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EVIDENCE

THEODORE KLEIN*

This article is a *Survey* of Florida court decisions during a recent two-year period concerning problems in evidence. It is a continuation of previous articles and it covers selected decisions from 132 So.2d 460 to 159 So.2d 641, inclusive. For presentation purposes, the subject matter covered by this *Survey* will be presented by topic, rather than chronologically.

EXAMINATION

Applying the standard rule with regard to timeliness of objection in *Seaboard Air Line R.R. Co. v. Ellis*,¹ the court refused to review the question of admissibility of testimony of a witness on the grounds that after objections to questions put to the witness were sustained, no proffer of his testimony was made to the trial court. Consequently, nothing appeared in the record which could be the basis for review. Similarly, no review of allegedly prejudicial remarks by the trial court could be had for the reason that no timely objection had been made to the remarks at the time of trial.²

If an objection which is made to a particular line of testimony is overruled, repeated objections to questions involving the same area and subject are not necessary and failure to make them is not an implied consent to the admission of such testimony.³

In *Owca v. Zemzichi*,⁴ a failure to object to testimony on the subject of future employment, such subject being an item of special damages not contained in the plaintiff's complaint, nevertheless precluded the defendant from objecting to an instruction on the subject. The defendant's failure to object to the testimony constituted a waiver on his part, and the issue was tried by implied consent under Rule 1.15 of the Florida Rules of Civil Procedure. Although an amendment to the pleadings had been ordered by the court, thereby fortifying its position, the court nevertheless indicated:

amendment of pleadings is not necessarily considered imperative where no objection has been made that the evidence is not within the scope of the pleadings in a case which is tried as if the issue had been raised.⁵

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1. 143 So.2d 550 (Fla. 3d Dist. 1962).

2. *Collins v. Farley*, 147 So.2d 593 (Fla. 3d Dist. 1962).

3. *McCullers v. State*, 143 So.2d 909 (Fla. 1st Dist. 1962).

4. 137 So.2d 876 (Fla. 2d Dist. 1962).

5. *Id.* at 879.

However, the mere fact that an otherwise inadmissible matter enters the judicial arena does not automatically constitute a waiver of the sort mentioned, nor endogenously allow it to be tried by implied consent. Thus, where the subject of insurance was inadvertently mentioned, it did not "open the door" for opposing counsel to show that there had been an insurance recovery.⁶

Viewing the same problem from a different perspective, in an action for wrongful death, testimony solicited by counsel that the defendant had previously killed a man was unintentionally admitted.⁷ When the defendant then introduced the fact that he had been acquitted for the prior killing, he neither lost nor waived the benefit of his objection since he was merely trying to minimize the harmful effect of the improper testimony.

Several problems have arisen which involved comments to the effect that the defendant in a criminal trial did not testify in his own behalf. In *Peel v. State*⁸ the prosecuting attorney in his closing argument stated that when the defendant was asked certain questions on the stand, he "took the Fifth." On appeal, it was determined that the defendant had not "taken the Fifth Amendment." The appellate court held that statements made in such a manner would be a comment on the evidence, and furthermore pointed out defendant's failure to comply with section 918.10(4) of the Florida Statutes, which provides that in order to appeal upon the refusal to give an instruction, a specific timely objection is necessary. Another situation in which defendant was held to waive his right to object to the prosecution attorney's comment that defendant had failed to take the stand presented itself identically in two separate cases.⁹ In both instances the defendant's counsel had first made it very clear to the jury that the defendant had not testified in his own behalf. In this light, affirmation thereof by the state's attorney did not constitute reversible error.

REFRESHING THE MEMORY

In *Minturn v. State*,¹⁰ it was held to be prejudicial error to allow a witness for the state to use a notebook to refresh his independent memory without requiring that the notebook be made available to the defense during cross-examination. The court stated that to hold otherwise would circumvent the right of the defendant to a fair cross-examination; in addition, it labeled the right to examine the notebook as one stemming from the constitutional guaranty that the accused be confronted by his accusers.

6. *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So.2d 543 (Fla. 2d Dist. 1963).

7. *Carbone v. Coblentz*, 132 So.2d 629 (Fla. 3d Dist. 1961).

8. 154 So.2d 910 (Fla. 2d Dist. 1963).

9. *Nations v. State*, 145 So.2d 259 (Fla. 2d Dist. 1962), and *Pinkney v. State*, 142 So.2d 144 (Fla. 2d Dist. 1962).

10. 136 So.2d 359 (Fla. 3d Dist. 1962).

FIRST HAND KNOWLEDGE

In a prosecution for performing acts with the intent to procure a miscarriage,¹¹ the state introduced testimony of a doctor relating to the analysis of a tissue specimen taken from the prosecuting witness. The defendant contended that the state's evidence did not establish an unbroken chain of possession from the time of taking the specimen until analysis. The court held that continuity of possession was sufficiently established by showing that the specimen was taken by a witness and came into the hands of the doctor who analyzed it and testified as to the results through customary hospital procedure. It was not necessary that every person who handled the specimen be put on the stand to establish the chain; it sufficed to show that the tissue was taken, properly identified, and reached the laboratory through normal hospital practice.

OPINIONS AND EXPERT TESTIMONY

Most of the problems in this area concerned the weight to be given to expert testimony. The difficulties arose in deciding whether an "expert" was truly an "expert," and if so, whether the area covered by his testimony was expertise subject matter. In addition a number of problems arose in which the expert's opinion was not, for one reason or another, based upon first hand knowledge. The courts' solutions were as varied as the situations with which they were presented.

In *Home Ins. Co. v. Wiggins*,¹² the court enunciated the general proposition that the trial court can rule in its sound discretion on the qualifications and range of subject matter on which an expert may be questioned; here when the deposition of an expert as to the cause of an accident was sought to be admitted,¹³ and there was no evidence which indicated the length and quality of the deponent's experience, the trial court could hold within its discretion that this particular witness did not qualify as an expert. In *State Road Dept. v. Outlaw*,¹⁴ the court pragmatically stated that because of the fact that the condemning authority would be placed at great expense if landowners were required to get professional appraisers in each instance, the trial court had discretion to allow a person to testify as an expert based on the facts adduced in each case. Thus, qualifications other than being a professional appraiser could constitute one as an expert, and even the testimony of certain lay witnesses would be admissible.

The court passes on the competency of an expert, but the failure of an otherwise competent expert to consider one of numerous factors involved in assessing compensation goes neither to his competency, nor the

11. *Urga v. State*, 155 So.2d 719 (Fla. 2d Dist. 1963).

12. 147 So.2d 157 (Fla. 1st Dist. 1962).

13. *Seminole Shell Co. v. Clearwater Flying Co.*, *supra* note 6.

14. 148 So.2d 741 (Fla. 1st Dist. 1963).

competency of his testimony, but only to the weight to be given his opinion. This problem arose in *State Road Dept. v. Falcon*¹⁵ in which the state's experts, in making a valuation in a condemnation proceeding, did not take into account one particular transaction, an omission which was subsequently brought out by the defendant's experts. The court held that this failure by the state's witnesses could not render them incompetent, and the trial court's granting of a new trial on that basis was reversible error in that the remission of the state's experts was only arguable to the jury.

In *Schnedl v. Rich*,¹⁶ the plaintiff sought to introduce an expert to interpret tax returns. The court then agreed with counsel that an expert was not needed in that the returns are presumably within the comprehension of the ordinary juror. Thus, no error was committed by excluding testimony on the matter by the expert. But in a personal injury action¹⁷ the jury was held to be free to reject expert testimony and rely on contradictory lay evidence, even though the facts testified to by a physician concerning a whiplash injury were not within the ordinary experience of the jury. And in the same vein, in *Norman v. State*,¹⁸ the defendant's sanity was in issue. The court held that the jury could consider both testimony of psychiatrists and lay witnesses who observed the accused during his alleged insanity.

Two interesting decisions which were seemingly contradictory concerned the admissibility and weight of a psychiatrist's opinion as to the defendant's sanity at the time the crime was committed. In *McCullers v. State*,¹⁹ the testimony of the doctor was based in substantial part upon hearsay concerning the defendant's actions at the time of the crime. The court, in excluding the testimony, stated that it could not be known how much of his testimony was valid because of the impossibility of determining the credibility of the statements upon which the expert relied for his opinion. It was also impossible to say that the jury did not rely heavily upon this expert. The same question arose in *Land v. State*,²⁰ but in this instance the expert's testimony was permitted to go to the jury. The apparent inconsistency was reconciled in the following statement:

Clearly, an opinion based upon long and painstaking study of the subject and personal knowledge of his history is worthy of great credence, while an opinion, based solely upon information offered by third persons, would be of little or no value and not admissible. But an opinion, founded upon the expert's scientific examination of the subject and conversations with third persons,

15. 157 So.2d 563 (Fla. 2d Dist. 1963).

16. 137 So.2d 1 (Fla. 2d Dist. 1962).

17. *Shaw v. Puleo*, 159 So.2d 641 (Fla. 1964).

18. 156 So.2d 186 (Fla. 3d Dist. 1963).

19. 143 So.2d 909 (Fla. 1st Dist. 1962).

20. 156 So.2d 8 (Fla. 1963).

would not be inadmissible, absent a showing that his conclusion was based in major or substantial part upon such conversations. In the McCullers case, *supra*, the expert testimony was based almost entirely upon conversations with third persons not before the court while, in this case, such conversations appear to have been incidental and of little or no influence. To restrict the scope of the examination to the subject alone would often preclude the expert's consideration of pertinent data. However, the extent to which he relied on information obtained other than through first-hand observation, as disclosed by direct and cross examination, is an element to be considered by the jury as it assesses the credibility of the report.²¹

In *Urga v. State*,²² a doctor's opinion based on hearsay that an abortion had been attempted was inadmissible, but it was harmless error when the trial court permitted his opinion into evidence because it was cumulative of what had already been said, and standing alone, was not essential for conviction.

In one ostensibly anomalous situation, the jury was, in effect, not permitted to reject the testimony of expert witnesses. In *Dade County v. Renedo*,²³ a condemnation case in which there was conflicting evidence as to value, the jury was permitted to resolve the conflict, but only within the bounds of the evidence. Thus, when the experts' value estimates were not, either by themselves or in relation to any other evidence, susceptible of different interpretations, the amount of the jury verdict had to lie somewhere between the lowest and highest estimate of value. The jury was permitted to view the property, but was not permitted to utilize the knowledge gained by the view to arrive at an independent determination as to value. The view was used only to assist in interpreting the evidence.

A hypothetical question containing assumptions of fact must be based on facts established by competent, substantial evidence. Thus, when the answer to such a question containing unsupported assumptions was itself the only evidence of causal connection between a collision and certain female disorders, the hypothetical question was held to be improper.²⁴ Similarly, in *Monsalvatge & Co. of Miami, Inc. v. Ryder Leasing, Inc.*,²⁵ an expert witness had to assume from the hypothetical question posed to him that a certain number of hours had been spent in a case for the purpose of awarding an attorney's fee. In fact, no such testimony had been offered to the jury. The estimate of fees was held to be without evidential value, for a conclusion by an expert not supported by the evidence cannot constitute proof of existence of facts necessary

21. *Id.* at 11.

22. 155 So.2d 719 (Fla. 2d Dist. 1963).

23. 147 So.2d 313 (Fla. 1962).

24. *Young v. Pyle*, 145 So.2d 503 (Fla. 1st Dist. 1962).

25. 151 So.2d 453 (Fla. 3d Dist. 1963).

to support the opinion. In addition, an answer of an expert to a hypothetical question must be given on the basis of facts stated in the question, and without recourse to other facts within the expert's own knowledge. Thus in *Sheehan v. Frith*,²⁶ hypothetical questions prefaced by the phrase "all things being equal" would require or permit the witness to draw conclusions of fact from the evidence or allow him to exercise his own judgment, neither of which would be permissible. In *Carlton v. Bielling*,²⁷ a hypothetical question was posed to an expert which sought to elicit his opinion as to the validity of opinions expressed by the opponent's experts. The court held that testimony of experts given in answer to hypothetical questions which incorporate opinions, inferences, and conclusions of others is improper. However, when the expert did not express his opinion as to the validity of the opposing experts' testimony as he was asked, but instead gave a contrary opinion based on the evidence adduced, with appropriate reasons, the error was harmless. In *Pinkney v. State*,²⁸ a physician who examined two bodies to determine the time of death believed, when he examined them, that one had been embalmed. This was not the case; nevertheless, the validity of his opinion was not destroyed, since it was based on later-adduced testimony which was to the effect that no embalming had taken place before the time of his examination.

Testimony of a doctor was sought to be admitted to the effect that a party's faculties would have been impaired to the extent of 25% as a result of the ingestion of an admitted quantity of alcohol.²⁹ The court held that the testimony would be so equivocal, uncertain, and indefinite as to have no probative value. In *Casey v. Florida Power Corp.*,³⁰ the petitioner sought an easement for a right of way for power lines across a landowner's property by way of condemnation. The respondent landowner sought to introduce evidence that the fair market value of the property would be lowered by virtue of the fact that a prospective purchaser would be afraid of the steel towers and power lines located on the land. The court excluded this opinion testimony on the ground that it was too speculative and conjectural, stating that the line must be drawn when a jury must base its award upon ignorance and fear.

IMPEACHMENT

In *Minturn v. State*,³¹ a witness for the state used a notebook to refresh his memory. The court held that the defense had the right to

26. 138 So.2d 76 (Fla. 3d Dist. 1962).

27. 146 So.2d 915 (Fla. 1st Dist. 1962).

28. 142 So.2d 144 (Fla. 2d Dist. 1962).

29. Whitten v. Erny, 152 So.2d 510 (Fla. 2d Dist. 1963).

30. 157 So.2d 168 (Fla. 2d Dist. 1963).

31. 136 So.2d 359 (Fla. 3d Dist. 1962).

examine the notes so as to be in a position to impeach the witness on cross-examination. Section 90.10 of the Florida Statutes requires a predicate to be laid before a witness may be impeached. Thus, in *Hancock v. McDonald*³² the trial court erred in not requiring a foundation to be laid—first, by calling to the witness' attention the alleged contradictory statement, and then, by giving him an opportunity to explain the inconsistency.

A trial court cannot properly conclude that the income tax returns of a taxicab driver are unreliable indications of his true income for the reason that a large portion of his income consisted of gratuities.³³ The court could not presume that he would fail to report such gratuities as income, and thus, his tax returns were admissible as impeachment evidence on his claimed loss of earnings. In *Corbett v. Berg*,³⁴ an action to recover for personal injuries, the defendant asked the plaintiff if he had ever filed a workmen's compensation claim. When he received a negative reply, the defendant sought to introduce an Industrial Commission index card containing information pertaining to a workmen's compensation claim which had been made by plaintiff in the past. In addition to its use in refuting plaintiff's statement that his injury resulted solely from the mishap upon which this suit was based, the index card could properly be used to impeach the plaintiff's testimony. In *Finley P. Smith, Inc. v. Schectman*,³⁵ the defendant introduced testimony to the effect that the plaintiff had not paid his hospital bill as he contended, but rather, his insurance carrier had paid the bill. The court held that the fact that the plaintiff had not personally paid the hospital bill could not be used to reduce the plaintiff's damages. However, the matter was introduced by defendant for impeachment purposes only, and thus, a court instruction that the jury should not consider this factor in mitigation of damages was sufficient to prevent a mistrial. The instruction was all that was required to restrict an otherwise improper scope of examination to a proper impeachment objective.

In *Goswich v. State*,³⁶ in an attempt to impeach a witness for the defense, the prosecuting attorney had elicited from the witness the fact that he previously had invoked his constitutional privilege against self-incrimination at the time he was subpoenaed before the state's attorney. The court, in holding that this type of impeachment was proper, pointed out that cases involving the constitutional right of a *party-defendant* were

32. 148 So.2d 56 (Fla. 1st Dist. 1963).

33. *Collins v. Farley*, 137 So.2d 31 (Fla. 3d Dist. 1962), affirmed by the same court in *Sheldon v. Tiernan*, 147 So.2d 593 (Fla. 3d Dist. 1962), after being reversed on other grounds in *Farley v. Collins*, 146 So.2d 366 (Fla. 1962).

34. 152 So.2d 196 (Fla. 3d Dist. 1963).

35. 132 So.2d 460 (Fla. 2d Dist. 1961).

36. 137 So.2d 863 (Fla. 3d Dist. 1962).

not controlling, and further restricted the issue by virtue of the fact that the witness here involved voluntarily had taken the stand. In arriving at the decision, it was first stated that the policy of the courts was "to allow great latitude in the cross-examination of a witness as to matters affecting his credibility."³⁷ This was held to be especially cogent when the cross-examination dealt with the motive or intent of the witness as directed to a party. Basing its ultimate decision on public policy, the court opined:

Perhaps it would be better if no mention were ever made of the fact that one person has exercised a constitutional right and that another has not. Then the persons wishing to exercise the right could not be criticised or censored by anyone. But such freedom from criticism does not exist in the exercise of any right.

All courts are daily concerned with the rights of the individual. No single right can be unreasonably extended at the expense of others. The requirement of the public that truth be displayed at criminal trials outweighs the right of a witness not to have it known that he has used the Fifth Amendment as a reason for failing to testify.³⁸

A witness cannot be cross-examined as to collateral or irrelevant facts merely to discredit him by showing contradictions. Thus, in a prosecution for performing acts with the intent to commit an abortion,³⁹ inquiries concerning the former married life and divorce of the prosecuting witness sought to establish whether she had been impregnated by a man other than her husband, and therefore had testified falsely in her divorce proceeding; as such, her alleged illicit conception could be classified only as prior misconduct, which is not reasonably relevant to the instant case, and could not be made the basis of impeachment proof. The impeaching evidence must be directed to credibility, rather than to former misconduct of a different category. In *Peel v. State*,⁴⁰ the defendant's counsel tried to impeach the state's witness by showing (1) that the witness had been granted immunity, and (2) that he had been indicted for another murder. On the matter of immunity, the defense could properly suggest to the jury that the testimony of a witness so stultured is entitled to no weight and credibility. However, on the question of another crime, the court held this to be a collateral matter solicited on cross-examination which is not a proper method of impeachment. The court quoted from *Watson v. Campbell*⁴¹ wherein the Supreme Court of Florida stated that the general rule is that "evidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness."

37. *Id.* at 867.

38. *Id.* at 867.

39. *Urga v. State*, 155 So.2d 719 (Fla. 2d Dist. 1963).

40. 154 So.2d 910 (Fla. 2d Dist. 1963).

41. 55 So.2d 540 (Fla. 1951).

COMPETENCY

In *Whitten v. Erny*⁴² it was stated that the question of competency of an expert is for the trial judge to decide; as previously noted,⁴³ the failure of an otherwise competent expert to consider one of numerous factors involved in assessing compensation goes not to his competency, but only to the weight to be given his testimony. The trial court in its sound discretion rules on the qualifications of the expert and determines the range of subjects on which he may be questioned.⁴⁴ In *Seminole Shell Co. v. Clearwater Flying Co.*⁴⁵ the deposition of an expert which contained his opinion of the cause of an accident was sought to be admitted. Since the deposition was void of any evidence which showed the length and quality of the defendant's experience, the trial court within its discretion could properly hold that the witness was not competent to testify in the matter.

In *Porter v. State*⁴⁶ the defendant's common-law wife was permitted to testify against him. There was no error, since Section 90.04 of the Florida Statutes, which allows a wife to testify against her husband, abrogated the common-law rule that forbade either husband or wife from testifying against the other. The court overruled the defendant's contention that the statute was limited in its scope to situations in which the wife was an interested party.

In an action for negligence, the plaintiff took the deposition of the defendant's store manager.⁴⁷ In the course of the deposition, the plaintiff sought to elicit the contents of a conversation which the deponent had with another employee; the defendant objected, contending that it was his work product and, therefore, was privileged. Since the store manager did not mention more than the employee's name and address in his personal report, the conversation was in no way privileged as a work product, and it was a proper matter for discovery.

An attorney has an obligation not to divulge information given to him in confidence by his client, and any unauthorized disclosure by him is a violation of his oath as an attorney. Thus, in *Cayson v. State*,⁴⁸ an attorney defended a client charged with murder. Later the client contended that the murder had been confessed to his attorney by one of his previous clients. The defendant contended the former representation by the attorney was an inconsistent position with regard to the defendant. The court, in holding the attorney-client privilege paramount, opined

42. 152 So.2d 510 (Fla. 2d Dist. 1963).

43. *State Road Dept. v. Falcon*, 157 So.2d 563 (Fla. 2d Dist. 1963); see text accompanying note 15 *supra*.

44. *Home Ins. Co. v. Wiggins*, 147 So.2d 157 (Fla. 1st Dist. 1962).

45. 156 So.2d 543 (Fla. 2d Dist. 1963).

46. 160 So.2d 104 (Fla. 1964).

47. *Winn-Dixie Stores, Inc. v. Belcher*, 144 So.2d 863 (Fla. 2d Dist. 1962).

48. 139 So.2d 719 (Fla. 1st Dist. 1962).

that not only was there no inconsistency in representing both clients, but the knowledge which the attorney allegedly possessed may have even aided the attorney in defending the second client. The court further stated that had the attorney been called as a witness, he could not have been compelled to testify to the identity of the former client or to any information divulged to him in his capacity as an attorney, absent a waiver of the privilege by the client.

RELEVANCY

Before a court can rule on the relevancy of evidence to the issue at hand, it must first be determined that the evidence has some bearing on a material issue. Thus, in an action to revoke a medical license from a doctor who was accused of performing an abortion, a question to the prosecuting witness asking her to name the man she blamed for her pregnant condition was improper on the ground that pregnancy was not material to the crime of abortion.⁴⁹ In *Bowden v. State*⁵⁰ the complaining witness in a prosecution for incest named her father, the defendant, as the father of her child. The defendant's motion for blood grouping tests for impeachment purposes to show non-paternity was overruled on the basis that parentage is not material and not a determinative issue in incest. The court also found that additional testimony existed which supported a finding by the jury of incest.

Aside from evidence of other crimes the cases in which the problem of relevancy was dealt with did not fit into any pattern, but rather fell into haphazard niches as to when certain testimony was relevant to the issues at hand and when it was not. In pursuit of justice the trial judge could elicit testimony which he deemed proper to acquaint the jury with the facts needed to intelligently resolve issues, and could make inquiries to obtain truth.⁵¹

In *Pauline v. Lee*,⁵² a hearing to revoke a liquor license, there was testimony that the defendant's employees had solicited for prostitution. Although there was no proof that this was ever done in the presence of the defendant, it was so recurrent as to permit an inference of condonation on the part of the defendant.

In *Casey v. Florida Power Corp.*⁵³ the landowner in a condemnation suit sought to introduce testimony concerning the characteristics of the power line which was to run across his land. Since the defendant failed to show anything which relevantly connected this type of line with land values, the trial court was correct in rejecting the testimony.

49. *Grimes v. Kennedy*, 152 So.2d 509 (Fla. 1st Dist. 1963).

50. 137 So.2d 621 (Fla. 2d Dist. 1962).

51. *Crews v. Warren*, 157 So.2d 553 (Fla. 1st Dist. 1963).

52. 147 So.2d 359 (Fla. 2d Dist. 1962).

53. 157 So.2d 168 (Fla. 2d Dist. 1963).

The problem of corroboration of testimony was touched upon in two cases. In *Cayson v. State*⁵⁴ the defendant desired to put a witness on the stand who allegedly had heard a confession that someone other than the defendant had committed the crime for which the defendant was now on trial. The court stated that the uncorroborated testimony of a witness that some unnamed third party confessed on some indefinite date that he had committed the crime was not entitled to credence.

In an action for negligence the defendant claimed that the collision was an unavoidable accident because her brakes suddenly failed.⁵⁵ She introduced testimony to show that her brakes had been checked regularly and operated perfectly up to the time of the collision. Several weeks after the accident, three experts examined the brake system of the automobile and found an unusual rupture in the main hydraulic brake line, which would not have been detectable from a visual outside inspection. The plaintiff contended that the experts' opinions were not entitled to credence, since the lapse of time prior to their examination precluded any of their findings from being relevant as to the condition of the brakes at the time of the collision. The court, however, indicated the corroborating testimony of a police officer to the effect that he found a puddle of brake fluid under the automobile immediately following the accident, and in view of this substantiating testimony, the lapse of time until the examination by the experts did not render their testimony inadmissible, but it bore only on the weight to be given to their testimony.

In *Hardy v. Hayes Boch Roofing Co.*,⁵⁶ an action for personal injuries, the plaintiff read the deposition of the defendant's physician into evidence without including medical records attached to the deposition. When the defendant later offered these records into evidence, the plaintiff objected. The court, in holding that the trial court properly overruled the objection, distinguished the instant situation from two cases relied on by the plaintiff. One involved "progress notes" rather than hospital records. In the other, a portion of a deposition was read into evidence, but the entire deposition was permitted to be taken into the jury room. This was reversible error in that it allowed irrelevant matters to influence the jury. However, in the instant case, the evidence offered by the defendant constituted a part of the hospital records, contained no irrelevant information, and therefore, properly could be admitted into evidence. In *Minturn v. State*⁵⁷ the state read a confession in open court which alluded to previous crimes. A mistrial was granted on the basis that the state has a duty to delete those portions of a confession which are not relevant to the crime in question.

54. 139 So.2d 719 (Fla. 1st Dist. 1962).

55. *Guelli v. Kraus*, 145 So.2d 900 (Fla. 2d Dist. 1962).

56. 152 So.2d 497 (Fla. 2d Dist. 1963).

57. 136 So.2d 359 (Fla. 3d Dist. 1962).

The Florida courts have taken a firm position with regard to the admissibility of evidence of other crimes. Thus, in an action for wrongful death, unsolicited testimony that the defendant previously had killed a man was still too prejudicial—even after a court instruction.⁵⁸ The defendant attempted a rehabilitation by showing he had been acquitted for the crime, but this did not constitute a waiver of objection to the prejudicial matter, and a mistrial was the only cure. In *Licht v. State*⁵⁹ the defendant was charged with receiving stolen property. A witness for the state testified to the fact that he and the defendant had committed petit larceny in a hardware store. The appellate court held this to be reversible error in that it was a wholly independent crime from the one for which the defendant was on trial; since it was not introduced to show motive, intent, absence or mistake or a common scheme, it was irrelevant and inadmissible for the reason that it bore no relation to the crime charged which would connect the two as parts of one transaction, and it shed no light on the character of the crime charged.

In a prosecution for murder, in which the cause of death was poisoning by arsenic oxide, the state tried to show that the defendant's husband and a friend of hers died of the same kind of poison ten years before.⁶⁰ The court stated that "the test of admissibility of similar fact evidence is relevancy of the collateral crime to the crime charged or to the facts out of which resulted the crime charged."⁶¹ It was further pointed out that the previous crime was only admissible to cast light upon the character of the act under investigation under one of the general exceptions,⁶² in addition to which evidence was necessary to connect the defendant with the collateral crime. Consequently, the evidence of the previous deaths fell short on two grounds: With respect to the first, there was a lack of proof of similarity in the manner of accomplishment since all that was proved was that arsenic oxide was found in all of the bodies. The court held that "these facts are inadequate to show a scheme, plan or design in connection with the death of either decedent, much less a common scheme, plan or design."⁶³ To bolster its position, the court also noted that the previous deaths were so remote in time as to render them irrelevant to the instant case. The court's statement on the second requirement for admissibility was in effect relegated to a position of mere dicta in view of the holding on the first point, but the court quoted from *Wrather v. State*⁶⁴ with approval:

58. *Carbone v. Coblenz*, 132 So.2d 629 (Fla. 3d Dist. 1961).

59. 148 So.2d 295 (Fla. 3d Dist. 1963).

60. *Norris v. State*, 158 So.2d 803 (Fla. 1st Dist. 1963).

61. *Id.* at 804.

62. "Such evidence is admissible only if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistakes, common scheme, identity, or a system of general pattern of criminality." *Ibid.*

63. *Id.* at 805.

64. 179 Tenn. 666, 669, 169 S.W.2d 854, 858 (Tenn. 1943).

Without going so far as to hold . . . that the proof of the independent crime must be "beyond a reasonable doubt," we approve the rule that, to render evidence of an independent crime admissible, the proof of its commission, and of the connection of the accused on trial therewith, must be not "vague and uncertain," but clear and convincing. Obviously, an absolute essential is that (1) a former crime has been committed, and (2) committed by the identical person on trial . . . and this limitation upon admissibility applies equally to all the exceptions to the general rule excluding evidence of other crimes, whether introduced to prove identity or for any other purpose.

The initial holding of the court was to the effect that the present situation did not fall into one of the "exceptions to the general rule," but the court nevertheless stated the above to be the rule in Florida. A further discussion ensued as to when such similar fact evidence would be admissible under the rules of relevancy:

In a trial for an unpleasant crime, evidence must be excluded which indicates that the prisoner is more likely than most men to have committed it, but evidence must be admitted which tends to show that no man but the prisoner, who is known to have done these things before, could have committed it. There is a point in the ascending scale of probability when it is so near to certainty, that it is absurd to shy at the admission of the prejudicial evidence.⁶⁵

In *Horner v. State*⁶⁶ the defendant was charged with threatening the state's witness to keep him from testifying against the defendant in a pending trial for grand larceny. Evidence relating to the crime of grand larceny, and to the pending proceeding was admissible under an exception to the general rule excluding other crime evidence, because it was relevant to the issues of motive and intent, and it was necessary to give a complete picture of the crime charged. In a prosecution for assault with intent to procure a miscarriage, testimony of other like offenses concerning the method employed to procure miscarriage was not admissible to establish bad character; however, it was relevant to show the general scheme and modus operandi of the defendant.⁶⁷

In *Williams v. State*⁶⁸ evidence of another crime was admitted under the exception which permits the showing of a system or general pattern of criminality. However, the other crime testimony was so voluminous that it transcended the bounds of relevancy, for it no longer became indicative of the pattern involved. Many objects involved in the first crime were introduced into evidence which had nothing to do with the

65. Comment, *Exclusion of Similar Fact Evidence*, 46 HARV. L. REV. 954, 983-84.

66. 149 So.2d 863 (Fla. 3d Dist. 1963).

67. *Nations v. State*, 145 So.2d 259 (Fla. 2d Dist. 1962).

68. 143 So.2d 484 (Fla. 1962).

crime charged. As a result, the collateral crime became a feature of the trial instead of an incident and converted the development of facts into an assault on the defendant's character. The rule excluding evidence of other crimes applies equally to witnesses who are not parties. Thus, in *Peel v. State*⁶⁹ evidence that the witness had committed another crime amounted to a specific act which was not admissible to reflect upon his morals or character; nor may a particular act of misconduct be used to impeach his credibility. This rule was again enunciated in *Urga v. State*⁷⁰ wherein it was attempted to be shown that the prosecuting witness had had an illicit conception and had given false testimony in a divorce proceeding. The court stated that proper impeachment must be directed to credibility rather than misconduct of a different category. The prior actions must be reasonably relevant and material to the pending charge or they will be excluded from the evidence.

In a prosecution for rape, the defense rested on the fact of consent.⁷¹ Consequently, even without an attack of the prosecuting witness' character by the defendant, the state could introduce evidence of the general reputation for chastity for the reason that it was relevant to a material issue. In *Norman v. State*,⁷² the defendant was refused the right to introduce evidence pertaining to his general reputation for non-violence, which was the character trait involved in the crime with which he was charged. The state conceded that the lower court erred in excluding the testimony, but contended that the error was harmless because (1) the defendant had admitted the acts of violence and (2) the defendant had successfully presented other evidence to the same effect. The appellate court disagreed, since two issues for the jury to consider were (1) whether the defendant committed the acts while in a state of legal provocation, and (2) whether the defendant at the time of the acts was legally responsible for his acts. Under these conditions, it was impossible to say that the relevant evidence improperly excluded was such that it might not have influenced the jury to decide the other way upon either or both of these issues.

In *Finley P. Smith, Inc. v. Schectman*,⁷³ the defendant introduced evidence that the plaintiff's hospital bill had been paid by an insurance company, for the purpose of impeaching plaintiff's prior testimony. The plaintiff's objection was overruled and he then said "It's all right with me if you are going to inject insurance." The defendant then moved for a mistrial on the basis of plaintiff's statement, which was denied by the court. The court asked the defendant if he wanted an instruction to cure the error, but he replied that he wanted nothing more said about the

69. 154 So.2d 910 (Fla. 2d Dist. 1963).

70. 155 So.2d 719 (Fla. 2d Dist. 1963).

71. *Edmondson v. State*, 146 So.2d 396 (Fla. 3d Dist. 1962).

72. 156 So.2d 186 (Fla. 3d Dist. 1963).

73. 132 So.2d 460 (Fla. 2d Dist. 1961).

matter. The lower court was held to be correct in refusing to declare a mistrial, for although the plaintiff may have been wrong in making the comment about insurance, it could not be said that there was not some justification in replying to the defendant who raised the subject initially. In an ostensibly contrary opinion, insurance coverage was inadvertently mentioned by a witness in *Seminole Shell Co. v. Clearwater Flying Co.*⁷⁴ Opposing counsel sought to capitalize upon this error by introducing testimony as to whether there actually had been insurance compensation. The trial court permitted the testimony on the basis that plaintiff had "opened the door" even though insurance had no relevancy to any issue being tried, and then the court of its own volition sought to correct the error by an instruction to the jury. The appellate court indicated that insurance coverage is admissible when it is relevant to an issue involved in the case, such as ownership, but the mere mention of insurance by one party does not occasion the admissibility of additional testimony on the subject by the other. Nor was the court's instruction to the jury sufficient to correct the error since the effect upon the minds of the jury could not be neutralized so easily. The distinguishing factors in the two cases were that in the *Schechtman* case the subject of insurance came forth through elicited testimony and therefore a reply to the matter was deemed to be somewhat justified. More cogent than that point, however, was the fact that in the *Schechtman* case the subject was introduced for a legitimate purpose, *i.e.*, impeachment. The appellate court in the instant case, held in effect, that the relevancy to a permissible aim outweighed the prejudiciality of the matter.

A scientific experiment which is sought to be admitted must have a relationship to a material issue. Thus, blood grouping tests to show non-paternity were not admissible in a prosecution for incest since parentage was not a material nor a determinative issue in the case.⁷⁵ In order for the results of an experiment to be admissible, the conditions in the test must be substantially similar to those at the time of the accident. The determination of similarity rests within the sound discretion of the trial court. Thus, in *Morton v. Hardwick Stove Co.*,⁷⁶ conditions under which a stove exploded were simulated in an experiment. The trial court did not abuse its discretion in setting aside a verdict for the plaintiff after it had improperly admitted the test, since great dissimilarities in air pressure in the experiment and under actual conditions were shown to exist.

BEST EVIDENCE

In *Corbett v. Berg*,⁷⁷ an index card of the Industrial Commission was admissible as a "public record," and therefore, a duly certified copy

74. 156 So.2d 543 (Fla. 2d Dist. 1963).

75. *Bowden v. State*, 137 So.2d 621 (Fla. 2d Dist. 1962).

76. 138 So.2d 807 (Fla. 2d Dist. 1962).

77. 152 So.2d 196 (Fla. 3d Dist. 1963).

in accordance with section 92.12 of the Florida Statutes was also admissible.

HEARSAY

In *Pauline v. Lee*,⁷⁸ an action to revoke a liquor license, witnesses testified to the fact that the defendant's employees had solicited for prostitution. The court held that such testimony was not hearsay for it was not introduced to establish the truth of the statements attributed to the declarants, but rather, the testimonies were verbal acts introduced solely to establish the very fact of their utterance.

After the plaintiff was permitted to read a deposition to the jury in an action to recover for personal injuries, medical reports of the defendant's doctor which were attached to a deposition were sought to be introduced into evidence by the defendant.⁷⁹ In holding the reports admissible, the court distinguished a case involving a doctor's "progress notes" as opposed to regular hospital records. The court further distinguished the instant case from one in which a portion of a deposition was read into evidence, and then, the entire deposition was taken into the jury room. It was pointed out that:

such action was reversible error on the basis that it permitted irrelevant, harmful and improper matters to influence the jury and permitted them to have access to the written testimony of a witness who had not appeared and given his testimony orally before the court, thereby placing testimony offered by deposition in a higher category than that offered in person by a witness before the court.⁸⁰

In *Cayson v. State*⁸¹ the defendant sought to have his attorney called as a witness. He contended that the crime for which he was on trial had been confessed to the attorney by a previous client. The court refused to allow him to testify for several reasons, but it stated that even if he were allowed to take the stand, his testimony would be based on hearsay, and therefore, inadmissible. In *Urga v. State*,⁸² a doctor rendered an opinion that an abortion had been attempted. His opinion was based on a conversation between the defendant and the prosecuting witness, which the latter related to the doctor. Since the opinion was based on hearsay, it was inadmissible. However, it was held to be harmless error because it was cumulative of what had already been said on the stand, and standing alone, it was not essential for conviction.

An expert who testifies as to the sanity of the defendant at the time the crime was committed must not base his opinion strictly on hearsay.

78. 147 So.2d 359 (Fla. 2d Dist. 1962).

79. *Hardy v. Hayes-Boch Roofing Co.*, 152 So.2d 497 (Fla. 2d Dist. 1963).

80. *Id.* at 498.

81. 139 So.2d 719 (Fla. 1st Dist. 1962).

82. 155 So.2d 719 (Fla. 2d Dist. 1963).

As was noted in a different context,⁸³ if a substantial part of a doctor's opinion is derived from conversations with third parties not before the court, his testimony would be inadmissible. If the conversations with third parties were merely incidental and had little influence on the doctor's ultimate opinion, his testimony is not excludable on the ground that it is hearsay. However, argument as to the weight to be given such testimony will be permitted.⁸⁴ Similarly, in *Pinkney v. State*⁸⁵ a physician examined two bodies to determine the times of death. At the time of his examination he incorrectly believed that one of the bodies had been embalmed. This did not destroy the validity of his testimony regarding the matter, for his opinion on the stand was based on later-adduced testimony to the effect that no embalming had taken place at the time of his examination.

A party may render the statements of another admissible against himself by subsequently adopting them as his own. The court in *Trimble v. State*⁸⁶ found this exception to the hearsay rule to be applicable to a situation in which the defendant expressly assented to certain portions of an accomplice's confession. In holding this to be an adoptive admission of a party opponent, the court said:

where a codefendant [sic] or accomplice makes a confession and its contents are brought to the defendant's attention (through hearing it given or hearing it read) and the defendant states that the facts contained therein are correct, the statement is admissible because, to use the Supreme Court's words, "to this extent it was his own statement."⁸⁷

Since it was held to be "his own statement," the rule that a confession of a co-defendant or accomplice is not admissible in evidence against a defendant was not applicable.

Evidence as to what a witness would have done had she read the warning on a can of drain cleanser was considered to be too conjectural in *Drachett Prod. Co. v. Blue*⁸⁸ to have any evidentiary value. In attempting to prove the defendant's negligence in failing to give sufficient warning of the product's dangerous potential, such conjecture—since she had not read the warning—did not involve the proof of a fact. Rather it attempted to prove a state of mind which would be impossible for the defendant to disprove.

In *Corbett v. Berg*,⁸⁹ an index card from the files of the Industrial

83. See text accompanying notes 19-21 *supra*.

84. *Land v. State*, 156 So.2d 8 (Fla. 1963).

85. 142 So.2d 144 (Fla. 2d Dist. 1962).

86. 143 So.2d 331 (Fla. 1st Dist. 1962).

87. *Id.* at 332.

88. 152 So.2d 463 (Fla. 1963).

89. 152 So.2d 196 (Fla. 3d Dist. 1963).

Commission fell within the "public record" exception to the hearsay rule. The card was a record "kept by an authorized public officer as a convenient and appropriate mode of discharging the duties and functions of his office." As such, the card constituted prima facie evidence of the fact that it purported to show. In *Hardy v. Hayes-Boch Roofing Co.*,⁹⁰ as indicated previously, the court distinguished "hospital records" which would be admissible under an exception to the hearsay rule, from "progress notes" and "consultation notes" which would be excluded on the ground that they were not a part of "hospital records." In *World Ins. Co. v. Kincaid*,⁹¹ a coroner's report indicating the cause of death as suicide was admitted into evidence. Although the Florida Statutes make the coroner's records "public records" and admissible as to the facts stated therein, a statement in the report that death was caused by suicide is not such a fact, as contemplated by the statute, but rather an opinion. As such, it was deemed as improper as the opinion of another witness to the effect that the insured met his death by accident and not by suicide.

JUDICIAL NOTICE

In the area of judicial notice, most of the cases merely dealt with the problem immediately before them, *i.e.*, whether the subject was one in which judicial notice could properly be taken. A few cases dealt generally with the concept of judicial notice, and with the subsequent effect of taking or refusing to take judicial notice of a matter.

In *Nielsen v. Carney Groves, Inc.*⁹² the question of the navigability of a certain stream became a relevant issue. In considering whether judicial notice should or should not have been taken, the appellate court indicated that a matter judicially noticed must be of common and general knowledge and authoritatively settled. A matter of common knowledge, as opposed to an official record, means that it is taken as true without the necessity of offering evidence; this is so because it is assumed that the fact is so notorious that it will not be disputed. However, if an opponent believes that the matter is disputable, he should be given an opportunity to present evidence to that effect; if his evidence raises a genuine issue of material fact, the matter should not be judicially noticed but, rather, should be left as a question for the jury. In *Mobley v. State*,⁹³ a question arose as to the applicability of a rule of the Game and Fresh Water Fish Commission. The rule was not offered into evidence, but judicial notice was taken of the rule. Even though a statute authorized the taking of judicial notice of the rule, the court held that for an orderly dispensation of justice the defendant should have been "appraised, under

90. 152 So.2d 497 (Fla. 2d Dist. 1963).

91. 145 So.2d 268 (Fla. 1st Dist. 1962).

92. 159 So.2d 489 (Fla. 2d Dist. 1964).

93. 143 So.2d 821 (Fla. 1962).

the rules of procedure, of the regulation of which violation is alleged."⁹⁴ In *Public Serv. Mut. Ins. Co. v. State*,⁹⁵ the court took judicial notice of the fact that federal courts have concurrent jurisdiction with state courts over many judiciable matters within the geographical bounds of the state. Thus, when the defendant was incarcerated by a federal court and it therefore became impossible for him to appear in a state trial court, this constituted an act of law which operated to exonerate the bond posted for the defendant in the state court.

Judicial notice can be taken of the fact that a great deal of municipal police action is initiated as the result of a complaint. Thus, in *Kelly v. State*⁹⁶ an attempted bribe to suppress complaints, although not directed to strict "legal proceedings," nevertheless was covered by section 838.011 of the Florida Statutes, which defines bribery. The bribery statute speaks of proceedings pending at law, but the court held that the attempted suppression of complaints would no less short-circuit municipal action and, therefore, was covered by the statute. In *State v. Boggs*,⁹⁷ it was alleged that a search warrant was issued on the basis of a false affidavit. In reversing a finding of contempt, the court held that to find contempt for false swearing, there must be judicial knowledge of the falsity, and a mere belief or suspicion of falsity was insufficient.

In *State Road Dept. v. Outlaw*⁹⁸ it was stated that the trial court could not take judicial notice that a witness had the knowledge and skills qualifying him to testify as an expert. As noted previously, the resulting conclusion was to the effect that because of the great expense to which the condemning authority may be placed, the qualification for testifying as an expert would be somewhat relaxed in such instances.⁹⁹

DEAD MAN'S STATUTE

The failure to invoke specifically the dead man's statute did not constitute a waiver of the protection which it affords when the record made it reasonably clear that the statute was the basis for objecting to testimony. Thus, in *Schenkel v. Atlantic Nat'l Bank*¹⁰⁰ there was held to be no waiver since numerous objections were made to the testimony. The court subsequently held that testimony of a nurse as to services rendered to a decedent under an alleged oral contract upon which she was now suing, was a "transaction" within the purview of the dead man's statute.

In *Collins v. Farley*,¹⁰¹ the question arose as to whether the dead

94. *Id.* at 823.

95. 140 So.2d 66 (Fla. 1st Dist. 1962).

96. 137 So.2d 608 (Fla. 3d Dist. 1962).

97. 151 So.2d 456 (Fla. 2d Dist. 1963).

98. 148 So.2d 741 (Fla. 1st Dist. 1963).

99. See text accompanying note 14 *supra*.

100. 141 So.2d 327 (Fla. 1st Dist. 1962).

101. 137 So.2d 31 (Fla. 3d Dist. 1962).

man's statute should preclude a party to an automobile accident, who is now a party to a suit involving the collision, from testifying as to the actions of the deceased driver just prior to the collision. The court noted that the word "transaction" had been construed "to encompass every variety of affairs which can form the subject of negotiation, interview or actions between two persons," and therefore held that the driver's testimony was barred by the statute. However, on certiorari to the supreme court,¹⁰² closer scrutiny was made of the matter. After considerable discussion of the history, purpose and divergent constructions of the dead man's statute, the court adhered to the view that a "transaction" requires a "course of conduct or a mutuality of responsibility resulting from the voluntary conduct of opposing parties." Thus, a "transaction" results "when one enters upon a course of conduct after a knowing exchange of reciprocal acts or conversations." The court therefore held that an automobile collision did not constitute a "transaction" as was contemplated by the dead man's statute, and the survivor of such a collision was free to testify as to his observations just prior to the accident. The court stated that

the exclusion of such testimony will work greater injustices by preventing recovery on legitimate claims as against the view that admissibility might result in the establishment of fraudulent claims against decedents' estates.¹⁰³

In *Security Trust Co. v. Grant*,¹⁰⁴ the executor of the decedent's estate was sued upon a demand note which provided for interest and reasonable attorney's fees. The plaintiff's complaint alleged that a certain attorney had been hired to file this suit, and he was to receive a reasonable sum for his services, as the court may find. The plaintiff subsequently discharged the attorney and hired new counsel. The first attorney was then called as a witness for the purpose of relating an acknowledgement by the deceased that the signature on the note was her own. The defendant objected to his testimony on the ground that, because he was to receive a "reasonable sum as the court finds," he was a party interested in the event whose testimony would be barred by the dead man's statute. The gist of the problem thus resolved itself into a consideration of the type of fee that the attorney was to receive. The defendant contended that, because he was to receive "reasonable fees as the court finds," his fee would necessarily be based on the outcome of the case and thus would be a contingency arrangement constituting a sufficient "interest" in the case to disqualify the attorney's testimony. While the court conceded this point to the defendant, it went on to state that, when an attorney's representation of a client is terminated, his compensation is subsequently

102. *Farley v. Collins*, 146 So.2d 366 (Fla. 1962).

103. *Id.* at 370.

104. 155 So.2d 805 (Fla. 3d Dist. 1963).

presumed to be on a quantum meruit basis. The court further held that, even if this were not true, there is no presumption that the original contingent fee arrangement survived the termination of the attorney-client relationship. Since the attorney was presumably to be compensated only for the reasonable value of the service which he rendered for his client, there was no evidence to indicate that the attorney had a disqualifying "interest in the event" of the action.

ACCIDENT REPORTS

In *Hancock v. McDonald*,¹⁰⁵ an action involving an automobile collision, the question arose as to whether the defendant was operating a vehicle with the knowledge and consent of the son of the owner of the vehicle. On the stand, the son denied giving the defendant permission, and the plaintiff then called the investigating officer as a witness in an effort to prove that the son previously had made an inconsistent statement regarding such permission. The trial court excluded the testimony on the basis of section 317.17 of the Florida Statutes, which regards all accident reports made by persons involved in accidents as confidential information not to be used in any trials. However, the appellate court pointed out that the son was not at or near the scene of the collision and was not required to make an accident report, also that there was no showing that his statement was used in the officer's accident report. Under these circumstances, the son was not a member of the class of "persons involved in accidents" within the meaning of section 317.17, and consequently his statement to the officer was not privileged.

COMMENT BY THE COURT

If a party wishes to object to comments made by the judge, he must do so at the time of the alleged impropriety. Thus, in *Collins v. Farley*¹⁰⁶ the defendant failed to preserve the point for appeal by failing to make a timely objection to the remarks at the time of trial. In *Crews v. Warren*,¹⁰⁷ the defendants contended that the trial judge participated in the trial to such an extent as to prejudice the jury adversely to the defendants. On appeal the court concluded that the questioning of a witness by the judge in this particular instance was proper in that it was an attempt to clarify certain vital facts within the apparent knowledge of the witness to which he had given somewhat vague testimony. The defendants further contended that, while the defendants' counsel was cross-examining a witness, the judge made prejudicial remarks to the effect that he disliked repetitive testimony and matters which amounted to little or nothing on cross-examination. The appellate court pointed out that it is

105. 148 So.2d 56 (Fla. 1st Dist. 1963).

106. 147 So.2d 593 (Fla. 3d Dist. 1962).

107. 157 So.2d 553 (Fla. 1st Dist. 1963).

confronted with nothing but the whole record, and that a trial judge is in a peculiarly advantageous position to observe the nuances and implications of all that transpired. Thus, one who challenges the remarks or actions of a trial judge

assumes the heavy burden . . . of showing the commission of an act that is inherently or under the peculiar circumstances of the case clearly of a nature prejudicial to his rights. . . . The act complained of must be such as to produce a compelling inference that had it not occurred the jury would have returned a verdict more favorable to the aggrieved party.¹⁰⁸

In view of the above test, the remarks complained of in the instant case did not constitute a sufficient departure from the norm of acceptable judicial conduct to result in any such probable, detrimental prejudice to the defendants.

VIEW BY JURY

In *Ace Cab Co. v. Garcia*,¹⁰⁹ an action involving an automobile collision, one of the jurors viewed the scene of the accident during the course of the trial without court permission. Although this was misconduct on the part of the juror, it was not the basis for a new trial unless it could be shown that such a view was prejudicial. Since the record was devoid of any showing that the unauthorized view operated to the prejudice of the defendants, the contention was held to be without merit.

ADVERSE WITNESS RULE

When a plaintiff calls the defendant as an adverse witness under Florida Rule of Civil Procedure 1.37(a), he is not bound by the defendant's testimony, nor is the plaintiff's prima facie case destroyed if there exists on his behalf other conflicting testimony as well.¹¹⁰ In *P & N Inv. Corp. v. Rea*¹¹¹ the court held that a person called as an adverse witness pursuant to Rule 1.37(a) need not be declared as such. However, even without involving the rule, if an obviously adverse witness is called, as was here the case, the plaintiff is not bound by his unfavorable testimony unless the evidence otherwise fails to demonstrate a prima facie case. The court reached its decision after quoting numerous authorities to the effect that a party should be permitted to impeach his own witness, but in the court's specific holding in this case, no such sweeping legal pronouncement was made.

In *Brookbank v. Mathieu*¹¹² the court pointed out that Rule 1.37(a)

108. *Id.* at 561-62.

109. 140 So.2d 338 (Fla. 3d Dist. 1962).

110. *Busser v. Sabatasso*, 143 So.2d 532 (Fla. 3d Dist. 1962).

111. 153 So.2d 865 (Fla. 2d Dist. 1963).

112. 152 So.2d 526 (Fla. 3d Dist. 1963).

states that an adverse party called as a witness "may be contradicted and impeached by or on behalf of the *adverse party also*, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief." The reason for the rule, as announced by the court, was to "extend to the adverse party the same right of cross-examination that is extended to his opposite when a witness is called under the rule." Thus, the trial court had erred in not allowing counsel to interrogate the defendant by leading questions on cross-examination after he had been called by the plaintiff as an adverse witness.