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Evidence

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EVIDENCE

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Introduction

Many interesting and novel (to Florida) evidence questions arose during the period covered by this Survey. In the main, it was gratifying to note the obviously careful attention given by the courts to an area of law too often neglected. Evidence for its own sake is no more to be fostered than procedure for procedure's sake, but careful attention to the field of evidence is as important today as it was once thought to be in the process of the determination of the truth of the facts in issue between parties as well as the preservation of the rights of litigants and witnesses.

The Florida Legislature enacted legislation broadening our immunity statute, in cases where a witness is required to testify in our new promoting litigation Statute, chapter 59-381. The Legislature likewise extended the scope of confidential communications to include Ministers, Priests, Rectors, Rabbis and others like situated. [Florida Statutes chapter 59-144 (1959).] Section 90.231 of the Florida Statutes has been amended to include expert witnesses who are subpoenaed before a state attorney or a grand jury and the provision exempting condemnation suits has been eliminated. Section 317.231 has been added to provide that a witness otherwise qualified to testify may testify when his testimony is derived from the use of an electronic, electrical, or mechanical speed measuring device upon certain conditions therein stated.

Judicial Notice

In the case which established the presumption of negligence in rear-end automobile collision cases, the court took judicial notice of the fact that it is the duty of a motorist to stop at an intersecting street when the light is red.[1] The supreme court took judicial notice that all of the defendants in a criminal case charged with armed robbery were within an age group that commits a very large percentage of crimes in this country.[2] Courts in this state do not take judicial notice of municipal ordinances.[3]

Burden of Proof

In a suit by a client against a deceased attorney's estate to cancel promissory notes executed by the client in favor of the attorney, the

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1. McNulty v. Cusack, 104 So.2d 785 (Fla. App. 1958).
2. Stanford v. State, 110 So.2d 1 (Fla. 1959).
3. Conrad v. Jackson, 107 So.2d 369 (Fla. 1958); Younghans v. State, 97 So.2d 31 (Fla. 1957).

court held that the burden of establishing the lack of consideration was cast upon the plaintiff client.[4]

In reversing the trial judge who in a wrongful death action at the close of the plaintiff's case withdrew the case from the jury and directed a verdict for the defendant, the court decided that the trial judge improperly weighed the evidence in much the same way as the jury might be expected to do and discredited the testimony of one of the chief witnesses for the plaintiff because of a prior inconsistent statement.[5] Although in a criminal prosecution for homicide the jury is the sole judge of the credibility of the witnesses and the weight of the evidence, the court is the judge of its sufficiency. If a verdict is supported by evidence it will not be disturbed on appeal, but the legal effect of competent evidence which is not impeached, discredited or controverted is a question of law.[6]

In *Commercial Credit Corporation v. Varn*,[7] the plantiff slipped on the defendant's floor and injured her foot. She introduced no testimonial or direct evidence either as to the condition of the floor or the cause of the skidding. In order to arrive at the conclusion that the defendant was responsible in damages for the ultimate injury, the jury would have had to infer in the first place that under all of the circumstances there was negligence on the part of the defendant in the maintenance of the floor. In addition, it would have had to infer that such negligence produced a dangerous condition of the floor which in turn existed at the time the plaintiff walked over it and then the ultimate final inference that such inferred dangerous condition was the proximate cause of the plaintiff's skidding. There being no direct evidence of the dangerous condition of the floor, the court said that the inference of this dangerous condition was not justified to the exclusion of all other reasonable inferences. This being so, the ultimate conclusion of the jury would have to be founded upon inferences based upon inferences. The above is a factual demonstration of the legal rule applied by the court that the inference of the existence of an essential fact to be drawn from circumstantial evidence cannot be made the basis of a further inference of an essential fact, unless it can be said that the initial inference was established to the exclusion of any other reasonable inference.

In reversing a chancellor and remanding the cause for the entry of a decree opposite to that entered by the chancellor, the court said that when uncontradicted testimony consists of facts, as distinguished from opinions, and it is not illegal, improbable or unreasonable or contrary within itself, it should not be wholly disregarded, but should be accepted

4. Gerlach v. Donnelly, 98 So.2d 493 (Fla. 1957).
5. Leslie v. Atlantic Coastline R.R., 103 So.2d 645 (Fla. App. 1958).
6. Harris v. State, 104 So.2d 739 (Fla. App. 1958).
7. 108 So.2d 638 (Fla. App. 1959).

as proof of the issue.[8] It should be noted that this is not a case where the appellate court is remanding for a new trial, but rather a case in which it is determining as a matter of law that certain testimony must be accepted as true and a decree based thereon, that is, that the party has reached the stage of complete persuasion as a matter of law.

"Reasonably certain" is the test that is applied in the case of *Stores v. Hussey*,[9] for the determination of whether or not a mortality table is admissible into evidence in support of an injury which is alleged to be permanent in nature.

Proof of fraud must be by clear and convincing evidence. However, the uncorroborated testimony of the mortgagors as to the fraud in the procurement of the mortgage is sufficient to vitiate it even though the mortgage has been acknowledged.[10] In order to establish adultery, the circumstances proven must be such as to lead the guarded discretion of a reasonable and just man to the guilt of the participants.[11] Conviction of incest may be upon the uncorroborated testimony of the prosecutrix.[12]

Presumptions

By far, the most significant decision in this area was the case of *McNulty v. Cusack*,[13] which established a presumption of negligence in the case of a rear-end automobile collision and which has been followed in two other cases.[14] A true presumption is created rather than an inference in that the court says that the establishment of the presumption compels rather than permits a decision in the absence of rebutting evidence.

The District Court of Appeal, Second District, had occasion in the case of *Bryant v. City of Tampa*,[15] to re-state the rule often stated by our supreme court that the violation of a municipal ordinance creates a prima facie showing of negligence, in an automobile collision case which involved an exceeding of the speed limit. There is a presumption that where married people live together in a common home, the husband is the head of the family.[16] The rule that a presumption vanishes when it is rebutted is demonstrated in the cases of *Gerlach v. Donnelly*,[17] and *Atlantic Coast Line Railroad Company v. Connell*.[18] In the latter, the statutory presumption of negligence by the railroad placed upon it the burden of

8. Kinney v. Mosher, 100 So.2d 644 (Fla. App. 1958).
9. 100 So.2d 649 (Fla. App. 1958).
10. Myerson v. Boyce, 97 So.2d 488 (Fla. App. 1957).
11. Parker v. Parker, 97 So.2d 136 (Fla. 1957).
12. Knight v. State, 97 So.2d 116 (Fla. 1957).
13. 104 So.2d 785 (Fla. App. 1958); Note, 13 U. MIAMI L.REV. 236 (1958).
14. Cooper v. Yellow Cab Co., 106 So.2d 436 (Fla. App. 1958); Shedden v. Yellow Cab Co., 105 So.2d 388 (Fla. App. 1958).
15. 100 So.2d 665 (Fla. App. 1958).
16. Solomon v. Davis, 100 So.2d 177 (Fla. 1958).
17. 98 So.2d 493 (Fla. 1957).
18. 110 So.2d 80 (Fla. App. 1959).

affirmatively showing that it had exercised all ordinary and reasonable care and diligence, and when this was done the presumption ceased to exist. In the former case, a suit on a negotiable instrument, the presumption that it had been issued for a valuable consideration and that there was delivery likewise ceased to exist when evidence was offered to the contrary.

In the case of *Thompson v. Miami Transit Company*,[19] the supreme court distinguished between a presumption, which has the effect of making a prima facie case without anything more, and an inference, which arises from circumstantial evidence and enables a trier of fact to weigh the evidence in the balance with all other evidence.

Relevancy

In *Kellum v. State*,[20] the trial judge made a remark which might have caused the jurors to consider that the crime with which the defendant was charged was one of a series or wave of offenses by policemen. The court reversed, holding that evidence of similar and disconnected crimes which were committed by other members of the police force was inadmissible and that even evidence of collateral crimes of the defendant himself, independent of and unconnected with the crime for which he was on trial was also inadmissible.

At a trial for possesion of moonshine whisky and other related crimes, the prosecuting witness was permitted to testify that she bought moonshine whisky from the defendant and that she had made several purchases in the past and would go to the defendant whenever her stock was depleted. The court said that the evidence was admissible, relying upon the case of *Davis v. State*,[21] in which the court had said that such evidence, while not admissible to prove that the defendant committed the crime charged, could be used to show his purpose, plan, intent or knowledge. It would have been helpful had the court explained how the questioned evidence would tend to show any of these items.[22]

In introducing the relevancy section in the Third Survey of Florida Law,[23] this writer said that one of the most difficult problems which faces the judge in a trial of a law suit is ruling on the admissibility of evidence which has slight probative value when compared with its possible undue prejudice, confusion of issues, unfair surprise, and undue prolongation of the trial. The court, in ruling on an objection, should take into consideration the purpose for which the evidence is being introduced; that is, whether the same fact may easily be established by other non-prejudicial evidence and whether the evidence is of a cumulative nature. The recent

19. 100 So.2d 620 (Fla. 1958).
20. 104 So.2d 99 (Fla. App. 1958).
21. Davis v. State, 87 So.2d 416, 418 (Fla. 1956).
22. Dixon v. State, 104 So.2d 122 (Fla. App. 1958).
23. 12 U. MIAMI L. REV. 580 (1958).

case of *Williams v. State*,[24] seems to justify the statement. In this prosecution for the alleged rape of the seventeen year old prosecutrix, her testimony was that she parked the family automobile on a parking lot in the vicinity of Webb's City in St. Petersburg; she did some shopping and returned to her car between 9:00 and 9:30 P.M., and that after she had driven the car a short distance, the defendant suddenly reached over from the back seat of the car, stabbed her in the chest with an ice pick and then leaped over into the driver's seat and threatened to kill her if she did not submit to his wishes and thereafter criminally assaulted her sexually on two separate occasions. The defendant, who testified in his own behalf, did not deny having had sexual relations with the prosecutrix, but his sole defense was that this relationship with her was attained with her consent. His testimony was that he had known the prosecutrix, had had prior dates with her and had previously had sexual relations with her with her consent; that, on the date in question, he met her persuant to a prior arrangement and that his sexual relations with her on that night were accomplished with her consent and without threat. The prosecution was permitted to introduce the testimony of a deputy sheriff (who arrested the defendant the day following the alleged incident) that the defendant advised him on this occasion that when he saw the automobile he thought it was his brother's and crawled in the back to take a nap. As a part of its case in chief, the state was permitted to introduce the testimony of a girl aged sixteen regarding an incident which occurred some six weeks prior to the attack on the prosecutrix. This testimony was that on the earlier date the young lady had parked her car at approximately the same hour and same parking lot as did the prosecutrix on the night in question and upon returning to her car had opened the door and seen the head of a man on the floor of the back seat of the car. She screamed and two policemen came to her rescue. The occupant of the car ran. He was identified as the defendant in this prosecution, and later, when taken to police headuarters, testified that he had mistaken the car for his brother's automobile and had crawled into the back of it to take a nap. The prior incident involved a black Plymouth of a model several years earlier than the green Buick driven by the prosecutrix.

The court, speaking through Mr. Justice Thornal, approached the problem of the admissibility of this *other crime evidence* in terms of a rule of *admissibility* rather than a rule of *exclusion*. The court took the position that the proper approach was not to consider the admissibility of the evidence on the basis of an exception to the rule excluding such evidence, but rather that the problem was a basic one of relevancy and concluded that "the proper rule simply is that *relevant evidence* will not be excluded *merely* because it relates to similar facts which point to the commission of a separate crime." The court seems to have been influenced by two Harvard

24. 110 So.2d 654 (Fla. 1959).

Law Review articles (appearing in volumes 46 and 51 Harvard Law Review at pages 954 and 988 respectively).

State v. Goebel,[25] was also a prosecution for rape and sodomy on two young men about six weeks apart. At the trial, the defendant testified concerning his route of going to the restaurant where he met the second of the two young women and the state was permitted to introduce a statement wherein the defendant stated that he went a different route and there accosted a third young woman; attempted to have intercourse with her against her will, but that she managed to open the truck door and escape. This court was likewise was impressed with the two law review articles heretofore mentioned; however, the policy of the court with regard to the admissibility of this kind of evidence was stated in the following manner.

> This is a situation where the policy of protecting a defendant from undue prejudice conflicts with the rule of logical relevance, and a proper determination as to which should prevail rests in the sound discretion of the trial court, and *not merely on whether the evidence comes within certain categories which constitute exceptions to the rule of exclusion*. . . . (Emphasis added)
>
> We dislike to send this case back for a new trial, for if the evidence of the prosecuting witnesses, together with the defendant's own signed statement, is to be believed, to describe him as a beast is to libel the entire animal kingdom. Nevertheless, he was entitled to a fair trial. . . .

It is felt that the basic problem is not one of whether the evidence is to be treated as an exception to a rule against admissibility or as a basic problem of relevancy, but rather that a determination should be made balancing the undue prejudice against the logical relevancy and that there should not be automatic admissibility when the evidence comes within the certain recognized categories.

Evidence that the operator of a motor scooter had a restricted license is not admissible when no cause or connection appears between the collision and the fact of the restricted license.[26] The act of being alone in a house covered up in bed with a man is relevant as part of a defendant's defense in establishing lack of prior chastity.[27] In a prosecution for rape where the defense is consent, the general reputation for chastity of the prosecutrix is relevant.[28] In an indictment for first degree murder where the defense is self defense, proof of character of the deceased is by his general reputation in the community for such character. The defendant sought to introduce specific acts of violence by the deceased for the purpose of showing her apprehension of eminent danger. The court indicated

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25. 36 Wash.2d 367, 218 P.2d 300 (1950).
26. Coldner v. Levtin, 96 So.2d 553 (Fla. 1957).
27. Hickman v. State, 97 So.2d 37 (Fla. 1957).
28. Raulerson v. State, 102 So.2d 281 (Fla. 1958).

that this evidence would be admissible provided the acts were within a close proximity timewise to the occurrence of the homicide.[29]

In a prosecution for murder, the deceased's wife was called as the state's first witness for the stated purpose of identifying the body of her deceased husband from a photograph taken at the morgue. The state had in the courtroom another witness (who was called later) who could have identified the deceased. During defendant's opening statement, the identity of the deceased was admitted. The state urged that since the wife's testimony was for a proper purpose, viz. to establish the identity of the deceased, it was immaterial that her testimony may have induced sympathy for her loss to the prejudice of the defendant. The court held that since this identity was admitted and could have been shown through other witnesses, it was improper and prejudicial for the defendant to permit the state to indirectly prove the decedent's family status in a homicide prosecution. The court said that both the state and the accused are under a heavy responsibility to present their evidence in a manner most likely to secure for the accused a fair trial, free, insofar as possible, from any suggestion which might bring before the jury any matter not germane to the issue of guilt.[30]

A type of *custom and practice* evidence presented a problem to the court in the case of *Tampa Drug Company v. Wait*,[31] which was an action for wrongful death of a plaintiff who died as a result of the use of carbon tetrachloride purchased from the defendant to clean floors. The alleged negligence consisted of the failure to print on the label of the container an adequate warning of the dangers characteristic of such product and the fatal effects which might follow its use. The plaintiff was permitted to introduce into evidence labels promulgated for the use of the chemical industry by the labeling committee of the Manufacturing Chemists Association. The court said that the labels were admissible into evidence, "not . . . to establish a conclusive standard of care," but are submitted to the jury along with all the other evidence as a basis for comparing defendant's label with others, merely as a guide to a determination of the adequacy of the warning furnished by the defendant. It is suggested that this evidence, although probably admissible, was not admitted to establish a standard of care. The standard of care owing by the defendant to the plaintiff is a matter of substantive law and not the subject matter of evidence; but what the triers of fact are to determine is whether or not the defendant fell below that standard of care imposed upon him by the substantive law.

In a prosecution for larceny of money, evidence tending to show the accused had no money before the larceny and considerable money thereafter,

29. Freeman v. State, 97 So.2d 633 (Fla. App. 1957).
30. Hathaway v. State, 100 So.2d 662 (Fla. App. 1958).
31. 103 So.2d 603 (Fla. 1958).

is relevant and admissible. The flight of a person accused of a crime is admissible although it raises no presumption of guilt.[32] The reasoning which forbids the consideration of forced sales also renders it incompetent for either party to put in evidence the amount paid by the condemnor to the owners of neighborhood lands taken at the same time.[33]

Demonstrative Evidence

Plaintiff instituted a suit for personal injuries as a result of the defendant's negligence in failing to properly maintain the steps of its city hall. Photographs of the steps taken subsequent to the accident were admitted into evidence (apparently without objection). On appeal,[34] the court took the position that it was improper to draw an inference from the photographs that the steps were in a defective condition for a long period of time and, by dictum, indicated that photographs in themselves are not evidence of what they portray unless there is testimony of a witness describing the condition from personal observation. In a criminal prosecution,[35] a photograph of the decedent which showed him lying on a hospital operating table with the point of entry of the bullet into his body being visible was properly admitted into evidence. The photograph was introduced to show the jury the point where the bullet penetrated deceased's body and also to demonstrate that the shot was fired from such a distance as to refute any claim of powder burns that might appear if the shooting had occurred in the close confines of a struggle as claimed by the defendant.

Alston v. Shiver,[36] was a suit for assault and battery in which one of plaintiff's witnesses identified an axe handle as a replica of the stick used by the defendant in beating plaintiff. The court, in rejecting this evidence, said that there was a difference in length between the actual instrument and the replica and that the person offering such evidence was required to give a good reason for its acceptance into evidence and this was particularly true if the object were not the original but only a replica or a facsimile.

Hearsay

Smith v. Mott,[37] was a suit for wrongful death of a decedent who was struck by a truck while walking across a highway. The verdict and judgment were for defendant. The sole ground of appeal (most unusual in itself) was that on cross-examination of the plaintiff's witness who was the County Medical Examiner, he testified that he examined the decedent's body after death, and as part of his examination he took a blood sample, designated it by name and number and sent it to the laboratories of the

32. Harrison v. State, 104 So.2d 391 (Fla. App. 1958).
33. Hollywood, Inc. v. Broward County, 107 So.2d 227 (Fla. App. 1958).
34. City of Jacksonville v. Hampton, 108 So.2d 768 (Fla. App. 1959).
35. Cullaro v. State, 97 So.2d 40 (Fla. 1957).
36. Alston v. Shiver, 105 So.2d 785 (Fla. 1958).
37. 100 So.2d 173 (Fla. 1957).

Florida State Board of Health in Miami. The result of the analysis was sent by the Board of Health to the Medical Examiner, where it became a part of his official records and reports. After referring to his records and notes, the Medical Examiner testified, "the report was that in the case of Ralph Smith, Medical Examiner case, Broward County, No. 382-55, Blood Ethyl Alcohol was 0.210 percent by weight." Plaintiff objected to the testimony because it was secondary evidence and hearsay evidence. The trial court over-ruled the objection and the supreme court affirmed. Re-hearing was granted but the court adhered to its initial opinion. The court failed to distinguish between a record admissible under the "public record" exception to the hearsay rule and secondary evidence of that public record through the testimony of a witness concerning the contents of the report, although from an examination of the file it appears that such was the basis for granting the petition for re-hearing.

The admissions of an assignor are admissible against an assignee party as admissions of a party opponent.[38] In a prosecution for violation of lottery statutes,[39] during a raid a deputy sheriff answered the telephone where various individuals were placing bets during the progress of the raid. Evidence of this fact was said to be admissible as a "verbal fact" and as such the questioned evidence was not hearsay. Testimony by the prosecutrix that friends told her that the defendant was an abortionist and that thereafter she went to see the party so named is hearsay in a criminal prosecution for criminal abortion.[40] The dissenting opinion in the case of *Martin v. Tindel*,[41] considers the admissibility of declarations of bodily condition made to a physician consulted for the purpose of receiving treatment and those made to a physician employed as a prospective expert witness.

Admissions and confessions are of course exceptions to the hearsay rule. A confession should not be rejected because it was made under excitement or mental distress or disturbance not induced by extraneous pressure exerted to compel a confession, but which arose from the confessor's own apprehension due to the situation in which he found himself. Therefore, the confession was properly admitted where the tiral court exercised prudence and caution in determining the admissibility of a confession by conducting a preliminary investigation in the absence of the jury and requiring a proper predicate to be laid.[42] In order for a confession to be received in evidence there must be first introduced some independent proof of the *corpus delicti* either directly or circumstantially sufficient to make a prima facie showing.[43] Guilt cannot be found upon a naked extra-judicial

38. Vineberg v. Hardison, 108 So.2d 922 (Fla. App. 1959).
39. Chacon v. State, 102 So.2d 578 (Fla. 1957).
40. Urga v. State, 104 So.2d 43 (Fla. App. 1958).
41. 98 So.2d 473 (Fla. 1957).
42. Cullaro v. State, 97 So.2d 40 (Fla. 1957).
43. Frazier v. State, 107 So.2d 16 (Fla. 1958).

confession or admission unsupported by proof of the *corpus delicti* of the crime.[44]

Best Evidence Rule

In a prosecution for abortion the defendant sought to impeach the credibility of the prosecutrix by referring to her testimony at a prior hearing which was inconsistent with her present testimony. The trial judge sustained an objection to such testimony stating that the record was the best evidence. On appeal, the court held that the best evidence rule was not applicable.[45] An excellent discussion of the best evidence rule can be found in the opinion of Judge Frank in *Herzig v. Swift and Company*,[46] in which the trial judge rejected oral testimony concerning partnership earnings on the ground that the books of the partnership were the best evidence of the partnership earnings. He said:

> In its modern application, the best evidence rule amounts to little more than the requirement that the contents of a writing must be proved by the introduction of the writing itself, unless its absence can be satisfactorily accounted for. Here there was no attempt to prove the contents of a writing; the issue was the earnings of the partnership, which for convenience were recorded in books of account after the relevant facts occurred.

Parol Evidence Rule

The Parol Evidence Rule applies only to the parties to a contract or their privies.[47] Parol evidence may be admitted to clarify a matter and show the true intention of the parties when a contract is entered into and a second one (executed almost simultaneously with that of the first) casts some doubt upon the meaning of a provision of the first contract.[48]

Privilege

Testimony not to show the details of an attempted compromise, but rather to explain a provision of a consumated agreement is not within the compromise and settlement privilege and conversations between the attorneys for the parties are not privileged.[49]

The fact that a defendant in a criminal trial did not testify at a preliminary hearing was held to be within the privilege against self-incrimination and consequently the prosecuting attorney was not permitted

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44. Alexander v. State, 107 So.2d 261 (Fla. App. 1958).
45. Urga v. State, 104 So.2d 43 (Fla. App. 1958).
46. 146 F.2d 444 (1945).
47. Bessemer Properties v. Barber, 105 So.2d 895 (Fla. App. 1958).
48. J. M. Montgomery Roofing Co. v. Fred Howland, Inc., 98 So.2d 484 (Fla. 1957); see also Hood v. Hood, 100 So.2d 422 (Fla. App. 1958).
49. Hood v. Hood, 100 So.2d 422 (Fla. App. 1958).

to comment before the court or jury on the failure of the accused so to testify in his own behalf.[50]

Cross-Examination

The proper limits of cross-examination and the range to be permitted during such examination is a matter, in criminal as well as in civil cases, that lies within the sound discretion of the trial court.[51] In *Frost v. State*,[52] the defendant was convicted of aggravated assault on a police officer. On direct examination of the officer it was shown that the defendant's wife was at the scene of the happening and also that the police officer had drawn his black jack. Cross-examination as to whether the officer hit the defendant's wife with the black jack was not permitted. The court reversed the conviction saying that since the subject had been introduced on direct examination, cross-examination was a right which the defendant had to examine into all matters considered on direct examination even though the defendant testified extensively about the very things that he sought to elicit on cross-examination.

A party may not impeach an immaterial statement made by a witness unless such immaterial statement is shown to be prejudicial or otherwise harmful to the party's right to a fair trial.[53]

Lockwood v. State[54] and *McArthur v. Cook*[55] involved impeachment by conviction of a crime and in both of these cases the court gave a very clear and helpful statement of the process which must be followed. In the latter case, the court first said that this method of impeachment is applicable to both civil and criminal trials, and that the procedure to be followed is that the witness must first be asked the straightforward question as to whether he has ever been convicted of a crime. The inquiry must end at this point unless the witness denied that he had been convicted. In the event of such denial, the adverse party may then in the presentation of his side of the case produce and file in evidence the record of any such conviction. If the witness admits prior conviction of a crime, the inquiry by his adversary may not be pursued to the point of naming the crime for which he has been convicted. If the witness so desires, he may of his own volition state the nature of the crime and offer any relevant testimony that would eliminate any adverse implication. Conviction of a crime is a ground for impeachment even though such conviction is in the pendency of an appeal.[56]

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50. Hathaway v. State, 100 So.2d 662 (Fla. App. 1958).
51. Hathaway v. State, 100 So.2d 662 (Fla. App. 1958).
52. Frost v. State, 104 So.2d 77 (Fla. App. 1958).
53. Carter v. State, 101 So.2d 911 (Fla. App. 1958); Lockwood v. State, 107 So.2d 777 (Fla. App. 1958).
54. 107 So.2d 777 (Fla. App. 1958).
55. McArthur v. Cook, 99 So.2d 565 (Fla. 1957).
56. Gonzalez v. State, 97 So.2d 127 (Fla. 1957).

In a suit where counsel represents both the defendant insured and defendant's insurance company, it is improper for counsel to impeach the defendant.[57]

Sodium Amythal, the so called truth serum, may not be used either for impeachment or rehabilitation purposes.[58]

Competency of Witnesses

In a criminal trial the defendant's counsel asked for the imposition of the rule for the separation of witnesses, whereupon witnesses were excluded from the courtroom. A witness read a copy of prior testimony and objection to his competency to testify was overruled by the trial judge. The court decided that while the entire matter of placing witnesses under or excepting them from the rule was within the discretion of the trial judge as well as whether one who has been placed under the rule and has violated the rule shall be allowed to testify, in this case, the trial court had abused its discretion in permitting the witness to testify.[59]

Opinion

The conclusion or opinion of an expert witness based upon facts or inferences not supported by the evidence has no evidential value, nor can a conclusion be deducted or inferred from the conclusion itself, nor can the opinion constitute proof of the existence of facts necessary to support the opinion.[60] An expert may not give an opinion when it is not based upon his personal knowledge of the type of rig used for a vehicle under discussion and when his knowledge is based solely on a study of his records.[61] The court in *Miller v. Tropical Gables Court*[62] aligned itself with what it called the present trend of authority which makes no distinction between evidential and ultimate facts as subjects of expert opinion. The court said that when facts are within the ordinary experience of a jury experts will not be permitted to testify to their conclusions, but when the facts to be determined are obscure and can be only made clear through the opinions of persons skilled in relation to the subject matter, then it makes no difference whether the opinion be on an ultimate fact in issue or not.

Admission and Exclusion

In a capital case, while ruling on defendant's objection to the admissibility of evidence, the trial judge commented on testimony; he

57. Spadaro v. Palmisano, 109 So.2d 418 (Fla. App. 1959).
58. Knight v. State, 97 So.2d 116 (Fla. 1957).
59. Young v. State, 99 So.2d 304 (Fla. App. 1957).
60. Arkin Constr. Co. v. Simpkins, 99 So.2d 557 (Fla. 1957).
61. Martin v. Storey, 97 So.2d 343 (Fla. App. 1957).
62. 99 So.2d 589 (Fla. App. 1958).

later stated to the jury that he did not wish to comment to the jury, and he had no right to do so and directed the jury not to consider his reference to the evidence. The supreme court, none the less, held this to be reversible error.[63] After both parties had rested their case the previous day of trial, the plaintiff sought to re-open to introduce a witness in rebuttal; this was not permitted by the trial judge. The appellate court held that in order for it to rule on this alleged error it would have been necessary for the party seeking to re-open to make a proffer of the evidence which he desired to introduce. Since this was not done, the court found it impossible to determine whether the refusal of the lower court was prejudicial.[64]

In an indictment for first degree murder, the failure of the defendant to make timely objection to the court's prejudicial remarks was not fatal so as to preclude a review thereof on appeal.[65] An error based upon an improper question of a prosecuting attorney will not be considered on appeal unless an objection is timely made. However, this rule is subject to the exception that if the improper question with its resultant answer is of such character that neither the rebuke nor detraction may entirely destroy its sinister influence, a new trial should be awarded regardless of the want of an objection thereto.[66]

Upon appropriate occasions, a juror as a trier of fact may be justified in propounding a question to a witness.[67] While it is undeniable that the court may not participate actively in the questioning of a witness, he may do so to clarify the witness's testimony, and where a witness's answers are of such a nature as to acquire lengthy interrogation, such interrogation is not improper.[68]

It was held error but not reversible error to permit the jury to take into the jury room an exhibit which was marked for identification but never admitted into evidence.[69]

Where timely and proper objection is made to evidence on the ground that it is inadmissible under the Dead Man's Statute and the objection is over-ruled, the objecting party is entitled to fully cross-examine on the subject without losing the protection afforded by the statute.[70]

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63. Raulerson v. State, 102 So.2d 281 (Fla. 1958).
64. Andrews v. Cardosa, 97 So.2d 43 (Fla. 1957).
65. Hamilton v. State, 109 So.2d 422 (Fla. App. 1959).
66. Hathaway v. State, 100 So.2d 662 (Fla. App. 1958).
67. Shoultz v. State, 106 So.2d 424 (Fla. App. 1958); Ferrara v. State, 101 So.2d 797 (Fla. 1958);
68. Younghans v. State, 97 So.2d 31 (Fla. 1957).
69. Beard v. State, 104 So.2d 680 (Fla. App. 1958).
70. Land v. Hart, 109 So.2d 589 (Fla. App. 1959).