 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, as you find them from the evidence, may require.

63. Reasonable Doubt

A person accused of crime is presumed to be innocent until his guilt has been established by proof beyond a reasonable doubt. And to overcome this presumption and establish guilt, it is not sufficient to furnish a mere preponderance of evidence tending to prove guilt, nor to prove a mere probability of guilt, but proof of guilt to the exclusion of, and beyond a reasonable doubt, is indispensible. The burden of such proof is on the State, and it is to the evidence introduced upon the trial, and to it alone, that you are to look for such proof.

Keeping this in mind as jurors charged with the solemn duty in hand, you must carefully, impartially and conscientiously consider, compare and weigh all the testimony and if after doing this you 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.

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 an 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 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 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.

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 have no right to go outside of the testimony for doubts of any kind.

64. Circumstantial Evidence

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

65. Corpus Delicti

Elements. 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.

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 a reasonable doubt.

66. Credibility of Defendant Witness

The Court charges you that under the laws of this state a defendant may become a witness and testify in his own behalf, and in consideration of the testimony of such defendant, and the weight and credibility which should be given to the same, it is proper for you to take into consideration the interests which such defendant has in the trial and in its result, and all the circumstances by which he is surrounded at the time he testifies, and also the reasonableness or unreasonableness, probability or improbability of what he says, just as you would the testimony of any other witness.

67. Confessions — Extra-Judicial

The rule is well established that a confession made out of court is not admissable in evidence against the accused unless it has been freely and voluntarily made.

When evidence of a confession is admitted in evidence it becomes the duty of the jury to give it a fair and unprejudiced consideration, having in mind the time and circumstances of its making and its harmony or

inconsistency with the other evidence in the case, as well as the motives which you may find from the evidence to have influenced the defendant in making the confession, if you find in fact that the defendant made a confession and then to give effect to such parts thereof as you find sufficient reason to credit and reject that which you find sufficient to disbelieve. You are to determine the credence which shall be attached to the alleged confessions and each part thereof. If you should believe that any alleged confession was made or induced because of any threat, promises or other inducement held out to defendant by any one, then such is not a confession because it was not made freely and voluntarily and should be by you disregarded and given no consideration.

68. Insanity

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.

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.

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 prisoner is sane or not, he is entitled to the benefit of the doubt, and to an acquittal.

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.

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.

The true test of criminal responsibility, when the defense of insanity is interposed, is whether the accused had sufficient use of his reason to understand:

First: The nature and consequences of the act with which he is charged; and

Second: To understand that it was wrong for him to commit it.

If such were the facts, he was criminally responsible for it, whatever peculiarity may be shown about him in other respects. Whereas, if his reason was so defective, in consequence of mental disorder, that he could not understand what he was doing, or that what he was doing was wrong, he ought to be treated as an irresponsible person, and acquitted.

Or, if you find 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, (or sane or insane at this time while being tried), 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."

69. Delusions

If a person under an insane delusion as to existing facts commits an offense in consequence thereof, his guilt or innocence depends on the nature and extent of the delusion. If such person labors under partial delusions only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts, with respect to which the delusion exists, were real. For example, if under the influence of his delusion he supposes another man to be in the act of taking his life, and he kills that man as he supposes in self-defense, then he would be exempt from punishment. But if his delusion was that the deceased had inflicted a serious injury to his character or property, or to his happiness in any way, and he killed him in revenge for such supposed or real injury, he would be liable to punishment, if he had a mind to enable him to distinguish right from wrong at the time the homicide occurred.

In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will or controlling mental power over it, through the overwhelming violence of mental disease, and his intellectual power is for the time obliterated, then he is not a responsible moral agent and is not punishable for criminal acts.

But these are extremes easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but capable of remembering, reasoning, and judging, or so perverted by insane delusion, as to act under false impressions and influences.

In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal; a sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, and a violation of the dictates of duty. Although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and has a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong; then such partial insanity is not sufficient to exempt him from responsibility for criminal acts.

(To be given only to the extent applicable to the facts and non-applicable portions to be omitted.)

70. Verdict

If, after having heard and carefully considered all the evidence in the case, you have any reasonable doubt in your minds as to the defendant's guilt of any crime within the charge, then you must acquit him. If, on the other hand, you are satisfied beyond such reasonable doubt of his guilt, then it will be your duty to convict him of such of the aforesaid crimes as to which you are satisfied beyond a reasonable doubt, you being the sole judges of the testimony and the credibility of the witnesses.

Your verdict 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.

71. Form of Verdict — Murder

If you find the defendant(s) (or any of them) guilty of murder in the first degree, the form of your verdict will be:

> We, the jury, find the defendant(s)____________________
> ____________________________________ (naming such) (and each of them) guilty of murder in the first degree, as charged in the indictment. So say we all.

In capital cases where a jury convicts a defendant of murder in the first degree, a majority of their number may recommend him to the mercy of the Court, and such recommendation reduces the punishment from death to life imprisonment. In the event you find the defendant(s) (or any of them) guilty of murder in the first degree and a majority of you

recommend him to the mercy of the Court, the form of your verdict shall be:

We, the jury, find the defendant(s)________________________ (naming such) (and each of them) 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 the defendant(s) (or any of them) guilty of murder in the second degree, the form of your verdict will be:

We, the jury, find the defendant(s)________________________ (naming such) (and each of them) guilty of murder in the second degree. So say we all.

If you find the defendant(s) (or any of them) guilty of manslaughter, the form of your verdict will be:

We, the jury, find the defendant(s)________________________ (naming such) (and each of them) guilty of manslaughter. So say we all.

If you find the defendant(s) (or any of them) not guilty, the form of your verdict will be:

We, the jury, find the defendant(s)________________________ (naming such) not guilty. So say we all.

Whatever verdict you find, it must be signed by one of your number as foreman.