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THE FLORIDA JURY PROCESS

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The ensuing discussion had its genesis in a seminar program for newly-appointed state circuit judges conducted under the auspices of the College of Law of the University of Florida. The instant topic formed the basis for one of a series of conferences whereby various appellate and trial judges were enabled to share their judicial experiences with the recently installed members of the bench. It was thought that a presentation of the materials utilized in connection with the conference on the state jury system might be of general interest.

No attempt has been made in this article to predict or suggest modification in the structure or operation of our jury system. The intent, rather, is to furnish a précis of the role of the jury as it functions today in the trial courts of the state, with some emphasis upon the situation of the judge and his responsibilities.

Trial by jury has been an abiding institution of English-speaking peoples for many centuries. It has existed for the past five hundred years in substantially the same form as that used in our circuit courts. The jury is designed to focus the principles of law with which it is provided upon an immediate conflict and to arrive at a just verdict in the light of the facts elicited during the trial.

SCOPE OF THE JURY'S AUTHORITY

The processes by which the jury reaches its verdict are protected by the traditional secrecy with which the deliberations are cloaked; no opinion justifying the jury's verdict is required. The verdict is not precedent with the force of law, and it is not subjected to as rigorous a scrutiny upon review by an appellate tribunal as that which on occasion faces a judge sitting without a jury. Advocates of the jury system contend that a jury, because of these facts, is accorded limited freedom to soften the impact of a rule or principle of law that, if rigidly applied in a particular instance, would produce a harsh result.

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The authority of the jury, however, must be viewed in the perspective of the steps in a lawsuit. A number of factors limit the scope of a jury's powers. A jury trial is available in Florida only in certain cases, usually those in which it was a matter of right under the common law, with certain statutory additions. It is stated to be a right secured to all and inviolate forever.[1] In those civil cases in which a jury is available, it must be requested,[2] and failure to demand a jury may amount to a waiver of the right to jury trial.[3]

The issues to which the deliberations of the jury may be directed are determined by the pleadings of the parties.[4] These issues are frequently isolated or limited in a pre-trial conference presided over by the trial judge. The applicable law is provided the jury by the judge, and the evidence that will be presented to the panel for subsequent evaluation is likewise controlled by him.

The attorneys direct the flow of events during litigation and may, through settlement procedures, remove the case from the jury. Further, the plaintiff in a civil action may, by taking a nonsuit, preclude any action by the jury.[5] In a proper case, the judge has the authority to direct a verdict[6] or to enter judgment notwithstanding the verdict after the jury has made its findings.[7] A new trial may be ordered by the trial judge if, after re-evaluation, he feels that the manifest weight of the evidence is against the finding of the jury;[8] and a mistrial may be declared if the judge in his discretion considers that events during the trial have so prejudiced the jury as to preclude an impartial verdict.[9] Also, if the trial judge is satisfied as to the liability of the defendant but is in disagreement with the amount awarded the plaintiff by the jury verdict, he may offer the plaintiff the option of either remitting a portion of that amount or submitting to a new trial.[10] A final examination of the propriety of a jury's verdict, of course, is to be found in appellate review.

These limitations on the scope of the jury's authority must be

1. FLA. CONST. Decl. of Rights, §3; FLA. R. CIV. P. 2.1 (a). In addition, the impartiality of the jury is required as a condition of a criminal prosecution. FLA. CONST. Decl. of Rights §11.

2. FLA. R. CIV. P. 2.1 (b).

3. FLA. R. CIV. P. 2.1 (d); Bardee Corp. v. Arnold Altex Aluminum Co., 134 So. 2d 268 (3d D.C.A. Fla. 1961); Bittner v. Walsh, 132 So. 2d 799, (1st D.C.A. Fla. 1961). See also Shores v. Murphy, 88 So. 2d 294 (Fla. 1956).

4. FLA. R. CIV. P. 2.1 (c).

5. FLA. STAT. §54.09 (1961).

6. FLA. R. CIV. P. 2.7; FLA. STAT. §54.17 (1961).

7. FLA. R. CIV. P. 2.7.

8. FLA. R. CIV. P. 2.8.

9. See 32 FLA. JUR. *Trial* §245 at 506. *Cf.* First Nat'l Bank v. Bliss, 56 So. 2d 922 (Fla. 1952); Alicot v. Dade County, 132 So. 2d 302 (3d D.C.A. Fla. 1961).

10. Malone v. Folger, 132 Fla. 76, 180 So. 522 (1938); Kovacs v. Venetian Sedan Serv. Inc., 108 So. 2d 611 (3d D.C.A. Fla. 1959).

borne in mind in considering the operation of the jury system.

DEMAND FOR OR WAIVER OF JURY TRIAL

As previously stated, the right to trial by jury is secured to all and is inviolate.[11] It is not the creation or extension of the jury system that is accomplished by the application of this doctrine but rather the retention of the jury in those causes in which it was utilized at common law. The demand for jury trial may be made by any party upon any issue triable of right by a jury.[12] Either party may make such a demand in writing within ten days after the service of the last pleading directed to the issue. If the demand is properly made, trial by jury is not discretionary but a matter of right, and it may not be denied by the trial judge. A party may specify in his demand that only certain issues of fact are to be tried by jury.[13] If no such specification is made, a jury trial is granted for all the issues. If one party demands a jury trial limited to certain issues, however, the other party, within ten days or such lesser time as the court may order, may demand jury trial of the remaining issues of fact.[14]

Failure to make a timely demand pursuant to this rule is categorized as a waiver of the right to trial by jury.[15] The rule further states that "if waived, a jury trial may not be granted without the consent of the parties," and it also provides that a demand for a jury may not be withdrawn without the consent of the parties. In *Wood v. Warriner*,[16] in which the court construed an earlier rule of Florida procedure, Common Law Rule 31, neither party to the cause had requested a jury trial within the allocated time. On the day of trial, however, the plaintiff demanded a jury, and the trial judge granted the demand over the objection of the defendant. On appeal, the Florida Supreme Court affirmed. The defendant had not requested a continuance but had proceeded to trial, and the granting of the demand for jury trial under the circumstances was held not to be error. A 1956 decision of the Supreme Court of Florida,[17] which was decided under the present rules of civil procedure, cited the *Wood* case with approval and affirmed a ruling of the trial court that granted a jury trial over the objections of the defendant despite the failure of either party to demand it. Florida Rule of Civil Procedure 2.1 was considered and was construed in the light of Rule 1.15.

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11. See note 1 *supra*.
12. FLA. R. CIV. P. 2.1 (b).
13. FLA. R. CIV. P. 2.1 (c).
14. *Ibid.*
15. FLA. R. CIV. P. 2.1 (d).
16. 62 So. 2d 728 (Fla. 1953).
17. Shores v. Murphy, 88 So. 2d 294 (Fla. 1956).

The Supreme Court stated:[18]

> "[A] trial judge is granted an exceedingly broad discretion in permitting amendments in procedural matters and otherwise disregarding defects which do not affect the substantial rights of the parties. This would include the discretion to order a jury trial if justice requires it."

In a criminal action, the matter of waiver is decidedly more limited. A defendant is allowed to waive a jury trial except in cases in which the death sentence may be imposed. The waiver, however, must be affirmatively made in open court by the defendant, and an endorsement to that effect must be placed on the indictment or information and signed by the defendant.[19] The waiver may also be valid if its existence can be shown affirmatively from the record proper or from the trial proceedings.[20] Parenthetically, although the statute provides that a jury may not be waived in a capital case, a plea of guilty may accomplish this result and evidence may thereby be presented directly to the trial judge, who determines the degree of punishment.[21]

A further question may arise in a criminal action as to whether the consent of the trial judge and the state must be obtained before a defendant is allowed to waive a jury trial. Rule 23 (a) of the Federal Rules of Criminal Procedure expressly requires court approval and consent of the government before waiver is permitted; section 912.01 of Florida Statutes 1961 makes no such provision. However, in *Jones v. State*[22] the defendant, in accordance with the statutory requirement, announced in open court that he waived his right to trial by jury and would submit to a trial before the judge. The trial court in its discretion refused to allow the waiver and required the trial to be conducted before a jury. On appeal, the Florida Supreme Court held that a trial court is not required to dispense with a jury upon waiver by a defendant. The judge's consent was thus made a prerequisite to waiver of a jury trial in a criminal case. Whether the prosecution must also acquiesce has not as yet been determined.

TRIAL BY JURY UNDER THE CONSTITUTION AND STATUTES

In addition to the traditional common law right to trial by jury

18. *Id.* at 296. See also Bardee Corp. v. Arnold Altex Aluminum Co., 134 So. 2d 268 (3d D.C.A. Fla. 1961); Bittner v. Walsh, 132 So. 2d 799 (1st D.C.A. Fla. 1961) (trial without jury).

19. FLA. STAT. §912.01 (1961).

20. Sneed v. Mayo, 66 So. 2d 865 (Fla. 1953); Jones v. State, 155 Fla. 558, 20 So. 2d 901 (1945).

21. See McCall v. State, 135 Fla. 712, 185 So. 608 (1939).

22. 155 Fla. 558, 20 So. 2d 901 (1945).

in civil and criminal cases, the Constitution and the statutes of Florida have delineated certain controversies as warranting determination by a jury. The Constitution provides that in the condemnation of property full compensation shall be made and the amount of compensation shall be ascertained by a jury of twelve men.[23] These provisions have also been incorporated in the Florida statutes.[24] Both the constitutional and the statutory provisions specify that the jurors shall be twelve *men.*

A statute[25] declares that if the defendant in a quiet title action is in possession of the premises that form the basis of the controversy, either party may demand a trial by jury. In the event such a demand is made, the chancellor is directed to transfer the case to the law side of the court, where an ejectment action is subsequently tried by a jury. The jury trial, however, is restricted to the lands in the actual possession of defendant.

An action for forcible entry and unlawful detainer is tried by a jury of six men from the county who are freeholders and are not related to either party. The panel is formed from the jury in attendance at that term of court or, in case of deficiency, from bystanders.[26]

In the criminal area, it is provided that a jury shall be empaneled to determine whether a person convicted of a crime has previously been convicted of one or more offenses. If the defendant denies any prior conviction, remains silent, or refuses to answer, his identification as a prior offender rests with a jury.[27]

If a party demands a trial by jury in a civil case before any court or judge in vacation, a trial judge in his discretion may require that the party deposit an amount sufficient to cover the cost of the jury trial.[28]

SELECTION OF THE JURY

If a valid right to jury trial is established, the next task faced by the trial judge is that of presiding over the selection of the jury. Among the persons summoned for jury duty will be many who, for various reasons, wish the court to release them from their obligation to serve. Extreme caution must be exercised by the judge in utilizing his discretion as to these requests, for the parties are entitled to try their cause before a representative panel of their peers. Often a

23. FLA. CONST. art. 16, §29.
24. FLA. STAT. §73.10 (1961).
25. FLA. STAT. §66.16 (1961).
26. FLA. STAT. §82.09 (1961).
27. FLA. STAT. §775.11 (1961).
28. FLA. STAT. §40.25 (1961).

brief orientation conducted by the judge will aid greatly in bringing the attention of the persons selected for jury duty to bear upon the importance of their function and upon the need for responsible persons to serve as triers of fact.

Excusing Jurors

The matter of excusing prospective jurors for reasons personal to such individuals rests within the discretion of the trial judge. An attempt was made in *North v. State*[29] to attack a jury verdict convicting the defendant of murder in the first degree. It was contended that the trial judge committed prejudicial error by excusing prospective jurors in advance of trial, without the knowledge or consent of the defendant and his counsel and in their absence. Section 914.01 of Florida Statutes 1961, which provides, among other things, that the defendant must be present at the calling, examining, challenging, empaneling, and swearing of the jury, was cited as authority for this position. On appeal the trial judge was affirmed, and excusing prospective jurors in advance of trial was held to be within the broad discretion of the judge. The statute cited was deemed inapplicable to the action of the trial judge in excusing the prospective jurors in advance. The rationale underlying this position is that the parties litigant possess no intrinsic right to have any individual serve as juror in their cause; the right of the parties is to reject for cause or by peremptory challenge rather than to select any particular veireman.[30]

Under certain circumstances individuals are granted statutory exemption from jury duty.[31] Those persons who are over the age of sixty-five or are subject to bodily infirmities amounting to disability or are members of listed occupations may be entitled to an exemption. The exemption extended to a person over the age of sixty-five amounts to a personal privilege, and whether he avails himself of the opportunity rests within his personal discretion. If he waives his exemption, his age does not entitle either party in a civil or criminal case to seek his disqualification as a matter of law.[32]

The qualifications of a juror and the grounds upon which he may be challenged are listed in the Florida statutes.[33] The standards of

29. 65 So. 2d 77 (Fla. 1953).

30. See Williams v. Pichard, 150 Fla. 371, 7 So. 2d 468 (1942). See also Piccott v. State, 116 So. 2d 626 (Fla. 1959); Davis v. State, 90 Fla. 326, 105 So. 845 (1925). *Cf.* FLA. STAT. §40.36 (1961).

31. FLA. STAT. §§40.08,.09,.12, 231.05, 250.50, 251.13(2), 470,27 (1961).

32. Crosby v. State, 90 Fla. 381, 106 So. 741 (1925); Brown v. State, 40 Fla. 459, 25 So. 63 (1898).

33. FLA. STAT. §§40.01,.07, 54.12 (1961).

selection in a criminal trial are the same as those in civil cases.[34]

Once petit jurors have been selected and the preliminary oath has been administered, they are to serve for one week only, unless the judge in his discretion believes that circumstances require a longer period of service.[35]

Women are eligible to serve as jurors in Florida, but in order to be called, a woman must have previously registered with the clerk of the circuit court thereby indicating her desire to serve on a jury.[36] Women are excluded, however, from service on juries in eminent domain proceedings.[37] Despite the mandate of section 913.10 that twelve *men* shall serve as jurors in capital cases and six *men* shall compose a jury in other criminal cases, women may serve as jurors in criminal prosecutions. The fact that no women actually served on the jury that convicted a female defendant of second degree murder was held not to have deprived her of an impartial jury or of equal protection of the laws; and her contention that the burden imposed upon women of voluntarily registering for jury duty rendered the statute invalid was likewise rejected.[38]

Challenges

If the procedure provided by law for selecting, drawing, and summoning jurors has not been followed, a challenge to the array is in order.[39] Defects or irregularities in the selection process do not affect the legality of the organization of a jury unless it appears that they have resulted in a miscarriage of justice.[40] In a criminal trial the only ground for challenging the panel is that the jurors were not selected or drawn according to law.[41] When such a challenge is made in a felony prosecution, the defendant must be present at the calling, examining, challenging, empaneling, and swearing of the jury.[42]

In *Richards v. State*[43] the Florida Supreme Court stated the general rule that intentional and persistent discrimination against a race, religion, or class of persons in the selection of a jury list to try a criminal case would be violative of the constitutional rights of the accused; such a violation would not be excused by the fact that the persons actually selected for jury duty possessed the qualifications

34. FLA. STAT. §932.19 (1961).
35. FLA. STAT. §40.41 (1961).
36. FLA. STAT. §40.01 (1) (1961).
37. FLA. STAT. §40.01 (5) (1961).
38. Hoyt v. State, 119 So. 2d 691 (Fla. 1960).
39. Chance v. State, 115 Fla. 379, 155 So. 663 (1934).
40. FLA. STAT. §40.43 (1961).
41. FLA. STAT. §913.01 (1961).
42. FLA. STAT. §914.01 (3) (1961).
43. 144 Fla. 177, 197 So. 772 (1940).

prescribed by law. The court added, however, that the discrimination must be constant.

Usually a challenge to the array is made by a motion to quash.[44] The challenge must overcome the presumption of regularity in the selection or drawing of a juror.[45] Also, each person whose name is placed on the jury list by the appropriate officials is presumed to be the one intended to be listed as a juror.[46] In a criminal case, a challenge to the panel may be entered by either the defendant or the state.[47]

If a challenge to the array is justified, it must be seasonably made. If the defendant proceeds without objection to trial before a jury, he thereby waives the right to appeal any irregularities in the selecting and empaneling of the jurors.[48] This rule is also applicable to the defendant in a capital case.[49]

The voir dire examination is designed to enable the trial judge and respective counsel to discover grounds for disqualification of individual jurors. The disqualifying factors may be rooted in law, in bias or knowledge of the cause, or in the intuitive judgment of counsel as exemplified by the peremptory challenge. The trial judge is empowered in both civil and criminal cases to interrogate prospective jurors and to dismiss them if they do not meet the statutory prerequisites for jury duty.[50] Also, either party to a civil or criminal cause, in addition to counsel, may personally examine jurors to determine their qualifications.[51]

In a civil case, each party is allowed three peremptory challenges. If the parties on each side are unequal in number, however, the aggregate number of peremptory challenges available to each side is equal to the number to which the side possessing the larger number of parties is entitled.[52] In a criminal case, peremptory challenges available to the state and the defendant increase with the severity of the offense charged, varying from ten if the offense is punishable by death or imprisonment for life and six for other felonies to three for a misdemeanor charge.[53]

If the trial judge deems a challenge for cause entered by one of the attorneys to be unwarranted, he may deny it; the attorney, in

44. 20 FLA. JUR. *Jury* §64 at 77.
45. Haynes v. State, 71 Fla. 585, 72 So. 180 (1916).
46. FLA. STAT. §40.11 (1961).
47. FLA. STAT. §913.01 (1961).
48. Baker v. State, 150 Fla. 446, 7 So. 2d 792 (1942).
49. Buchanan v. State, 97 Fla. 1059, 122 So. 704 (1929).
50. FLA. STAT. §§54.12, 913.02 (1961).
51. FLA. STAT. §54.13 (1961).
52. FLA. STAT. §54.11 (1961).
53. FLA. STAT. §913.08 (1961).

order to remove the juror in question, must then utilize a peremptory challenge. Before a denial becomes a ground upon which appellate review may be sought, however, the party must affirmatively demonstrate that he has been prejudiced by the denial of his challenge for cause. Prejudice may be established by a showing that the party subsequently exhausted his stock of peremptory challenges and that a venireman who would have been removed through the exercise of a peremptory challenge was allowed to take his place on the jury. In *Young v. State*[54] the defendant challenged for cause a venireman who had admitted having formed an opinion and whose subsequent answers demonstrated a biased attitude that would preclude him from functioning as an impartial juror. The challenge for cause was denied. On appeal the defendant claimed that this was prejudicial error; the Supreme Court pointed out, however, that although the record on appeal showed that the defendant exhausted his full quota of peremptory challenges, it did not affirmatively indicate that one of the challenges was utilized to exclude the venireman in question. Even though the venireman did not serve on the jury, the court refused to assume that he had been peremptorily challenged. If error existed, it must have consisted of either overruling a challenge for cause and allowing the partial juror to serve or forcing the defendant to use a peremptory challenge to excuse him, so that the defendant's full quota of such challenges was exhausted at the time the jury was selected. Since it was not demonstrated that the jury finally empaneled contained at least one juror objectionable to the defendant, who had exercised all his peremptory challenges, the ruling of the trial court was upheld.[55] This reasoning was affirmed in *Withers v. State*,[56] in which the defendant asserted in the appellate court that the trial judge committed reversible error by denying two challenges for cause. This contention was held to be without merit, the court pointing out that the jurors did not serve and that the defendant's peremptory challenges had not been exhausted at the time the jury was finally selected.

In the converse situation, seldom will the act of a trial judge in excusing a juror upon voir dire examination constitute reversible error, even if it appears that the juror in question was qualified to serve.[57] The competency of a challenged juror is a problem composed of both law and fact to be resolved by the trial court through

54. 85 Fla. 348, 96 So. 381 (1923).

55. See also McRae v. State, 62 Fla. 74, 57 So. 348 (1912); Stokes v. State, 54 Fla. 109, 44 So. 759 (1907); Mathis v. State, 45 Fla. 46, 34 So. 287 (1903).

56. 104 So. 2d 725 (Fla. 1958).

57. Piccott v. State, 116 So. 2d 626 (Fla. 1959). See Walsingham v. State, 61 Fla. 67, 56 So. 195 (1911); John D. C. v. State *ex rel.* Julia V. H., 16 Fla. 554 (1878) for analysis of the principles underlying this statement.

Florida Law Review, Vol. 15, Iss. 1 [1962], Art. 1
use of his judicial discretion, and his determination should not be disturbed unless manifestly in error.[58]

To be effective, challenges to individual jurors must be timely; if they are not utilized prior to the swearing of the jury, the right to challenge is deemed to be waived[59] unless the disqualifying factor would affect the juror's capacity to render a fair and impartial verdict and thus bear upon the "fundamentals of the trial itself."[60] The tender of the venire by an attorney to opposing counsel or to the court does not of itself operate as a waiver of the right to exercise the statutory challenges. *O'Connor v. State*[61] held that the defendant was vested with the right to execute a peremptory challenge against a venireman at any time prior to the moment when he was sworn in chief. The opportunity to change the composition of a prospective jury is available until the jury is sworn to try the issues.[62] The *O'Connor* decision also stated that once a party had tendered or accepted the venire, the trial judge in his discretion might refuse to allow further voir dire examination by that party or his counsel.

The availability of the challenge until the time the oath is finally administered may, upon occasion, result in last moment challenges by counsel as a matter of trial tactics. If this procedure is indulged in excessively, the commencement of the trial may be unduly delayed. *Mathis v. State*[63] commented that normally the better practice is to postpone the swearing-in-chief until the full panel is obtained. The court designated as considerations resting within the sound discretion of a trial judge the time and manner of swearing jurors in chief after they have been examined on the voir dire and after an opportunity has been given for challenges. The exercise of this discretion will not be disturbed by an appellate court unless clearly abused. In the *Mathis* case certain veniremen were sworn singly after a voir dire examination and an opportunity for challenge. This technique may, in extreme cases, curtail excessive delay on the part of counsel.[64]

Section 913.04 of Florida Statutes 1961 delineates the time in which an individual juror may be challenged and states that the right will terminate upon the swearing of the juror to try the cause. The statute also vests the trial judge with discretion to allow a challenge to be made after the juror is sworn but prior to the presentation of any evidence, provided the belated challenge is offered for good cause.

58. Piccott v. State, 116 So.. 2d 626 (Fla. 1959); Singer v. State, 109 So. 2d 7 (Fla. 1959); Blackwell v. State, 101 Fla. 997, 132 So. 468 (1931).

59. FLA. STAT. §§913.03,.04 (1961); *Ex parte* Sullivan, 155 Fla. 111, 19 So. 2d 611 (1944).

60. Leach v. State, 132 So. 2d 329, 333 (Fla. 1961).

61. 9 Fla. 215 (1860).

62. Kennick v. State, 107 So. 2d 59 (1st D.C.A. Fla. 1958).

63. 45 Fla. 46, 34 So. 287 (1903).

64. See also King v. State, 125 Fla. 316, 169 So. 747 (1936).

During the voir dire examination counsel may probe into any matters concerning the members of the venire through questions reasonably expected to elicit responses bearing on their competence or bias as prospective jurors. Counsel may also inquire as to any interest they may possess in the subject matter of the controversy. The use of hypothetical questions by counsel to achieve these ends may or may not be proper. They are acceptable if they are designed to reveal grounds in which challenges for cause or peremptory challenges might be rooted. In *Pope v. State*[65] a hypothetical question was asked for the purpose of discovering whether the veniremen had conscientious scruples against enforcing the law applicable to the cause. On appeal the query was declared to be a correct statement of the law and to be proper in that it would aid counsel in fathoming whether an impartial panel could be selected.[66] Conversely, in *Dicks v. State*[67] the Supreme Court affirmed a ruling by the trial judge that a hypothetical question posed by counsel for the defense was improper. The court noted that the query was designed to evoke from the venireman a response that would indicate in advance of trial what his conclusion would be on a given state of the testimony. A pre-judgment of this nature was held an improper object of the voir dire examination. The rulings of the trial judge in this area will not be overruled in the absence of a clear abuse of discretion.

Replacing Jurors

After the jury is empaneled and the trial is in progress, one or more of the members of the jury may be either incapacitated as a result of death or illness or may be precluded from further service because of misconduct. In this instance, the procedure at common law contemplated the discharge of the entire panel coupled with immediate recall of the jurors in good standing and sufficient members of the venire to achieve once again a full complement of jurors and the empaneling of the jury de novo. Each party was granted once again his full number of peremptory challenges and tendered the new venire. The members of the venire then deemed acceptable were again sworn in chief.[68]

The inconvenience that results from this situation may in some instances be alleviated. In certain courts one or two alternate jurors may be summoned, sworn in chief, and empaneled to sit with the regular jury members in a civil trial. The qualifications of the alternate jurors must be in all respects similar to those of the principal

65. 84 Fla. 428, 94 So. 865 (1923).

66. See also Pait v. State, 112 So. 2d 380 (Fla. 1959).

67. 83 Fla. 717, 93 So. 137 (1922).

68. West v. State, 42 Fla. 244, 28 So. 430 (1900). See also Coley v. State, 69 Fla. 568, 68 So. 655 (1915).

jurors; they are to be treated as principal jurors and conduct themselves accordingly. In the event an alternate is not called upon to replace a regular juror by the time the jury retires to consider its verdict, he will be discharged. For each alternate juror summoned, each party receives an additional peremptory challenge to be exercised only against the alternate venireman.[69] Similar provision has been made in criminal trials.[70] During prolonged or expensive trials, this may be advantageous from a standpoint of time and expense.

FUNCTION OF THE JURY

Orientation

The attitude of jurors toward their responsibilities should be a matter of deepest concern to the trial judge. The parties before the court seeking a just determination of their controversy may be deprived of a basic right to a fair, impartial hearing if the jury members are begrudging, inattentive, hostile, or without a proper understanding of their duties. The bearing, dignity, and courtesy of the trial judge will make a decided impression upon the panel, and he will serve as an example deserving of emulation to the degree that he conveys a feeling of respect for the court and for its position as a source of justice. Time devoted to orienting the jury and awakening the individual members to a realization of their importance is well spent. Some jurisdictions provide the panel members with brochures and pamphlets that delineate their role in the trial and seek to acquaint them preliminarily with the mechanics of the proceedings they will observe. Such a pamphlet, entitled "Handbook for Trial Jurors," was the subject of scrutiny by the Florida Supreme Court when a convicted defendant in a criminal prosecution sought reversal on appeal, claiming that distribution of the handbook was improper and unlawful.[71] The pamphlet was sent to the jurors with their summonses, and they were admonished to surrender it on reporting for jury service and not to take it into the jury room. The defendant insisted that the brochure was in violation of section 918.10 of Florida Statutes 1961, which controlled the manner in which the jury was to be charged. In rejecting the contention the court commented that no statements that could be considered charges on questions of law were contained in the booklet. After an exhaustive review of its

69. FLA. STAT. §54.15 (1961). The statute may be brought into play under the direction of the presiding judge; it is applicable to Florida's circuit courts, criminal courts of record, and the court of record of Escambia County.

70. FLA. STAT. §913.10(2) (1961).

71. Ferrara v. State, 101 So. 2d 797 (Fla. 1958); *accord*, Schoultz v. State, 106 So. 2d 424 (Fla. 1958).

contents, the court held that distribution of the pamphlet was proper, concluding: "In sum, the jurors are told that they are searchers for truth and advised how best to find it."[72] Printed materials of this nature may be a helpful supplement to a personal explanation by the judge.

The comfort and well-being of the jury should likewise be foremost in the mind of the judge. A recurrent complaint of discharged jurors pertains to the extended periods of time during which they must loiter about the courthouse awaiting the commencement of a case or a ruling on a motion by counsel. A practice by the judge of keeping them informed of the status of the proceedings and the reasons for the various delays will greatly enhance the morale and interest of the jurors.[73] Other factors that will augment the physical well-being of the jurors are an adequate waiting room and a supply of periodicals or books for diversion while they are not sitting as a panel.

Insuring Impartiality and Fairness

The method of selecting jurors in Florida was contrived to make available to the parties in litigation an impartial, competent panel that would operate as the finder of fact. After the jury is empaneled, it becomes the responsibility of the trial judge to insure that this impartiality is preserved. No information or evidence may be procured by or supplied to the jurors during the course of a trial or during their deliberations except that which is deemed admissible by the judge and duly presented in open court in the presence of both parties and their counsel. The possession of unauthorized information that influences the jury in arriving at its determination may result in the overturning of the verdict and in the granting of a new trial.[74] The jury is precluded from perusing law books of any description after they have retired to determine their verdict.[75] Other printed matter, such as a dictionary, is likewise forbidden.[76]

Activities on the part of individual jurors, including unauthorized experiments, views, or inspections outside the presence of judge and counsel, may lead to reversal of the verdict or to a declaration of mistrial. Whenever the panel in a criminal case is allowed to leave the jury box prior to the moment the cause is submitted to them, the trial judge, whether the jurors are allowed to separate or not, must admonish them not to communicate with anyone about the case,

72. Ferrara v. State, 101 So. 2d 797, 801 (Fla. 1958).
73. See Rowe, *The Plight of the Juror*, 44 J. AM. JUD. SOC'Y 211 (1961).
74. Russ v. State, 95 So. 2d 594 (Fla. 1957).
75. Powell v. State, 88 Fla. 366, 102 So. 652 (1924); Johnson v. State, 27 Fla. 245, 9 So. 208 (1891); compare Linsley v. State, 88 Fla. 135, 101 So. 273 (1924).
76. Smith v. State, 95 So. 2d 525 (Fla. 1957).

including other members of the panel, and not to form or express any opinion on the merits of the cause. If the judge permits the jurors to separate, he must also warn them not to view the scene of the alleged offense.[77]

In the event that the jurors are released to the custody of a court official, he must be cautioned neither to speak to the jurors on any subject connected with the trial nor to permit any communication between them and third parties. He must also be admonished to keep the jurors together in the place specified by the court.[78] To allow a plaintiff and his counsel in a civil action to proceed in the same vehicle with the jurors to the location where the jury was to be accorded a view was declared to be reversible error in *Atlantic Coast Line R.R. v. Seckinger*.[79] This was true regardless of whether any communication was demonstrated to have taken place. If the situation is known to the defendant and his counsel, however, and no timely objection is registered, the irregularity may be deemed to be waived.[80] The trial judge himself must exercise care to communicate with the jurors only in the presence of the parties and counsel.[81]

The deliberate effort to corrupt, bias, or influence a juror is a punishable offense,[82] and the acceptance of a bribe on the part of a juror is likewise a criminal act.[83]

Arriving at a Verdict

Although taking the jury on a view of the premises is somewhat time consuming and inconvenient, it may be of invaluable assistance to the jury in a proper case by supplying them with new insight into the significance of the evidence presented during trial. The trial judge is empowered to order a view in both civil and criminal actions when, in his sound discretion, he deems it warranted.[84] It is specified that both the trial judge and the defendant must be present as the jury views the premises in a criminal action. The absence of the judge at this time is fundamental error, and it is not waived by failure of the defendant to enter a timely objection.[85] The view is an aid to

77. FLA. STAT. §918.06 (1961).

78. FLA. STAT. §918.07 (1961); *cf.* State v. Lewis, 54 So. 2d 199 (Fla. 1951).

79. 96 Fla. 422, 117 So. 898 (1928).

80. Miller v. Pace, 71 Fla. 274, 71 So. 276 (1916). *But see* Raines v. State, 65 So. 2d 558 (Fla. 1953).

81. *Cf.* Ferreri v. State, 109 So. 2d 578 (2d D.C.A. Fla. 1959).

82. FLA. STAT. §838.03 (1961).

83. FLA. STAT. §838.04 (1961).

84. FLA. STAT. §§54.16, 918.05 (1961). The necessity for the presence of the defendant in a cause involving an alleged felony is reiterated by FLA. STAT. §914.01 (6) (1961).

85. McCollum v. State, 74 So. 2d 74 (Fla. 1954).

the analysis of evidence formally presented in open court rather than evidence in itself. Any inferences that might be drawn from the view are not proper subjects for instruction by the court.[86]

The nature of the material that jurors may take to the jury room to assist them in their deliberations has been largely codified.[87] Forms of verdicts approved by the courts and shown to counsel, all written instructions that were given, and all items received into evidence except depositions are specified. A copy of a public or private document may be substituted for the original if the judge is of the opinion that the original should remain in the custody of its possessor. The trial judge has discretion to determine whether to allow various items to be taken to the jury room. If *any* written instructions are taken to the jury room, however, *all* must be taken, according to the statute.[88]

The method by which charges to the jury and requests therefor are to be handled in a criminal action has been provided by statute.[89] It is specifically stated that charges in a capital case shall be reduced to writing as well as orally delivered. In *Coggins v. State*,[90] a prosecution for first degree murder, the trial judge failed to reduce his charges to writing, and the asserted error was presented on appeal for review. The appellate court, remarking that exception was not taken at the time the charges were given orally but was first mentioned in motion for new trial, declared the objection to have been waived.[91] No evidence in the record on appeal indicated that a request was entered to have the charges made available to the jury during its deliberations.

In a criminal trial, the jurors, upon request, may be permitted in the discretion of the judge to return to the courtroom for additional instructions on any point of law or to have testimony about which they are in disagreement re-read after notice is given by the trial judge to the prosecution and to counsel for defendant.[92] The judge's failure to grant such a request by the jury may under certain circumstances be an abuse of discretion.[93] The judge, after notifying the prosecution and counsel for the defendant, may in his discretion recall the jury for additional instructions or to correct any former instructions that may have been erroneous.[94] No additional evidence

86. Orme v. Burr, 157 Fla. 378, 25 So. 2d 870 (1946).
87. FLA. STAT. §919.04 (1961).
88. FLA. STAT. §919.04(2) (1961).
89. FLA. STAT. §918.10(2) (1961).
90. 101 So. 2d 400 (3d D.C.A. Fla. 1958).
91. See also Driggers v. State, 38 Fla. 7, 20 So. 758 (1896); Hubbard v. State, 37 Fla. 156, 20 So. 235 (1896).
92. FLA. STAT. §919.05 (1961).
93. Penton v. State, 106 So. 2d 577 (2d D.C.A. Fla. 1958). *But see* Bates v. State, 102 So. 2d 826 (2d D.C.A. Fla. 1958).
94. FLA. STAT. §919.06 (1961).

may be presented to the jury, however, after they have retired to consider their verdict.[95]

In a civil case, the trial judge may explain the law to the jurors anew in the event that they are unable to agree on a verdict. They may then be sent out for further deliberation. If they return a second time without having arrived at a verdict, unless they merely request some additional explanation of the law, they may be sent out again only with their own consent.[96] The discretion of the trial judge in dealing with any request by the jury to have certain testimony read to them or evidence brought before them again was affirmed in *Florida Power and Light Co. v. Robinson*.[97] The Supreme Court stated upon review that the ruling of the trial judge in this regard would not be interfered with unless abuse of discretion was demonstrated.[98]

INSTRUCTIONS TO THE JURY

Instructions are designed to enlighten the jury on questions of law pertinent to issues of fact submitted to them.[99] They also serve to guide and control the jury in their deliberations so that they may arrive at a verdict fairly based on the law and facts of the case.[100]

The charges should be so phrased as to impress upon the minds of the jurors the legal principles that govern the issues; otherwise the charges fail. Since jurors are laymen of various educational levels, the instructions should be phrased with simplicity, conciseness, directness, and brevity in order to convey the principles of law without misleading.[101] The charges should be in language that the jury understands.[102] In this respect the thoughts and principles found in appellate opinions may be used. Modifications may be desirable in certain instances, however, since the language employed in appellate opinions is generally designed to elaborate upon the court's position and may not always be easily comprehended by lay jurors.

It is the duty of the trial judge, by statute, to charge on the law

95. FLA. STAT. §919.07 (1961). See also Jackson v. State, 107 So. 2d 247 (2d D.C.A. Fla. 1958).

96. FLA. STAT. §54.22 (1961); Alicot v. Dade County, 132 So. 2d 302 (Fla. 1961); Dehon v. Heidt, 38 So. 2d 39 (Fla. 1949).

97. 68 So. 2d 406 (Fla. 1953).

98. See also McAllister Hotel, Inc. v. Porte, 123 So. 2d 339 (Fla. 1960).

99. Holman Livestock Co. v. Louisville & N.R.R., 81 Fla. 194, 87 So. 750 (1921); *accord*, Board of Pub. Instr. v. Everett W. Martin & Son, 97 So. 2d 21 (Fla. 1957).

100. 1 RICHARDSON, FLORIDA JURY INSTRUCTIONS 7 (1954).

101. See Rossman, *The Judge-Jury Relationship in the State Courts*, 3 F.R.D. 98 (1943).

102. Cato v. State, 9 Fla. 163, 184 (1860).

of the case at the conclusion of argument of counsel.[103] In criminal cases it is also provided that the judge must instruct on the penalty of the offense.[104] In *Simmons v. State*,[105] however, it was held that this provision was directory and not mandatory, since the latter interpretation would result in an encroachment by the legislature upon the prerogatives of the judicial department.[106]

The litigants are entitled to have the court instruct the jury on the law applicable to the facts introduced in evidence.[107] However, the trial judge does not on his own initiative have the duty to charge the jury on all the possible issues. His responsibility is to charge the jury on the fundamental principles of law necessarily in issue; special requests should originate with counsel.

It is the duty of parties to a civil case to file written requests for charges.[108] If an appropriate request is made, the judge is required to reduce to writing the charges given.[109] In criminal cases, any party may file written requests for instructions.[110] Nevertheless, there is an area in which the court has the duty of charging the jury notwithstanding the absence of requests. It is difficult to say where the obligation of the court to charge on the law of the case terminates and where the duty of the parties to request instructions begins. Even though charges are not requested, the failure to charge may amount to fundamental error, a violation of constitutional guarantees, or miscarriage of justice. Most of the cases in this category are criminal; however, the problem was discussed in the civil case of *Miami Coca Cola Bottling Co. v. Mahlo*.[111] It has been held, in a capital case in which the state relied entirely on the confession, that failure to charge on the weight to be given a confession was reversible error even in the absence of request.[112] This exception has also been applied to failure to charge on the presumption of innocence.[113]

A cautionary instruction in regard to a confession was quoted with approval by the Supreme Court in *Melton v. State*.[114] If the

103. FLA. STAT. §§54.17, 918.10 (1) (1961).
104. FLA. STAT. §918.10 (1) (1961).
105. 160 Fla. 626, 36 So. 2d 207 (1948).
106. See also McClure v. State, 104 So. 2d 601 (3d D.C.A. Fla. 1958).
107. Austin v. State, 40 So. 2d 896 (Fla. 1949); Seaboard Air Line Ry. v. Kay, 73 Fla. 554, 74 So. 523 (1917); Archibald v. Wittmer, 120 So. 2d 236 (2d D.C.A. Fla. 1960).
108. FLA. R. CIV. P. 2.6 (b).
109. FLA. STAT. §54.18 (1961).
110. FLA. STAT. §918.10 (1961).
111. 45 So. 2d 119 (Fla. 1950).
112. Harrison v. State, 149 Fla. 365, 5 So. 2d 703 (1942).
113. McKenna v. State, 119 Fla. 576, 161 So. 561 (1935).
114. 159 Fla. 106, 30 So. 2d 916 (1947). See also Leach v. State, 132 So. 2d 329 (Fla. 1961).

evidence admitted during trial, in addition to the questioned confession, is sufficient to warrant conviction of the defendant, however, failure to instruct the jury on the weight to be given to the confession does not amount to fundamental error.[115]

Charges must be confined to the law, and the trial court may not comment or charge on the weight and sufficiency of the evidence, a matter that is solely for the determination of the jury.[116] This is so in most state courts but not in the federal system.[117]

The court should not invade the province of the jury. It is the jury's function to decide the facts and reach its verdict by applying those facts to the law as charged. Therefore, the charges should not make assumptions as to facts that are in conflict or as to non-existent facts. Inferences or conclusions of fact based on other facts are for the jury and not the judge.[118]

Function of the Grand Jury

The function of the grand jury grows out of the Constitution and statutes of Florida and the common law.[119] It is an appendage of the circuit court. Section 10 of the Declaration of Rights of the Constitution of Florida provides that no person shall be tried for a capital crime except upon presentment or indictment by a grand jury.[120] Concurrent authority is vested in the grand jury and the prosecuting attorney to cause an individual to be tried for a felony. The prosecuting attorney may file an information under oath and thereby initiate court proceedings. Section 10 also provides that the judge of any circuit court is authorized to dispense with the convening of a grand jury if he deems it unnecessary.

Chapter 905 of Florida Statutes 1961 provides legislative authority for the grand jury and directs the manner in which it will be empaneled and will function. It is specified in section 905.01 that not less than fifteen nor more than eighteen persons shall constitute a grand jury; all qualifications that are prerequisite to the selection of a petit juror are applicable to a grand juror. It also provides that the assent of at least twelve of the members of the grand jury shall be necessary to the finding of any indictment. The power to dispense with a grand jury extended by section 10 of the Declaration of Rights is reiterated in this section. Section 905.16 states the duties of the

115. Hamilton v. State, 88 So. 2d 606 (Fla. 1956); Sinnefia v. State, 100 So. 2d 837 (3d D.C.A. Fla. 1958).

116. Lithgow Funeral Centers v. Loftin, 60 So. 2d 745 (Fla. 1952).

117. See Soper, *The Charge to the Jury*, 1 F.R.D. 540 (1940).

118. Bessett v. Hackett, 66 So. 2d 694 (Fla. 1953); DeSalvo v. Curry, 160 Fla. 7, 33 So. 2d 215 (1948); Bates v. State, 78 Fla. 672, 84 So. 373 (1919).

119. State v. Tillett, 111 So. 2d 716 (2d D.C.A. Fla. 1959).

120. See also Fla. Stat. §904.01 (1961).

grand jury, which are, essentially, to inquire into every offense triable within the county. A grand jury may present any offense against the laws of this state, regardless of whether a specific punishment is stated, if punishment has not been inflicted.[121] The grand jury, under appropriate circumstances, may be directed to inquire into suspected violations of certain sections of the Criminal Anarchy and Communism Act.[122] A member of the grand jury who has personal knowledge or reason to believe that an offense has been committed is directed to make that information known to his fellow jurors, who shall thereupon investigate it.[123] The court is prohibited from restricting in any manner the investigation of the grand jury of any matter into which it by law is entitled to inquire.[124]

The grand jury has authority to investigate violations of the Florida child labor laws;[125] and, if the jury is convened during a campaign and prior to election day, it may consider asserted violations of the election code of the state upon the request of a candidadate or qualified voter.[126]

The grand jury may depart from the area of criminal violations and may probe into the departure of officials from their civil duties. It may investigate every offense that affects the morals, health, sanitation, and general welfare of the county, including county institutions, buildings, offices, and officers.[127] If a report issued by the grand jury unduly castigates or defames a public official or other person, the defamatory material may, upon motion to suppress or expunge, be stricken from the text of the report. The personal immunity of the members of the grand jury from liability in a libel action was established in *Ryon v. Shaw*.[128]

Each member of a grand jury is required to maintain the secrecy of the grand jury proceedings.[129] He is prohibited by statute from divulging either by statement or testimony how any member, including himself, voted in the deliberations or what opinions were expressed. No grand juror, reporter, interpreter, stenographer, or officer of the court may disclose that an indictment for a felony has been issued until the accused has been arrested. The testimony of any

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121. FLA. STAT. §932.15 (1961).
122. FLA. STAT. ch. 876 (1961).
123. FLA. STAT. §905.20 (1961); see *In re* Report of Grand Jury, 152 Fla. 154, 11 So. 2d 316 (1943).
124. FLA. STAT. §905.18 (1961).
125. FLA. STAT. §450.121 (1961).
126. FLA. STAT. §104.43 (1961).
127. State *ex rel.* Brautigam v. Interim Report of Grand Jury, 93 So. 2d 99 (Fla. 1957); Owens v. State, 59 So. 2d 254 (Fla. 1952).
128. 77 So. 2d 455 (Fla. 1955).
129. FLA. STAT. §905.10 (1961).

person appearing before a grand jury is likewise protected.[130]

The grand jury, under the laws of the State of Florida, is an invaluable adjunct to the judiciary and the state law enforcement officials in the detection of criminal or unauthorized behavior and in the summoning to the bar of justice the persons responsible. Although a circuit judge in his discretion may dispense with the grand jury, the very act of convening it has a salutary public effect in many instances and allows the citizens of a county to assume a greater responsibility in the law enforcement process of their community.

CONCLUSION

A number of the decisions pertaining to the selection and function of a jury that have been discussed are criminal cases. Although the principles imparted in the opinions are largely applicable to both criminal and civil court procedure, appellate review is sought more frequently from adverse rulings on matters connected with the mechanics of the jury process in criminal cases than in those of a civil nature. Whether liberty or property is at issue, however, the responsibility vested in the jury, as an arm of the court and a participant in the administration of justice, is of so solemn a nature as to require adherence to the highest standards of selection and operation of juries.

This discourse has not been designed to comprehend all aspects of the jury system as practiced in the circuit courts of this state. It is hoped, however, that it will be helpful as a guide to the relationship between the trial judge and the jury in Florida and to the responsibilities of judge and counsel when a jury is utilized.

130. FLA. STAT. §§905.24-.27 (1961).