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EVIDENCE

RICHARD TOUBY*

INTRODUCTION

During the period covered by this survey, the Supreme Court of Florida considered several interesting evidence problems. A general appraisal of the court's work product with regard to these problems is that the court is primarily concerned with justice in the case before it, rather than the enunciation of general principles for *stare decisis* purposes and that the evidence is not an end in itself, but the vehicle for the accomplishment of an end.

The Florida Legislature during the survey period enacted legislation dealing with registration and protection of trademarks, Florida Statutes, section 495.02 (1957). The legislature provided that the Secretary of State may accept as evidence that a mark has become distinctive, as applied to an applicant's goods, proof of continuous use of a mark by the applicant in this state or elsewhere for the five years preceding the date of filing of the application for registration. Florida Statutes, section 18.20 (1955) was amended by providing that the State Treasurer could photograph, microphotograph or reproduce on film all records and documents in his office; when the statute was complied with the reproductions should have the same force and effect as the originals and be treated as originals when offered in evidence.

JUDICIAL NOTICE

The court took judicial notice that: the public has a vital interest in the Miami Beach Hotel industry;[1] to have the many departments of city government it is appropriate that office facilities be made available;[2] the parking of automobiles is one of the most pressing and serious problems confronting governmental bodies;[3] there are serious situations facing the many Florida communities because of the inadequacy of their sewage systems and the consequent financial burdens involved in remedying such situations;[4] many municipal streets in Florida constitute component parts of the state highway system to the extent that traffic entering the city

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1. Thomas Jefferson, Inc. v. Hotel Employees' Union. etc., 84 So.2d 583 (Fla. 1956).
2. State v. City of Auburndale, 85 So.2d 611 (Fla. 1956).
3. Parking Facltiiies v. Miami Beach, 88 So.2d 141 (Fla. 1956).
4. Newport Manor v. Carmen Land Co., 82 So.2d 127 (Fla. 1955).

on the state highways is channeled through municipalities to connecting state highways at other points on municipal limits;[5] modern highway rights-of-way are not confined to the pavement on which vehicles actually travel; additional land may be and often is included for sidewalks, drainage, separation of traffic, future expansion, and other purposes.[6]

The court also took judicial notice that it frequently takes a legal tribunal months of diligent searching to determine the facts of a controversial situation.[7] In determining the degree of care imposed upon the operator of a supermarket, the court judicially noticed that customers of supermarkets are often accompanied by children who are too young to be left at home alone. Therefore, the intended use of a parking facility in connection with such an establishment must necessarily contemplate the presence of children of immature age and experience.[8]

Likewise, it was held that a court should not take judicial notice of material contained in the record of another case, unless it is brought to the attention of the court as a part of the record.[9]

In *Kostecos v. Johnson*,[10] a trial judge took judicial notice of the records in a county delinquent tax proceeding and in a drainage district foreclosure proceeding. Apparently both parties agreed to this and the trial judge recited his agreement in the judgment; no error was assigned on this. The court observed that:

> . . . . [W]e are constrained to point out that the trial court is not authorized to take judicial notice of the records in a different case pending or disposed of in the same court but outside the record in the case before him . . . . The case before us illustrates the sense of the rule.
>
> The judgment recites that the trial judge took judicial notice of the entire contents of the records in the two delinquent tax cases. Undoubtedly, he could conveniently call upon the office of the clerk of the court to bring the records before him and make them available for his examination in arriving at a judgment. Upon appeal, however, this court is not similarly situated, and we are therefore obviously without the information contained in the two records of the Circuit Court of Sarasota County which may or may not have properly constituted the basis of the summary judgment that was entered because these records do not constitute a part of the record on appeal unless they were appropriately introduced in evidence either in the original or by certified copy and then included in the record sent to this court for consideration.[11]

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5. Welker v. State, 93 So.2d 591 (Fla. 1957).
6. Dade County v. Harris, 90 So.2d. 316 (Fla. 1956).
7. Jacova v. Southern Radio & Television Co., 83 So.2d 34 (Fla. 1955).
8. Jackson v. Pike, 87 So.2d 410 (Fla. 1956).
9. *In re* Freeman's Adoption, 90 So.2d 109 (Fla. 1956).
10. 85 So.2d 594 (Fla. 1956).
11. *Id.* at 596.

BURDEN OF PROOF

The court, in *Harnett v. Fowler*,[12] re-affirmed a 1931 decree,[13] in observing:

> We do not overlook the proposition that this cause was heard by the trial judge without a jury. We have, however, held that where a law action is tried by the judge without a jury, a motion for directed verdict is made and governed by the same rules and principles as in cases where the cause is being heard by a jury.[14]

An argument often advanced is that if the trial judge is willing to grant a directed verdict, there is no question how he will rule on the facts when he is acting as the trier of fact. Nevertheless, by keeping the distinction between the different capacities in which the trial judge is acting, both counsel and a reviewing court should be able to determine the basis for the trial court's judgment.

Let us suppose that the initial burden of going forward with the evidence has been cast upon the plaintiff with regard to a certain disputed question of fact. After the plaintiff has rested his case, what guide should the trial judge use in granting a peremptory ruling for the defendant? The power to direct a verdict should be exercised with a degree of caution.[15] It is well settled that a party who moves for a directed verdict admits, for the purpose of testing the motion, the facts and evidence and, in addition, admits every reasonable and proper conclusion based therein which is favorable to the adverse party.[16]

In *Brightwell v. Beem*,[17] the court stated:

> At the outset we are confronted with the established rule that in considering the propriety of a directed verdict for the defendant, the court is required to evaluate the testimony offered in the cause, in the light most favorable to the plaintiff. Every reasonable intendment deductible from the evidence must be indulged in the plaintiff's favor.[18]

In *Nelson v. Ziegler*,[19] involving a suit by a pedestrian who was hit by an automobile, after the evidence was presented by both parties, the trial court withdrew the case from the jury and granted a directed verdict for the defendant on the basis, apparently, that the plaintiff was contributorily negligent. The court in reversing, said:

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12. 94 So.2d 724 (Fla. 1957).
13. E. E. Alley Co. v. Ball, 102 Fla. 1034, 136 So.704 (1931).
14. Harnetto v. Fowler, 94 So.2d 724, 725 (Fla. 1957).
15. See note 12 *supra*.
16. *Ibid*.
17. 90 So.2d 320 (Fla. 1956).
18. *Id*. at 322.
19. 89 So.2d 780 (Fla. 1956).

> A party moving for a directed verdict admits not only the facts stated in the evidence presented, but also admits every conclusion favorable to the adverse party that a jury might freely and reasonably infer from the evidence. It is ordinarily the function of the jury to weigh and evaluate the evidence. This is particularly so in negligence cases where reasonable men often draw varied conclusions from the same evidence. In a case of this nature, unless the evidence as a whole, with all reasonable deductions to be drawn therefrom, points to but one possible conclusion, the trial judge is not warranted in withdrawing the case from the jury and substituting his own evaluation of the weight of the evidence.[20]

The court has offered as a guide for directing a verdict the following statement:

> It is appropriate to direct a verdict for the defendant only when the evidence considered in its entirety and the reasonable inferences to be drawn therefrom fail to prove the plaintiff's case under the issues made by the pleading'[21]

A verdict for the defendant should never be directed by the court unless it is clear that there is no evidence whatever adduced that would in law support a verdict for the plaintiff. If the evidence is conflicting or will admit of different reasonable inferences and there is evidence tending to prove the issue, it should be submitted to the jury as a question of fact to be determined by them and not taken from the jury and passed upon by the court as a question of law.[22]

> The court in defining "competent, substantial evidence"[23] said: Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact and issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.[24]

Ippolito v. Brener,[25] involved a collision between a truck and an automobile moving in opposite directions. The suit was by the driver and passengers in the automobile against the driver and owner of the truck. The defendants alleged contributory negligence. The only eye witnesses, other than the interested witnesses to the collision, were the driver and his wife in a car following the truck. These witnesses testified that they could not see the automobile approaching, that therefore the automobile was on the wrong side of the highway. The defendants contended they should have a directed verdict. The court, in denying this contention, said,

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20. *Id.* at 782.
21. Hornett v. Fowler, 94 So.2d 724. 725 (Fla. 1957).
22. Cadore v. Karp, 91 So.2d 806 (Fla. 1957).
23. DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957).
24. *Id.* at 916.
25. 89 So.2d 650 (Fla. 1956).

"It is still a definite conflict of testimony in a choice of versions which is clearly within the province of the jury."

One of the issues involved in a locomotive-automobile collision at a railroad crossing was whether or not a warning whistle was blown.[26] The court stated:

> . . . . As to whether the train crew gave ample warning, it is true that some negative testimony says 'no,' but four impartial witnesses for the defendants testified that they saw the train aproach the crossing and heard it blow repeated blasts. In addition to these, the engineer and fireman both testified that the whistle was blown repeatedly before it reached the crossing. This court is committed to the doctrine that negative testimony will not make an issue in the face of positive testimony that the signals were given.[27]

An ultimate fact can be established by circumstantial evidence in a civil case, just as in a criminal case.[28]

The writer believes that the two most significant cases decided by the supreme court in the evidence field were the *New Deal Cab Company v. Stubbs*,[29] and *Hilkmeyer v. Latin American Air Cargo Expediters*.[30] In the latter case, the court reviewed its language in the former, and properly stated that it is important to distinguish situations where the trial judge can properly direct a verdict and those where he can grant a new trial. The considerations that guide the judicial discretion in directing a verdict, and granting a new trial, on the evidence are not the same. The court cited *Galloway v. United States*,[31] a leading case on the subject.[32]

In a case by a widow to recover the proceeds of an insurance policy, the court determined upon whom is cast the burden of persuasion of the trier of fact. The court said that in a civil case the burden of proof to determine whether the widow, who had been acquitted in a criminal trial of the murder of her husband, had unlawfully and intentionally killed

26. McAllister v. Tucker, 88 So.2d 526 (Fla. 1956). See Florida Publishing Co. v. Copeland, 89 So.2d 18 (Fla. 1956), where the court said that there is no doubt that the testimony of a plaintiff, although uncorroborated, if reasonable on its face and believed and accepted by the jury as true, can carry the burden of proof if it is made to appear that there was adduced at the trial contrary evidence opposed thereto so strong and positive that it may be said that the verdict of the jury, approving the single witness is clearly on the whole record against a manifest weight of the evidence considered as an entirety, then a new trial will be granted.

27. *Id.* 88 So.2d 526, 530 (Fla. 1956).

28. Tucker Brothers, Inc. v. Menard, 90 So.2d 908 (Fla. 1956).

29. 90 So.2d 614 (Fla. 1956).

30. 94 So.2d 821 (Fla. 1957).

31. 319 U.S. 372 (1943).

32. The *Gallaway* case acquires additional significance by comparing it with Gunning v. Coaley, 281 U.S. 90 (1930).

him would, *in the first instance*, rest upon the party who alleged that the killing was intentional and unlawful.[33]

PRESUMPTIONS

Dacus v. Blackwell,[34] was a suit by the heirs against the executrix of a will; the executrix, who was also the widow, had failed to pay her share of inheritance and estate taxes and the costs of administration of the estate of her deceased husband. The court observed:

> . . . . The orders of the probate court and returns filed by Maude Feaster, as the co-executrix, in the probate of the estate of her husband would appear to be the best evidence as to whether she paid her share of the cost of administration and taxes in question. These records are apparently still available and Maude Feaster would be estopped to deny the contents thereof.[35]

The court was apparently treating the records as an irrebuttable presumption of the existence of the facts contained in them.

The trustees of the Internal Improvement Fund were presumed to do their duty, hence the court could not assume that in the supervision and disposition of submerged lands the trustees will knowingly ignore the rights of upland owners.[36] The court should make a finding in accordance with the presumed fact in the absence of evidence offered to the contrary.

RELEVANCY

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.

Loftin v. Howard,[37] and *Seaboard Air Line Railway Co. v. Ford*,[38] involved suits, under the Federal Employers Liability Act, to recover for personal injuries. During the trial of the *Loftin* case, evidence was admitted of photographs designed to show the "look" of the yard. These photographs were taken more than a year after the accident and depicted parts of the

33. Carter v. Carter, 88 So.2d 153 (Fla. 1956). By the italicized phrase can the court possibly mean that the burden of persuasion may shift or is the court using the term "burden of proof" to indicate burden of going forward with the evidence?
34. 90 So.2d 324 (Fla. 1956).
35. *Id.* at 328.
36. Gautier v. Lapof, 91 So.2d 324 (Fla. 1956).
37. 82 So.2d 125 (Fla. 1955).
38. 92 So.2d 160 (Fla. 1956).

yard other than where the accident took place. The court said that the purpose of this kind of evidence was to reveal a rational picture of what took place, or to reproduce, as near as possible, the locus of the accident. If such evidence is in any way misleading, it should be rejected. It is a matter of common knowledge that a railroad yard is a working place, and that the spectacle of it changes from day to day. The photographs, having been taken more than a year after the accident, were remote and misleading and did not properly depict the accident scene.

In the *Seaboard Air Line Railway Co.*[39] case the plaintiff claimed injuries, caused by the use of chromate, from contact dermatitis. Evidence was introduced as to how many employees in the defendant's entire railroad system *claimed* to have occupational dermatitis during each year from 1947 through 1953. This evidence was improperly received; the court observed:

> . . . . Evidence may be relevant and yet its relavancy may be so slight and inconsequential that to receive it would be to distract that attention which would be concentrated on vital points and to confuse, rather than to illuminate the case.[40]

The court stated that even though this evidence might be remotely relevant it was merely cumulative, as there was other evidence sufficient to prove the defendant's knowledge of the dangerous propensities of Nalco (the chromite material). The tendency of the evidence to prejudice the jury against defendant far out-weighed any remote evidentiary value.

The court had before it on review a conviction for murder in the second degree, where the accused was convicted and judgment entered.[41] The questioned evidence in this case consisted of two photographs which depicted the scene of the crime and a third photograph of the body of the decedent taken at a funeral parlor which clearly showed the stab wound from which he died. The accused pleaded self defense; that the decedent had assaulted and hit her with a hammer; she claimed she struck the decedent with a knife while she was running out of the room. The court stated that the photographs depicting the scene of the crime were relevant and that there was a lack of inflammatory character in them. As to the third photograph, the court said that this was not inflammatory in character and apparently was relevant to one of the issues involved. The photograph showed a neat and skillful stab wound inflicted directly over the heart of the decedent. The character and location of the wound, clearly shown by the disputed photograph, tended to impeach the appellant's version of the affray. It was improbable that the wound could have been inflicted as appellant testified. Where a photograph was otherwise properly admitted, it was not a valid objection that it tended to prejudice the jury.

39. *Ibid.*
40. 92 So.2d 160,166 (Fla. 1957).
41. Kitchen v. State, 89 So.2d 667 (Fla. 1956).

A charge to a jury,[42] and closing argument by counsel,[43] indirectly involved problems of relevancy. One case is authority for the proposition that in a malpractice suit against a physician the fact that a verdict against the physician would result in a great injury to the professional character and reputation of the physician is irrelevant; in the other, a suit by a former employee against a railroad, evidence of the fact that the plaintiff had been discharged from the defendant's service because he had filed suit against the railroad, was held improper because irrelevant.

Ippolito v. Brener,[44] involved a collision between two vehicles. Blood alcohol tests were taken of the passenger in the hospital immediately after the accident; the evidence was held not material, since any degree of sobriety on the part of the passenger could not be attributed to the driver.

In accord with the general principle that a verdict in a criminal case is not admissible in a civil case based upon the same transaction, the Supreme Court of Florida,[45] refused to permit into evidence a plea of guilty to a manslaughter charge which was later withdrawn; the suit was by a widow to recover the proceeds of an insurance policy as its beneficiary and the contingent beneficiary offered the questioned evidence. Neither a judgment of acquittal or guilty is admissible into evidence in the civil case, nor a plea of guilty to manslaughter.

Ryan v. Noble,[46] affirmed by *Springer v. Morris*,[47] established the principle that evidence of liability insurance was not admissible in a personal injury suit. In an action[48] against a county port authority for injuries sustained on the authority's airport, because of an alleged dangerous condition of the roof, evidence of an insurance policy between Dade County and its insurer was properly excluded.[49]

HEARSAY

Hearsay consists of an extra-judicial assertion, which is offered into evidence for the purpose of proving the truth of the matter asserted.

For the purpose of showing notice or knowledge evidence that 87 employees in 19 cities or towns, in five jurisdictions including Florida, claimed to have an occupational dermatitis, during the years 1947 through 1953 was not hearsay; the purpose of the evidence was to prove knowledge as an "express communication" to defendant to prove that defendant "was on notice that there was something unsafe in its shops." Evidence of an

42. Stauf. v. Holden, 94 So.2d 361 (Fla. 1957).
43. See note 26 *supra*.
44. 89 So.2d 650 (Fla. 1956).
45. Carter v. Carter, 88 So.2d 153 (Fla. 1956).
46. Ryan v. Noble, 195 Fla. 830, 116 So. 766 (Fla. 1928).
47. Springer v. Morris, 74 So.2d 781 (Fla. 1954).
48. Rose v. Peters. The court cited Carl's Markets, Inc., v. Meyers, 82 So.2d 585 (Fla. 1955).
49. 69 So.2d 789 (Fla. 1953).

express communication to prove that a person charged with negligence had notice of the dangerous condition of a machine or place it not hearsay.[50] For the purpose of establishing notice or knowledge, the evidence is introduced for the purpose of establishing the fact that the matter was asserted, rather than the fact of the truth of the matter asserted; it is not, therefore, hearsay.

St. Germain v. Carpenter,[51] involved an automobile intersection collision cas where the driver of defendant's automobile died shortly after the accident. Plaintiff had a conversation with the decedent following the accident, but was not permitted to testify as to the decedent's statement. The court said:

> . . . Appellants contend that the exclusion of this evidence was error. The record shows, however, that an insufficient foundation was laid for the reception of this evidence, as part of the res gestae, in that the extent of the time interval between the accident and the statements at the hospital were not made clearly to appear. Moreover, the circumstances surrounding the giving of the statements sought to be introduced in evidence were not explored. Since the case must be remanded for a new trial, the plaintiffs will have another opportunity to lay a foundation in order that the trial court may determine accurately whether or not the statement may be received as part of the res gestae.[52]

It is difficult for the writer to understand why courts persist in the use of the term res gestate. Apparently the court in the instant case was thinking about the "exercised utterance" exception to the hearsay rule. It is suggested that another possible basis for admission of the questioned evidence is the "declaration against interest" exception to the hearsay rule, for it may very well be that the declaration was against the pecuniary interest of the declarant, who is now deceased.

Kaplan v. Roth,[53] was an automobile collision suit to recover damages for personal injuries. The complaint charged that the accident was caused by the negligence of an agent of the defendant. The answer denied the negligence on the part of the defendant or his agent. In the course of the investigation of the accident by police officers, the driver of the defendant's automobile admitted that he was at fault for the accident. Later, at a hearing in the police court, the agent again admitted responsi-

50. Seaboard Air Line Co. v. Ford, 92 So.2d 160 (Fla. 1956).
51. 84 So.2d 556 (Fla. 1956).
52. *Id.* at 558. From the plaintiff's attorney it was learned that the conversation between the deceased and Plaintiff was in the emergency room of a hospital fifteen minutes after the accident and that the decedent told the plaintiff that she had run through a stop sign by putting her foot on the gas instead of the brake. At the re-trial, the evidence was again excluded by the trial judge. However, the plaintiff received a verdict. The ruling by the trial judge is clearly erroneous, since the evidence is admissable under two exceptions to the hearsay rule, both as an excited utterance, and as a declaration against interest.
53. 84 So.2d 559 (Fla. 1956).

bility for the accident and pleaded guilty to a reckless driving charge. The agent died before the action commenced; the defendant had not been present when any of these proceedings took place. The trial court admitted these conversations in evidence over the objection of the defendant. The court observed that the admissions were not made in the defendant's presence and were beyond the scope of the agent's authority. The court concluded that the judgment of conviction in a criminal case, as well as any question directed to the defendant during the course of the civil trial relative to his conviction in the criminal case growing out of the accident, should not be introduced into evidence. The admission made to the police officer investigators was held to be within the privilege of Florida Statutes section 317.17 (1957).

What is the significance of the fact that the declarations of the agent were not made in the defendant's presence? Would the court then have considered the evidence admissible as an admission by the defendant through his failure to respond to an accusation? It is submitted that the defendant's presence or absence at the time of the agent's admissions is not material in this type of factual situation.[54]

An extra-judicial testimonial admission by a party is admissible into evidence under the admission of party opponent exception to the hearsay rule. Ordinarily such an admission even though one inconsistent with the party's position in the law suit, is considered the same as any other evidence and does not have a binding or precluding effect. In an action by a lumber supplier against a wholesale dealer for the invoice price of one car of lumber, a question arose as to which of two rules of the Southern Cypress Manufacturers Association was applicable. The court made the statement that nowhere in the certificate of inspection is it indicated that there is any complaint based upon a shortage of quantity. "This was appellant's own evidence and *he is bound by it* (emphasis added), and we, therefore, find that on the basis of this record, SCMA Rule 42 governs."[55] Although, since this evidence appears to be the only evidence before the court concerning the disputed question of fact, the court was not in error in coming to the conclusion that it did. The writer wonders whether the case can be taken as authority for the proposition that the testimonial admission of a party, whether before the court or extra-judicial, is to be considered as binding against the party making it.

Best Evidence Rule

Where a party seeking to establish a fact voluntarily destroyed the writing constituting the best evidence, he could not introduce secondary evidence, especially where the suit was in his own behalf and was founded

54. See Adkins v. Brett, 184 Cal. 252, 193 P. 251 (1920).
55. McNeill v. Jack, 83 So.2d 704, 706 (Fla. 1955).

upon the writing; first it was necessary to introduce evidence to explain the destruction of the writing to repel all inference of fraudulent design.[56]

PRIVILEGE

By statute, Florida has a certified public accountant and client privilege.[57] In construing this statute, the court observed that the privilege belongs to the client and he can waive it. Where a party has filed a claim based upon a privileged matter, and the proof will necessarily require that the privileged matter be offered in evidence, the client has waived his right to insist in pre-trial discovery proceedings that the matter is privileged.[58]

The privilege created by Florida Statutes section 317.17 (1957), making accident reports confidential, extends to cross-examination of a witness called by the opposite party.[59]

In a negligence action, the rule that an attorney cannot be compelled to divulge a communication made to him by his client without the consent of the client, "does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation." Nor can the information be withheld from the attorney. Under this rule, the attorney would be required to supply the names and addresses of witnesses known to the attorney who have knowledge concerning the facts.[60]

In *Vann v. State*,[61] the court adopted the position that:

> . . . . According to the weight of authority, a report or other communication made by insured to his liability insurance company concerning an event which may be made the basis of a claim against him, covered by the policy, is a privileged communication, as being between attorney and client, if the policy required the company to defend him through its attorney, and the communication is intended for the information or assistance of the attorney in so defending him.

CROSS-EXAMINATION

The scope of cross-examination was reconsidered in a recent criminal case.[62] In a prosecution for uttering a worthless check the state's sole witness testified on direct examination as to a "business arrangement" with the defendant. The defendant was convicted and on appeal argued that the trial court precluded cross-examination by him as to the arrangement. The court, after observing that the record did not justify the conclusion reached, stated that the transcript showed that the defendant was permitted to go into the business arrangement on cross-examination and that "if he wanted

56. *In re* McCollum's Estate, 88 So.2d 537 (Fla. 1956).
57. FLA. STAT. § 473.15 (1957).
58. Savino v. Luciano, 92 So.2d 817 (Fla. 1957).
59. Ippolito v. Brener, 89 So.2d 650 (Fla. 1956).
60. Dupree v. Better Way, 86 So.2d 425 (Fla. 1956).
61. 85 So.2d 133, 138 (Fla. 1956). The Court quoted from 22 A.L.R. 2d *59, 660.
62. Shargaa v. State, 84 So.2d 42 (Fla. 1955).

more he should have made the prosecuting witness his own." We can conclude, that in a criminal case cross-examination of the prosecuting witness is limited to matters brought out on direct examination and is not co-extensive with the issues.

In *Tucker Brothers, Inc. v. Menard*,[63] the court interpreted Rule 1.37 (a) Florida Rules of Civil Procedure.[64] A witness who was the corporate representative at the trial and who was permitted to remain in the court-room and advise with the attorneys for the defendants on the handling of the case was within the rule. It is sufficient if he is the managing representative of the corporation in connection with the particular matter under consideration.

Impeachment is a proper function of cross-examination. Conviction of a crime is a proper ground of impeachment. This ground of impeachment may have harsh results in the case of an accused in a criminal case who elects to take the stand.

Mead v. State,[65] involved an indictment for grand larceny. The defendant was asked by his attorney if he had "ever been convicted," and he replied that he had "been convicted in the military service." The prosecuting attorney began the cross-examination of the defendant and persistently questioned him with reference to the relative periods the defendant had spent in the guardhouse and in performing his duties as a soldier; this was over the objection of the defendant's attorney. The court held that once the defendant became a witness, he could be examined the same as any other witness about matters that would illuminate the quality of his testimony and in the process he could properly be asked about his former convictions of "crime." The court observed that the evidence of conviction of other crimes might well affect the credit the jury would give to his story and said that it is a rule that a witness may be asked if he has been convicted of a crime. However, the inquiry must stop there unless the defendant denies a conviction, in which case the opposing party may produce the record of conviction. In any event, the matter may not be pursued to the point of naming the crime when the defendant admits it. Such a course would result in abuse of the rule to the disadvantage of the defendant.

Smith v. State,[66] involved a criminal prosecution in which the accused was convicted of manslaughter. A witness for the accused testified on direct examination; on cross-examination the prosecuting attorney questioned the witness on an inconsistent statement made to the State Attorney

63. 90 So.2d 908 (Fla. 1956).
64. The Rule provides that a party may call as a witness an officer, director, and managing agent of a corporate adverse party and interrogate him by leading questions and contradict or impeach him in all respects as if he had been called as an adverse party. See also Seaboard Air Line R.R. v. Ford, 92 So.2d 160 (Fla. 1956).
65. 86 So.2d 773 (Fla. 1956).
66. 95 So.2d 525 (Fla. 1957).

after he had been called to the State Attorney's office. The court held that this was not a private paper or memorandum; it was error to allow the State Attorney to use this transcript for the purpose of impeaching the witness without allowing the witness and the defendant's counsel to inspect the transcript and introduce it into evidence for the purpose of explaining the alleged inconsistencies.

That impeachment of a witness does not destroy the witness's testimony as a matter of law was exemplified in a recent Florida case.[67] A witness for the prosecution was a bookkeeper who testified that she gave accused $1500.00. The accused denied receipt of this money. It was shown that the witness had been promised immunity from prosecution by the state, but the court said that this did not make her testimony incredible as a matter of law and the testimony of the witness and accused presented an issue which the jury could resolve against the accused.

COMPETENCY OF WITNESS

A father was convicted of rape of his nine year old daughter.[68] The conviction depended upon the testimony of the prosecutrix. The prosecutrix, who was nine years old was still in the first grade in school. She had not been taught the difference between telling lies and the truth. She had never gone to church, nor did she know what an oath was. However, she was told that she would go to the penitentiary if she told a "story." The court said:

> The prime test of competency of a young child is his intelligence, rather than his age. In addition, the infant witness should possess a sense of obligation to tell the truth. Sensibility to this moral obligation under oath is one of the turning factors. Fear of temporal punishment must be considered as producing a sword of compulsory veracity. However, we lean to the view that there is really no substitute for the spiritual and moral consciousness that should be the basic inducement to all witnesses to speak the truth.[69]

The court further observed that:

> We are aware of our numerous decisions which accord to the trial Judge a very broad discretion in determining the competency of witnesses. It is not, however, a discretion without bounds. It is a sound judicial discretion subject to appellate review.

The appellate court reversed and granted a new trial; the court did not state, however, that the trial judge erred in determining that the prosecutrix was incompetent as a witness.

A person who has been convicted of perjury is not competent as a witness in Florida. In *Lefcourt v. Streit*,[70] a question arose as to whether

67. Ewing v. State, 81 So.2d 185 (Fla. 1955).
68. Bell v. State, 93 So.2d 575 (Fla. 1957).
69. *Id.* at 577.
70. 91 So.2d 852 (Fla. 1957).

or not the plaintiff would be permitted to testify on his own behalf after he had been convicted of perjury in New York. The court held that the plaintiff was competent to testify as a witness in his own behalf, notwithstanding that the statute provided that conviction of perjury made any person incompetent to testify in any court in Florida.

Two new cases were decided involving the "dead man's statute."[71] The *Small* case is worthy of detailed study by counsel preparing a case for trial. It shows how a party may inadvertently waive the privilege, provided by the statute, when such a waiver is unnecessary and may be highly detrimental to his cause.

ADMISSION AND EXCLUSION

Ordinarily, a timely objection must be made to the admissibility of objectionable evidence in order to preserve the right to appeal, and this is also true of counsel's prejudicial remarks. However, in a recent Florida case,[72] the court said that:

> While we are committed to the rule that in the ordinary case, unless timely objections to counsel's prejudicial remarks are made, this court will not reverse the judgment on appeal, however, this ruling does not mean that if prejudicial conduct of that character in its collective impact of numerous incidents, is so extensive that its influence pervades the trial, gravely impairing the calm and dispassionate consideration of the evidence and the merits by the jury the court would not afford redress.

A party does not preserve his right to appeal, when he asks a question, it is objected to, and the objection sustained when the party does not make clear to the trial judge what the answer would have been to the question and that for the purpose for which it was offered the question was not subject to objection.[73]

In reviewing a judgment of a trial court, where the case was tried without a jury, the trial judge apparently does not have to discriminate with regard to the admissibility of evidence to the extent that he must in cases tried with a jury. In the *First Atlantic National Bank v. Cobbett*,[74] the court said, "We do not find that the evidence objected to injuriously or harmfully affected appellant when considered and evaluated by an experienced trial judge."

A defendant, offering no testimony in his own behalf except his own is entitled to the concluding argument before the jury.[75] A photograph was considered to constitute "testimony" within the meaning of this statute.[76]

71. FLA. STAT. § 95.05 (1957). Small v. Shure, 94 So.2d 371 (Fla. 1957); Jensen v. Lance, 88 So.2d 762 (Fla. 1956).
72. Seaboard Air Line R.R. v. Strickland, 88 So.2d 519, 523 (Fla. 1956).
73. Montgomery v. Stary, 84 So.2d 34 (Fla. 1956).
74. 82 So.2d 870 (Fla. 1955).
75. FLA. STAT. § 918.09 (1957).
76. Kennedy v. State, 83 So.2d 4 (Fla. 1955).